# MASS COMMUNICATION LAW

## CASES AND COMMENT

Donald M. Gillmor
Jerome A. Barron

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*American Casebook Series*

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# MASS COMMUNICATION LAW

## CASES AND COMMENT

SECOND EDITION

By

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FOR SOPHIE, VIVIAN AND PETER

AND

FOR MYRA, JONATHAN, DAVID AND JENNIFER

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# PREFACE TO THE SECOND EDITION

In this second edition of *Mass Communication Law* we continue an effort to combine the perspectives of law and journalism. As is the case with second editions, this volume is informed and enriched by the criticisms of students and teachers who have used the first edition. Since both authors teach from the book, the new edition also reflects our own experience with it. As a result, much that is completely new has been included in this edition.

The First Amendment materials have been reorganized and rewritten to present as much as possible of the contrariety and variety that exist in Supreme Court interpretations and implementations of First Amendment protections. In order to achieve this goal we have not hesitated to add First Amendment issues which predate the first edition and were not included, but which in retrospect should have been. As a guide to the student a new overview of the origins and meaning of First Amendment rights is found in the beginning chapter.

This edition reinforces the interdisciplinary intention of the authors to provide a teaching tool acceptable to both law and journalism. The new edition, however, is designed especially for the journalism student. Steps have been taken to make a sudden entry into the complex and intensely verbal world of law as meaningful and as understandable as possible for the journalist. In the crucial areas in each section and chapter, the authors still reflect the sincere belief that the courts should speak for themselves. Cases represent the original source materials of the law and there is no substitute for them.

Extensive legal citations are intended to encourage both student and teacher to read additional cases and commentaries when they are available. Only by this means can our readers gain their independence from the interpretations and conclusions of the authors.

Wherever possible judicial opinions have been edited to omit that which seems cryptic, superfluous or otherwise unnecessary for the student of mass communication. At the same time we have underscored that which we believe fundamental and indispensable. Many will question our judgments on both counts.

In each section the amount of explanatory editorial comment has been greatly expanded. A glossary defining commonly used legal terms found in the book has been provided. Illustrative charts of representative court systems have also been included.

Nor have we forgotten the law student. Except in the largest institutions, law school courses in mass communication law have been rare. In light of the great cases involving such urgent and contemporary issues as newsman's privilege, the Pentagon Papers, access to broadcast media, access to information, and the right of reply, it is our belief that mass communication law will increasingly find a place in the standard law school curriculum of the future. In the meantime

there are considerably more mass communication courses in law and journalism schools now than when the book first appeared in 1969.

For the law school teacher who uses the book for such a course and wishes to avoid duplication with other courses, a program of study based on the following assignments is suggested: Ch. IX (broadcast regulation), Ch. VIII (the copyright problems of cable television), Ch. V (free press and fair trial), Ch. II (libel and the newsman), Ch. III (the right of privacy), Ch. VI (newsman's privilege), Ch. VII (freedom of information), the section in Chapter VIII on the Newspaper Preservation Act, and, finally, the new and completely revised section in Chapter VIII on a right of access and reply to the press.

Journalism teachers will find flexible uses for the book. For the professional undergraduate course primary attention will undoubtedly be given to the materials on libel, privacy, freedom of information, newsman's privilege, obscenity, and free press and fair trial. Advertising students in such a course could substitute the law and regulation of advertising section of Chapter VIII for some of the press materials. Public relations students might do likewise with the material in Chapter VIII on influencing the opinion process. In the professional course, supplementary use may be made of the First Amendment chapter and the materials on antitrust, the regulation of broadcasting, and access to the media. Graduate seminars might be more inclined to focus on the historical and doctrinal elements of the book.

The chapter on free press and fair trial has been revised to reflect the apparent revival of judicial restraining orders against the press, and the present status and future of judicial "gag" orders is a focal point of the chapter.

The law of obscenity is described with as much precision as is possible in this volatile area of social and legal policy. Two new sections, Burger Court revisionism and the uncertain future of obscenity law, bring the chapter temporarily up to date.

The libel law chapter has been rewritten and clarified in part to show the deep imprint of the *New York Times* rule. The chapter also reflects the uncertainty, anxiety and division in the Court and country over the future of that doctrine. See Appendix C.

Entirely new chapters on privacy, newsman's privilege, and freedom of information have been written for the new edition. Their extended treatment reflects new problems for the journalist in these areas and the possible conflicts between privacy and newsman's privilege on the one hand and freedom of information on the other. Much more detail on the state law of invasion of privacy has been included. The new freedom of information chapter shows that the courts are coming to interpret the Freedom of Information Act so as to help journalists secure information the public needs and to minimize the extent to which government may use the exemptions in the Act to frustrate its basic purpose.

The new chapter on freedom of information includes a discussion of the celebrated tapes controversy between President Nixon and Special Prosecutor Cox, and shows how judicial techniques developed for deciding when information

should be made available to journalists in freedom of information cases were used in the famous case of *Nixon* v. *Sirica*. New material on access to the workings of state government are also included.

The new chapter on newsman's privilege includes the landmark *Branzburg* decision and discusses more recent judicial developments which suggest that reports of the death of a First Amendment basis for newsman's privilege may have been greatly exaggerated.

The chapter on selected problems of law and journalism emphasizes issues which relate to the social responsibilities and obligations of journalism. The controversial and, at this writing, still unsettled status of a right of reply to the press leads off the chapter with an entirely new collection of materials which attempt to reflect something of the ferment and fury in this bitterly disputed area of press law. The conflict is exemplified by a detailed discussion of the Florida right of reply case, *Tornillo* v. *Miami Herald*, and other cases.

New subjects in this chapter include a discussion of First Amendment difficulties created by imposing on the press policing functions with regard to the regulation of the financing of political campaigns. The impact of the Newspaper Preservation Act is presented in the antitrust section. The perplexing question of whether a newsman or broadcast journalist can be required to join a union is discussed in the materials on the media and the labor laws.

The advertising section has been completely rewritten and greatly expanded to attempt to give the student a clear understanding of the function of the Federal Trade Commission and the meaning of such regulatory concepts as false, deceptive and unfair advertising. The relatively new phenomena of corrective advertising and counter advertising are subjected to intensive discussion and analysis.

The second edition of this book finds copyright law still unrevised by Congress. But the new section on copyright reflects developments important to the journalist who must be aware of the effort to expand the doctrine of fair use. A section on copyright and the electronic media surveys repeated judicial efforts to free cable television from copyright liability to the broadcasters whose signals it imports.

The broadcast regulation chapter attempts to lead the broadcast journalist through the regulatory maze that besets the electronic media. New materials on judicial and FCC reexamination of the Fairness Doctrine are included. Sections on the validity of the abolition of cigarette advertising in broadcasting, the double-faceted problem of fairness doctrine compliance and group defamation, the changing fortunes of a right of access to the broadcast media, the meaning of prime time access, and the law on regulation of obscenity in broadcast programming are new features of this chapter. The obscenity section deals with the new and unanticipated problems of "topless" radio and obscenity in public access channels on cable television.

We believe the second edition is as up to date and as comprehensive as the enormous fluidity and volume of American law will permit.

## PREFACE TO THE SECOND EDITION

Although the authors continue to share the joy and travail of jointly editing each page of the entire work, primary responsibility for these materials were allocated in the following way: Professor Gillmor was the principal editor and author of Chapters II, III, IV, V, VI, and the advertising section of Chapter VIII; Professor Barron was the principal editor and author of Chapters I, VII, IX, and all of the sections in Chapter VIII except advertising.

Professor Barron wishes to express his thanks to Mary Adamski and Jeanetta Cutchens for their patience, skill and care in typing parts of the manuscript. He would also like to thank and acknowledge the help provided by Joseph L. Tasker of the second year class at the National Law Center, George Washington University and Nancy Kaplan of the Syracuse University College of Law, Class of 1974, for their assistance in the research and preparation of various portions of the manuscript, Mr. Tasker also assisted in preparing the index. He would especially like to thank his wife Myra Barron of the Virginia bar for the care and insight with which she researched and prepared the new materials on the Freedom of Information Act.

Professor Gillmor would like to acknowledge the invaluable help of Professor Ivan Preston of the University of Wisconsin with the advertising section of Chapter VIII. For suggestions and insights into the new problem of purloined papers he would like to thank Prof. Everette Dennis of the University of Minnesota. For many helpful suggestions along the way he would also like to thank Profs. Lyle Huseby of Moorhead State College, John Stempel of Indiana, Albert Pickerell of Berkeley, Ed Blinn of Iowa State, and, notably, Dean Rea of the University of Oregon. There are many others but foremost among them is Herbert Terry, an unusually gifted graduate student at the University of Minnesota, who has kept his teacher constantly stimulated and alerted to new developments in the law, and has on numerous occasions rescued him from the dangers of oversimplification when dealing with complex issues of law.

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June, 1974

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**The principal cases are in italic type. Other cited cases are in roman type. Cases are listed by both the name of the plaintiff and of the defendant. References are to Pages.**

# TABLE OF CASES

# GLOSSARY

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.

Balance of Interests Doctrine: This is an approach often used by courts in cases involving First Amendment issues. 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.

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 thinks should obtain.

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. Technically, 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. This practice should be contrasted with obtaining review by way of appeal, where, theoretically at least, if the statutory requirements for appeal are met, the Court is supposed to be obliged to review the lower court decision. The dismissal

of an appeal is considered to be a disposition on the merits of a case, but the denial of a petition for a writ of certiorari is held to be no statement on the merits of the case itself. The situations in which review should be sought by way of appeal and certiorari are precisely set forth in the U. S. Judicial Code.

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 the 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.

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, Art. 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 wish to make their reasons explicit.)

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.

Damages: Money that a person receives as compensation, as the result of a court order, for injury to his 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, 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 minimis*: The law does not concern itself with trifles.

*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.

Directed Verdict: The trial judge decides that as a matter of law reasonable men 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.

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 the twentieth century American constitutional law with Supreme Court Justices Frankfurter and Harlan as well as many other jurists. 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 non-elected 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 considering statutes that limit the individual rights guaranteed by the Bill of Rights and the fourteenth amendment, the normal presumption of constitutionality should not operate. 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.

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 freedom of speech, freedom of religion, freedom of assembly, etc.

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 rel.: Legal proceedings which are instituted by the attorney general in the name of and in behalf of the state, but on the information and at the instigation of an individual who has a private interest in the matter.

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.

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.

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.

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.

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.

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 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 judicial restraint. See this glossary. A judicial activist believes the judiciary may, in some circumstances, serve as a fulcrum for social change. The majority of the Supreme Court under the leadership of Chief Justice Warren, the so-called Warren Court, was often charged by its critics with judicial activism.

The Warren Court through the process of constitutional interpretation imposed new rules and duties in the areas of reapportionment, racial equality, and criminal procedure. Defenders of these examples of judicial activism say that they illustrate the democratic character of judicial review.

Jurisprudence: The philosophy of law. Sometimes used as a synonym for law itself.

Mandamus: A writ ordering a lower court judge or other public official to perform a legal duty as to which he has no discretion.

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.

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.

*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.

*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.

*Per Curiam*: When the opinion of a court of 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.

Petitioner: The most common way of seeking review of a lower court decision in the United States Supreme Court is by petitioning for a writ of certiorari. The person who files the petition seeking review is called by the Court 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. Th plaintiff's complaint and the defendant's answer are examples of pleadings.

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.

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 the source for the journalist's reports on the facts of the arrest.

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.

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.

Respondent: The term used to identify the party opposed to granting a petition. The party petitioning for judicial relief is the petitioner, his 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 A.L.I. 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.

Scienter: Guilty knowledge. In some criminal prosecutions, 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.

*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.

*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.*

Subpoena Ad Testificandum: A subpoena which seeks testimony.

Subpoena Duces Tecum: A subpoena which commands a witness to produce documents or papers pertinent to the issues of a pending controversy.

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 pre-trial 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."

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.

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.

*Ultra Vires*: Acts beyond the scope of the powers of a corporation, as defined by its charter or act of incorporation.

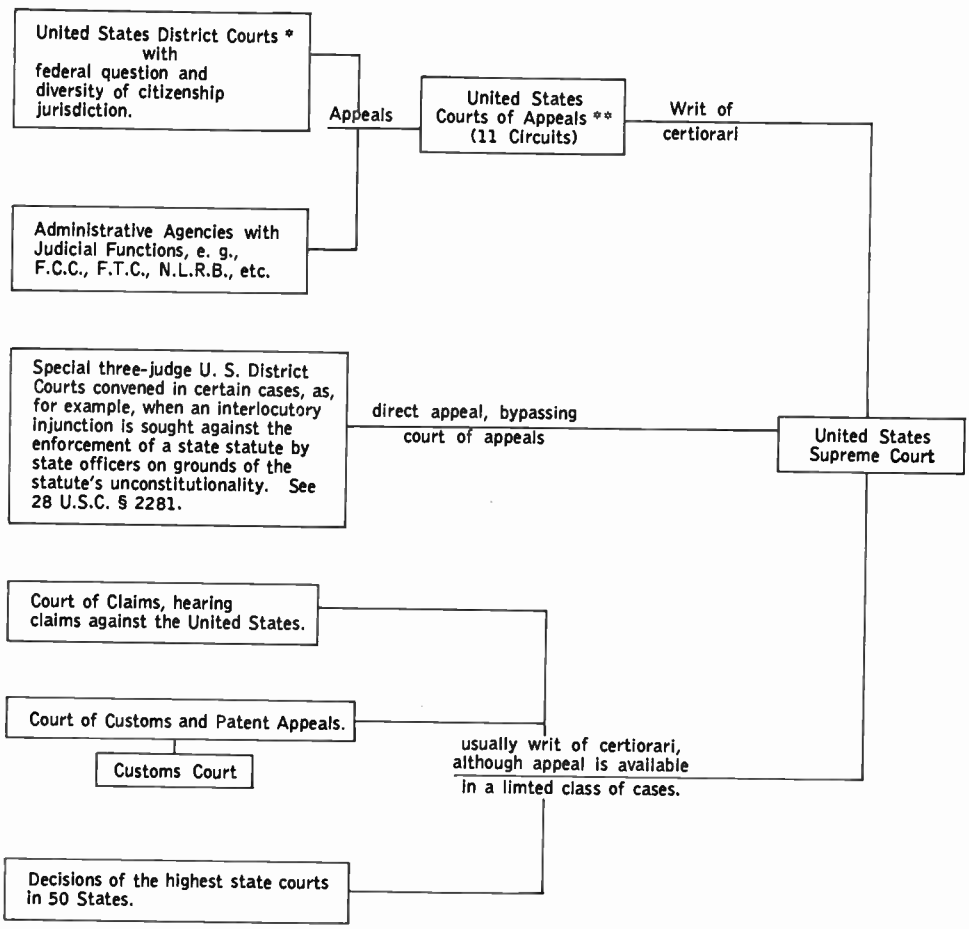
Venireman: A member of a panel of jurors.

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.

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.

# THE FEDERAL COURT SYSTEM



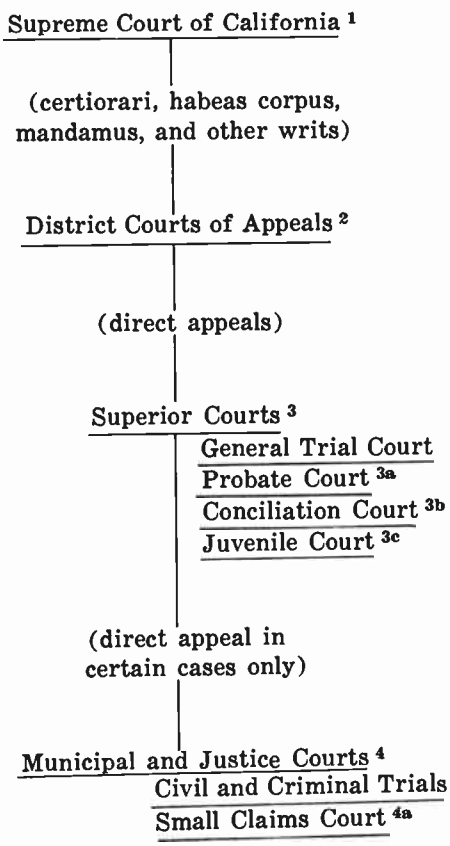

* There is at least one federal district court in every state.

** The United States is divided into eleven federal judicial circuits. Appeals from a federal district court go to the court of appeals in the circuit in which the federal district court is located. California is in the Ninth Circuit. An appeal from a federal district court located in California would therefore be taken to the United States Court of Appeals for the Ninth Circuit.

# THE STATE COURT SYSTEM

The two state court systems outlined below are presented as illustrative examples of two state court systems. They are intended to provide a guide to the state judicial process for the student who is unfamiliar with the organization of state courts.

## A. 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:

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.

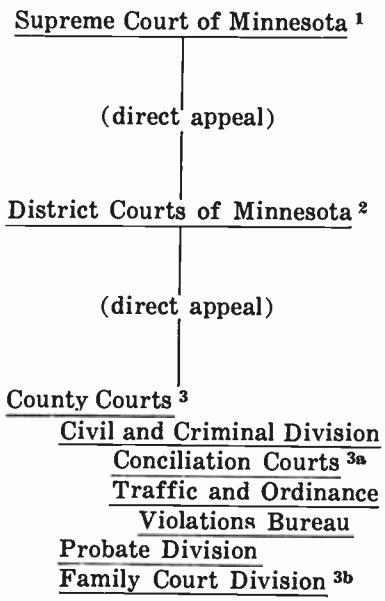
4. There is one Superior Court in each county. The Municipal and Justice Courts represent subdivisions of each county by population. These courts are trial courts with limited jurisdiction. Their civil jurisdiction is in cases involving generally less than $5000 in controversy. They also have original 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 less than $500, 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.

# THE STATE COURT SYSTEM

## B. The Minnesota Court System




1. Here there is no intermediate appellate court, so direct review is by the Supreme Court.

2. These are the trial courts of general civil and criminal jurisdiction. They also hear appeals from some County Court cases.

3. The County Courts are courts of limited jurisdiction. They hear minor civil and criminal cases, but have exclusive jurisdiction over probate, guardianship, incompetency, and juvenile proceedings. Ramsey and Hennepin Counties operate under their own systems.

3a. As the term is used in Minnesota this is the small claims court. Compare where California has a quite different court by this name. That, of course, is not unusual. Perhaps the most extreme example is New York State, which calls its general jurisdiction trial court the "Supreme Court" of New York.

3b. The Family Court considers marriage, divorce, and other cases that involve the members of a family. It can, in some states, also consider assault or other such crimes when charged by one family member against another. Note that family courts do not exist as separate courts in every state, and, as used here, the Family Court has a much broader jurisdiction than the California Conciliation Court.

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# 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 and selected decisions of U.S. District 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). The official publication of Supreme Court decision 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 (L.W.), the first publication to report a decision and normally within 48 hours of its issuance, and the Commerce Clearing House (CCH) United States Supreme Court Bulletin.

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

The Federal Supplement (F.Supp.) contains selected decisions of U.S. District Courts and of the U.S. Customs Court, and also contains rulings of the Judicial Panel on Multidistrict Litigation.

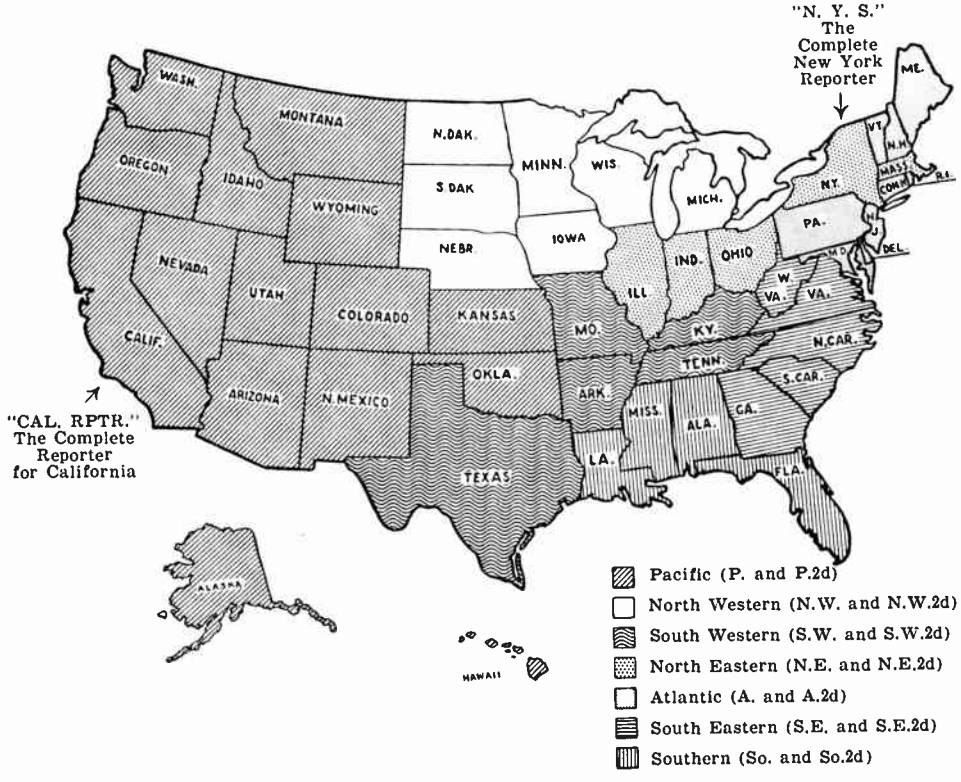
Federal Rules Decisions (F.R.D.) prints U.S. District Court decisions primarily involving the Federal Rules of Criminal and Civil Procedure, and also contains miscellaneous reports and articles.

## DECISIONS OF STATE COURTS

The seven regional reporters contain decisions of the highest state court and usually 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 N.Y. 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, District 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.

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# CASES AND COMMENT
# ON
# MASS COMMUNICATION LAW

## Chapter I

## THE FIRST AMENDMENT IMPACT ON MASS COMMUNICATION: THE THEORY, THE PRACTICE AND THE PROBLEMS

### SECTION 1. AN INTRODUCTION TO THE STUDY OF THE FIRST AMENDMENT

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 post-revolutionary 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 Mr. Justice 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.

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. In other words, the Court sustained the status quo on the basis of a value outside the Constitution (governmental self-preservation) despite the undoubted impairment of a value specifically to be found within the Constitution, the First Amendment.

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 li-

censing 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. ed., Milton, Areopagitica, p. 58 (Cambridge University Press, 1918).

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 Mr. Justice Holmes in a famous dissent after World War II 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.

The licensing system terminated 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 critic 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.

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; and in England in 1792 the 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 of Congress 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 journalists. 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' 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 ex-

pression 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 seditious libel. See Levy, The Legacy Of Suppression 247–248 (1960).

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,* Mr. Justice Brennan, speaking for the Court, laid the Alien and Sedition Acts to rest: "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 re-interpretation the First Amendment receives from the Supreme Court. The distinguished First Amendment scholar Professor Harry Kalven considers 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 Cases: A Note On 'The Central Meaning of the First Amendment',* Supreme Court Review 191 at 205 (1964).

Professor Kalven believes the repudiation of seditious libel has 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.
>
> * * *
>
> 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, pp. 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. The Court's citation to the work of John Stuart Mill is not surprising. Mill, along with Milton, has been one of the vital influences in First Amendment thought.

One of the great influences on modern First Amendment law was this English political philosopher and economist who lived long after the enactment of the First Amendment. John Stuart 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-con-

trolled 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 Zachariah 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 Mr. Justice Oliver Wendell Holmes, it became important to try to develop a rationale for constitutional protection of freedom of speech and press. In cases like *Abrams v. United States, 250 U.S. 616, (1919)*, Mr. Justice 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 used by Mill.

Thus, Justice Douglas wrote, dissenting in the Supreme Court decision validating the anti-Communist persecution of the '50's, *Dennis v. United States, 341 U.S. 494 at 584 (1951)*:

> When ideas compete in the market for acceptance, full and free discussion expires 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 *Of 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. See text, Ch. IX. 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 unaniminity with regard to the principle of free discussion as an ultimate value.

Thus, the New Left political philosopher, Herbert Marcuse, believes Mill's writings assume 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 is hostile to the marketplace of ideas. He thinks 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, are unusable. Marcuse wants to substitute "precensorship" for "the more or less hidden censorship that permeates the free media." And he submits the traditional marketplace of ideas concept of freedom of expression to the following 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.

For still others the wisest course for the future will be to cleave to the following distillation of First Amendment experience as described by Mr. 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).*

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. Whether this has been the most salutary procedure for the development of a rational and coherent law to cope with problems of securing freedom of expression in the media is itself a good question. 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 track, radio, television and the movies. Occasionally, the Supreme Court has tried to deal with each medium in terms of its own problems. For example Mr. Justice 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).* Mr. Justice Jackson in *Kovacs v. Cooper, 336 U.S. 77 (1949),* urged that each medium be considered a law unto itself. Mr. Justice Black rejected this kind of "favoritism."

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 the First Amendment chapter of this book, as well as in its 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", "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. What understanding of freedom of speech and press we have is owed in large measure to the Supreme Court opinions of Justices with such different judicial approaches as Brandeis and Butler, Black and Frankfurter, Harlan and Warren, and Burger and Douglas.

## SECTION 2. THE DEVELOPMENT OF THE LAW OF FREEDOM OF SPEECH AND PRESS IN THE SUPREME COURT

### A. THE RISE OF THE CLEAR AND PRESENT DANGER DOCTRINE

The First Amendment to the U. S. Constitution must be the necessary start-

ing 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. The assumptions on which such protection is based and, a critical examination of their functional validity, is our first task if we are to 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 in the United States during World War I of conscription for the first time since the Civil War, the opposition of radical groups to participation in that holocaust, and the anti-radical "red scare" of the early nineteen twenties 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 arises 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 Mr. Justice Oliver Wendell Holmes.

Holmes became one of the principal 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 Holmes expected his clear and present danger doctrine to serve?

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## SCHENCK v. UNITED STATES

249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919).

Mr. 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, c. 30, tit. 1, § 3, 40 Stat. 217, 219 (Comp. St.1918, § 10212c), 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, c. 15, 40 Stat. 76 (Comp.St.1918, §§ 2044a–2044k), 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 non-mailable by title 12, § 2, of the Act of June 15, 1917 (Comp.St.1918, § 10401b), 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 Amendnent 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.

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## SOME COMMENTS AND QUESTIONS ON SCHENCK

1. 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*, Mr. 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).* Justice 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 non-protection. 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."

2. 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?

3. 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?

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## 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 Wilson to defeat the Bolsheviks. The pamphlets also called for a general strike of munitions workers. The majority of the Supreme Court, per Mr. Justice 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 Mr. Justice Holmes, in which he was joined by Mr. Justice Brandeis, became one of the significant documents in the literature of the law of free expression.

Mr. 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 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 "Work-

ers, 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, c. 75, 40 Stat. 553, amending section 3 of the earlier Act of 1917 (Comp.St. § 10212c). 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.

* * *

I do not see how anyone can find the intent required by the statute in any of the defendant's words. The second leaflet is the only one that affords even a foundation for the charge, and there, without invoking the hatred of German militarism expressed in the former one, it is evident from the beginning to the end that the only object of the paper is to help Russia and stop American intervention there against the popular government—not to impede the United States in the war that it was carrying on. To say that two phrases taken literally might import a suggestion of conduct that would have interference with the war as an indirect and probably undesired effect seems to me by no means enough to show an attempt to produce that effect.

* * *

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 the 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.

Mr. Justice BRANDEIS concurs with the foregoing opinion.

### NOTES AND QUESTIONS ON ABRAMS

1. The student should note that Holmes' 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' *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 explo-

sion, 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 audiences. 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?

2. Does Holmes in his dissent in *Abrams* give any hint as to why he dissented there but previously wrote an opinion for a unanimous court affirming the convictions in *Schenck*?

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## A NOTE ON FIRST AMENDMENT INTERPRETATION: HOLMES, MEIKLEJOHN, AND CHAFEE

The political philosopher, Alexander Meiklejohn, was a severe critic of the views articulated by Justice Holmes. Holmes' 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 is merely a verbal dodge for permitting restriction of free speech and press whenever the Congress is disposed to do so.

Does Professor Meiklejohn believe then that no manner of expression can be restricted by government—even "counselling to murder" or falsely shouting fire in a crowded theatre? Professor Meiklejohn does 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 government is 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, is 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 is to assure that the general citizenry will have the necessary information to make the informed judgments on which a self-governing society is dependent. Speech unrelated to that end is therefore not public speech, and not within the scope of the First Amendment, and so within the regulatory power of legislatures.

Meiklejohn's theory has 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, are 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.

Professor Chafee's basic point is 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 is that it allows the Congress some room to legislate in the area of public discussion but in such a way that the scope for such legislation is very restricted. For Chafee, the alternative to the Holmesian interpretation of the First Amendment is 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 is obvious to Chafee that some concessions must be made to popular intolerance in periods of stress in the form of legislation. It is apparently very clear to him that, if some concessions are not made, the consequences for free expression in any time of turmoil and anxiety will necessarily be worse than if some relaxation of the absolute language of the First Amendment is not permitted.

For Professor Meiklejohn it is a matter of great significance that the First Amendment prohibits the abridgment of "freedom of speech" rather than "speech itself." This for him is 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 L. Levy, *Legacy of Suppression* (1960). Even though Professor Levy's study suggests that the Framers had no experience with the broad-gauged theories of absolute freedom of expression, developed in different ways by Professor Meiklejohn, and Mr. Justice Black, he suggests that this does not mean that we should be bound by the Framers' understanding of the document which they authored. See Levy, supra, 309. A similar view has been 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 (a) the historical approach to the First Amendment, (b) the Meiklejohn approach and (c) the Lasswellian approach?

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## 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 REVOLU-

TIONARY 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 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 Mr. 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 States 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 ev-

ery 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.

Mr. Justice HOLMES (dissenting). Mr. 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 this 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 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.

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## SOME COMMENTS AND QUESTIONS ON THE GITLOW CASE

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' subsequent definition of the clear and present doctrine in his famous concurrence in *Whitney v. California, 274 U.S. 357 (1927)*, infra p. 20 states 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 Mr. 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 (a) the clear and present danger doctrine as understood by Sanford, and (b) 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' 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 Mr. 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 a little over forty-five years old.

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## B. THE CLEAR AND PRESENT DANGER TEST REFINED: THE AUTHORIZED BRANDEIS VERSION

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### WHITNEY v. CALIFORNIA

274 U.S. 357, 47 S.Ct. 641, 7 L.Ed. 1095 (1927).

**Editorial Note:**

Miss 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. Miss 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."

Miss 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. Miss Whitney argued that as the convention progressed it developed that the majority of the delegates entertained opinions about violence which Miss Whitney 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 Mr. Justice Sanford, said that what Miss Whitney was really doing was asking the Supreme Court to review questions of fact which 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 Miss 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 Mr. Justice Brandeis, joined by Justice Holmes, rather than Mr. 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.

Mr. Justice BRANDEIS (concurring.) Miss 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 Miss 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 Miss 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 Miss Whitney was a member. Under these circumstances the judgment of the State court cannot be disturbed.

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Mr. Justice HOLMES joins in this opinion.

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## COMMENTS ON THE BRANDEIS OPINION IN THE WHITNEY CASE

1. 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. The law student, and the journalism student particularly, 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.

2. 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, how-

ever, 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.

Brandeis' *Whitney* opinion makes it clear that it is the courts ultimately which must decide whether the governmental apprehension that a danger is so immediate as to warrant repression rather than discussion is reasonable. The Brandeisian approach to freedom of expression is based on a faith in the curative capacities of the exchange of opinion. It is only when there is insufficient time for such a process to operate that governmental repression is justified. There is much that is contemporary in this attempt to develop both a test and a philosophy for freedom of expression. A preference by authority for the "power of reason as applied through public discussion" over force is in this view vital to the maintenance of a healthy public order. There is a direct relationship between the ability to challenge authority and the basic security of the structure of government: "* * * the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies."

3. In *De Jonge v. Oregon, 299 U.S. 353 (1937)*, a well-known First Amendment case in the thirties, a generous view of First Amendment protection was taken by the Court. Yet the Court did not even mention the clear and present danger doctrine.

Dirk De Jonge was convicted under the Oregon Criminal Syndicalism law which forbade a number of offenses "embracing the teaching of criminal syndicalism" which was defined under the Oregon law as follows: "the doctrine which advocates crime, physical violence, sabotage, or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution." De Jonge, a member of the Communist Party had presided at a peaceful meeting of the Party protesting police brutality during a strike of longshoremen. The Supreme Court reversed the judgment of conviction against De Jonge. The Court did not quarrel with the view of the lower court that the Communist Party's aims and activities could come under the Oregon law prohibiting various acts of criminal syndicalism as defined by the statute. The Court did not believe, however, that the necessary conclusion from this was that De Jonge's activities were not protected under the First Amendment. Chief Justice Hughes said for the Court:

> We are not called upon to review the findings of the state court as to the objectives of the Communist Party. Notwithstanding those objectives, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by that party. The defendant was none the less entitled to discuss the public issues of the day and thus in a lawful manner, without incitement to violence

or crime, to seek redress of alleged grievances. That was of the essence of his guaranteed personal liberty.

4. 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 Justices Brandeis and Holmes. In *De Jonge v. Oregon,* the clear and present danger doctrine was not relied on at all and the conviction of the accused, in circumstances quite similar to that of Miss Whitney's, was reversed.

5. Functionally, how useful has the clear and present danger doctrine actually proven to be? Dean Robert McKay, in a study of the First Amendment, has answered the question very pragmatically. Counting the cases from 1919 to 1937, Professor McKay concludes: "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).

6. Why do you think Chief Justice Hughes failed to mention the clear and present danger doctrine in *De Jonge?* Does this on-again off-again use of the clear and present danger doctrine have any relationship to the wisdom of Brandeis's insistence that the courts rather than the legislature ought to be the final arbiter with regard to when freedom of expression ought to be curtailed?

The *De Jonge* case appears to take the view that so long as expression or communication (speech) is not closely related to action, the First Amendment compels protection for the expression at issue. In this regard, the Court in *De Jonge* emphasized that Dirk De Jonge had not engaged in "incitement to violence" during the offending meeting. (If he had, would conviction have been permissible because the expression fell into the "action" category?) State infringement of expression in such circumstances must fall as a violation of the First and Fourteenth Amendments. This theory is sometimes called the speech-action distinction, of which will more be said later. But under the speech-action approach to First Amendment interpretation, if the expression at issue falls primarily into the speech category, the state may not, consistent with the First Amendment, regulate the expression. If, on the other hand, the expression falls primarily into the action category, some state regulation may, consistent with the First Amendment be permissible.

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## C. THE PREFERRED POSITION THEORY

Courts have often declared that they grant a presumption of constitutionality to challenged legislation. In *U. S. v. Carolene Products Co., 304 U.S. 144 (1938),* dealing with a federal statute concerning economic regulation, Chief Justice 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 Chief Justice 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, 268 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 says 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 presumption of constitutionality afforded to legislation in general.

After the *Carolene Products* footnote, the next most authoritative statement of the preferred position theory is to be found in a concurring opinion in a sound truck case, *Kovacs v. Cooper, 336 U.S. 77 (1949)*, by Mr. Justice Frankfurter whose attack on the theory provides at the same time an excellent account of its development in the American constitutional law of freedom of expression. The impact of technology on First Amendment theory is also evidenced by the case because it raises the difficult and continuing question whether a single First Amendment theory is satisfactory to resolve the problems raised by media as different as sound trucks, newspapers, radio and television.

## KOVACS v. COOPER

336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949).

**Editorial Note:**

The *Kovacs* case presented the Supreme Court with the question of the validity of a Trenton, New Jersey ordinance making it unlawful to use sound trucks emitting "loud and raucous" noises on the city streets. Appellant was found guilty of violating the ordinance by a police judge and his conviction was affirmed in the New Jersey appellate courts. The Supreme Court affirmed.

Mr. Justice REED announced the judgment of the Court and an opinion in which The CHIEF JUSTICE and Mr. Justice BURTON join. * * *

The use of sound trucks and other peripatetic or stationary broadcasting devices for advertising, for religious exercises and for discussion of issues or controversies has brought forth numerous municipal ordinances. The avowed and obvious purpose of these ordinances is to prohibit or minimize such sounds on or near the streets since some citizens find the noise objectionable and to some degree an interference with the business or social activities in which they are engaged or the quiet that they would like to enjoy. A satisfactory adjustment of the conflicting interests is difficult as those who desire to broadcast can hardly acquiesce in a requirement to modulate their sounds to a pitch that would not rise above other street noises nor would they deem a restriction to sparsely used localities or to hours after work and before sleep—say 6 to 9 p. m.—sufficient for the exercise of their claimed privilege. Municipalities are seeking actively a solution. * * * We think it is a permissible exercise of legislative discretion to bar sound trucks with broadcasts of public interest, amplified to a loud and raucous volume, from the public ways of municipalities. On the business streets of cities like Trenton, with its more than 125,000 people, such distractions would be dangerous to traffic at all hours useful for the dissemination of information, and in the residential thoroughfares the quiet and tranquility so desirable for city dwellers would likewise be at the mercy of advocates of particular religious, social or political persuasions. We cannot believe that rights of free speech compel a municipality to allow such mechanical voice amplification on any of its streets.

The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention. This is the phase of freedom of speech that is involved here. We do not think the Trenton ordinance abridges that freedom. It is an extravagant extension of due process to say that because of it a city cannot forbid talking on the streets through a loud speaker in a loud and raucous tone. Surely such an ordinance does not violate our people's "concept of ordered liberty" so as to require federal intervention to protect a citizen from the action of his own local government. Cf. Palko v. Connecticut, 302 U.S. 319, 325. Opportunity to gain the public's ears by objectionably amplified sound on the streets is no more assured by the right of free speech than is the unlimited opportunity to address gatherings on the streets. The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself. That more people may be more easily and cheaply reached by sound trucks, perhaps borrowed without cost from some zealous supporter, is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open.

Section 4 of the ordinance bars sound trucks from broadcasting in a loud and raucous manner on the streets. There is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers. We think that the need for reasonable protection in the homes or business houses from the distracting noises of vehicles equipped with such sound amplifying devices justifies the ordinance.

Affirmed.

Mr. Justice MURPHY dissents.

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Mr. Justice FRANKFURTER, concurring.

* * * I conclude that there is nothing in the Constitution of the United States to bar New Jersey from authorizing the City of Trenton to deal in the manner chosen by the City with the aural aggressions implicit in the use of sound trucks.

The opinions in this case prompt me to make some additional observations. My Brother REED speaks of "The preferred position of freedom of speech," though, to be sure, he finds that the Trenton ordinance does not disregard it. This is a phrase that has uncritically crept into some recent opinions of this Court. I deem it a mischievous phrase, if it carries the thought, which it may subtly imply, that any law touching communication is infected with presumptive invalidity. It is not the first time in the history of constitutional adjudication that such a doctrinaire attitude has disregarded the admonition most to be observed in exercising the Court's reviewing power over legislation, "that it is *a constitution* we are expounding," McCulloch v. Maryland, 4 Wheat. 316, 407. I say the phrase is mischievous because it radiates a constitutional doctrine without avowing it. [There follows a chronology of cases which discusses the "preferred position" theory of the First Amendment.]

In short, the claim that any legislation is presumptively unconstitutional which touches the field of the First Amendment and the Fourteenth Amendment, insofar as the latter's concept of "liberty" contains what is specifically protected by the First, has never commended itself to a majority of this Court.

Behind the notion sought to be expressed by the formula as to "the preferred position of freedom of speech" lies a relevant consideration in determining whether an enactment relating to the liberties protected by the Due Process Clause of the Fourteenth Amendment is violative of it. In law also, doctrine is illuminated by history. The ideas now governing the constitutional protection of freedom of speech derive essentially from the opinions of Mr. Justice Holmes.

The philosophy of his opinions on that subject arose from a deep awareness of the extent to which sociological conclusions are conditioned by time and circumstance. Because of this awareness Mr. Justice Holmes seldom felt justified in opposing his own opinion to economic views which the legislature embodied in law. But since he also realized that the progress of civilization is to a considerable extent the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other beliefs, for him the right to search for truth was of a different order than some transient economic dogma. And without freedom of expression, thought becomes checked and atrophied. Therefore, in considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties

which derive merely from shifting economic arrangements. Accordingly, Mr. Justice Holmes was far more ready to find legislative invasion where free inquiry was involved than in the debatable area of economics. * * *

The objection to summarizing this line of thought by the phrase "the preferred position of freedom of speech" is that it expresses a complicated process of constitutional adjudication by a deceptive formula. And it was Mr. Justice Holmes who admonished us that "To rest upon a formula is a slumber that, prolonged, means death." Collected Legal Papers, 306. Such a formula makes for mechanical jurisprudence.

Some of the arguments made in this case strikingly illustrate how easy it is to fall into the ways of mechanical jurisprudence through the use of oversimplified formulas. It is argued that the Constitution protects freedom of speech: Freedom of speech means the right to communicate, whatever the physical means for so doing; sound trucks are one form of communication; ergo that form is entitled to the same protection as any other means of communication, whether by tongue or pen. Such sterile argumentation treats society as though it consisted of bloodless categories. The various forms of modern so-called "mass communications" raise issues that were not implied in the means of communication known or contemplated by Franklin and Jefferson and Madison. Cf. Associated Press v. United States, 326 U.S. 1. Movies have created problems not presented by the circulation of books, pamphlets, or newspapers, and so the movies have been constitutionally regulated. Mutual Film Corporation v. Industrial Commission, 236 U.S. 230. Broadcasting in turn has produced its brood of complicated problems hardly to be solved by an easy formula about the preferred position of free speech. See National Broadcasting Co. v. United States, 319 U.S. 190.

Only a disregard of vital differences between natural speech, even of the loudest spellbinders, and the noise of sound trucks would give sound trucks the constitutional rights accorded to the unaided human voice. Nor is it for this Court to devise the terms on which sound trucks should be allowed to operate, if at all. These are matters for the legislative judgment controlled by public opinion. So long as a legislature does not prescribe what ideas may be noisily expressed and what may not be, nor discriminate among those who would make inroads upon the public peace, it is not for us to supervise the limits the legislature may impose in safeguarding the steadily narrowing opportunities for serenity and reflection. Without such opportunities freedom of thought becomes a mocking phrase, and without freedom of thought there can be no free society.

Mr. Justice JACKSON, concurring.

* * * Freedom of speech for Kovacs does not, in my view, include freedom to use sound amplifiers to drown out the natural speech of others.

I do not agree that, if we sustain regulations or prohibitions of sound trucks, they must therefore be valid if applied to other methods of "communication of ideas." *The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself, and all we are dealing with now is the sound truck.* (Emphasis added.)

* * *

Mr. Justice BLACK, with whom Mr. Justice DOUGLAS, and Mr. Justice RUTLEDGE concur, dissenting.

The question in this case is not whether appellant may constitutionally be convicted of operating a sound truck that emits "loud and raucous noises." The appellant was neither charged with nor

convicted of operating a sound truck that emitted "loud and raucous noises." The charge against him in the police court was that he violated the city ordinance "in that he did, on South Stockton Street, in said City, play, use and operate a devise known as a sound truck." The record reflects not even a shadow of evidence to prove that the noise was either "loud or raucous," unless these words of the ordinance refer to any noise coming from an amplifier whatever its volume or tone.

* * * If as some members of this Court now assume, he was actually convicted for operating a machine that emitted "loud and raucous noises," then he was convicted on a charge for which he was never tried. * * *

Ideas and beliefs are today chiefly disseminated to the masses of people through the press, radio, moving pictures, and public address systems. To some extent at least there is competition of ideas between and within these groups. The basic premise of the First Amendment is that all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition. Laws which hamper the free use of some instruments of communication thereby favor competing channels. Thus unless constitutionally prohibited, laws like this Trenton ordinance can give an overpowering influence to views of owners of legally favored instruments of communication. This favoritism, it seems to me, is the inevitable result of today's decision. For the result of today's opinion in upholding this statutory prohibition of amplifiers would surely not be reached by this Court if such channels of communication as the press, radio, or moving pictures were similarly attacked.

There are many people who have ideas that they wish to disseminate but who do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places. Yet everybody knows the vast reaches of these powerful channels of communication which from the very nature of our economic system must be under the control and guidance of comparatively few people. On the other hand, public speaking is done by many men of divergent minds with no centralized control over the ideas they entertain so as to limit the causes they espouse. It is no reflection on the value of preserving freedom for dissemination of the ideas of publishers of newspapers, magazines, and other literature, to believe that transmission of ideas through public speaking is also essential to the sound thinking of a fully informed citizenry.

It is of particular importance in a government where people elect their officials that the fullest opportunity be afforded candidates to express and voters to hear their views. It is of equal importance that criticism of governmental action not be limited to criticisms by press, radio, and moving pictures. In no other way except public speaking can the desirable objective of widespread public discussion be assured. For the press, the radio, and the moving picture owners have their favorites, and it assumes the impossible to suppose that these agencies will at all times be equally fair as between the candidates and officials they favor and those whom they vigorously oppose. And it is an obvious fact that public speaking today without sound amplifiers is a wholly inadequate way to reach the people on a large scale. Consequently, to tip the scales against transmission of ideas through public speaking as the Court does today, is to deprive the people of a large part of the basic advantages of the receipt of ideas that the First Amendment was designed to protect.

There is no more reason that I can see for wholly prohibiting one useful instrument of communication than another. If

Trenton can completely bar the streets to the advantageous use of loud speakers, all cities can do the same. In that event preference in the dissemination of ideas is given those who can obtain the support of newspapers, etc., or those who have money enough to buy advertising from newspapers, radios, or moving pictures. This Court should no more permit this invidious prohibition against the dissemination of ideas by speaking than it would permit a complete blackout of the press, the radio, or moving pictures. It is wise for all who cherish freedom of expression to reflect upon the plain fact that a holding that the audiences of public speakers can be constitutionally prohibited is not unrelated to a like prohibition in other fields. And the right to freedom of expression should be protected from absolute censorship for persons without, as for persons with, wealth and power. At least, such is the theory of our society.

I am aware that the "blare" of this new method of carrying ideas is susceptible of abuse and may under certain circumstances constitute an intolerable nuisance. But ordinances can be drawn which adequately protect a community from unreasonable use of public speaking devices without absolutely denying to the community's citizens all information that may be disseminated or received through this new avenue for trade in ideas. I would agree without reservation to the sentiment that "unrestrained use throughout a municipality of all sound amplifying devices would be intolerable." And of course cities may restrict or absolutely ban the use of amplifiers on busy streets in the business area. A city ordinance that reasonably restricts the volume of sound, or the hours during which an amplifier may be used, does not, in my mind, infringe the constitutionally protected area of free speech. It is because this ordinance does none of these things, but is instead an absolute prohibition of all uses of an amplifier on any of the streets of Trenton at any time that I must dissent.

I would reverse the judgment.

Mr. Justice RUTLEDGE, dissenting.

* * *

### NOTES AND QUESTIONS

1. Obviously there is a relationship between the availability and the relative inexpensiveness of sound trucks and whether or not there should be regulation or indeed prohibition of sound trucks on city streets.

Does the fact that the more orthodox means of communication are far more expensive (advertising space in the print media or broadcast time) than the sound truck have any bearing on the extent to which sound trucks can be regulated?

To what extent does providing a forum for the impecunious and the unpopular have an effect on such opposing values as rights to information, privacy and silence?

2. In light of your study of the development that began after World War I of a modern American law of freedom of expression in the Supreme Court, you should recognize that these developments, which still manifest an enormous hold on the contemporary legal structure of all the media of mass communication, occurred to a very large extent in a context indifferent to the rise of the interconnected mass communications such as the electronic media (radio and television) or even the one-newspaper city.

As you read some of the famous free speech and free press cases ask yourself: What interests is the constitutional guarantee of freedom of speech and press designed to protect? Is what the court says in a given case in accord with what it does in terms of effectuating those interests? Are the participants in the communications process sufficiently recognized

by courts? Are other interests besides the speaker's, the publisher's or the government's identified and protected? Who are these other participants?

Reflections on such issues will aid in a critical evaluation of what present First Amendment law is and what it ought to be.

3. On the basis of Frankfurter's concurrence in *Kovacs* it would certainly appear that Frankfurter is willing to extend a fairly high degree of protection to at least some kind of expression. Note the following statement in the opinion: "* * * those liberties of the individual which history has attested as the indispensable conditions of the open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." Doesn't this language itself reflect values similar to those which animate the "preferred position" doctrine? Why then does Frankfurter attack the "preferred position" theory with such zeal? Apparently, he simply doesn't think it is useful constitutional doctrine. He complains that it substitutes for "a complicated process of constitutional adjudication" a "deceptive formula." He protests that all the various kinds of communications, employing many different contexts and technologies, should not be able to claim the same measure of constitutional protection. But does this criticism take the "preferred position" phrase too seriously? What suggestions would you offer to protect the values which the "preferred position" theory reflects but which at the same time would be sensitive to the problems of each communications context?

4. Another basis for Frankfurter's criticism of the "preferred position" theory might be an institutional concern for the Court. Is the "preferred position" theory a "mischievous phrase" because a majority of the Court has not steadfastly rallied to it and applied it? The *Dennis* case is certainly one of the clearest illustrations of the doctrine's failure to prevail. Although the "preferred position" theory continues to enjoy popular currency and occasional judicial support, in the last analysis is it incapable of doing the task assigned to it? Is Frankfurter concerned, therefore, that the doctrine, for all its alluring rhetoric, serves to do institutional damage to the Court? Note that Frankfurter, speaking of the "preferred position" doctrine in *Dennis v. United States,* text p. 63, castigated the Court for "having given constitutional support, over repeated protests, to uncritical libertarian generalities."

5. 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, p. 429 (2d Ed. 1968).

Professor 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? With the clear and present danger doctrine and the preferred position theory, we are given more help. In the clear and present danger situation, we know that the challenged statute will not be upheld if the clear and present danger

doctrine is properly applied. Where the substantive evil the statute guards is very great and the danger of its occurrence imminent, the law may stand. Similarly, where a preferred position approach is in use we know that when a state statute intended to achieve some valid police power purpose infringes on First Amendment freedom, the justification for the statute will have to meet a far heavier burden than usual if it is to withstand constitutional assault.

## D. 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 illegal action.

### 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.

Mr. Justice Murphy stated the facts of the case for an 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 God-damned 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 'fight-

ing 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."

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."

### NOTES AND QUESTIONS

1. 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 on the part 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.

2. 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 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" have been 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); Mallie Lewis v. City of New Orleans, 94 S.Ct. 970 (1974).*

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## E. THE HOSTILE AUDIENCE PROBLEM

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### FEINER v. NEW YORK

340 U.S. 315, 71 S.Ct. 303, 95 L.Ed. 295 (1951).

**Editorial Note:**

In *Feiner v. New York,* 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 Vinson upheld his conviction against a contention by Feiner that his arrest violated his First Amendment rights of free speech. Justice 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 outnumbered by the audience and there was a possibility some of the audience 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?

Who should the police protect? The speaker or the hostile audience. In dissent in *Feiner*, Mr. Justice Black's answer is 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. Would Mr. Justice Black support arresting the speaker in this variation of the hostile audience problem?

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

Mr. Justice Frankfurter's views were directly challenged by Mr. 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, ask-

ed 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 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 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.

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## F. THE FIRST AMENDMENT AND STATE REGULATION OF HANDBILLS, LEAFLETS AND PAMPHLETS: FREEDOM OF DISTRIBUTION

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### LOVELL v. GRIFFIN

303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938).

**Editorial Note:**

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 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 delivered by Chief Justice 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 no distinctions but covered all "literature" in all circumstances. 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 non-compliance 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?

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## STATE REGULATION OF SOLICITATION

## CANTWELL v. CONNECTICUT

310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

**Editorial Note:**

*Cantwell v. Connecticut* was yet another case involving the imposition of state criminal penalties on members of 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 30 days' imprisonment or both.

The Cantwells' convictions were affirmed by the state courts of Connecticut. But the United States Supreme Court unanimously per Justice 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. Mr. 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.

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## THOMAS v. COLLINS

323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945).

**Editorial Note:**

A Texas statute prohibited labor union organizers from soliciting members unless they first applied for and obtained an organizer's identification card from a designated state official. The statute required all union organizers to carry their identification cards whenever conducting solicitation and to produce them upon request. Thomas, an officer of the United Automobile, Aircraft and Agricultural Implements Workers (U.A.W.) traveled from his headquarters in Detroit to give a union organizing speech in the town of Pelly, Texas. The state attorney general obtained an *ex parte* restraining order enjoining Thomas from soliciting any union memberships in violation of the statute.

Confronted with this injunction, Thomas appeared as scheduled and made a point of soliciting his entire audience, and one listener in particular, to join the U.A.W. He was promptly arrested and convicted of contempt of court for violating the temporary restraining order. In a habeas corpus proceeding, the state supreme court upheld Thomas's conviction, and he sought review in the United States Supreme Court which reversed, 5–4. Justice Rutledge delivered the opinion of the Court, in which Justices Douglas, Black, and Murphy joined. Justice Jackson filed a separate concurring opinion. Justice Roberts dissented, joined by Chief Justice Stone, and Justices Reed and Frankfurter.

Texas defended its statute on the ground that it was merely an appropriate regulation of a commercial enterprise, i. e., solicitation by union agents of membership in its ranks. The statute, said Texas, was a reasonable exercise of the state's police power to regulate business practices and no special burden should be pressed upon the state to justify that power simply because the First Amendment rights of union organizers were incidentally affected by the operation of the statute.

Because of the preferred position given to First Amendment rights, Mr. Justice Rutledge replied that it is not sufficient that a mere rational connection exist between the exercise of the state police power and the harm the state seeks to avert. Rather, a state must demonstrate clear and present "public danger, actual

or impending" before First Amendment freedoms can be infringed.

Although the Texas statute prohibited only solicitation, and not other speech concerning labor unions, the Court focused on the difficulty Thomas would have had giving a union organizing speech while steering clear of any express or implied solicitation. "The threat of the restraining order, backed by the power of contempt, and of arrest for crime, hung over every word." Thomas had not been enjoined from giving a speech, but only from soliciting union memberships, said the state. The core of the case, Justice Rutledge countered, was that the statute in effect deterred Thomas from addressing labor issues at all, since he could not be sure that any word he uttered might not later be the basis for a charge of solicitation.

The state then argued that the statute merely required "previous identification," and that an organizer's card would issue automatically upon proper application. It was not, therefore, a matter of discrimination or discretionary licensing. Relying on *Cantwell dictum* concerning solicitation of funds, 310 U.S. 296, 306, Texas urged the Supreme Court to affirm the identification requirement. Justice Rutledge declined but conceded that where a union organizer moved beyond mere speech and advocacy to the solicitation of monies, "he enters a realm where a reasonable registration or identification requirement may be imposed," since the state has an interest in protecting its citizens against frauds and financial loss. But Thomas had not engaged in fund-raising. As applied to Thomas' speech-making, the Texas statute impermissibly infringed on his freedom to speak his mind and to urge others to join the union cause.

In his special concurrence, Justice Jackson put his finger on the distinction between state regulation of business practices and state regulation of free speech:

> The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. * * * A usual method of performing this function is through a licensing system. But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth. * * *

Justice Jackson also dealt with the contention of the state of Texas that the statute was directed at solicitation, not at speech. "It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such." The state, he intimated, wanted to block Thomas's speech and sought to accomplish this end by branding his activity as solicitation so as to bring it within the licensing system of the statute:

> Texas did not wait to see what Thomas would say or do. I cannot escape the impression that the injunction sought before he had reached the state was an effort to forestall him from speaking at all. * * *

The four dissenting Justices, however, took the opposite view. Thomas, they said, was in Texas to pursue his professional vocation as union organizer, an agent for a business corporation, and therefore subject, like other professionals, to the licensing power of the state. Justice Roberts, who delivered the dissenting opinion, refused to accept the majority's argument that solicitation could not effectively be separated from general speech-making. Thomas would have been free to deliver an address so long as he had avoided solicitation of union memberships. The statute did not make speech-making a crime. Solicitation was

primarily a business practice and reasonable state regulation of that practice should not be struck down.

The majority ruled that the impact of the Texas statute on First Amendment rights imposed a heavier burden of justification upon the state than it would have borne in a normal regulatory situation. Does this approach illustrate the function of the preferred position theory in First Amendment litigation? The dissenters argued in *Thomas* that despite the incidental infringement on certain First Amendment freedoms, the Texas statute in question was predominantly a regulatory one and therefore constitutionally permissible upon a showing of mere reasonableness.

Justice Rutledge stated that if a union organizer were to engage in the solicitation of monies, a licensing and identification system would have been permissible. If the Texas statute had prohibited the solicitation of dues, not membership, would it have been any less a deterrent to pro-union speeches than in the present case? Would the Court have upheld a licensing scheme under those circumstances?

Is solicitation a form of "speech plus", i. e., more than mere expression?

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## COMMERCIAL SOLICITATION

## BREARD v. ALEXANDRIA

341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233 (1951).

**Editorial Note:**

A nuisance ordinance in the city of Alexandria, Louisiana, prohibited door-to-door solicitation for sales of "goods, wares, or merchandise," without the prior consent or invitation of the homeowner. Breard, who was employed by a Pennsylvania corporation, coordinated door-to-door solicitation of general and news magazine subscriptions in various communities, including Alexandria. He was arrested for violation of the town solicitation ordinance and fined $25 or 30 days in jail.

Breard appealed the conviction on three grounds: (1) the ordinance was an unreasonable imposition on his right to earn a living, (2) the ordinance was an impermissible burden on interstate commerce, and (3) as applied to the selling of magazines, the ordinance was a violation of the First Amendment guarantee of freedom of the press.

The state courts of Louisiana affirmed Breard's conviction and so did the United States Supreme Court. The 6–3 decision held that (1) the ordinance was a reasonable exercise of the police power despite its negative impact on Breard's choice of livelihood, (2) the ordinance did not unreasonably interfere with interstate commerce, and (3) the right of Alexandria citizens to be free from the annoyance of door-to-door salesmen outweighed the First Amendment rights of the publishers to carry out solicitations in that manner.

Mr. Justice Reed held for the Court that the commercial aspect of the situation (selling subscriptions) diluted the free press issue and rendered Breard's activities more easily subject to state regulation than the press might ordinarily be:

> The issue brings into collision the rights of the hospitable housewife, peering on Monday morning around her chained door, with those of Mr. Breard's courteous, well-trained but possibly persistent solicitor * * * Behind the housewife are many housewives and homeowners in the towns where [such] * * * ordinances offer their aid. Behind Mr. Breard [is his employer] * * * with an annual business of $5,000,000 in subscriptions.

Mr. Justice Reed pointed out that there were many other ways to solicit magazine subscriptions besides intruding on the

privacy of families through door-to-door sales techniques.

Chief Justice Vinson dissented, joined by Justice Douglas, on the grounds that the Alexandria ordinance imposed an unreasonable burden on interstate commerce. Justice Black, also joined by Justice Douglas, dissented on First Amendment grounds.

Justice Black contended that the "balancing" test used by Justice Reed amounted to a rejection of the "preferred freedom" doctrine of earlier cases. The interest to be balanced, Justice Black said, was not the mere personal interest of Breard, but rather the preferred freedom of the press in which the entire society has a stake.

Interestingly, Justice Black, citing *Valentine v. Chrestensen,* 316 U.S. 52 (1942), stated that the Alexandria ordinance was constitutional as to merchants generally. See text, pp. 163, 170. But Breard, said Justice Black, was an "agent of the press." The intersection of a commercial and a publishing situation in *Breard* posed no difficulty for Justice Black because he believed that even some commercial dilution could not override the First Amendment interest inherent when publishing was involved. Justice Reed, however, took a different approach. For him, the combination of commercial and publishing elements made the Alexandria ordinance easier to uphold.

Do you think that Breard was really performing a *press* function in coordinating door-to-door magazine subscription sales? Is it reasonable to apply the Alexandria ordinance against Fuller Brush salesmen but not against magazine subscription hawkers? What about right of privacy aspects of the case, the right of Alexandria families to be protected against peddlers, hard-sell artists, and other annoying intrusions of a commercial sort? Does their right to privacy outweigh the rights of the sales personnel?

Mr. Justice Black's position, of course, is predicated on the view that the Constitution does not establish a right to privacy. As a matter of constitutional text, why does Mr. Justice Black take the position that privacy is not a constitutional right? Is it fair to say that commercial solicitation enjoys the least measure of constitutional protection or does the right of privacy element in the case preclude such an assessment of the case?

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## G. THE SPEECH PLUS PROBLEM: PARADES AND DEMONSTRATIONS

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### COX v. NEW HAMPSHIRE

312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941).

**Editorial Note:**

A number of Jehovah's Witnesses were convicted in Manchester, New Hampshire for violation of a state statute prohibiting a "parade or procession" upon a public street without a special license. The 68 defendants and 20 others met at a hall in Manchester on Saturday night, July 8, 1939 in order to engage in an information march.

On Saturday nights in an hour's time 26,000 persons normally passed one of the intersections where the defendants marched. Although no technical breach of the peace occurred, the New Hampshire Supreme Court said the marchers did interfere with normal sidewalk travel. No permit was sought for the march, the state court observed, even though defendants knew that one was required.

The Court in *Cox* held valid the New Hampshire statute on the ground that the state may prevent serious interference with normal usage of streets and parks.

A way to understand the *Cox* case and subsequent cases is to consider that one of the objectives the Court is really trying to accomplish in these cases is to constitutionalize the gatekeeper function. The gatekeeper or official who is in charge of the entry to a public facility is justified in governing access to the facility on bases which make sense in terms of the dominant purposes of the facility. A parade, perhaps, should not be allowed to proceed through an intersection at the height of the evening rush hour. On the other hand, a parade permit should not be denied, apart from traffic considerations, in order to satisfy unstated ideological considerations entertained by the officials in charge. These speech plus cases reflect a "balancing" process at work which seeks to weigh the rationality of the state's interest against the petitioner's claim of free expression. How does this "balancing" process work? Sometimes the fact that an ideological consideration was behind license denial can be borne out by the fact that the parade is sought during a period when the public site involved can accommodate both normal traffic and the parade at issue. In such circumstances, the permit or license for the parade should issue since official hostility to a group or cause which seeks to parade is not a constitutionally permissible basis for "licensing."

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## POULOS v. NEW HAMPSHIRE

345 U.S. 395, 73 S.Ct. 760, 97 L.Ed. 1105 (1953).

**Editorial Note:**

Section 22 of Portsmouth, New Hampshire's city ordinance banned any "theatrical or dramatic presentation," "parade or procession upon any public street or way," or "open air public meeting," unless a license for the event was first obtained from City Council.

Poulos, a Jehovah's Witness, applied for a permit for a religious meeting which he hoped to hold in a Portsmouth park the following month. The permit was refused. A state court later ruled that the City Council had acted unreasonably, arbitrarily, and capriciously in denying the permit.

Without seeking a court order to force City Council to issue the permit, Poulos and his coreligionists attempted to hold their public meeting in the park without a license. When arrested for violating section 22, Poulos sought to defend himself on the grounds that the City Council's license refusal was an unconstitutional denial of his First Amendment rights. He was convicted and fined $20.

On appeal, the New Hampshire Supreme Court held that section 22 was valid on its face and that Poulos's remedy against the discriminatory refusal of city officials to grant the permit was to seek a writ of mandamus requiring issuance of the permit. But the state court held Poulos was not free to ignore the denial of the license and hold the meeting anyway. Poulos carried a further appeal to the United States Supreme Court, which affirmed his conviction, 7-to-2. Justice Reed spoke for the Court. Justices Black and Douglas dissented. Justice Frankfurter, who concurred in the result, filed a separate opinion which focused on a procedural, not a constitutional point of law.

Section 22 of the Portsmouth ordinance laid down no standards whatsoever by which the granting or denial of permits was to be regulated. This, one might argue, was a fatal constitutional defect, since it granted local officials unlimited discretion in deciding which applications for public meetings should be granted. But the New Hampshire Supreme Court avoided this argument by construing the ordinance in a very narrow manner. The ordinance, the state Court said, gave local authorities no discretion in refusing permits. Rather, the state

Court instructed them to process all permit applications and to regulate the issuance of licenses only insofar as necessary to avert congestion in the public parks. The ordinance, so construed, was held valid as a "ministerial," traffic-management ordinance not a discretionary one.

The United States Supreme Court accepted the construction of the ordinance which had been applied by the state court. But the Court ruled that a discriminatory application of the ordinance would not have entitled petitioners to proceed with their meeting free from later prosecution:

> [T]o allow applicants to proceed without the required permits to run businesses, erect structures, purchase firearms, transport or store explosives or inflammatory products, hold public meetings without prior safety arrangements or take other unauthorized action is apt to cause breaches of the peace or create public dangers. * * * Delay is unfortunate, but the expense and annoyance of litigation is a price citizens must pay for life in an orderly society. * * *

Because of the authoritative construction of the ordinance established by the state courts, the Supreme Court said it would assume that had Poulos taken that ruling to the Portsmouth City Council, the permit would have been issued "promptly and fairly." Poulos had argued that to force him to resort to a mandamus remedy (while barring him from holding his public meeting in the interim) would deprive him of his First Amendment rights and constitute a prior restraint such as those struck down in *Cantwell* and *Thomas*.

While conceding the possible vexation of procedural delay, the Court rejected Poulos's contention and distinguished *Cantwell* and *Thomas*: in those cases, the ordinances disobeyed were invalid on their face; here, the ordinance as construed was valid. A mere error of judgment by local officials created the problem and this error could be corrected by means of mandamus.

The Court drew a parallel between Poulos's action and the refusal by a hypothetical would-be speaker to even apply for a license on the grounds it would be denied anyway. In either case, said Justice Reed, there is a defense only if the ordinance is later held to be invalid on its face. An invalid law being null and void, it is no crime to disobey it. But it is an offense to disobey a valid ordinance even if it can be proven that the ordinance was implemented in discriminatory fashion.

Justice Frankfurter's concurring opinion chided the majority for getting into the question of the ordinance's validity in the first place. That issue had been decided by the state court and by the Supreme Court itself in an earlier case involving another clause of the identical statute (*Cox v. New Hampshire*, construing the "parade or procession" clause, discussed in this text at page 41). Where there is no need to enunciate constitutional doctrine, said Justice Frankfurter, "silence is golden" should be the guiding rule. The Court should have assumed the constitutionality of the ordinance and moved on from there to consider a single question: was New Hampshire's choice of procedural remedy (mandamus) so inimical to Poulos's constitutional rights that it violated due process?

Justice Frankfurter believed it did not violate due process, "[i]n the absence of any showing that Poulos did not have available a prompt judicial remedy. * * *" For him, time was an important factor. Poulos made his original permit application a full six weeks before his meeting was scheduled to take place. There was ample time, in this case, for Poulos to acquire a permit by bringing a

state action to force the Portsmouth City Council to issue it.

To justify the decision of the Court, Mr. Justice Reed had cited extensively the cases upholding state regulation of business practices (see the quote from his opinion, ante). In a sharp dissenting opinion, Mr. Justice Black took issue with this analysis. Justice Black agreed that one should appeal a denial of a license to purchase weapons, rather than going out to buy them anyway. But storing explosives without a license is different from speaking without a license. The purpose of the First Amendment is to set expression apart from other matters, including the regulation of business practices. If Portsmouth's refusal to grant a permit was unlawful, as the state court had found it was, why could Poulos not disregard it as he could have disregarded an invalid statute?

Mr. Justice Douglas said an invalid administrative decision is no more sacred and its flouting no more dangerous to society than an invalid law. Mr. Justice Douglas emphasized the delay which the mandamus route would pose and the infringement of Poulos's right to speak when he wished.

Justice Douglas said that even under the narrow interpretation of the ordinance which the state court established and the Supreme Court accepted, local officials were granted unwarranted discretion in granting or denying licenses for use of the public parks. The New Hampshire courts interpreted the ordinance to direct the City Council to administer licensing fairly but to balance requests for permits against the reasonable needs of the city and its residents in using the parks. This granted local officials the power to regulate speech. In Douglas' view, the ordinance was not merely ministerial. Rather, city government was permitted to regulate speech just as it could regulate business practices. The ordinance, as construed, disrupted the preferred position of First Amendment rights and should have been held invalid on its face.

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## WALKER v. BIRMINGHAM

388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967).

**Editorial Note:**

*Walker v. City of Birmingham,* an important First Amendment case, arose out of the Negro civil rights protest movement of the 1960s. Just before Easter 1963, eight black ministers, including the late Martin Luther King, were arrested and held in contempt for leading civil rights marches in Birmingham on Easter 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 contend 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 Stewart, affirmed the conviction, 5–4. Justices Warren, Douglas, Brennan and 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 in-

valid 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.*

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 *Thomas v. Collins,* 323 U.S. 516 (1945), text, p. 37, and *Lovell v. Griffin,* 303 U.S. 444 (1938), text, p. 35.

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. Justice 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-to-4. Justice Black, who had dissented in *Poulos,* cast a deciding vote in *Walker,* to sustain contempt convictions in the face of the vague, overbroad, the limitless injunction. Justice 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?

Compare *Walker v. City of Birmingham* with *Thomas v. Collins,* discussed in this text at page 37. In each case, a statute which was arguably invalid formed the basis for an injunction which prohibited the exercise of free speech. In each, a person violated the injunction without first taking steps to have it modified or dissolved and without making a serious effort to comply with the requirements of the ordinance on which the injunction was based. When faced with contempt charges, each person sought to defend on the grounds that the underlying ordinance was unconstitutional. In *Thomas,* that argument succeeded; the Supreme Court held that statute invalid and ruled that the contempt conviction could not stand. In *Walker,* there was an opposite result. Why? The Texas statute challenged in *Thomas* sought to regulate pure speech, while the Birmingham statute in *Walker* purported to regulate the use of public streets. Would this difference be determinative? The majority opinion in *Walker* did not mention *Thomas v. Collins.*

*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. 94 S.Ct. 270 (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" rule was a violation of the First Amendment. The court of appeals relied on *Walker* for its decision that even an unconstitutional court must be obeyed until it is reversed. See discussion of the *Dickinson* case in this text, p. 428.

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## CARROLL v. PRESIDENT AND COMMISSIONERS OF PRINCESS ANNE

393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325 (1968).

**Editorial Note:**

Carroll and other members of the white supremacist National States Rights Party conducted a public rally near the courthouse steps of Princess Anne, Maryland. In speeches there, they vilified both Negroes and Jews in a highly provocative and militant manner. The rally broke up in the early evening with a

promise that it would be continued the following night. The next day, however, county officials sought and obtained an *ex parte* restraining order from a state court which prohibited Carroll's group from holding any rallies or meetings in the county for a period of 10 days. The injunction was obeyed and at a trial at the end of 10 days, the state court extended the restraint for a period of 10 *months*. On appeal, the state Court of Appeals affirmed the 10-day injunction but reversed the 10-month extension, holding that "the period of time was unreasonable and that it was arbitrary to assume that a clear and present danger of civil disturbance and riot would persist for ten months."

Although the 10-month injunction was struck down by this state decision, petitioners sought certiorari from the United States Supreme Court for review of the 10-day order. Though the 10-day period had long since elapsed, they contended that the state court's affirmance of that decree remained reviewable, because it had affected the willingness of officials in other Maryland counties to allow the group to hold rallies there. The Supreme Court granted certiorari and in a unanimous decision per Justice Fortas, reversed the state court of appeals and held that the 10-day injunction was unconstitutional. Justices Black and Douglas concurred.

Referring to the earlier decision in *Walker v. City of Birmingham,* discussed at page 43 of this text, Justice Fortas noted for the Court that *Walker's* holding required enjoined parties to seek judicial review of court orders restraining First Amendment freedoms, rather than disobeying court decrees and raising the constitutional issue in defense to contempt proceedings. Here, Carroll and his co-petitioners followed the dictates of *Walker*. They abandoned their plan for the second rally and obeyed the terms of the 10-day injunction. But then they sought judicial review of its issuance and terms. On that challenge, they were not only entitled to review despite the expiration of the restraint (i. e., the question was not moot), but also to careful consideration of every First Amendment issue involved in the case.

An *ex parte* restraint on the exercise of First Amendment freedoms could not be justified, said Justice Fortas, absent a showing by the state that it was impossible to bring petitioners in on the proceeding. Here county officials were clearly able, but not willing, to notify Carroll of the hearing on the injunction, since Carroll and his followers were in the county that very day. Participation by *both* sides is necessary and desirable, said Justice Fortas, because without hearing from both parties in a case the court is not in a position to make the sensitive evaluation of the facts necessary in First Amendment matters.

*Carroll* holds that *ex parte* orders restraining marches or meetings are now unconstitutional where it is possible to provide an opportunity for notice and hearing to the demonstrating group and such opportunity prior to rendering the *ex parte* order has not been provided. Does *Carroll* therefore overrule *Walker?* Was it possible to extend notice and hearing to the Black ministers in *Walker?*

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## SHUTTLESWORTH v. CITY OF BIRMINGHAM

394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969).

**Editorial Note:**

Two years after it decided *Walker v. City of Birmingham,* the Supreme Court considered a different case arising out of the identical facts. 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 back-handed compliment from Mr. 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 Justice 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 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,* discussed at page 41 of this text, 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:

> Given the absence of speedy procedures, the Reverend Shuttlesworth and his associates were faced with a serious dilemma. * * * If they attempted to exhaust the administrative and judicial remedies provided by Alabama law, it was almost certain that no effective relief could be obtained by Good Friday. * * * With fundamental rights at stake, he was entitled to adopt the more probable meaning of the ordinance and act on his belief that the city's permit regulations were unconstitutional.

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, Justice 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 pre-

pared to concede that the principle of cases such as *Lovell v. Griffin,* text, p. 35, 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?*

## H. PICKETING, HANDBILLING, AND STATE ACTION: THE COLLISION POINTS BETWEEN FREEDOM OF EXPRESSION AND PROPERTY RIGHTS

### PICKETING

### 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 anti-picketing 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 was given First Amendment protection in *Thornhill.* Mr. Justice 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.

Mr. 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.

The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. The Continental Congress in its letter sent to the Inhabitants of Quebec (October 26, 1774) referred to the "five great rights" and said: "The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs." Journal of the Continental Congress, 1904 Ed., vol. I, pp. 104, 108. Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

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—includ-

ing 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.

* * *

### NOTES AND QUESTIONS

1. 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 anti-picketing 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.

2. It is a principle of due process adjudication that criminal statutes should be drawn so that the class affected by them are sufficiently apprised of the conduct expected of them in order that they 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).

The *Thornhill* case 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. 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 held explain the vagueness doctrine? Is it possible for a statute to be defectively overbroad but not overly vague?

3. The thrust of *Thornhill* was that the anti-picketing section of the Alabama Code was overly broad but that a more narrowly-drawn statute might pass 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 anti-picketing 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 non-verbal communication merited First Amendment protection, albeit in a non-absolute form.

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## PICKETING AND STATE ACTION

### AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590 v. LOGAN VALLEY PLAZA, INC.

391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968).

Mr. Justice MARSHALL delivered the opinion of the Court.

* * *

This Court has also held, in Marsh v. State of Alabama, 326 U.S. 501 (1946), that under some circumstances property that is privately owned may, at least for First Amendment purposes, be treated as though it were publicly held. In *Marsh*, the appellant, a Jehovah's Witness, had undertaken to distribute religious literature on a sidewalk in the business district of Chickasaw, Alabama. Chickasaw, a so-called company town, was wholly owned by the Gulf Shipbuilding Corporation. * * *

The corporation had posted notices in the stores stating that the premises were private property and that no solicitation of any kind without written permission would be permitted. Appellant Marsh was told that she must have a permit to distribute her literature and that a permit would not be granted to her. When she declared that the company rule could not be utilized to prevent her from exercising her constitutional rights under the First Amendment, she was ordered to leave Chickasaw. She refused to do so and was arrested for violating Alabama's criminal trespass statute. In reversing her conviction under the statute, this Court held that the fact that the property from which appellant was sought to be ejected for exercising her First Amendment rights was owned by a private corporation rather than the State was an insufficient basis to justify the infringement on appellant's right to free expression occasioned thereby. Likewise the fact that appellant Marsh was herself not a resident of the town was not considered material.

The similarities between the business block in *Marsh* and the shopping center in the present case are striking. The perimeter of Logan Valley Mall is a little less than 1.1 miles. Inside the mall were situated, at the time of trial, two substantial commercial enterprises with numerous others soon to follow. Immediately adjacent to the mall are two roads, one of which is a heavily traveled state highway and from both of which lead entrances directly into the mall. Adjoining the buildings in the middle of the mall are sidewalks for the use of pedestrians

going to and from their cars and from building to building. In the parking areas, roadways for the use of vehicular traffic entering and leaving the mall are clearly marked out. The general public has unrestricted access to the mall property. The shopping center here is clearly the functional equivalent to the business district of Chickasaw involved in *Marsh*.

It is true that, unlike the corporation in *Marsh* the respondents here do not own the surrounding residential property and do not provide municipal services therefor. Presumably, petitioners are free to canvass the neighborhood with their message about the nonunion status of Weis Market, just as they have been permitted by the state courts to picket on the berms outside the mall. Thus, unlike the situation in *Marsh,* there is no power on respondents' part to have petitioners totally denied access to the community for which the mall serves as a business district. This fact, however, is not deteminative. In *Marsh* itself the precise issue presented was whether the appellant therein had the right, under the First Amendment, to pass out leaflets in the business district, since there was no showing made there that the corporate owner would have sought to prevent the distribution of leaflets in the residential areas of the town. While it is probable that the power to prevent trespass broadly claimed in *Marsh* would have encompassed such an incursion into the residential areas, the specific facts in the case involved access to property used for commercial purposes.

We see no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the "business district" is not under the same ownership. Here the roadways provided for vehicular movement within the mall and the sidewalks leading from building to building are the functional equivalents of the streets and sidewalks of a normal municipal business district. The shopping center premises are open to the public to the same extent as the commercial center of a normal town. So far as can be determined, the main distinction in practice between use by the public of the Logan Valley Mall and of any other business district, were the decisions of the state courts to stand, would be that those members of the general public who sought to use the mall premises in a manner contrary to the wishes of the respondents could be prevented from so doing.

Such a power on the part of respondents would be, of course, part and parcel of the rights traditionally associated with ownership of private property. And it may well be that respondents' ownership of the property here in question gives them various rights, under the laws of Pennsylvania, to limit the use of that property by members of the public in a manner that would not be permissible were the property owned by a municipality. 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.

We do not hold that respondents, and at their behest the State, are without power to make reasonable regulations governing the exercise of First Amendment rights on their property. Certainly their rights to make such regulations are at the very least co-extensive with the powers

possessed by States and municipalities, and recognized in many opinions of this Court, to control the use of public property. Thus where property is not ordinarily open to the public, this Court has held that access to it for the purpose of exercising First Amendment rights may be denied altogether. See Adderley v. State of Florida, 385 U.S. 39 (1966).

* * * Likewise, *Adderley* furnishes no support for the decision below because it is clear that the public has virtually unrestricted access to the property at issue here. Respondents seek to defend the injunction they have obtained by characterizing the requirement that picketing to be carried on outside the Logan Mall premises as a regulation rather than a suppression of it. Accepting *arguendo* such a characterization, the question remains, under the First Amendment, whether it is a permissible regulation.

* * *

It is therefore clear that the restraints on picketing and trespassing approved by the Pennsylvania courts here substantially hinder the communication of the ideas which petitioners seek to express to the patrons of Weis.

The sole justification offered for the substantial interference with the effectiveness of petitioners' exercise of their First Amendment rights to promulgate their views through handbilling and picketing is respondents' claimed absolute right under state law to prohibit any use of their property by others without their consent. However, unlike a situation involving a person's home, no meaningful claim to protection of a right of privacy can be advanced by respondents here. Nor on the facts of the case can any significant claim to protection of the normal business operation of the property be raised. Naked title is essentially all that is at issue.

The economic development of the United States in the last 20 years reinforces our opinion of the correctness of the approach taken in *Marsh*. The large-scale movement of this country's population from the cities to the suburbs has been accompanied by the advent of the suburban shopping center, typically a cluster of individual retail units on a single large privately owned tract. It has been estimated that by the end of 1966 there were between 10,000 and 11,000 shopping centers in the United States and Canada, accounting for approximately 37% of the total retail sales in those two countries.

These figures illustrate the substantial consequences for workers seeking to challenge substandard working conditions, consumers protesting shoddy or overpriced merchandise, and minority groups seeking nondiscriminatory hiring policies that a contrary decision here would have. Business enterprises located in downtown areas would be subject to on-the-spot public criticism for their practices, but businesses situated in the suburbs could largely immunize themselves from similar criticism by creating a *cordon sanitaire* of parking lots around their stores. Neither precedent nor policy compels a result so at variance with the goal of free expression and communication that is the heart of the First Amendment.

* * *

The judgment of the Supreme Court of Pennsylvania is reversed and the case is remanded for further proceedings not inconsistent with this opinion. It is so ordered.

Mr. Justices BLACK, HARLAN and WHITE, dissenting.

### NOTES AND QUESTIONS

1. Professor Miller in his article *Toward the 'Techno-Corporate' State?—An Essay in American Constitutionalism*, 14 Vill.L.Rev. 1 at 65 states the implications

of *Amalgamated Food Employees* as follows:

"The 1946 decision of the Supreme Court in *Marsh v. Alabama* directly applied the Constitution to a corporation (the Gulf Shipbuilding Company); it exists as a time bomb ticking away in the United States Reports ready for use when thought appropriate. That that time may be imminent is a possible conclusion from the clutch of recent decisions relating to race relations (the 'sit-in' cases principally) in which the Court has all but erased the state action concept. The bomb exploded, at least partially, in a decision in May, 1968, *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, holding that a privately owned shopping center could not prevent picketing by union members on its premises; this decision extended *Marsh v. Alabama.* (One member of the present High Bench, Mr. Justice Douglas, considers the corporate charter a sufficient link to the state to make the Constitutional applicable.) In addition, there are scattered decisions by both federal and state courts, concerning union membership in the main, that tend in that direction. So, too, do actions of the avowedly political branches of government: If one takes an expansive view of the manner in which the Constitution may be altered, then the precepts of the Civil Rights Act of 1964 and presidential actions relating to nondiscrimination in employment by government contractors constitute a recognition that ostensibly private entities should (must) follow the Constitution."

2. Professor Arthur S. Miller has advocated the need to "constitutionalize" the corporation. 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 concentration of power, such as the nationwide chains of daily newspapers (most of them 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. 852.

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.

3. As the *Logan Valley* case indicates, the problem of the relationship of picketing to freedom of expression has prompted varying reactions from the Court in the years between *Thornhill* in 1940 and *Logan Valley* in 1968. Picketing is "speech plus." Mr. Justice Mar-

shall says, picketing involves "elements of both speech and conduct." "Speech plus" is presumably more susceptible to government regulation than "pure speech." This is so, in Mr. Justice Black's view, for example, because the First Amendment only protects speech.

4. The Court in *Logan Valley* tried to shed some light on the meaning of "speech plus." Government regulation, the Court pointed out, does not become constitutionally permissible merely because conduct is intertwined with speech.

Mr. Justice Douglas pointed out in his concurrence that the proper way to deal with "speech plus" is to protect the communication which is seeking expression by regulating the conduct in such a way as to avoid interference with things having nothing to do with the interchange of ideas, such as traffic flow, without banishing the communicative aspects of the activity altogether. But suppose the conduct cannot be regulated without throttling the speech aspect of the activity?

5. For Mr. 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? Cf. Mr. Justice Douglas' concurring opinion in *CBS v. Democratic National Committee*, 412 U. S. 94 (1973). See this text, p. 859.

6. In footnote 9, in Mr. 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.

Does the distinction Mr. Justice Marshall attempts 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.

7. *Lloyd Corp. v. Tanner, 407 U.S. 551 (1972)*, answered the question which Mr. 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 hand bills 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 Center* 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. A general discussion of the case law justifying the dedication to public use of both public and private property for First Amendment purposes is found in Barron, Freedom Of The Press For Whom? 94–116 (1973).

8. In *Amalgamated Food Employees*, Mr. 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 *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).

9. The privately-owned shopping center cases have been used to support a right of access to the privately-owned press on the ground that the fact of their private ownership has not inhibited the imposition of an obligation on a shopping center to permit some exercise of First Amendment rights. See Barron, *An Emerging First Amendment Right of Access to the Media?* 37 Geo.Wash.L. Rev. 487 (1969).

For a scholarly and thoughtful exposition of the view that the shopping center cases should not be used as an analogy to justify the imposition of access obligations on privately-owned newspapers, see Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N. Car.L.Rev. 1 at 34 (1973). Professor Lange believes that the *Lloyd Center* case limits the scope of the state action concept. He also believes that an extension of First Amendment rights to readers vis-a-vis their daily newspapers on the basis of the shopping center cases would be unwarranted, particularly in the light of the *Lloyd Corp.* case:

> Indeed, the Court in *Lloyd* (sic) places particular emphasis on "the scope of the invitation extended to the public" by the private enterprise. It notes, for example, that in the case of the shopping center in question "there is no open-ended invitation to the public to use the Center for any and all purposes, however incompatible with the interests * * * (being served)." By analogy, one can also argue that private newspapers extend no "open-ended" invitation to publish material which is "incompatible" with the editorial interests that they wish to serve.

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## I. THE DECLINE, DEATH AND REVIVAL OF THE CLEAR AND PRESENT DANGER DOCTRINE

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### AMERICAN COMMUNICATIONS ASS'N, CIO v. DOUDS

339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925 (1950).

**Editorial Note:**

An important decision in the development of the judicial interpretation of

freedom of expression, the *Douds* case foreshadows the decline of the clear and present danger doctrine as the doctrinal tool for adjudicating the validity of legislation challenged on the basis of the First Amendment. The case raised the question of the validity of § 9(h) of the Labor Management Relations Act of 1947. That statutory provision denied access to the National Labor Relations Board of any union whose officers refused to file affidavits with the Board stating that the officer was not a member "of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the U. S. government by force or by any illegal or unconstitutional methods." The difficult question presented, said Chief Justice Vinson, was whether "consistently with the First Amendment, Congress, by statute, may exert these pressures upon labor unions to deny positions of leadership to certain persons who are identified by particular beliefs and political affiliations."

Mr. Chief Justice VINSON.

* * *

The contention of petitioner * * * that this Court must find that political strikes create a clear and present danger to the security of the Nation or of widespread industrial strife in order to sustain § 9(h) similarly misconceives the purpose that phrase was intended to serve. * * *

When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented. The high place in which the right to speak, think, and assemble as you will was held by the Framers of the Bill of Rights and is held today by those who value liberty both as a means and an end indicates the solicitude with which we must view any assertion of personal freedoms. We must recognize, moreover, that regulation of "conduct" has all too frequently been employed by public authority as a cloak to hide censorship of unpopular ideas. We have been reminded that "It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control."

On the other hand, legitimate attempts to protect the public, not from the remote possible effects of noxious ideologies, but from present excesses of direct, active conduct, are not presumptively bad because they interfere with and, in some of its manifestations, restrain the exercise of First Amendment rights. In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by § 9(h) pose continuing threats to that public interest when in positions of union leadership. * * * It should be emphasized that Congress, not the courts, is primarily charged with determination of the need for regulation of activities affecting interstate commerce. This Court must, if such regulation unduly infringes personal freedoms, declare the statute invalid under the First Amendment's command that the opportunities for free public discussion be maintained. But insofar as the problem is one of drawing inferences concerning the need for regulation of particular forms of conduct from conflicting evidence, this Court is in no position to substitute its judgment as to the necessity or desirabili-

ty of the statute for that of Congress.
* * *

When compared with ordinances and regulations dealing with littering of the streets or disturbance of householders by itinerant preachers, the relative significance and complexity of the problem of political strikes and how to deal with their leaders becomes at once apparent.
* * *

**Editorial Note:**

[Chief Justice Vinson went on to say that the statute reviewed in *Douds* was not aimed at the suppression of dangerous ideas as was the case in *De Jonge v. Oregon, 299 U.S. 353 (1937)*, text, supra, p. 23. Vinson said § 9(h) affected only a few persons and left "those few free * * * to maintain their affiliations and beliefs subject only to the possible loss of positions" which Congress had determined were in danger of abuse to the injury of the public. The Court concluded that on considering "the deference due a congressional judgment concerning the need for regulation of conduct affecting interstate commerce and the effect of the statute upon rights of speech, assembly, belief", § 9(h) of the Labor Management Relations Act, 1947, did "not unduly infringe freedoms protected by the First Amendment."

[Mr. Justice Frankfurter and Mr. Justice Jackson each wrote separate opinions in which they concurred generally with the Chief Justice's majority opinion but took exception to Chief Justice Vinson's willingness to overlook constitutionally vague aspects of § 9(h). Furthermore, Mr. Justice Jackson introduced the idea that the clear and present danger doctrine was to be applied to normal political expression and not to the Communist Party which "alone among American parties or present is dominated and controlled by a foreign government." This attempt to remove normal constitutional tests from Communist cases was to become particularly manifest in the *Dennis* case. *Dennis v. United States, 341 U.S. 494 (1951)*, infra, text, p. 63.

[A much more direct assault on Vinson's reasoning in *Douds* was lodged by Mr. Justice Black in dissent. Mr. Justice BLACK said in part:]

* * *

The Court assures us that today's encroachment on liberty is just a small one, that this particular statutory provision "touches only a relative handful of persons leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint." But not the least of the virtues of the First Amendment is its protection of each member of the smallest and most unorthodox minority. Centuries of experience testify that laws aimed at one political or religious group, however rational these laws may be in their beginnings, generate hatreds and prejudices which rapidly spread beyond control.

* * *

Under such circumstances, restrictions imposed on proscribed groups are seldom static, even though the rate of expansion may not move in geometric progression from discrimination to arm-band to ghetto and worse. Thus I cannot regard the Court's holding as one which merely bars Communists and nothing more.

* * *

Like anyone else individual Communists who commit overt acts in violation of valid laws can and should be punished. But the postulate of the First Amendment is that our free institutions can be maintained without prescribing or penalizing political belief, speech, press, assembly or party affiliation.

Fears of alien ideologies have frequently agitated the nation and inspired legislation aimed at suppressing advocacy of those ideologies. At such times the fog of public excitement obscures the an-

cient landmarks set up in our Bill of Rights. Yet then, of all times, should this Court adhere most closely to the course they mark. * * *

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## SOME COMMENTS AND QUESTIONS ON THE DOUDS CASE

1. Chief Justice Vinson says that the issue presented in the *Douds* case is not the same kind of question which "Holmes and Brandeis found convenient to consider in terms of clear and present danger." What is the distinction Vinson is trying to make?

2. Chief Justice Vinson attempts to distinguish *DeJonge v. Oregon.* Although not verbalized as such, Chief Justice Vinson's argument can be reduced essentially to the conclusion that *DeJonge* dealt with speech or expression and that *Douds* deals with action. Under this analysis, once action is substantially present, even though containing elements of expression, it then becomes susceptible to government regulation. Do you think the expression-action dichotomy presents a useful basis on which to construct a rationale for a law of freedom of expression?

Of course it is not clear that Chief Justice Vinson's *Douds* opinion sought to establish any such rationale but one distinguished First Amendment authority has suggested just such an approach. See Emerson, *Toward A General Theory of the First Amendment*, 72 Yale L.J. 877 (1963); The System of Freedom of Expression (1970).

Prof. Emerson makes very clear his awareness that expression (or speech) and action are very often blended. (It should be noted in contrast that Professor Meiklejohn's categories of "public" and "private" speech are discussed without much recognition that separating them will present a very difficult judicial task.) To penetrate the problem of disentangling action and expression, Professor Emerson suggests that inquiry be directed to "whether the harm attributable to the conduct is immediate and instantaneous, and whether it is irremediable except by punishing and thereby preventing the conduct." See Emerson, supra, 877 at 917.

But Professor Emerson warns that such regulation of conduct must be evaluated in terms of whether it jeopardizes a "workable system of free expression." The basic task, in Emerson's view, is to distinguish that which is essentially expression from action, protecting the former but rendering the latter susceptible to regulation.

Under the *Douds* facts, using Professor Emerson's rationale, would the result still be the same as that reached by Chief Justice Vinson?

3. Another approach to First Amendment problems is also found in Vinson's opinion in *Douds* particularly in the following statement:

"When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented."

Although not labeled as such, this approach is essentially the "balancing" test. The governmental interest secured by the particular legislation at issue is weighed against the right of free expression. As between this "balancing" approach (a concept most closely associated with Mr. Justice Frankfurter) and the clear and present danger test, which do you think is most likely to lead to greater freedom of speech and press? Why? Did the Court in *Douds* profess to use the clear and present danger test?

4. Mr. Justice Black's dissent in *Douds* is indicative of still another doc-

trine which has been hotly contested in the Supreme Court opinions of the 1950's and the 1960's: Mr. Justice Black's absolutist theory of the First Amendment. This conception is stated mildly enough in the portion of the dissent excerpted where he says that the assumption of the First Amendment is that "our free institutions can be maintained without prescribing or penalizing political belief, speech, press, assembly or party affiliation." This sentence appears innocuous but actually it reflects a rather bold theory of freedom of expression. Mr. Justice Black simply denies any legislative power to regulate the political freedoms, primarily speech and press. The basic justification Mr. Justice Black gives for this position is also found in his *Douds* dissent. He denies any legislative power in this area because "it springs from the assumption that individual mental freedom can be constitutionally abridged whenever any majority of this Court can find a satisfactory legislative reason." In his view, the government, as a matter of constitutional text, is barred from curtailing freedom of expression. Considering the different result obtained in *DeJonge v. Oregon, 299 U.S. 353 (1937)*, as opposed to that in *Douds*, isn't the last statement of Mr. Justice Black a rather rueful but basically accurate statement of the actual state of the law of free expression?

5. Many of the ideas expressed in Chief Justice Vinson's opinion became significant in *Dennis* a year later. *Douds* should be seen as setting the stage for *Dennis*. A major theme in *Douds* was that freedom of speech was an important constitutional value but not in any absolute sense. The insistence that the First Amendment is not to be interpreted in any absolute sense to this day enjoys the support of a majority of the Justices of the Supreme Court. See particularly the opinions of Chief Justice Burger and Mr. Justice Blackmun in the *Pentagon Papers* case. See text, p. 114. See *New York Times v. United States, 403 U.S. 713 (1971)*. Vinson in *Douds* says that First Amendment freedoms are themselves "dependent upon the power of constitutional government to survive." Vinson suggests the right of self-preservation of constitutional government transcends all other constitutional rights. In Vinson's view, this interest in governmental self-preservation necessarily makes freedom of speech and press less than an absolute: "Freedom of speech thus does not comprehend the right to speak on any subject at any time."

From the perspective of the always perplexing problem of formulating a test to define when freedom of speech and press have been violated, the *Douds* case merely formalized the fact that as far as the Supreme Court is concerned the clear and present danger doctrine was not the exclusive means to resolve First Amendment problems, but instead, just one of many approaches to First Amendment problems. Furthermore, *Douds* disclosed that the formulation of clear and present danger, characterized by Vinson as "a rigid test requiring a showing of imminent danger to the security of the nation," would not be used by the Vinson Court where a Communist threat to the preservation of the government was perceived.

Instead of the clear and present danger doctrine, two other First Amendment doctrines, inextricably related, were used by Chief Justice Vinson in *Douds*, the dichotomous speech-action test and the "balancing" test. Vinson provides a collection of cases where First Amendment values have been weighed to their disadvantage against competing constitutional values. Cases involving state interests such as the welfare of children, an efficient civil service, and the character of members of the bar were cited in *Douds* as illustrative of situations where, on a balancing approach, some govern-

mental interest weighed heavier than the undoubted First Amendment interest which a particular state or federal governmental action transgressed.

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## DENNIS v. UNITED STATES

341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951).

Mr. Chief Justice VINSON announced the judgment of the Court and an opinion in which Mr. Justice REED, Mr. Justice BURTON and Mr. 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. (1946 ed.) § 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. (1946 ed.) §§ 10, 11 (see present 18 U.S.C. § 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.

The trial of the case extended over nine months, six of which were devoted to the taking of evidence, resulting in a record of 16,000 pages. 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. Although we do not agree that the language itself has that significance, we must bear in mind that it is the duty of the federal courts to interpret federal legislation in a manner not inconsistent with the demands of the Constitution. American Communications Ass'n v. Douds, 1950, 339 U.S. 382, 407.

* * *

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.

We pointed out in Douds that the basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies. It is for this reason that this Court has recognized the inherent value of free discourse. An anal-

ysis 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.

No important case involving free speech was decided by this Court prior to Schenck v. United States, 1919. Indeed, the summary treatment accorded an argument based upon an individual's claim that the First Amendment protected certain utterances indicates that the Court at earlier dates placed no unique emphasis upon that right. It was not until the classic dictum of Justice Holmes in the Schenck case that speech *per se* received that emphasis in a majority opinion.

* * *

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. Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature.

* * *

To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative.

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. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though doomed from the out-

set 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.

**Editorial Note:**

[At this point the opinion discusses the trial judge's charge to the jury. The trial judge charged the jury that what the law denounced was not the abstract doctrine of overthrowing or destroying government by unlawful means but rather the teaching and advocacy of such a purpose as a "rule or principle of action."

[The judge then charged the jury that if they did find the defendant guilty of advocating the kind of action described above, then "I find as a matter of law that there is sufficient danger of substantive evil that the Congress has a right to prevent to justify the application of the statute under the First Amendment of the Constitution." The judge said this ruling was no concern of the jury. This squarely raised the following issue for the Supreme Court: Was the constitutional issue of whether a federal statute abridging political expression was justified by the clear and present danger doctrine a question for the jury or the court?]

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

Mr. Justice FRANKFURTER, concurring in affirmance of the judgment.

* * * The first question is whether—wholly apart from constitutional matters—the judge's charge properly explained to the jury what it is that the Smith Act condemns. The conclusion that he did so requires no labored argument. On the basis of the instructions, the jury found, for the purpose of our review, that the advocacy which the defendants conspired to promote was to be a rule of action, by language reasonably calculated to incite persons to such action, and was intended to cause the overthrow of the Government by force and violence as soon as circumstances permit. This brings us to the ultimate issue. In enacting a statute which makes it a crime for the defendants to conspire to do what they have been found to have conspired to do, did Congress exceed its constitutional power?

Few questions of comparable import have come before this Court in recent years. The appellants maintain that they have a right to advocate a political theory, so long, at least, as their advocacy does not create an immediate danger of obvious magnitude to the very existence of our present scheme of society. On the other hand, the Government asserts the right to safeguard the security of the Nation by such a measure as the Smith Act. Our judgment is thus solicited on a conflict of interests of the utmost concern to the well-being of the country. This conflict of interests cannot be resolved by a dogmatic preference for one or the other, nor by a sonorous formula which is in fact only a euphemistic disguise for an unresolved conflict. If adjudication is to be a rational process, we cannot escape a candid examination of the conflicting claims with full recognition that both are supported by weighty title-deeds. * * *

**Editorial Note:**

[Chief Justice Vinson's critique of the clear and present danger doctrine is inserted at this point for comparison with that of Mr. Justice Frankfurter.]

* * *

Mr. Chief Justice VINSON: The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts. The guilt is established by proof of facts. Whether the First Amendment protects the activity which constitutes the violation of the statute must depend upon a judicial determination of the scope of the First Amendment applied to the circumstances of the case.

* * *

The question in this case is whether the statute which the legislature has enacted may be constitutionally applied. In other words, the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction. We hold that the statute may be applied where there is a "clear and present danger" of the substantive evil which the legislature had the right to prevent. Bearing, as it does, the marks of a "question of law," the issue is properly one for the judge to decide. * * *

We agree that the standard as defined is not a neat, mathematical formulary. Like all verbalizations it is subject to criticism on the score of indefiniteness. But petitioners themselves contend that the verbalization, "clear and present danger" is the proper standard. We see no difference, from the standpoint of vagueness, whether the standard of "clear and present danger" is one contained in *haec verba* within the statute, or whether it is the judicial measure of constitutional applicability. We have shown the indeterminate standard the phrase necessarily

connotes. We do not think we have rendered that standard any more indefinite by our attempt to sum up the factors which are included within its scope. We think it well serves to indicate to those who would advocate constitutionally prohibited conduct that there is a line beyond which they may not go—a line which they, in full knowledge of what they intend and the circumstances in which their activity takes place, will well appreciate and understand. * * * Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution. But we are not convinced that because there may be borderline cases at some time in the future, these convictions should be reversed because of the argument that these petitioners could not know that their activities were constitutionally proscribed by the statute.

Mr. Justice FRANKFURTER:

* * *

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?

Just as there are those who regard as invulnerable every measure for which the claim of national survival is invoked, there are those who find in the Constitution a wholly unfettered right of expression. Such literalness treats the words of the Constitution as though they were found on a piece of outworn parchment instead of being words that have called into being a nation with a past to be preserved for the future. The soil in which the Bill of Rights grew was not a soil of arid pedantry. The historic antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest. * * *

The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them. Not what words did Madison and Hamilton use, but what was it in their minds which they conveyed? Free speech is subject to prohibition of those abuses of expression which a civilized society may forbid. As in the case of every other provision of the Constitution that is not crystallized by the nature of its technical concepts, the fact that the First Amendment is not self-defining and self-enforcing neither impairs its usefulness not compels its paralysis as a living instrument. Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules.[5] The demands of

[5] Professor Alexander Meiklejohn is a leading exponent of the absolutist interpretation of the First Amendment. Recognizing that certain forms of speech require regulation, he excludes those forms of expression entirely from the protection accorded by the Amendment. "The constitutional status 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".

* * *

A generation ago this distribution of responsibility would not have been questioned. * * * But in recent decisions we have made explicit what has long been implicitly recognized. In reviewing statutes which restrict freedoms protected by the First Amendment, we have emphasized the close relation which those freedoms bear to maintenance of a free society. See Kovacs v. Cooper, 336 U.S. 77, 89, 95 (concurring). Some members of the Court—and at times a majority—have done more. They have suggested that our function in reviewing statutes restricting freedom of expression differs sharply from our normal duty in sitting in judgment on legislation. It has been said that such statutes "must be justified by clear public interest, threatened not doubtedly or remotely, but by clear and present danger. The rational connection between the remedy provided and

a merchant advertising his wares, of a paid lobbyist fighting for the advantage of his client, is utterly different from that of a citizen who is planning for the general welfare." Meiklejohn, Free Speech 39. "The radio as it now operates among us is not free. Nor is it entitled to the protection of the First Amendment. It is not engaged in the task of enlarging and enriching human communication. It is engaged in making money." Id. at 104. Professor Meiklejohn even suggests that scholarship may now require such subvention and control that it no longer is entitled to protection by the First Amendment. See id. at 99–100. Professor Chafee in his review of the Meiklejohn book, 62 Harv.L. Rev. 891, has subjected this position to trenchant comment.

the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." Thomas v. Collins, 323 U.S. 516, 530. It has been suggested, with the casualness of a footnote, that such legislation is not presumptively valid, see United States v. Carolene Products Co., 304 U. S. 144, 152, note 4, and it has been weightily reiterated that freedom of speech has a "preferred position" among constitutional safeguards. Kovacs v. Cooper, 336 U.S. 77, 88.

The precise meaning intended to be conveyed by these phrases need not now be pursued. It is enough to note that they have recurred in the Court's opinions, and their cumulative force has, not without justification, engendered belief that there is a constitutional principle, expressed by those attractive but imprecise words, prohibiting restriction upon utterance unless it creates a situation of "imminent" peril against which legislation may guard. It is on this body of the Court's pronouncements that the defendants' argument here is based.

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.
* * *

Mr. Justice BLACK, dissenting.

* * *

Mr. Justice DOUGLAS, dissenting.

If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality. This case was argued as if those were the facts. The argument imported much seditious conduct into the record. That is easy and it has popular appeal, for the activities of Communists in plotting and scheming against the free world are common knowledge. But the fact is that no such evidence was introduced at the trial. There is a statute which makes a seditious conspiracy unlawful. Petitioners, however, were not charged with a "conspiracy to overthrow" the Government. They were charged with a conspiracy to form a party and groups and assemblies of people who teach and advocate the overthrow of our Government by force or violence and with a conspiracy to advocate and teach its overthrow by force and violence. It may well be that indoctrination in the techniques of terror to destroy the Government would be indictable under either statute. But the teaching which is condemned here is of a different character.

So far as the present record is concerned, what petitioners did was to organize people to teach and themselves teach the Marxist-Leninist doctrine contained chiefly in four books: * * *.

* * *

The opinion of the Court does not outlaw these texts nor condemn them to the fire, as the Communists do literature offensive to their creed. But if the books themselves are not outlawed, if they can lawfully remain on library shelves, by what reasoning does their use in a classroom become a crime? It would not be a crime under the Act to introduce these books to a class, though that would be teaching what the creed of violent overthrow of the Government is. The Act,

as construed, requires the element of intent—that those who teach the creed believe in it. The crime then depends not on what is taught but on who the teacher is. That is to make freedom of speech turn not on *what is said*, but on the *intent* with which it is said. Once we start down that road we enter territory dangerous to the liberties of every citizen.
* * *
We then start probing men's minds for motive and purpose; they become entangled in the law not for what they did but *for what they thought*; they get convicted not for what they said but for the purpose with which they said it.

Intent, of course, often makes the difference in the law. An act otherwise excusable or carrying minor penalties may grow to an abhorrent thing if the evil intent is present. We deal here, however, not with ordinary acts but with speech, to which the Constitution has given a special sanction.

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 divers 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.

* * *

**Editorial Note:**

[Mr. Justice Douglas thought that the question of clear and present danger "being so critical an issue in the case, would be a matter for submission to the jury." He also thought that the record in the case "contains no evidence whatsoever showing that the acts charged *viz.*, the teaching of the Soviet theory of revolution with the hope that it will be realized, have created any clear and present danger to the Nation. The Court, however, rules to the contrary."]

* * *

That ruling is in my view not responsive to the issue in the case. We might as well say that the speech of petitioners is outlawed because Soviet Russia and her Red Army are a threat to world peace.

* * * Communists in this country have never made a respectable or serious showing in any election. I would doubt that there is a village, let alone a city or county or state, which the Communists could carry. Communism in the world scene is no bogey-man; but Communism as a political faction or party in this country plainly is. Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party. * * *

How it can be said that there is a clear and present danger that this advocacy will succeed is, therefore, a mystery. Some nations less resilient than the United States, where illiteracy is high and where democratic traditions are only budding, might have to take drastic steps and jail these men for merely speaking their creed. But in America they are miserable merchants of unwanted ideas; their wares remain unsold. The fact that their ideas are abhorrent does not make them powerful. * * *

The First Amendment provides that "Congress shall make no law * * * abridging the freedom of speech". The Constitution provides no exception. This does not mean, however, that the Nation need hold its hand until it is in such weakened condition that there is no time to protect itself from incitement to revolution. Seditious conduct can always be punished. But the command of the First Amendment is so clear that we should not allow Congress to call a halt to free speech except in the extreme case of peril from the speech itself. The First Amendment makes confidence in the common sense of our people and in their maturity of judgment the great postulate of our democracy. Its philosophy is that violence is rarely, if ever, stopped by denying civil liberties to those advocating resort to force. The First Amendment reflects the philosophy of Jefferson "that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order." The political censor has no place in our public debates. Unless and until extreme and necessitous circumstances are shown our aim should be to keep speech unfettered and to allow the processes of law to be invoked only when the provocateurs among us move from speech to action.

* * *

## NOTES AND QUESTIONS

1. 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

says that the clear and present danger test, thus understood, cannot 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 disregards the factor of time in applying the clear and present danger test.

2. 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 re-formulation 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" doctrine. Vinson's "clear danger" rationale, however, merely asks whether a grave threat is posed to the state in the future if not now. Obviously, under such a weighing process the likelihood of a statute being held violative of the First Amendment is far less likely.

3. Frankfurter's long concurrence in *Dennis* argues for a balancing approach for cases where the values of freedom of expression and national security are in conflict. But Frankfurter intends 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. Unless it can be said Congress engaged in no balancing process whatever, the Congressional determination controls. Frankfurter extolls his approach as implementing the popular or democratic will. Further, he says his approach will cause no lasting damage to civil liberties.

4. Does Frankfurter's opinion in *Dennis* overlook the point that majoritarianism and constitutionalism are not necessarily synonymous? Are they? 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 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 note 4 (1938)*. In that opinion, Chief Justice Stone raised but deferred consid-

eration 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 appears 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 appears to be saying that in freedom of expression cases the presumption should be against the legislative judgment.

5. Of the law of conspiracy Mr. 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 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 has 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."

6. Chief Justice Vinson reformulates the clear and present danger doctrine in such a way as to make it an entirely new test. He says that the Government can act before the *putsch* is executed, and the Court rejects 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 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.

7. The Vinson view as to what is the ultimate societal value contrasts sharply with that of Mr. Justice Black, who in his dissent argues that free speech and press are the preferred values, in the American constitutional system.

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## YATES v. UNITED STATES

354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957).

**Editorial Note:**

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 the *Yates* case. The Court's decision per Mr. 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 14 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 Mr. 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, Mr. Justice Clark says, as he reads Chief Justice Vinson's opinion in *Dennis,* that he sees no basis for the distinction between advocacy of unlawful action and advocacy of abstract doctrine which Harlan says is the heart of the *Dennis* case. For Mr. 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. Mr. Justice Harlan's "reading" of *Dennis* in *Yates* may be 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 Mr. Justice Black says that the "First Amendment provides the only kind of security system which can preserve a free government." This remark is 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 Mr. 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.

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."

"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 Syndicalism Legislation in the United States 21 (1939). * * * [L]ater decisions have fashioned the principle 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.

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### NOTES AND QUESTIONS

1. 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 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 50 years of free speech doctrine, the Court in *Brandenburg* issued a relatively short opinion.

2. Professor 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 1900's 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?

3. 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.

4. While believing that the drift of recent Court decisions appears to toll the "end of the line" for the doctrine of "clear and present danger", Professor Frank Strong urges that before we bid our "tearless farewells" to that doctrine, we consider its potential usefulness in developing a new, more sensitive approach to First Amendment freedoms. *Fifty years of "Clear and Present Danger": From Schenck to Brandenburg—And Beyond,* 1969 Sup.Ct.Rev. 41.

Professor Strong suspects that the emerging test for legislation proscribing freedom of expression is the *definitional balancing* test. Definitional balancing, unlike the *ad hoc* approach espoused by Justices Frankfurter and Harlan, starts with a heavy presumption in favor of First Amendment freedoms. It incorporates, in other words, Justice Black's notion of "preferred freedom." Definitional balancing would impose a heavier burden of proof upon a legislature for laws infringing First Amendment freedoms than for laws regulating commercial activity, for example. The reason is that the Court regards a First Amendment infringement as more than the infringement of the rights of an individual person; rather, it considers, as did Meiklejohn, the threat to free self-government which any First Amendment infringement entails. We are still balancing, but the scales are weighted in favor of the First Amendment.

In this view, however, adoption of definitional balancing would just be the first step in judicial review of legislation which proscribes freedom of expression. The second step is a determination of whether the law under challenge is sufficiently tailored to meet the specific harm it seeks to avert. Even if the objective of the legislation is constitutionally permissible, the validity is not assured without this second determination.

It is here, in the second stage of definitional balancing, that Professor Strong

advocates a role for a revived and revised "clear and present danger" test. How much of a "nexus" must exist between the legitimate governmental purpose and the sweep of the legislative scheme proposed to implement that purpose? If all that is required is a "reasonable" connection, Professor Strong suggests, the test is diluted enough to sanction virtually any governmental incursion into First Amendment freedoms. A tighter "nexus" is required.

5. Professor Strong believes that there is a line of cases in support of an application of "clear and present danger" which would require that the challenged governmental action must be shown to be *closely* and *intimately connected* with a permitted objective of government." (Emphasis added.)

Such a requirement would impose a burden of specificity upon legislative draftsmen. This is related to the relatively recent doctrine of "overbreadth" which the Supreme Court has used to strike down legislation whose net has been cast too indiscriminately. See *Winters v. New York, 333 U.S. 507 (1948),* for an early formulation; also *Talley v. California, 362 U.S. 60 (1960)* and *NAACP v. Button, 371 U.S. 415 (1963).*

If Professor Strong's test were applied in *Brandenburg,* he says, the Ohio criminal syndicalism statute would have fallen, because the state could not possibly have demonstrated a sufficiently tight nexus between its permissible objective of proscribing unlawful conduct and the broad sweep of the statutory language.

6. Should a test such as Professor Strong's be adopted by the Supreme Court? Even if such a standard is adopted, is "clear and present danger" the appropriate way to describe it? Or might "clear and present danger" be particularly apt, given its long history of shaping and re-shaping by the Court?

## THE MEANING OF BRANDENBURG v. OHIO

(The following excerpts are from an address, "Security Legislation In A Constitutional Perspective", by Jerome A. Barron before the Conference on Security In State Legislatures, sponsored by the National Legislative Conference Security Committee, Washington, D.C., March 26, 1971.)

* * *

In the *Yates* case, the Supreme Court re-weighted the values at stake between security and free expression and assembly. The government had "misunderstood" *Dennis,* said Mr. Justice Harlan, speaking for the Court. The essence of *Dennis* was to proscribe advocacy of unlawful action and not advocacy of abstract doctrine. With one sentence, the scope of governmental restraint over expression was very considerably narrowed. Harlan professed to be interpreting the word "advocacy" in the Smith Act rather than interpreting the First Amendment. But the effect on re-vitalizing the constitutional right of freedom of expression by his interpretation of "advocacy" was substantial. Of the clear and present danger doctrine, there was not even a whisper.

The Court in *Yates* acquitted 5 of the 14 defendants and the government dropped the prosecutions in the remaining cases in reaction to the same federal security statute.

The difference between 1951 and 1957 shows how difficult it is to state any hard and fast principles of security law in a constitutional system such as ours. Clearly, the temper of the country in 1951 was different than it was in 1957. By 1957, McCarthyism was on the wane. The anti-communism of the early 'fifties was somewhat dissipated. That these political facts colored the Court's decision was undeniable.

Similarly, the Court may have thought that the danger to the country was greater in 1951 than in 1957, or even that the hysteria was greater in '51. It all served to prove what Justice Frankfurter had said in his separate opinion in *Dennis:* These were non-Euclidean problems and could not be imprisoned in inflexible formulas.

But the dynamics of the American process of constitutional interpretation are relentless. By 1969 the clear and present danger doctrine was back. But it was back as Brandeis understood it rather than as Vinson had applied it. The civil libertarian shift of the pendulum was clear. In *Brandenburg v. Ohio,* a state criminal syndicalist statute came under constitutional attack. The statute was very similar to the California criminal syndicalist statute which had been upheld in *Whitney v. California*, the case which had evoked the famous clear and present danger doctrine concurring opinion from Brandeis. The state criminal syndicalist statutes were of World War I vintage and were designed to deal with legislative concern about anarchist and bolshevik threats to the public order. Ohio's statute punished "advocating * * * the duty, necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" as well as "voluntarily assembl(ing) with any society, group or assemblage of persons forced to teach or advocate the doctrines of criminal syndicalism."

In *Brandenburg,* the Court summarized the 1927 *Whitney* holding validating California's statute as interpreting " 'advocating' violent means to effect political and economic change" to involve "such danger to the security of the state that the state may outlaw it." But this approach is now rejected. The Supreme Court in 1969 said that the *Whitney* test of reasonableness had been discredited by later decisions. *Dennis* and *Yates* were both relied on for the proposition that a state may not forbid advocacy of the "use of force except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

What of course this standard for state security legislation does is to bring back the clear and present danger doctrine as Brandeis understood it. As a matter of craftsmanship, and intellectual honesty, it would have been much more useful for the Court to have pointed out that it was bringing back the factor of time, or emergency, as the justification for state security legislation rather than to pretend that it had been there all the time.

Actually the Court in *Brandenburg* used the sterner *Yates* approach to security legislation rather than the milder one employed by Vinson in *Dennis. Brandenburg,* a leader of the Klan, had been a speaker at a Ku Klux Klan rally in Hamilton County, Ohio. As a result of that incident, he had been convicted under the Ohio criminal syndicalist statute. The conviction was reversed; *Whitney v. California* was reversed, and the Ohio criminal snydicalist statute was struck down. It was struck down because it failed to make a distinction between punishment of advocacy of unlawful action and advocacy of abstract ideas. Furthermore, it is not advocacy of unlawful action which can be punished but only that which incites "to imminent lawless action."

*Brandenburg v. Ohio* is very recent evidence that state legislation forbidding assembly for purposes of advocacy is not, without more, constitutional. Clear and present danger as a doctrine, as Brandeis understood it, is now the measure of state security legislation. *Brandenburg* also makes clear that the standard applies to the right of petition and assembly. As the Court said in *Brandenburg*: "Statutes affecting the right of assembly, like those touching on freedom of speech,

must observe the established distinctions between mere advocacy and incitement to imminent lawless action."

What does *Brandenburg* mean for state security legislation? It does not necessarily mean that the state criminal syndicalist legislation or state security legislation generally is necessarily unconstitutional. It is possible for legislatures by amendment to make imminence of unlawful action a clear precondition for criminal sanction, thereby validating their security legislation. Similarly, it is open to the state courts by curative gloss to remedy the defective breadth of existing statutes.

It is in my judgment unfortunate that *Brandenburg* is not a more clearly written decision. It is unfortunate that in such an important area no particular justice took responsibility for the decision and that it is masked in the anonymity of a *per curiam* label.

A return to first principles in the clear and present danger doctrine is very important for ascertaining the future direction of protecting the processes of government as well as the historic rights of free assembly, petition, and expression.

Emphasis on lack of opportunity for discussion or counter-discussion and the necessity that the emergency be imminent should have been stressed for what it was —a deliberate departure from the rule of the Communist cases of the 'fifties as symbolized by *Dennis*. The Court in 1969 says it follows *Yates* as well as *Dennis*, but *Yates* was a decision far more sensitive to First Amendment values, than *Dennis*. Furthermore, *Yates* was not even a clear and present danger case.

The way is therefore open to apply the quite different standards of *Dennis* and *Yates* in the future without embarrassment, since the Court professes in *Brandenburg* to believe that all the different tests are in harmony. In fact they are not. The approach in *Dennis* is much more sympathetic to upholding federal security legislation, *Yates* in 1957 less sympathetic, and *Brandenburg* in 1969 much more restrictive of state security legislation than the other two.

In the judicial mind, the severity of the application of security legislation as well as the question of its basic validity is not decided as an abstract question of constitutional theory but in light of contemporary social and political realities. Today the judicial test for state security legislation is a rigorous one. But it has not always been so as *Whitney v. California*, shows with regard to state security legislation and as *Dennis v. United States* shows with regard to federal security legislation.

* * *

## J. THE "BALANCING" APPROACH

### A NOTE ON "BALANCING"

1. A year after the decision in *Yates*, Mr. 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. § 192. On re-

view to the Supreme Court of the United States, Mr. 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, Mr. Justice 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). Cf. Watkins v. United States, 354 U.S. 178 (1957).*

Mr. Justice Black dissented in *Barenblatt* on the ground he has asserted before and since, i. e., 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 this right, the right to err politically, which keeps us strong as a Nation. For no number of laws against communism can have as much effect as the personal conviction which comes from having heard its arguments and rejected them, or from having once accepted its tenets and later recognized their worthlessness. Instead, the obloquy which results from investigations such as this not only stifles "mistakes" but prevents all but the most courageous from hazarding any views which might at some later time become disfavored. This result, whose importance cannot be overestimated, is doubly crucial when it affects the universities, on which we must largely rely for the experimentation and development of new ideas essential to our country's welfare. 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." It is admitted that this Committee can only seek information for the purpose of suggesting laws, and that Congress' power to make laws in the realm of speech and association is quite limited, even on the Court's test. Its interest in making such laws in the field of education, primarily a state function, is clearly narrower still. Yet the Court styles this attenuated interest self-preservation and allows it to overcome the need our country has to let us all think, speak, and associate politically as we like and without fear of reprisal. Such a result reduces "balancing" to a mere play on words and is completely inconsistent with the rules this Court has previously given for

applying a "balancing test," where it is proper: "[T]he courts should be *astute* to examine the *effect* of the challenged legislation. Mere *legislative preferences or beliefs* * * * may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

* * *

2. Mr. Justice Black criticizes Harlan's use of the "balancing" test on the ground that the wrong things are 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 Mr. Justice Frankfurter's concurrence in *Dennis.* But Frankfurter's "balancing" test and Harlan's are really not quite the same. Harlan says 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."

3. Mr. Justice Black said in dissent in *Barenblatt* that "balancing" was only to be applied to conduct incidentally involving speech, never to speech itself. Further, Justice Black said, the Court had not properly applied the balancing test, even assuming its validity. Black says the Court poses the issue as the government's right of self-preservation against Barenblatt's right to refrain from revealing Communist affiliations. The real issue, says Justice Black, is the government's interest in its security against the constitutionally protected rights of association and expression. If "balancing" is capable of such different interpretations, is it not fairly useless as a test for constitutional adjudication? Or as Laurent Frantz put it: "How is the judge to convert balancing into something that does not merely give him back whatever answer he feeds into it?" See Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson,* 51 Calif.L.Rev. 729 (1963).

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## K. THE SPEECH-ACTION DICHOTOMY TODAY: DEFINING "SYMBOLIC" SPEECH

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A test advocated as useful to First Amendment litigation is the "speech-action" dichotomy. The speech-action test proceeds on the assumption that one can separate speech from action. The premise of the judicial task of separation is that speech is protected (but that legislation restricting action may be valid). The recent spate of "draft-card" burnings in the United States has made the advocates of this approach reflect on its utility literally under fire.

If action is "symbolic", shouldn't it really be treated as "speech" for purposes of constitutional litigation?

Is a speech-action dichotomy too mechanical an approach, or is it a useful way of thinking about and resolving First Amendment problems?

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## UNITED STATES v. O'BRIEN

391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

Mr. 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. A sizable

crowd, including several agents of the Federal Bureau of Investigation, witnessed the event. Immediately after the burning, members of the crowd began attacking O'Brien and his companions. An FBI agent ushered O'Brien to safety inside the courthouse. After he was advised of his right to counsel and to silence, O'Brien stated to FBI agents that he had burned his registration certificate because of his beliefs, knowing that he was violating federal law. He produced the charred remains of the certificate, which, with his consent, were photographed.

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.)

* * *

**Editorial Note:**

[On appeal, the United States Court of Appeals for the First Circuit held the 1965 Amendment unconstitutional as a law abridging freedom of speech. *O'Brien v. United States, 376 F.2d 358 (1st Cir. 1967).* But the Court of Appeals ruled that O'Brien's conviction should be affirmed because violation of the regulation requiring possession of the draft card was, under the court's view also, a violation of the Universal Military Training and Service Act. The court said that such a violation "was a lesser included offense of the crime defined by the 1965 Amendment." Meanwhile, two other federal courts of appeal had held the statute unconstitutional. *United States v. Miller, 367 F.2d 72 (2d Cir. 1966), cert. den. 386 U.S. 911 (1967),* and *Smith v. United States, 368 F.2d 529 (8th Cir. 1966).* To resolve the conflict among the circuit courts of appeal, the Supreme Court granted *certiorari* in the *O'Brien* case.]

* * *

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.

* * *

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 there 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.

Mr. Justice MARSHALL took no part in the consideration or decision of these cases.

Mr. Justice HARLAN, concurred.

[Mr. 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.]

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## NOTES AND QUESTIONS

1. 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. One observer, writing of the 1968 Boston trial which resulted in the conviction of Dr. Benjamin Spock and three others for conspiracy to aid in the violation of the draft law, has urged that a distinction should be drawn between isolated acts of "draft-card" destruction and systematic destruction of Selective Service files. See Sax, *Civil Disobedience—The Law Is Never Blind,* Saturday Review (September 28, 1968) p. 22. But it is this observer's view that the formal legal system fails to make such distinctions. Professor Sax says of the *O'Brien* case, for instance, that the case illustrates this failure, since, in his view, the draft-card burning in *O'Brien* was "an act overwhelmingly of protest content, with only the most trivial justification of need for possession of selective service documents by individual registrants."

2. Professor Sax argues that a "constructive goal" behind constitutionally unprotected conduct should distinguish such activity from behavior which is directed at "active obstruction of a matter adequately settled through some political or legal institution."

The *O'Brien* case illustrates a point raised in the introduction to this section on freedom of speech: the interchangeable use by the Supreme Court of freedom of the *press* cases as authorities in free *speech* cases and vice-versa. One of the most influential free press decisions,

*Grosjean v. American Press Co., 297 U. S. 233 (1936),* discussed in the text at p. 155, was used as authority in *O'Brien* to rebut petitioner's contention that the purpose of the 1965 Amendment was to infringe upon free speech.

Does the Court's use of *Grosjean* have any bearing on the view that instead of distinguishing between action and speech, the effort of the court should be directed to whether the objective of the protest in question is a "constructive goal"? But doesn't this involve the courts in an attempt to fathom the motive behind legislation, an attempt which the Court in *Grosjean* said the judiciary should refuse to undertake?

3. There is another First Amendment point, dealt with subsequently in this chapter, which bears much more directly on mass communications but which, at the same time, shows the relevance of the *O'Brien* case to problems of free expression in mass communication. It is a matter of such importance that Mr. Justice Harlan wrote a short concurrence to deal with it in *O'Brien*. The point is the crucial role of assuring access to an audience in order to secure First Amendment objectives. When a governmental policy prevents a "speaker" (or writer) from "reaching a significant audience with whom he could not otherwise lawfully communicate", Mr. Justice Harlan suggests that in such circumstances a statute must be submitted to First Amendment attack. In other words, the more limited the opportunity for reaching an audience by protesting groups, the greater the vulnerability of otherwise legitimate statutes to First Amendment attack.

This theory was used in a draft card burning prosecution and rejected by the courts. See *United States v. Kiger, 297 F.Supp. 339 (S.D.N.Y. 1969), aff'd 421 F.2d 1396 (2d Cir. 1970), cert. den. 398 U.S. 904 (1970).*

4. Prior to the *O'Brien* case, the federal courts of appeal had considered the symbolic speech concept as a defense to convictions for burning draft cards. In *United States v. Miller, 367 F.2d 72 (2d Cir. 1966) cert. den. 386 U.S. 911 (1967)* a conviction under § 12(b)(3) of the Universal Military Service and Training Act, as amended by 79 Stat. 586 (1965), 50 U.S.C.A.App. § 462(b)(3) (Supp. I, 1965) was upheld. A consideration of the *Miller* case is useful because the Court of Appeals gave more thorough consideration to the symbolic speech issue in *Miller* than did the Supreme Court in *O'Brien*. The 1965 Amendment prohibited the knowing destruction or mutilation of a Selective Service certificate. Miller had burned his "draft card" at a street rally near the Army Building in Manhattan. The Court of Appeals held that the public interest protected by the proper functioning of the Selective Service System rendered the statute constitutional. The government interest in forbidding mutilation or destruction of a draft card was held to outweigh any alleged abridgment of freedom of symbolic expression of speech by a registrant's burning of his draft card. *Accord: Smith v. United States, 368 F.2d 529 (8th Cir., 1966).*

In *Miller,* Judge Feinberg for the Second Circuit described the appellant's argument as follows:

> Appellant urges the First Amendment defense even more vigorously in his alternate argument that, as applied to the facts of this case, the statute is an unconstitutional suppression of speech. Appellant reasons as follows: Symbolic speech is protected by the First Amendment; burning a draft card in a public meeting is such symbolic speech; moreover, card burning is a most dramatic form of communication, and there is a constitutional right to make one's speech as effective as possible, subject to the proper constitutional standard; and, finally whether that standard be the clear and present dan-

ger test or a balancing of interests, the statute as it was applied to him is unconstitutional.

The Court of Appeals pointed out the roots of the symbolic speech idea in *West Virginia State Bd. of Education v. Barnette, 319 U.S. 624 (1943)* where Justice Jackson had 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.

5. The symbolic speech idea relates to the dichotomy between speech and action of which Mr. Justice Black was the foremost judicial exponent and of which Professor Emerson is the foremost academic exponent. Under this theory, speech has absolute First Amendment protection where speech plus or speech interspersed with action does not enjoy absolute protection but is subject to reasonable restriction. If draft card burning is symbolic speech, a statute prohibiting it is invalid. If, on the other hand, it is conduct, it is subject to reasonable restriction and a permissible state interest may validate the statute even though the activity had a communicative aspect.

6. In *Stromberg v. California, 283 U.S. 359 (1931)*, the 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."

Judge Feinberg's analysis of the symbolic speech doctrine in *Miller* is as follows:

> But that conduct may be symbolic does not end the matter; it is only the beginning of constitutional inquiry. Is all communicative action symbolic speech and is all symbolic speech protected by the First Amendment? The range of symbolic conduct intended to express disapproval is broad; it can extend from a thumbs down gesture to political assassination. Would anyone seriously contend that the First Amendment protects the latter? Appellant would undoubtedly respond that peaceful symbolic acts, as contrasted to violent ones, are protected and that draft card burning is clearly the former.

The flaw in the symbolic speech doctrine is that the doctrine can prove too much. Judge Feinberg added: "(S)incere motivation or the labeling of even non-violent conduct as symbolic does not necessarily transform that conduct into speech protected by the First Amendment."

Judge Feinberg suggested that certain symbolic acts like picketing, sit-ins ("the poor man's printing press"), and the technique of a "silent and reproachful presence" in the civil rights struggle may judicially be considered speech. Protest gestures such as turning on water faucets, dumping garbage in front of City Hall, stalling cars in traffic, burning of the flag were viewed less sympathetically. Do you see between these two categories of symbolic acts?

Judge Feinberg also said:

> We are not at all sure that destroying a draft card even at a public rally must be regarded as an exercise of speech, but we are willing to assume it *arguendo* as the district court did. However, this only forms the basis for further analysis. Appellant concedes that even speech may be regulated, or in certain circumstances prohibited, provided that the proper constitutional test is met; it is here that appellant contends the 1965 amendment fails.

By saying this, is Judge Feinberg really putting symbolic speech on the action side of the speech-action distinction? Feinberg thought that the balancing test

rather than the clear and present danger test was the relevant approach. "Most recent Supreme Court decisions", he argued, "seem to require use (of the balancing test), at least where a narrowly drawn statute on its face regulates conduct not the communication of ideas." Balancing the indirect restraint on expression against the public interest in the proper functioning of the Selective Service System, the Court concluded that "forbidding destruction of Selective Service certificates" served "legitimate purposes in administering the system."

7. Does Chief Justice Warren reject the whole symbolic speech concept in *O'Brien?* It appears that Chief Justice Warren's test in *O'Brien* is just another form of the balancing test frequently used in speech plus cases. Warren pointed out 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 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.

Notice 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?

### 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 decided to wear black arm bands to school to protest the Vietnam war. The Des Moines school system had prohibited the wearing of the arm bands 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, Mr. 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.

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## TINKER v. DES MOINES INDEPENDENT SCHOOL DIST.

393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

Mr. 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, supra, 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 schools' 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.
* * *

* * *

The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. Cf. Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (5th Cir. 1966).

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. Cf. Hammond v. South Carolina State College, 272 F.Supp. 947 (D.C.S.C.1967) (orderly protest meeting on state college campus); Dickey v. Alabama State Board of Education, 273 F. Supp. 613 (D.C.M.D.Ala.1967) (expulsion of student editor of college newspaper). 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 consisted 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.

Mr. Justice STEWART, concurring.

* * *

Mr. Justice WHITE, concurring.

* * *

Mr. Justice BLACK, dissenting.

The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected "officials of state supported public schools * * *" in the United States is in ultimate effect transferred to the Supreme Court. The Court brought this particular case here on a petition for certiorari urging that the First and Fourteenth Amendments protect the right of school pupils to express their political views all the way "from kindergarten through high school." Here the constitutional right to "political expression" asserted was a right to wear black armbands during school hours and at classes in order to demonstrate to the other students that the petitioners were mourning because of the death of United States soldiers in Vietnam and to protest that war which they were against. Ordered to refrain from wearing the armbands in school by the elected school officials and the teachers vested with state authority to

do so, apparently only seven out of the school system's 18,000 pupils deliberately refused to obey the order. One defying pupil was Paul Tinker, 8 years old, who was in the second grade; another, Hope Tinker, was 11 years old and in the fifth grade; a third member of the Tinker family was 13, in the eighth grade; and a fourth member of the same family was John Tinker, 15 years old, an 11th grade high school pupil. Their father, a Methodist minister without a church, is paid a salary by the American Friends Service Committee. Another student who defied the school order and insisted on wearing an armband in school was Christopher Eckhardt, an 11th grade pupil and a petitioner in this case. His mother is an official in the Women's International League for Peace and Freedom.

As I read the Court's opinion it relies upon the following grounds for holding unconstitutional the judgment of the Des Moines school officials and the two courts below. First, the Court concludes that the wearing of armbands is "symbolic speech" which is "akin to 'pure speech' " and therefore protected by the First and Fourteenth Amendments. Secondly, the Court decides that the public schools are an appropriate place to exercise "symbolic speech" as long as normal school functions are not "unreasonably" disrupted. Finally, the Court arrogates to itself, rather than to the State's elected officials charged with running the schools, the decision as to which school disciplinary regulations are "reasonable."

Assuming that the Court is correct in holding that the conduct of wearing armbands for the purpose of conveying political ideas is protected by the First Amendment, cf., e. g., Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949), the crucial remaining questions are whether students and teachers may use the schools at their whim as a platform for the exercise of free speech—"symbolic" or "pure"—and whether the courts will allocate to themselves the function of deciding how the pupils' school day will be spent. While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases. This Court has already rejected such a notion. In Cox v. Louisiana, 379 U.S. 536, 554 (1965), for example, the Court clearly stated that the rights of free speech and assembly "do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time."

While the record does not show that any of these armband students shouted, used profane language, or were violent in any manner, detailed testimony by some of them shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically "wrecked" chiefly by disputes with Mary Beth Tinker, who wore her armband for her "demonstration." Even a casual reading of the record shows that this armband did divert students' minds from their regular lessons, and that talk, comments, etc., made John Tinker "self-conscious" in attending school with his armband. While the absence of obscene remarks or boisterous and loud disorder perhaps justifies the Court's statement that the few armband students did not actually "disrupt" the classwork, I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts

about the highly emotional subject of the Vietnam war. And I repeat that if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary. The next logical step, it appears to me, would be to hold unconstitutional laws that bar pupils under 21 or 18 from voting, or from being elected members of the boards of education.

* * *

I deny, therefore, that it has been the "unmistakable holding of this Court for almost 50 years" that "students" and "teachers" take with them into the "schoolhouse gate" constitutional rights to "freedom of speech or expression." Even *Meyer* did not hold that. It makes no reference to "symbolic speech" at all; what it did was to strike down as "unreasonable" and therefore unconstitutional a Nebraska law barring the teaching of the German language before the children reached the eighth grade. * * * 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. * * *

In my view, teachers in state-controlled public schools are hired to teach there. Although Mr. Justice McReynolds may have intimated to the contrary in Meyer v. Nebraska, certainly a teacher is not paid to go into school and teach subjects the State does not hire him to teach as a part of its selected curriculum. Nor are public school students sent to the schools at public expense to broadcast political or any other views to educate and inform the public. The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders. It may be that the Nation has outworn the old-fashioned slogan that "children are to be seen not heard," but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach.

### NOTES AND QUESTIONS

1. 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 pre-existing statutes, but arm-band 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 arm-band wearing.

The Court in the *Tinker* case did not cite or discuss *O'Brien*. Is this defensible? Explicable?

2. 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?

Another flag desecration case where the Court refused to confront the "symbolic speech" approach was *Smith v. Goguen,* 94 S.Ct. 1242 (1974). Goguen had worn an American flag sown to the seat of his trousers. He was convicted in the Massachusetts state court for violating a Massachusetts flag misuse statute subjecting to criminal liability anyone "who publicly * * * treats contemptuously the flag of the United States." Goguen successfully attacked the conviction by way of a petition for habeas corpus in the federal courts. The Supreme Court affirmed the federal courts, 6–3, and held that the statutory phrase "treats contemptuously" was unconstitutionally vague and overbroad.

Mr. Justice White in a concurring opinion made the following remarks:

> In the case before us, as has been noted, the jury must have found that Goguen not only wore the flag on the seat of his pants but also that the act—and hence Goguen himself—was contemptuous of the flag. To convict on this basis is to convict not to protect the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas about the flag unacceptable to the controlling majority in the legislature.

3. Professor Emerson believes that expression was the basic element in Street's flag 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).

4. Is *Watts v. United States, 394 U. S. 705 (1969),* a case involving an oral threat on the life of the President of the United States really an example of pure speech? The Supreme Court had no difficulty in holding that the statute prohibited "knowingly and willfully" making a threat to "take the life of the President" was constitutional:

> Certainly the statute under which petitioner was convicted is constitutional on its face. The Nation has a valid, even an overwhelming, interest in protecting the safety of the Chief Executive and in allowing him to perform his duties without interference from threats of physical violence.

The Court said the statute under consideration in *Watts* punished pure speech but emphasized that the Government must prove a true threat. Is a true threat involving an intent on the part of the defendant to carry out the threat better analyzed as action? In other words, just as the act of flag burning might really be speech, language containing a threat to kill the President may really be action. The Supreme Court did not think the utterance punished in *Watts* fell under the ban of the statute since the Court considered the offending language merely to be "a kind of political hyperbole."

The Court explains that for speech to be punishable under the statute, it must be "taken in context". The context here revealed a "conditional statement" on the part of the defendant speaker and apparently no incendiary reaction in his audience as a result of his words.

Despite the Court's statement in *Watts* that the statute punished pure speech and was nevertheless constitutional on its face, might it not be more accurate to say that the statute could only be constitutionally applied to punish language manifesting a "knowing threat" on the life of the President? Language arising out of such a context is perhaps better understood in First Amendment terms as "action" rather than "speech." Thus, the statute, in fact, did not punish "pure speech" at all.

5. Mr. Justice Douglas concurred and indicated that he believed that the statute did punish pure speech. He appears to suggest that the statute is for that reason objectionable under the First Amendment.

6. Mr. Justice White dissented without opinion. Is this because he thinks that words threatening the life of the President which are no more than "political hyperbole" can still be constitutionally punished? In the last analysis, whether a threat on the life of the President constitutes "hyperbole" is always a guess, is it not? Suppose Watts had really tried to kill President Johnson after making these remarks? Would prosecution under the statute still have been for "hyperbole?" Perhaps the majority would say that the context was now different. If so, the majority's approach appears to be fairly reasonable and sensitive. Both Mr. Justice Harlan and Mr. Justice White also dissented.

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## COHEN v. CALIFORNIA

403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971).

Mr. 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 the 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." 1 Cal.App.3d 94, 97–98, 81 Cal. Rptr. 503, 505 (1969).

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.Rptr., 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," cf. Stromberg v. California, 283 U.S. 359 (1931), not upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen's ability to express himself. Cf. United States v. O'Brien, 391 U.S. 367 (1968). 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. Yates v. United States, 354 U.S. 298 (1957).

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. This does not end the inquiry, of course, for the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses. 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. * * * No fair reading of the phrase "offensive conduct" can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created.

In the second place, as it comes to us, this case cannot be said to fall within those relatively few categories of in-

stances 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." *Id.*, at 738. 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 a 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 a 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.

* * *

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Against this perception of the constitutional policies involved, we discern cer-

tain 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.

Mr. Justice BLACKMUN, with whom THE CHIEF JUSTICE and Mr. Justice BLACK join.

I dissent, and I do so for two reasons:

1. Cohen's absurd and immature antic, in my view, was mainly conduct and little speech. * * * The California Court of Appeal appears so to have described it, 1 Cal.App.3d, at 100, 81 Cal. Rptr., at 503, and I cannot characterize it otherwise. Further, the case appears to me to be well within the sphere of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), where Mr. 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.

* * *

### NOTES AND QUESTIONS

1. 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 contro-

versy constituted "offensive conduct" prohibited by the California Penal Code. Although the conviction was reversed, it was not reversed on the view endorsed by Mr. Justice Black and Professor Emerson that pure speech must receive absolute protection under the First Amendment. Mr. 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."

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 dependent 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 Court, the forum of the protest in *Cohen*, than were 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 Mr. Justice Harlan's opinion for the Court in *Cohen*.

2. 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, Mr. 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?"

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## FREEDOM OF THE COLLEGE AND HIGH SCHOOL PRESS

As the Supreme Court indicated in *Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969)*, school board and districts, as agencies of the state are not immune from First Amendment restrictions, and high school and college students enjoy the same First Amendment protections as the rest of the citizenry—at least to the point where publications interfere seriously with school order and discipline. See Trager, *Freedom of the Press in College and High School,* 35 Albany Law Review 161 (1971).

An influential case—although it was declared moot when the plaintiff elected not to return to the college in question 402 F.2d 515 (5th Cir. 1968)—is *Dickey v. Alabama State Board of Education.*

## DICKEY v. ALABAMA STATE BOARD OF EDUCATION

273 F.Supp. 613 (M.D.Ala.1967).

### ORDER

JOHNSON, Chief Judge. * * *

During the early part of the 1966–67 school year, Gary Clinton Dickey, while a full-time student at Troy State College, was chosen as an editor of the Troy State College student newspaper, The Tropolitan. * * *

In early April 1967, Dr. Frank Rose, President of the University of Alabama, came under attack by certain Alabama state legislators for his refusal to censor the University of Alabama student publication, "Emphasis 67, A World in Revolution." * * * The theme of the "Emphasis" program was a "World in Revolution." In carrying out this theme, "Emphasis" published excerpts from the speeches of Bettina Aptheker, a Communist who gained notoriety at the University of California, and Stokely Carmichael, President of the Student Nonviolent Coordinating Committee and an incendiary advocate of violent revolution. To give a balanced view of a "World in Revolution," "Emphasis" carried articles by leading anti-revolutionaries such as General Earl G. Wheeler, Chairman of the Joint Chiefs of Staff. After public criticism by certain Alabama legislators, Dr. Rose, in the exercise of his judgment as President of the University of Alabama, took a public stand in support of the right of the University students for academic freedom. Criticism of Dr. Rose for this position by certain state legislators became rather intense. The newspapers widely publicized the controversy to a point that it became a matter of public interest throughout the State of Alabama.

Editor Dickey determined that the Troy State College newspaper, The Tropolitan, should be heard on the matter. He prepared and presented to the faculty adviser an editorial supporting the position taken by Dr. Rose. He was instructed by his faculty adviser not to publish such an editorial. * * * It is without controversy in this case that the basis for the denial of Dickey's right to publish his editorial supporting Dr. Rose was a rule that had been invoked at Troy State College to the effect that there could be no editorials written in the school paper which were critical of the Governor of the State of Alabama or the Alabama Legislature. The rule did not prohibit editorials or articles of a laudatory nature concerning the Governor or the Legislature. * * * All parties in this case concede that the editorial is well written and in good taste. However, the evidence in this case reflects that solely because it violated the "Adams Rule," Dickey's conduct, in acting contrary to the advice of the faculty adviser and of President Adams, was termed "willful and deliberate insubordination." This insubordination is the sole basis for his expulsion and/or suspension.

It is basic in our law in this country that the privilege to communicate concerning a matter of public interest is embraced in the First Amendment right relating to freedom of speech and is constitutionally protected against infringement by state officials. The Fourteenth Amendment to the Constitution protects these First Amendment rights from state infringement, * * * and these First Amendment rights extend to school children and students insofar as unreasonable rules are concerned. West Virginia State Board of Education v. Barnette, 319 U.S. 624. * * * Regulations and rules which are necessary in maintaining order and discipline are always considered reasonable. In the case now before this Court, it is clear that the maintenance of order and discipline of the students attending Troy State College had nothing to do with the rule that was invoked against Dickey. As a matter of fact, the president of the institution, President Adams, testified that his general policy of not criticizing the Governor or the State Legislature under any circumstances, regardless of how reasonable or justified the criticism might be, was not for the purpose of maintaining order and discipline among the students. On this point, President Adams testified that the reason for the rule was that a newspaper could not criticize its owners, and in the case of a state institution the owners were to be

considered as the Governor and the members of the Legislature.

With these basic constitutional principles in mind, the conclusion is compelled that the invocation of such a rule against Gary Clinton Dickey that resulted in his expulsion and/or suspension from Troy State College was unreasonable. A state cannot force a college student to forfeit his constitutionally protected right of freedom of expression as a condition to his attending a state-supported institution. State school officials cannot infringe on their students' right of free and unrestricted expression as guaranteed by the Constitution of the United States where the exercise of such right does not "materially and substantially interfere with requirements of appropriate discipline in the operation of the school." Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966). The defendants in this case cannot punish Gary Clinton Dickey for his exercise of this constitutionally guaranteed right by cloaking his expulsion or suspension in the robe of "insubordination." The attempt to characterize Dickey's conduct, and the basis for their action in expelling him, as "insubordination" requiring rather severe disciplinary action, does not disguise the basic fact that Dickey was expelled from Troy State College for exercising his constitutionally guaranteed right of academic and/or political expression.

* * *

In accordance with the foregoing, it is the order, judgment and decree of this Court that the action taken by Troy State College, acting through its Student Affairs Committee, on Friday, August 25, 1967, which action denies to Gary Clinton Dickey admission to Troy State College beginning with the fall quarter of 1967, be and the same is hereby declared unconstitutional, void, and is rescinded.

**NOTES AND QUESTIONS**

1. In a 1970 college case, the president of the institution insisted that all material for the college newspaper be approved by him or his representative. A board was established but without any guidelines or standards of editorial acceptability. A Massachusetts federal district court considered this arrangement "prima facie an unconstitutional exercise of state power," because it amounted to a prior restraint and provided no procedural safeguards. The court did say, however, that the "exercise of rights by individuals must yield when they are incompatible with the school's obligation to maintain the order and discipline necessary for the success of the educational process." *Antonelli v. Hammond, 308 F.Supp. 1329 (D.Mass.1970).*

2. In *Scoville v. Joliet Township High School District 204, 425 F.2d 10 (7th Cir. 1970)* two high school students were suspended for distributing 60 copies of a 14-page mimeographed journal containing poetry, editorials and reviews. One editorial criticized the principal for a pamphlet describing school rules and ventured the suggestion that "He has to be kidding * * * I urge all students in the future to either refuse to accept or destroy upon acceptance all propaganda that Central's administration publishes * * *." The editorial also called attendance regulations "utterly idiotic and asinine," and accused the senior school dean of having a "sick mind." A district court upheld the suspension, but the circuit court of appeals reversed, relying on *Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)* to narrow the issue to a question of whether administrators could have reasonably "forecast substantial disruption of or material interference with school activities."

The court held that distribution of the pamphlets did not portend disruption, and it cautioned administrators not to in-

vade the First and Fourteenth Amendment rights of students without clear evidence of probable disruption of school activities. See also *Sullivan v. Houston Independent School District, 307 F.Supp. 1328 (S.D.Tex.1969).*

3. Although a new awareness of the rights of the scholastic press is reflected in these decisions, the courts have not yet fully defined the concepts upon which they depend—"reasonable rules and regulations," "order and discipline," and "material interference with good order." And, of course, there remains the power of school authorities to withhold funds from irritating and provocative publications.

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## SECTION 3. THE LEGAL AND CONSTITUTIONAL MEANING OF FREEDOM OF THE PRESS

### A. THE DOCTRINE OF PRIOR RESTRAINT

### NEAR v. MINNESOTA

283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931).

The Legal and Factual Background of the *Near* Case

**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 section 2?

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) 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.

Mr. 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 estab-

lished 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 by-word, 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.

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, however, 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.

Mr. 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.

Mr. Justice VAN DEVANTER, Mr. Justice McREYNOLDS, and Mr. Justice SUTHERLAND concur in this opinion.

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## SOME COMMENTS AND QUESTIONS ON THE *NEAR* CASE

1. 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 area of exceptions were apparently four: (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; and (4) cases where private interests in reputation could only be protected by the use of injunctions.

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 Mr. Justice Butler of reaching out to decide the constitutional status of prior restraints which were not involved in the case at bar. Technically, Mr. 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 has 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. A contemporary 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 the 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).*

2. It will be remembered that among the areas of exception mentioned in *Near* as not included within the general prohibition against prior restraints was the area of libel law. The Court in *Near* specifically excluded from the ban on prior restraints the use of injunctions to prohibit libelous publications. 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 Ch. II, text, infra, p. 238. 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. Mr. 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 government of that city—an attack, which, let us assume, until the *New York Times* case, would have been 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?

3. 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' opinion in *Near v. Minnesota*, that he 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).

4. Refusal to view freedom from prior restraint as an absolute prohibition is found in recent cases, some well-known and some not. A recent prior restraint case, *Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971),* not as famous as the celebrated Pentagon Papers case, illustrates that a presumption against prior restraints is still operative in American constitutional law, but this presumption, nevertheless, does not amount to an absolute prohibition against prior restraints.

5. *Organization for a Better Austin v. Keefe,* involved an order of the Circuit Court of Cook County, Illinois enjoining a racially integrated organization in the Chicago neighborhood of Austin from distributing leaflets in the Chicago suburb of Westchester, Illinois. The leaflets described the activities of a realtor who lived in Westchester and did business in Austin. According to the leaflets, the realtor engaged in "block-busting" or the "panic peddling" of homes owned by whites to blacks. The Organization for a Better Austin was opposed to "block-busting" because it was interested in stabilizing the racial composition of Austin. The realtor obtained an injunc-

tion against the distribution of the leaflet in Westchester describing his activities in Austin. The *Organization for a Better Austin* contended that the injunction was an invalid prior restraint. The Supreme Court agreed. The realtor contended that the leaflets violated his right of privacy, and that the leaflets were coercive and intimidatory rather than informative. The Supreme Court rejected these contentions and held that to justify a prior restraint on the peaceful distribution of leaflets, the party seeking the prior restraint had to justify a heavy burden which the realtor had not met. The *Organization for a Better Austin* case was cited as a precedent by some of the Justices in the Pentagon Papers case, *New York Times v. United States, 403 U.S. 713 (1971),* text p. 114.

6. 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 great 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) newsmen's 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 36 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 saying 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 U.S. 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 Pa-

pers. 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 law suits 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 appeal 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

## UNITED STATES v. THE WASHINGTON POST

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.

Mr. Justice BLACK, with whom Mr. Justice DOUGLAS joins, concurring.

I adhere to the view that the Government's case against the Washington Post should have been dismissed and that the injunction against the New York Times should have been vacated without oral argument when the cases were first presented to this Court. 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. Fur-

thermore, after oral arguments, I agree completely that we must affirm the judgment of the Court of Appeals for the District of Columbia and reverse the judgment of the Court of Appeals for the Second Circuit for the reasons stated by my Brothers DOUGLAS and BRENNAN. 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 certainty 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 interrelated 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 Mr. 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.

Mr. Justice DOUGLAS, with whom Mr. 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. § 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. § 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 by 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 Free 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 anti-democratic, 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.

Mr. 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 of 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.

Mr. Justice STEWART, with whom Mr. 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 county 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. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.

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.

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 responsibility of the courts to decide the applicabiliy 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.

Mr. Justice WHITE, with whom Mr. 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. 2009 (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 different from those that have purported to govern these injunctive proceedings.

Mr. 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, e. g., 18 U.S.C. § 798; 50 U.S.C. § 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., 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. See Z. Chaffe & E. Re, Equity 935–954 (5th ed. 1967); 1 H. Joyce, Injunctions §§ 58–60a (1909). 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. The proposal provided that:

> "During any national emergency resulting from a war to which the United States 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. Whoever violates any such prohibition shall be punished by a fine of not more than $10,000 or by imprisonment for not more than 10 years, or both: *Provided,* That nothing in this section shall be construed to limit or restrict any discussion, comment, or criticism of the acts or policies of the Government or its representatives or the publication of the same." 55 Cong.Rec. 1763.

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.

In 1957 the United States Commission on Government Security found that "[a]irplane journals, scientific periodicals, and even the daily newspaper have featured articles containing information and other data which should have been deleted in whole or in part for security reasons." In response to this problem the Commission, which was chaired by 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 Government 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. The Government is here asking this Court to remake that decision. This Court has no such power.

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.

Mr. 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. Mr. 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 excep-

tions, 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 Mr. Justice HARLAN and Mr. Justice BLACKMUN but I am not prepared to reach the merits.[2]

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 Mr. 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.

Mr. Justice HARLAN, with whom the CHIEF JUSTICE and Mr. Justice BLACKMUN join, dissenting.

These cases forcefully call to mind the wise admonition of Mr. Justice Holmes, dissenting in Northern Securities Co. v. United States, 193 U.S. 197, 400–401 (1904):

"Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."

With all respect, I consider that the Court has been almost irresponsibly feverish in dealing with these cases.

Both the Court 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 26.

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

[2] 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.

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 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, supra, 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.

"[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948) (Jackson, J.).

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. Be-

fore 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.

Mr. Justice BLACKMUN.

I join Mr. Justice HARLAN in his dissent. I also am in substantial accord with much that Mr. 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 law suit 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 proper-

ly 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 down-grading 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 concede that there are situations where restraint is in order and is constitutional. Mr. 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 negotiation 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.

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**NINE NOTES ON NINE JUSTICES**
**THE MAJORITY:**

MR. JUSTICE BLACK'S OPINION

1. The resolute champion of an absolute First Amendment, Mr. Justice Black, caught the sense of the Court's overall reaction to the *New York Times* case more quickly than did the American press which was too busy rejoicing over the result to worry overmuch about the principles the Justices may have established for the future. Said Justice Black: "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."

The government's position in the Pentagon Papers case, said Mr. Justice Black, constituted a "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."

The boldness of this view, in Mr. Justice Black's opinion, was undoubtedly caused by the fact that Congress had failed to enact a statute authorizing injunctions against publication in the press of papers which in the judgment of the President would jeopardize national security. Utilizing his famed plain meaning rule, Justice Black made it clear he would have invalidated such a law even if Congress had passed it.

Is Mr. Justice Black saying that "inherent Presidential power" has become an additional exception to the general freedom from prior restraint? Are the exceptions to the prior restraint doctrine set forth in *Near* dependent for implementation on codification of these exceptions in a *statute?*

While Justice Black regrets that "some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined," is this not, rather astringently expressed to be sure, the essence of the doctrine of *Near v. Minnesota?*

In *Near*, Chief Justice Hughes conceded that First Amendment protection "even as to previous restraint is not absolutely unlimited. But the exception has been recognized only in exceptional cases."

Further, Chief Justice Hughes observed: "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."

Justice Black explains that the word "security" is too broad and vague a term to utilize as an exception to First Amendment protection. On the basis of Hughes' above-mentioned remarks about an exception to the doctrine of prior restraint, could you draft a federal statute

restraining publication of papers jeopardizing the national security which would pass constitutional muster under the opinion in the Pentagon Papers case?

MR. JUSTICE DOUGLAS' OPINION

2. A key point raised by Mr. Justice Douglas was that "there is, moreover, no statute barring the publication by the press of the material which the *Times* and *Post* seek to use". The point is that, freedom of expression versus government self-preservation conflicts such as *Dennis* notwithstanding, the absence of a law authorizing injunctions against the press may have in itself denied success to the government's case. Another critical issue was raised by Justice Douglas: Did 18 U.S.C.A. § 793(e) of the Espionage Act apply to the press or not? That depended on how one interpreted the Act's strictures against "whoever * * * willfully communicates. * * *"

Mr. Justice Douglas argues that no existing federal legislation authorized a press restraint or publication. Does emphasis on lack of statutory authorization imply that for Douglas the situation might be altered if there had been a statute explicitly covering the case? Do Justice Black and Justice Douglas part company over the extent of the protection the First Amendment protection from prior restraint grants the press? After all, in *Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971),* the Court had ruled there was a heavy presumption against prior restraints, but the Court had not ruled there was an absolute prohibition of prior restraints.

MR. JUSTICE BRENNAN'S OPINION

3. Note that for Mr. Justice Brennan the freedom from prior restraint enjoyed by the press is an extensive freedom but not an absolute one. His approach is more sensitive than the usual war-peacetime dichotomy (i. e., greater latitude by government over the press during wartime). Brennan implies that publication by the press of information, even in peacetime, which might lead to a nuclear holocaust might be validly restrained if government could make a convincing presentation that such was the case. Brennan's approach is clear. The press enjoy a generous *qualified* immunity from prior restraint: "Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue."

Mr. Justice Brennan stated that "the First Amendment stands as an absolute bar to the imposition of judicial restraints in circumstances of the kind presented by these cases." Brennan then says that there is a "single extremely narrow class of cases in which the First Amendment's bar on prior judicial restraint may be overridden." In his opinion the case law indicates this occurs when the nation "is at war." Brennan also suggests that his definition of war is a flexible one; he further suggests that his interpretation of war would reach "the present world situation." But what is necessary for restraint of publication in these circumstances, says Brennan, is that the government produce its proof to the judiciary before a restraint is issued. This approach is certainly in harmony with the basic presumption against the validity of prior restraints enunciated in *Organization for a Better Austin*; it is also in harmony with the emphasis by Chief Justice Hughes in *Near* that exceptions to the doctrine of freedom from prior restraint were exceptional.

MR. JUSTICE STEWART'S OPINION

4. Stewart's position appears to be that Congress cannot and should not intrude on the degree of privacy the Executive feels it necessary to have to conduct its affairs. On the other hand, Stewart believes that if the Executive wishes to enjoin the publication of materials it deems secret which the press has some-

how gotten hold of, a court, in the absence of statute, should not grant the request at least in the absence of irreparable damage.

Stewart appears to support the constitutional validity of a system for designating documents as classified and closed to the normal modes of public scrutiny. Is the classification system that this view of executive prerogative or inherent Presidential power permits itself an invalid prior restraint?

Mr. Justice Stewart also emphasized what may be called the rule of law point. He complained: "* * * we are asked neither to construe specific regulations nor to apply specific laws." Absent a law, Stewart was not inclined to support an injunction of material the disclosure of which seemed to him unlikely to bring "irreparable damage" to the Republic. But there was an ominous hint in Stewart's opinion that he might look on the case differently "if a criminal prosecution is instituted." Does this mean that although it is not constitutional to restrain the press from publishing the Pentagon Papers, it may be constitutional to indict Katherine Graham, publisher of the *Washington Post*, and Arthur Ochs Sulzberger, publisher of the *New York Times*, for publishing the Papers?

## MR. JUSTICE WHITE'S OPINION

5. Mr. Justice White rejected the absolutist view that "in no circumstances would the First Amendment permit an injunction about publishing information about government plans or operations."

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. 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 is 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 for 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 afforded to 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 is 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. The newspaperman is being told that he may publish but that he will have to put his body on the line if he does. Four of the nine Justices would seem to condone criminal penalties if indeed United States interests have been gravely injured.

An issue that the extended press accounts of the case were remiss about was the identity of the precise federal laws which were supposedly violated. Justice White gives a through answer to this inquiry. In footnotes 5–10, of his opinion Justice White sets forth the federal legislation which may be relevant to the publication of the Pentagon Papers and which have been violated by their publication. As a result of Justice White's account of the relevant federal legislation, the newspapers which published the Pentagon Papers before and (paradoxically) *after* the announcement of the decision were in Justice White's words "now on full notice of the position of the United States and must face the consequences if they publish."

Justice White suggests that existing federal legislation may be violated by publication of these papers. Justice White points out that 18 U.S.C.A. § 793 (e) makes it a criminal offense for any unauthorized possessor of a document "relating to national defense" either willfully to communicate or to retain it.

An implicit constitutional premise of Mr. Justice White's opinion is that legislative restraints on the press, either by way of prior restraint or subsequent punishment, come with a greater presumption of validity than restraints promulgated by either the judiciary or executive which go forth without express legislative approval. Congress is the explicit addressee of the First Amendment's limitations: "Congress shall make no law * * * abridging freedom of speech or press." Doesn't this textual argument cut both ways?

Justice White appears to reject the government's case in the Pentagon Papers for two reaons: (1) No statute prohibits a prior restraint in these circumstances; and (2) In view of the great protection afforded against prior restraints by the First Amendment, a restraint on publication on these facts should not be upheld. But Justice White appears to go out of his way to make it clear that if the publishers have violated existing federal legislation by publishing the Pentagon Papers, they may properly, and consistently, with the First Amendment, be punished *subsequent* to publication. Why?

Since some newspapers were waiting for the Supreme Court's decision in the case, was Justice White's opinion in effect a prior restraint? Since criminal prosecutions of press personnel had not been sought at the time of the Pentagon Papers case, was Justice White's advance statement of his view of the relationship of existing federal legislation to the Pentagon Papers case an appropriate one? Can it be justified as avoiding a subsequent "vagueness" argument if one of the statutes discussed by Justice White was relied on for a criminal prosecution against one of the protagonists in the Pentagon Papers case?

### MR. JUSTICE MARSHALL'S OPINION

6. 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 Mr. 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. The Supreme Court's hesitation here might well illustrate the extent to which First Amendment values concerning the importance of public access to historic governmental records were widely shared among a majority of the Justices.

The student should note that the federal district judge, Murray Gurfein, who brought the whole case to pass when he issued the temporary restraining order against the *New York Times* in the first place, ultimately decided for the press. Judge Gurfein concluded that the language in 18 U.S.C. § 793(e) prohibiting the willful communication of information the communicator believes to be detrimental to the United States did not apply to newspapers. Justice Douglas agreed. But Justice Marshall thought Gurfein's reading of the law was "not the only plausible construction" of the law. Justice White, of course, developed a reading of 18 U.S.C. § 793(e) which would cover the press.

## THE DISSENTERS:

### CHIEF JUSTICE BURGER'S OPINION

7. Chief Justice Burger said that only those taking the absolutist view of the First Amendment found the Pentagon Papers case to be an easy case. But is this necessarily a defect? The absolutist view makes it unnecessary for the judge to inquire into the degree of the restraint on the press or the depth of the governmental need for secrecy. Surely there are strong arguments that the courts are not well equipped to develop either the apparatus or the methodology to resolve such issues.

Whether this is a persuasive defense of the absolutist position or not, it is very clear that neither Chief Justice Burger nor Mr. Justice Blackmun takes an absolutist position. Burger states unequivocally: "Of course, the First Amendment right itself is not an absolute." Mr. Justice Blackmun points out with equal directness: "The First Amendment, after all, is only one part of an entire Constitution."

Can a defense be made that the government has no right to guard the sources of its decision-making? If so, isn't the press hypocritical if it argues that it has an absolute right to guard its sources, as it has in the newsman privilege area?

It annoys the Chief Justice that the *Times* had three or four months to decide whether to publish the papers while the Court is given almost no time to consider whether the government's request to enjoin their publication should be granted.

Notice that Burger was particularly sympathetic to the government's privacy or confidentiality claim.

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 how far 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. Burger 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 de-classification 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 identity 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 identity 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 secrecy from public view to shield decisions of the highest substantive character. As a First Amendment matter, doesn't this distinction support the *Times* and not the government?

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? Max Frankel of the *New York Times* answered that the constitution in the First Amendment had elected the press. Chief Justice Burger's opinion indicates that he believes, on the other hand, that in a crisis the ultimate determination must be with the Executive. Does the majority of the Court believe that ultimately such questions under our system are given on an absolute basis neither to the press nor to the Executive but to the courts?

## MR. JUSTICE HARLAN'S OPINION

8. Mr. Justice Harlan believed that Executive determinations in national security questions, tinged with problems of foreign relations, must bear a heavy presumption of validity. For Harlan, the doctrine of prior restraint is subject to exception in national security cases. The student should go back and re-read *Near v. Minnesota*, text, p. 104; the student should read with particular care Note 1, text, p. 110. Justice Harlan apparently believes that *Near* makes a clear exception to the doctrine of freedom from

prior restraint in national security cases. Mr. Justice Douglas, on the other hand, relies on *Near v. Minnesota* for his absolutist position with regard to freedom from prior restraint. For which position is *Near v. Minnesota* the better precedent?

Harlan apparently believed that it is possible for the government to enjoin the press on the basis of the national security even in the absence of a statute. But Harlan stated: "The power to evaluate the 'pernicious influence' of premature disclosure is not, however, lodged in the Executive alone." In order to protect First Amendment values, Harlan would have required (1) that the Court satisfy itself that the dispute was with the President's foreign relations power; and (2) that the Court satisfy itself that the national security decision be made by the head of the national security department concerned.

The difficulty with giving the emphasis to the President's foreign relations power in a conflict between that power and First Amendment values is that it may sharply circumscribe the scope of First Amendment protection since such a much larger area of activity could be placed within the scope of the foreign relations power today than was the case in 1791.

In the crunch Burger had said he would yield to the Executive in a contest with the press. Stewart had said the same. The difference between Stewart and Burger then is slight. Stewart will not sustain injunctive relief absent a statute. Other than that his view and Burger's are essentially the same. Harlan would at least have the judiciary make a preliminary inquiry into whether Presidential power as a barrier to the full scope of First Amendment protection has been properly invoked.

Harlan said that before a court should assist the government in preventing "premature disclosure" he would require (1) that the Court satisfy itself that the dispute was within the foreign relations power; and (2) that the Court satisfy itself that the national security decision be made by the head of the national security department concerned. Would this procedure involve requiring the press to produce the documents in its possession and the government the documents in its possession for review by the judge prior to determining whether relief should be issued against the press at the instance of the government?

## MR. JUSTICE BLACKMUN'S OPINION

9. Blackmun rejects the absolutist view of the First Amendment as categorically as did Burger: "The First Amendment, after all, is only one part of an entire Constitution."

As an institutional matter, is it an appropriate function for a Supreme Court Justice who may have to decide cases in the future involving the same newspapers to "strongly urge" that the Washington *Post* and the New York *Times* "be fully aware of their ultimate responsibilities to the United States of America."

Do you think it is fair to say that press publicity compelled a decision by the Court against its will? Both Burger and Blackmun seem very much concerned with what might be called accountability. If the press publishes documents which result in delays in the freeing of prisoners and the death of soldiers, the situation is seen as more unfortunate than if government takes such steps because there would be no real press accountability. The theory is that government can be voted out but the press cannot.

As a recent Nixon appointment to the Court, Mr. Justice Blackmun's view on First Amendment matters had not been widely known. In the Pentagon Papers case, Blackmun makes clear his opposition to a "doctrine of unlimited absolutism" for the First Amendment.

Do you detect in Blackmun's opinion any pique that the terrific publicity which the newspapers gave to the question of publication of the Pentagon Papers pressured the court into an ill-considered and hastily-rendered decision? If this pressure loomed large as a factor in decision, and Justices Harlan and Burger apparently thought it did, is that a testament to the power of the press? Does this kind of press power influence the question of whether or not First Amendment issues should be given an absolutist or a balancing interpretation?

Is a consequence of Mr. 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.

On the other hand, if the press is not permitted to inform the nation of its history, how then will the people be able adequately to judge the Executive? Is it not information alone which makes the franchise meaningful and effective?

## ADDITIONAL COMMENTS AND QUESTIONS

1. A majority of the Court appear 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.

2. 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.

3. Read the Freedom of Information Act set forth in the text at p. 525. How could the Freedom of Information Act have been used to declassify the Pentagon Papers?

4. 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 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."

5. Arthur Sylvester, former assistant secretary of defense for public affairs, during the Cuban missile crisis of October 1962, had defended the government's right, indeed its duty, to lie if necessary to mislead the enemy and protect the people it represented. But during the Johnson administration he said:

"Every sophisticated newsman knows the federal government puts its best, not its worst, foot forward. That being so, it is his (the reporter's) function to penetrate this protective coloration behind which all men attempt to mask their errors. * * *. If there is a credibility gap, it measures the failure of newsmen to do their job."

In other words, if the government had the right to lie or dissemble, the press has a duty to expose it.

6. From a constitutional perspective, the prior restraint issue dominates the case. In this case, the decision corroborates the view that the core idea of freedom of the press in the United States is freedom from prior restraint. The majority of the Court was determined not to permit a prior restraint unless explicitly authorized by Congress. For the Court's majority, as between prior restraint and subsequent punishment, prior restraint posed the graver threat to freedom of the press.

7. Are efforts by Congressional committees to subpoena broadcast journalists for their out-takes basically another form of prior restraint? On the basis of the nine opinions in the *New York Times* Pentagon Papers case, is it likely a majority of the Court would view the use of congressional subpoena power against broadcast journalists in order to obtain out-takes as an invalid prior restraint?

8. 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. This issue is quite analogous to the question of whether the descendants of famous (but dead) notables ought to be able to use the libel laws to protect the reputations of their ancestors at the expense of history. See text, *Frick v. Stevens,* p. 208.

9. In a matter that has been termed "the second Pentagon Papers case" the conflict between freedom of the press and the national security has once again surfaced over the publication of The CIA and the Cult of Intelligence, written by Victor L. Marchetti, formerly with the CIA, and John D. Marks, a former State Department employee. In March of 1973, a federal court in Alexandria, Virginia, enjoined Mr. Marchetti from further breaches of the secrecy agreement he had signed when he joined the CIA, and ordered that the manuscript of the book be turned over to the CIA for inspection. The authors complied, and the CIA returned the manuscript with 20 per cent of the text deleted, on grounds that it contained classified information.

In filing a new action challenging the injunction, the authors have been joined by their publisher, Alfred A. Knopf, Inc. They charge that the public has been deprived of the right to receive "vital and timely" information regarding the conduct of the government, that the government's action is clearly censorship, and that the secrecy agreements signed by both Marchetti and Marks are unconstitutional prior restraints on freedom of speech and the press. See *New York Times*, Wednesday, October 31, 1973, at 44.

## B. CENSORSHIP OF THE PRESS BY CONDITIONING THE USE OF THE MAILS: THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

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### UNITED STATES ex rel. MILWAUKEE SOCIAL DEMOCRATIC PUB. CO. v. BURLESON

255 U.S. 407, 41 S.Ct. 352, 65 L.Ed. 704 (1921).

Mr. Justice CLARKE delivered the opinion of the Court.

After a hearing on September 22, 1917, by the Third Assistant Postmaster General, of the time and character of which the relator (plaintiff in error) had due notice and at which it was represented by its president, an order was entered, revoking the second-class mail privilege granted to it in 1911 as publisher of the Milwaukee Leader. So far as appears, all that the relator desired to say or offer was heard and received. This hearing was had and the order was entered upon the charge that articles were appearing in relator's paper so violating the provisions of the National Defense Law, approved June 15, 1917, which has come to be popularly known as the Espionage Act of Congress (40 Stat. 217), as to render it "nonmailable" by the express terms of title 12 of that act (Comp.St.1918, Comp. St.Ann.Supp.1919, §§ 10401a–10401d). On appeal to the Postmaster General the order was approved.

* * *

**Editorial Note:**

[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 trial court dismissed the newspaper's petition. The Court of Appeals of the District of Columbia affirmed the judgment of the trial court and the case was brought to the United States Supreme Court by writ of error.]

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.

* * *

The first comprehensive law providing for the classification of mails was enacted on March 3, 1879 (20 Stat. 355). From that time to this, mail classification, frequently approved by this court, has dealt only with "mailable matter." In section 7 of that act (Comp.St. § 7302), still in effect, "mailable matter" is divided into four classes, and by section 10 (Comp.St. § 7304) the second class of such "mailable matter" is defined as including newspapers and periodicals. By section 1 of title 12 of the act of June 15, 1917, supra (Comp.St.1918, Comp.St.Ann.Supp. 1919, § 10401a), any newspaper violating any provision of the act is declared to be "nonmailable matter," which shall "not be conveyed in the mails or delivered from any post office or by any letter carrier."

The extremely low rate charged for second-class mail—to carry it was said, in argument, to cost seven times the revenue which it yields—is justified as a part of "the historic policy of encouraging by low postal rates the dissemination of current intelligence." * * *

* * *

For the purpose of preventing disloyalty and disunion among our people of many origins, and to the end that a united front should be presented to the enemy, the Espionage Act, one of the first of

the national defense laws enacted by Congress after the entry of the United States into the World War (approved June 15, 1917, 40 Stat. 217), provided severe punishment for any person who "when the United States is at war" shall willfully make or convey false reports or false statements with intent to interfere with the operation and success of the military or naval forces of the country, or with the intent to promote the success of its enemies, or who shall cause, or attempt to cause, insubordination, disloyalty, mutiny or refusal of duty in such forces, or who shall willfully obstruct the recruiting and enlistment service of the United States (section 3, tit. 1 [Comp. St.1918, Comp.St.Ann.Supp.1919, § 10212c] ). 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."

It was under the provisions of this wartime act and under the specific injunction of section 396 of the Revised Statutes of the United States (Comp.St. § 582), declaring it to be the duty of the Postmaster General to "superintend generally all the business of the [Post Office] Department and to execute all laws relating to the postal service," that the order in this case was entered.

* * *

All this being settled law, there remains the question whether substantial evidence to support his order may be found in the facts stated in the Postmaster General's answer,

* * *

Without going much into detail: It was declared in the quoted articles that the war was unjustifiable and dishonorable on our part, a capitalistic war, which had been forced upon the people by a class, to serve its selfish ends.

* * *

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, articles 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 ex-

clude 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.

Mr. 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.

The denial to a newspaper of entry as second-class mail, or the revocation of an entry previously made, does not deny to the paper admission to the mail; nor does it deprive the publisher of any mail facility. It merely deprives him of the very low postal rates, called second-class, and compels him to pay postage for the same service at the rate called third-class, which was, until recently, from 8 to 15 times as high as the second-class rate. Such is the nature and the only effect of an order denying or revoking the entry. See Postal Laws and Regulations, §§ 421, 422, and 423. In this case entry to the second-class mail was revoked because the paper had, in the opinion of the Postmaster General, systematically inserted editorials and news items which he deemed unmailable. The question presented is: Did Congress confer upon the Postmaster General authority to deny second-class postal rates on that ground? The question is one of statutory construction. No such authority is granted in terms in the statutes which declare what matter shall be unmailable. Is there any provision of the postal laws from which the intention of Congress to grant such power may be inferred? The specific reason why the Postmaster General deemed these editorials and news items unmailable was that he considered them violative of title 12 of the Espionage Act (Comp.St.1918, Comp.St.Ann.Supp.1919, §§ 10401a–10401d). But it is not contended that this specific reason is of legal significance. The scope of the Postmaster General's alleged authority is confessedly the same whether the reason for the nonmailable quality of the matter inserted in a newspaper is that it violates the Espionage Act, or the copyright laws, or that it is part of a scheme to defraud, or concerns lotteries, or is indecent, or is in any other respect matter which Congress has declared shall not be admitted to the mails.

* * *

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.

First. Power to exclude from the mails has never been conferred in terms upon the Postmaster General. Beginning with the Act of March 3, 1865, c. 89, § 16, 13 Stat. 507, relating to obscene matter and the Act of July 27, 1868, c. 246, § 13, 15 Stat. 196, concerning lotteries, Congress has from time to time forbidden the deposit in the mails of certain matter. In each instance, in addition to prescribing fine and imprisonment as a punishment for sending or attempting to send the prohibited matter through the mail, it declared that such matter should not be conveyed in the mail, nor delivered from any post office nor by any letter carrier. By section 6 of the Act of June 8, 1872 (Rev.Stat. 396 [Comp.St. § 582] ), the Postmaster General was empowered to "superintend * * * the business of the department, and execute all laws relative to the postal service." As a matter of administration the Postmaster General, through his subordinates, rejects matter offered for mailing, or removes matter already in the mail, which in his judgment is unmailable. The existence in the Postmaster General of the power to do this cannot be doubted. The only question which can arise is whether in the individual case the power has been illegally exercised. But while he may thus exclude from the mail specific matter which he deems of the kind declared by Congress to be unmailable, he may not, either as a preventive measure or as a punishment, order that in the future mail tendered by a particular person or the future issues of a particular paper shall be refused transmission.

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. Congress has not granted to the Postmaster General power to deny the right of sending matter by mail even to one who has been convicted by a jury and sentenced by a court for unlawful use of the mail and who has been found by the Postmaster General to have been habitually using the mail for frauds or lotteries and is likely to do so in the future. It has, in order to protect the public, directed postmasters to return to the sender mail addressed to one found by the Postmaster General to be engaged in a scheme to defraud or in a lottery enterprise. But beyond this Congress has never deemed it wise, if, indeed, it has considered it constitutional, to interfere with the civil right of using the mail for lawful purposes.

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.

Second. The second-class mail rate is confined to newspapers and other periodicals, which possess the qualifications and comply with the conditions prescribed by

Congress. In the present case the Postmaster General insists that by reason of alleged past violations of title 12 of the Espionage Act, two of the conditions had ceased to be fulfilled. His reasons are these: The Mail Classification Act of March 3, 1879, c. 180, 20 Stat. 358, provides by section 14 (Comp.St. § 7306) that a newspaper to be mailable at the second-class rates "must be regularly issued at stated intervals as frequently as four times a year," and that it must be "originated and published for the dissemination of information of a public character." If any issue of a paper has contained matter violative of the Espionage Act, the paper is no longer "regularly issued"; and likewise it has ceased to be a paper "published for the dissemination of information of a public character." The argument is obviously unsound. The requirement that the newspaper be "regularly issued" refers, not to the propriety of the reading matter, but to the fact that publication periodically at state intervals must be intended and that the intention must be carried out. Similarly, the requirement that the paper be "published for the dissemination of information of a public character" refers not to the reliability of the information or the soundness of the opinions expressed therein, but to the general character of the publication. The Classification Act does not purport to deal with the effect of, or the punishment for, crimes committed through a publication. It simply provides rates and classifies the material which may be sent at the respective rates. The act says what shall constitute a newspaper. Undoubtedly the Postmaster General has latitude of judgment in deciding whether a publication meets the definition of a newspaper laid down by the law, but the courts have jurisdiction to decide whether the reasons which an administrative officer gives for his actions agree with the requirements of the statute under which he purports to act. * * * The fact that material appearing in a newspaper is unmailable under wholly different provisions of law can have no effect on whether or not the publication is a newspaper. Although it violates the law, it remains a newspaper. If it is a bad newspaper, the act which makes it illegal, and not the Classification Act, provides the punishment.

There is also presented, in brief and argument, a much broader claim in support of the action of the Postmaster General. 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. Because the payment made for this governmental service is less than it costs, it is assumed that a properly qualified person has not the right to the service so long as it is offered, and may not complain if it is denied to him. The service is called the second-class privilege. 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. This determination in the case of the second-class rate may involve more subjects of inquiry, some of them, perhaps, of greater difficulty, than in cases of other rates. But the function of the Postmaster General is the same in all cases. In making the determination he must, like a court or a jury, form a judgment whether certain conditions prescribed by Congress exist, on controverted facts or by applying the law. The function is a strictly judicial one, although exercised in administering an executive office. And it is not a function which either involves or permits the exercise of discretionary power. The so-

called permit is mere formal notice of his judgment, but indispensable to the publisher because without it the local postmaster will not transmit the publication at second-class rates. The same sort of permit is necessary for the same bulk service at first, third or fourth-class rates. There is nothing, in short, about the second-class rate which furnishes the slightest basis in law for differentiating it from the other rates so far as the discretion of the Postmaster General to grant or withhold it is concerned.

Third. Such is the legislation of Congress. 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. In respect to newspapers mailed by a publisher at second-class rates there is clearly no occasion to imply this drastic power. For a publisher must deposit with the local postmaster, before the first mailing of every issue, a copy of the publication which is now examined for matter subject to a higher rate and in order to determine the portion devoted to advertising.

* * *

If there is illegal material in the newspaper, here is ample opportunity to discover it and remove the paper from the mail. Indeed, of the four classes of mail, it is the second alone which affords to the postal official full opportunity of ascertaining, before deposit in the mail, whether that which it is proposed to transmit is mailable matter. * * * [T]he construction urged by the Postmaster General would raise not only a grave question, but a "succession of constitutional doubts," * * *.

It would in practice seriously abridge the freedom of the press. Would it not also violate the First Amendment? It would in practice deprive many publishers of their property without due process of law. Would it not also violate the Fifth Amendment? It would in practice subject publishers to punishment without a hearing by any court. * * *

In conclusion I say again—because it cannot be stressed too strongly—that the power here claimed is not a war power. There is no question of its necessity to protect the country from insidious domestic foes. To that end Congress conferred upon the Postmaster General the enormous power contained in the Espionage Act of entirely excluding from the mails any letter, picture or publication which contained matter violating the broad terms of that act. But it did not confer —and the Postmaster General concedes that it did not confer—the vague and absolute authority practically to deny circulation to any publication which in his opinion is likely to violate in the future any postal law. * * *

* * *

Mr. Justice HOLMES, dissenting.

* * *

* * * The United States may give up the postoffice when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues and it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man. There is no pretence that it has done so. Therefore I do not consider the limits of its constitutional power.

To refuse the second-class rate to a newspaper is to make its circulation impossible and has all the effect of the order that I have supposed. I repeat. When I observe that the only powers expressly given to the Postmaster General to prevent the carriage of unlawful matter of the present kind are to stop and to

return papers already existing and posted, when I notice that the conditions expressly attached to the second-class rate look only to wholly different matters, and when I consider the ease with which the power claimed by the Postmaster could be used to interfere with very sacred rights, I am of opinion that the refusal to allow the relator the rate to which it was entitled whenever its newspaper was carried, on the ground that the paper ought not to be carried at all, was unjustified by statute and was a serious attack upon liberties that not even the war induced Congress to infringe.

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## HANNEGAN v. ESQUIRE

327 U.S. 146, 66 S.Ct. 456, 90 L.Ed. 586 (1946).

Mr. Justice DOUGLAS delivered the opinion of the Court.

Congress has made obscene material nonmailable, 35 Stat. 1129, 18 U.S.C. § 334, 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. § 7 of the Classification Act of 1879, 20 Stat. 358, 43 Stat. 1067, 39 U.S.C. § 221, 39 U.S.C.A. § 221. And it has specified four conditions upon which a publication shall be admitted to the second-class. § 14 of the Classification Act of 1879, 20 Stat. 358, 48 Stat. 928, 39 U.S.C. § 226, 39 U.S.C.A. § 226. 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, pursuant to the Act of March 3, 1901, 31 Stat. 1107, 39 U.S.C. § 232, 39 U.S.C.A. § 232, 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. A hearing was held before a board designated by the then Postmaster General. The board recommended that the permit not be revoked. Petitioner's predecessor took a different view. He did not find that Esquire Magazine contained obscene material and therefore was nonmailable. He revoked its second-class permit because he found that it did not comply with the Fourth condition. The gist of his 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 de-

[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."

voted 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. Regular features of the magazine (called "The Magazine for Men") include articles on topics of current interest, short stories, sports articles or stories, short articles by men prominent in various fields of activities, articles about men prominent in the news, a book review department headed by the late William Lyon Phelps, a theatrical department headed by George Jean Nathan, a department on the lively arts by Gilbert Seldes, a department devoted to men's clothing, and pictorial features, including war action paintings, color photographs of dogs and water colors or etchings of game birds and reproductions of famous paintings, prints and drawings. There was very little in these features which was challenged. But petitioner's predecessor found that 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. Some witnesses found the challenged items highly objectionable, calling them salacious and indecent. Others thought they were only racy and risque. Some condemned them as being merely in poor taste. Other witnesses could find no objection to them.

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 Act of February 20, 1792, 1 Stat. 232, 238, granted newspapers a more favorable rate. These were extended to magazines and pamphlets by the Act of May 8, 1794, 1 Stat. 354, 362. * * *

The postal laws make a clear-cut division between mailable and nonmailable material. The four classes of mailable matter are generally described by objective standards which refer in part to their contents, but not to the quality of their contents. The more particular descriptions of the first, third, and fourth classes follow the same pattern, as do the first three conditions specified for second-class matter. If, therefore, the Fourth condition is read in the context of the postal laws of which it is an integral part, it, too, must be taken to supply standards which relate to the format of the publication and to the nature of its contents, but not to their quality, worth, or value. In that view, "literature" or the "arts" mean no more than productions which convey ideas by words, pictures, or drawings.

If the Fourth condition is read in that way, it is plain that Congress made no radical or basic change in the type of regulation which it adopted for second-class mail in 1879. The inauguration of even a limited type of censorship would have been such a startling change as to have left some traces in the legislative

history. But we find none. Congressman Money, a member of the Postal Committee who defended the bill on the floor of the House, stated that it was "nothing but a simplification of the postal code. There are no new powers granted to the Department by this bill, none whatever." 8 Cong.Rec. 2134. The bill contained registration provisions which were opposed on the ground that they might be the inception of a censorship of the press. Id., p. 2137. These were deleted. Id., pp. 2137, 2138. It is difficult to imagine that the Congress, having deleted them for fear of censorship, gave the Postmaster General by the Fourth condition discretion to deny periodicals the second-class rate, if in his view they did not contribute to the public good. * * *

* * *

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. * * *

* * *

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 Mr. Justice Brandeis and Mr. Justice Holmes in United States ex rel. Milwaukee Social Democrat 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.

It is plain, as we have said, 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. * * * 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.

This is not to say that there is nothing left to the Postmaster General under the Fourth condition. It is his duty to "execute all laws relative to the Postal Service." Rev.Stat. § 396, 5 U.S.C. § 369, 5 U.S.C.A. § 369. For example questions will arise * * * whether the publication which seeks the favorable second-class rate is a periodical as defined in the Fourth condition or a book or other type of publication. And it may appear that the information contained in a periodical may not be of a "public character." But the power to determine whether a periodical (which is mailable) contains information of a public character, literature or art does not include the further power to determine whether the contents meet some standard of the public good or welfare.

Affirmed.

### NOTES AND QUESTION

1. In the *Hannegan* case, Mr. Justice Douglas said, in an opinion for the majority, that serious constitutional issues were raised if the proposition was accepted that "the use of the mails is a privilege which may be extended or withheld on any grounds whatever." This statement may be taken to mean that the use of the mails may not be subjected to conditions which are themselves unconstitutional, conditions, for example, which would require newspapers to hue to a particular political philosophy if they are to remain eligible for the second-class mail rate. To support the proposition that unconstitutional conditions cannot be imposed on the press which uses the mails, Mr. Justice Douglas relied on the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in *Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 467 (1921)*. Yet 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 concurring opinion in the famous obscenity case, *Roth v. United States, 354 U.S. 476 (1957)*, Mr. Justice Harlan made the following observation on conditioning the use of the mails p. 504, fn. 5:

"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, 255 U.S. 407, 430–433*; Holmes, J., dissenting, in *Leach v. Carlile, 259 U.S. 138, 140; Cates v. Haderline, 342 U.S. 804*, reversing *189 F.2d 369; Door v. Donaldson, 90 U.S.App. D.C. 188, 195 F.2d 764.*"

In the light of this information, what do you think is the status of the *Milwaukee Social Democratic Publishing Co.* case today?

To what extent under the existing case law can government condition the availability of the second-class mail rate on requirements which have regard to press content?

2. Should government really be as neutral in terms of aiding the press as it is supposed to be with regard to religion? If so, do special mailing rates for the press infringe on such neutrality? If special mailing rates really function as a governmental subsidy of the press, would the withdrawal of this subsidy be free of First Amendment implications? Cf. *Grosjean v. American Press, 297 U.S. 233 (1936)*.

If special mailing rates for the press exist to aid in the dissemination of information in the service of public enlightenment, does this suggest that other affirmative governmental action, with similar aims, can be considered consistent with the First Amendment?

3. A more recent example of an attempt to use the mails for censorship purposes is 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. The differing First Amendment rationales employed by the Justices in *Lamont* demonstrates the lively existence of alternative theories of First Amendment protection. Often, as in *Lamont*, the Court uses these 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 no one offered the clear and present

danger doctrine as a rationalization in *Lamont*.

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## LAMONT v. POSTMASTER GENERAL

381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965).

Mr. 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." 39 U.S.C. § 4008(a).

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. 39 U.S.C. § 4008(b). 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. 39 U.S.C. § 4008(c).

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."

No. 491 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." The majority of the three-judge District Court nonetheless dismissed the complaint as moot, 229 F. Supp. 913, because Lamont would now receive his mail unimpeded. Insofar as the list was concerned, the majority thought that any legally significant harm to Lamont as a result of being listed was merely a speculative possibility, and so on this score the controversy was not yet ripe for adjudication. Lamont appealed from the dismissal, and we noted probable jurisdiction. 379 U.S. 926.

Like Lamont, appellee Heilberg in No. 848, when his mail was detained, refused to return the reply card and instead filed a complaint in the District Court for an injunction against enforcement of the statute. The Post Office reacted to this complaint in the same manner as it had to Lamont's complaint, but the District Court declined to hold that Heilberg's action was thereby mooted. Instead the District Court reached the merits and unanimously held that the statute was unconstitutional under the First Amendment. 236 F.Supp. 405. The Government appealed and we noted probable jurisdiction. 379 U.S. 997.

There is no longer even a colorable question of mootness in these cases, for the new procedure, as described above, requires the postal authorities to send a separate notice for each item as it is received and the addressee to make a separate request for each item. 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. As stated by Mr. Justice Holmes in *Milwaukee Pub. Co. v. Burleson*, 255 U.S. 407, 437 (dissenting): "The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues * * *."

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. We recently reviewed in *Harman v. Forssenius*, 380 U.S. 528, an attempt by a State to impose a burden on the exercise of a right under the Twenty-fourth Amendment. There, a registration was required by all federal electors who did not pay the state poll tax. We stated:

"For federal elections, the poll tax is abolished absolutely as a prerequisite to voting, and no equivalent or milder substitute may be imposed. Any material requirement imposed upon the federal voter solely because of his refusal to waive the constitutional immunity subverts the effectiveness of the Twenty-fourth Amendment and must fall under its ban." *Id.*, p. 542.

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 literature which federal officials have condemned as "communist political propaganda." The regime of this Act is at war with the "uninhibited, robust, and wide-open" debate and discussion that are contemplated by the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270.

We reverse the judgment in No. 491 and affirm that in No. 848.

It is so ordered.

## NOTES

1. Mr. Justice Douglas uses 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.

2. The remarkable extent to which Mr. Justice Holmes' dissents have become the law is illustrated by the *Lamont* decision. Thus, Mr. Justice Douglas quotes Holmes dissent in *Milwaukee Pub. Co. v. Burleson, 255 U.S. 407* rather than the majority opinion for the Court in that case. 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. 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.

## C. TAXATION OF THE PRESS AND CENSORSHIP

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## GROSJEAN v. AMERICAN PRESS

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 twenty thousand 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 13 newspapers, brought suit to enjoin the enforcement of the statute.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

* * *

The nine publishers who brought the suit publish thirteen newspapers; and these thirteen publications are the only ones within the state of Louisiana having each a circulation of more than 20,000 copies per week, although the lower court finds there are four other daily newspapers each having a circulation of "slightly less than 20,000 copies per week" which are in competition with those published by appellees both as to circulation and as to advertising. In addition, there are 120 weekly newspapers published in the state, also in competition, to a greater or less degree, with the newspapers of appellees. The revenue derived from appellees' newspapers comes almost entirely from regular subscribers or purchasers thereof and from payments received for the insertion of advertisements therein.

The act requires every one subject to the tax to file a sworn report every three months showing the amount and the gross receipts from the business described in section 1. The resulting tax must be paid when the report is filed. Failure to file the report or pay the tax as thus provided constitutes a misdemeanor and subjects the offender to a fine not exceeding $500, or imprisonment not exceeding six months, or both, for each violation. Any corporation violating the acts subjects itself to the payment of $500 to be recovered by suit. All of the appellees are corporations.

* * *

The validity of the act is assailed as violating the Federal Constitution in two particulars: (1) That it abridges the freedom of the press in contravention of the due process clause contained in section 1 of the Fourteenth Amendment; (2) that it denies appellees the equal protection of the laws in contravention of the same amendment.

1. The first point presents a question of the utmost gravity and importance; for, if well made, it goes to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests. The First Amendment to the Federal Constitution provides that "Congress shall make no law * * * abridging the freedom of speech, or of the press." While this provision is not a restraint upon the powers of the states, the states are precluded from abridging the freedom of speech or of the press by force of the due process clause of the Fourteenth Amendment. * * *

That freedom of speech and of the press are rights of the same fundamental character, safeguarded by the due process of law clause of the Fourteenth Amendment against abridgment by state legislation, has likewise been settled by a series of decisions of this court beginning with Gitlow v. People of State of New York, and ending with Near v. State of Minne-

sota. The word "liberty" contained in that amendment embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as well.

* * *

The tax imposed is designated a "license tax for the privilege of engaging in such business," that is to say, the business of selling, or making any charge for, advertising. As applied to appellees, it is a tax of 2 percent on the gross receipts derived from advertisements carried in their newspapers when, and only when, the newspapers of each enjoy a circulation of more than 20,000 copies per week. It thus operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising; and, second, its direct tendency is to restrict circulation. This is plain enough when we consider that, if it were increased to a high degree, as it could be if valid (Magnano Co. v. Hamilton, 292 U.S. 40, 45, and cases cited), it well might result in destroying both advertising and circulation.

A determination of the question whether the tax is valid in respect of the point now under review requires an examination of the history and circumstances which antedated and attended the adoption of the abridgment clause of the First Amendment, since that clause expresses one of those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions", and, as such, is embodied in the concept "due process of law" and, therefore, protected against hostile state invasion by the due process clause 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 forego-

ing 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 curtail 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.

This court had occasion in Near v. State of Minnesota, supra, 283 U.S. 697,

at pages 713 et seq., to discuss at some length the subject in its general aspect. The conclusion there stated is that the object of the constitutional provisions was to prevent previous restraints on publication; and the court was careful not to limit the protection of the right to any particular way of abridging it. Liberty of the press within the meaning of the constitutional provision, it was broadly said (283 U.S. 697, 716), meant "principally although not exclusively, immunity from previous restraints or [from] censorship."

Judge Cooley has laid down the test to be applied: "The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." 2 Cooley's Constitutional Limitations (8th Ed.) p. 886.

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 abridgement 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.

### A NOTE ON GROSJEAN

*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 Mr. Justice 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 *cf. U. S. ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407 (1921).*

Notice how helpful Hughes' opinion in *Near* proved to the decision of the Court in *Grosjean.* Hughes' willingness to make the prior restraint concept cover various modes of advance governmental press censorship contributed to the general understanding, made clear in the *Hannegan* case in 1946, that the whole panoply of direct restraints on the press was prohibited by the constitutional phrase "freedom of the press."

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. What kind of expression is protected? Political expression or commercial advertisements as well? An illustration of the problem is the case of *Valentine v. Chrestensen*, p. 163.

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## SECTION 4. THE MEANING OF PROTECTED SPEECH UNDER THE FIRST AMENDMENT

### A. ANONYMOUS SPEECH

## TALLEY v. CALIFORNIA

362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960).

Mr. 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, § 28.-06 of the Municipal Code of the City of Los Angeles, 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. * * * the 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 dis-

semination 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 importance. 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.

Judgment reversed and cause remanded with directions.

* * *

Mr. Justice CLARK, whom Mr. Justice FRANKFURTER and Mr. Justice WHITTAKER join, dissenting.

* * *

I stand second to none in supporting Talley's right of free speech—but not his freedom of anonymity. The Constitution says nothing about freedom of anonymous speech. In fact, this Court has approved laws requiring no less than Los Angeles' ordinance. I submit that they control this case and require its approval under the attack made here. First, Lewis Publishing Co. v. Morgan, 1913, 229 U. S. 288, upheld an Act of Congress requiring any newspaper using the second-class mails to publish the names of its editor, publisher, owner, and stockholders. 39 U.S.C. § 233, 39 U.S.C.A. § 233. Second, in the Federal Regulation of Lobbying Act, 2 U.S.C. § 267, 2 U.S.C. A. § 267, Congress requires those engaged in lobbying to divulge their identities and give "a modicum of information" to Congress. United States v. Harriss, 1954, 347 U.S. 612, 625. Third, the several States have corrupt practices acts outlawing, *inter alia*, the distribution of anonymous publications with reference to political candidates.[2] While these statutes are leveled at political campaign and election practices, the underlying ground sustaining their validity applies with equal force here.

No civil right has a greater claim to constitutional protection or calls for more rigorous safeguarding than voting rights. In this area the danger of coercion and reprisals—economic and otherwise—is a matter of common knowledge. Yet these statutes, disallowing anonymity in promoting one's views in election campaigns, have expressed the overwhelming public policy of the Nation. Nevertheless the Court is silent about this impressive authority relevant to the disposition of this case.

All three of the types of statutes mentioned are designed to prevent the same abuses—libel, slander, false accusations, etc. The fact that some of these statutes are aimed at elections, lobbying, and the mails makes their restraint no more palatable, nor the abuses they prevent less deleterious to the public interest, than the present ordinance.

All that Los Angeles requires is that one who exercises his right of free speech through writing or distributing handbills identify himself just as does one who speaks from the platform. The ordinance makes for the responsibility in writing that is present in public utterance. When and if the application of such an ordinance in a given case encroaches on First Amendment freedoms, then will be soon enough to strike that application down. But no such restraint has been shown here. * * * We have upheld complete proscription of uninvited door-to-door canvassing as an invasion of privacy. Breard v. City of Al-

[2] Thirty-six States have statutes prohibiting the anonymous distribution of materials relating to elections. E. g.: Kan.G.S.1949, § 25-1714; M.S.A. § 211.08; Page's Ohio R.C. § 3599.09; Purdon's Pa.Stat.Ann., Title 25, § 3546.

exandria, 1951, 341 U.S. 622. Is this less restrictive than complete freedom of distribution—regardless of content—of a signed handbill? And commercial handbills may be declared *verboten*, Valentine v. Chrestensen, 1942, 316 U.S. 52, regardless of content or identification. Is Talley's anonymous handbill, designed to destroy the business of a commercial establishment, passed out at its very front door, and attacking its then lawful commercial practices, more comportable with First Amendment freedoms? I think not. Before we may expect international responsibility among nations, might not it be well to require individual responsibility at home? Los Angeles' ordinance does no more.

* * *

I dissent.

### NOTES AND QUESTIONS

1. 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?

2. Suppose the Los Angeles ordinances were amended to prohibit anonymous handbills where the combination of the handbill's content and the anonymity of its sponsors and authors would stimulate "fraud, deceit, false advertising, and negligent use of words"? The dissemination of such anonymous handbills could be prohibited under *Talley*. Does *Valentine v. Chrestensen, 316 U.S. 52 (1942)*, completely validate the ordinance as hypothetically amended? (The *Valentine* case is reported in the next section.) Justice Harlan joined the majority's result in *Talley* because the ordinance was not limited.

3. Note also that Justice Clark 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? Doesn't Justice Clark suggest a means to accomplish these two objectives? He refers 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 argues that Talley has made no showing that similar restraints would befall him. Does 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?

4. 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), rev'd on other grounds, *Golden v. Zwickler*, 394 U.S. 103 (1969).

5. In *United States v. Insco, 365 F. Supp. 1308 (D.C.Fla.1973)*, a federal statute, 18 U.S.C. § 612, which forbids publication or distribution of any "writing or other statements relat-

ing to" a congressional candidate without attribution was upheld. A 1972 Republican candidate for Congress was indicted under this statute for the alleged publication and distribution of roughly 2500 automobile stickers. The bumper stickers linked the name of the Democratic opponent of the defendant Republican candidate with that of the Democratic presidential candidate, George McGovern. The bumper sticker gave no indication as to the source of its distribution and publication. Among other contentions, the defendants argued unsuccessfully, that *Talley* precluded his prosecution. The court rejected this contention on the following basis:

> Finally, the defendant Republican candidate contends that Talley v. California, 362 U.S. 60 (1960), is applicable and precludes this prosecution. In that case a Los Angeles ordinance restricting the distribution of handbills without attribution statements was declared unconstitutional. However, there is a distinction between the Los Angeles ordinance and 18 U.S.C. § 612. The ordinance was a broad one barring distribution of any handbills in any place, under any circumstances, without an atribution clause. Section 612, on the other hand, applies only to statements relating to or concerning a candidate for federal office. That statute is therefore limited in its coverage to a requirement of fairness in federal elections and does not preclude anonymous criticism of oppressive practices and laws as referred to by the majority in Talley.

Should we conclude from the reasoning in *Talley* and the result in the automobile bumper sticker case that mere identification of a particular communication as anonymous speech does not itself establish a basis for First Amendment protection? What were the oppressive practices in *Talley*, referred to by the Court in *Insco,* which led to the invalidation of the Los Angeles ordinance restricting the distribution of anonymous handbills?

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## B. COMMERCIAL SPEECH

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## VALENTINE v. CHRESTENSEN

316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942).

Mr. 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,[1] 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,

[1] "*Handbills, cards and circulars.*—No person shall throw, cast or distribute or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever, in or upon any street or public place, or in a front yard or court yard, or on any stoop, or in the vestibule or any hall of any building, or in a letterbox therein; provided that nothing herein contained shall be deemed to prohibit or otherwise regulate the delivery of any such matter by the United States postal service, or prohibit the distribution of sample copies of newspapers regularly sold by the copy or by annual subscription. This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter."

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 commerical 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 the printing of his proposed bill and started to distribute it. He was restrained by the police.

Respondent then brought this suit to enjoin the petitioner from interfering with the distribution. In his complaint he alleged diversity of citizenship; an amount in controversy in excess of $3,000; the acts and threats of the petitioner under the purported authority of § 318; asserted a consequent violation of § 1 of the Fourteenth Amendment of the Constitution; and prayed an injunction. The District Court granted an interlocutory injunction, and after trial on a stipulation from which the facts appear as above recited, granted a permanent injunction. The Circuit Court of Appeals, by a divided court, affirmed.

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.

### NOTES AND QUESTIONS

1. The "preferred position" theory of the First Amendment was objected to by Justice Frankfurter in part because it suggested to him that some constitutional rights were more important than others. See Mr. Justice Frankfurter's concurrence, *Kovacs v. Cooper, 336 U.S. 77 (1948)*, reported in the text, supra, p. 27. Mr. Justice Frankfurter warned that there was no hierarchy of constitutional values. Does the *Chrestensen* doctrine establish a hierarchy for expression, i. e., some communications merit a greater claim to constitutional protection than others. Is the core of the *Chrestensen* doctrine that, if there is a "preference" for speech, the speech "preferred" is political rather than commercial speech? Is the process of distinguishing between such categories necessarily one that must be chiefly responsive to motive? If that is the case, doesn't the *Grosjean* (text, supra, p. 155) case forbid such considerations?

An early answer to this question was attempted by Mr. Justice Douglas' opinion for the Court in *Murdock v. Pennsylvania, 319 U.S. 105 (1943)*, where the Court invalidated a municipal ordinance which, as applied to the Jehovah's Witnesses, required them to pay a license tax in order to sell religious books and pamphlets house-to-house. Mr. Justice Douglas made the following effort to explain the *Chrestensen* doctrine:

> The alleged justification for the exaction of this license tax is the fact that the religious literature is distributed with a solicitation of funds. Thus it was stated, in *Jones v. Opelika,* that when a religious sect uses "ordinary commercial methods of sales of articles to raise propaganda funds," it is proper for the state to charge "reasonable fees for the privilege of canvassing." Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital. As we stated only the other day in *Jamison v. Texas, 318 U.S. 413, 417.* "The states can prohibit the use of the streets for the distribution of purely commercial leaflets, even though such leaflets may have 'a civic appeal, or a moral platitude' appended. *Valentine v. Chrestensen, 316 U.S. 52, 55.* They may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes." But the mere fact that the religious literature is "sold" by itinerant preachers rather than "donated" does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books. The right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills. It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. It is plain that a religious organization needs funds to remain a going concern. But an itinerant evangelist, however misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him. Freedom

> of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way. As we have said, the problem of drawing the line between a purely commercial activity and a religious one will at times be difficult. On this record it plainly cannot be said that petitioners were engaged in a commercial rather than a religious venture. It is a distortion of the facts of record to describe their activities as the occupation of selling books and pamphlets. And the Pennsylvania court did not rest the judgments of conviction on that basis, though it did find that petitioners "sold" the literature. The Supreme Court of Iowa in *State v. Mead, 230 Iowa 1217, 300 N.W. 523, 524,* described the selling activities of members of this same sect as "merely incidental and collateral" to their "main object which was to preach and publicize the doctrines of their order." And see *State v. Meredith, 197 S.C. 351, 15 S.E.2d 678; People v. Barber, 289 N.Y. 378, 385–386, 46 N.E.2d 329.* That accurately summarizes the present record.

What reconciling principle to explain or distinguish commercial from political or religious expression does Justice Douglas appear to be reaching for? Does it succeed? What principle would you suggest?

2. It is hard to overestimate the importance of *Valentine v. Chrestensen.* Whenever some new regulation of mass communications is contemplated, *Valentine v. Chrestensen*-type considerations are usually present. In *Ginzburg v. United States, 383 U.S. 463 (1966),* reported, text, Ch. IV, infra, p. 359, the Supreme Court amended the constitutional test for obscenity by declaring that material which otherwise was not obscene would not be considered so if it was marketed against a "background of commercial exploitation." In *Ginzburg,* the Court cited as authority for this proposition the *Chrestensen* case.

3. Is the *Chrestensen* case actually a fundamental assault on the orthodox understanding of the First Amendment in that commercial considerations (including not just commercial content as in *Valentine* but the presence of commercial motive) make it possible to regulate what otherwise, under the First Amendment, would not be within the scope of regulation? Since most printed communication is undertaken for profit, can the *Valentine v. Chrestensen* doctrine be used to alter completely the meaning of freedom of the press as presently understood? Are any limitations on such an alteration found in the *Chrestensen* case itself?

4. 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 non-commercial 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.

Rather than confronting the question of what regulation, if any, is permissible when commercial and non-commerical speech are blended into one, the Supreme Court focused on Chrestensen's bad faith and concluded that on those facts his flyer was not constitutionally protected against the operation of the law. The Court did not consider the impact of this decision upon future situations in which

protected speech and commercial speech were joined in good faith.

There may be a Keystone Kops air about *Valentine v. Chrestensen,* but the case has turned out to contain the seeds of a constitutional doctrine of increasing significance: the theory that the First Amendment does not embrace what Justice Roberts referred to as "purely" commercial speech.

5. Note that *Valentine v. Chrestensen* was a unanimous decision. Why do you think Justice Black, for instance, agreed with the decision?

6. Decades after *Valentine v. Chrestensen* was decided, the Supreme Court declined to distinguish between entertainment speech and non-entertainment speech, in the case of *Time, Inc. v. Hill* (discussed in this text at page 290). In so doing, the Court echoed the concern of the court of appeals in *Valentine,* that to draw such elusive distinctions might well infringe on the expression of constitutionally-protected speech. Over protection, rather than under protection, became the rule. Is this approach at odds with that chosen in *Valentine v. Chrestensen?* In *Valentine,* did the Court allow protected speech to be infringed in pursuit of the regulation of unprotected speech? Or did it decide, instead, that Chrestensen's "protest" was insincere and therefore his leaflet was not truly mixed speech at all? Do you think the Court would have delivered such an off-handed opinion in *Valentine* if it had realized the potential impact of its holding? Would Justice Roberts perhaps have devoted more time to analyzing the mixed speech issue had he been less piqued by Chrestensen's antics?

## CAMMARANO v. UNITED STATES

358 U.S. 498, 79 S.Ct. 524, 3 L.Ed.2d 462 (1959).

**Editorial Note:**

Two cases, arising from different circuit courts of appeals, considered whether deductions as "ordinary and necessary" expenses under § 23(a)(1)(A) of the Internal Revenue Code of 1939 could be taken for expenses devoted to the defeat of legislation. The Treasury regulations provided that money expended by individual or corporate income taxpayers for the promotion or defeat of legislation are not deductible from corporate income. The sums involved were paid by wholesale beer distributors and liquor wholesaler organizations in furtherance of publicity programs with regard to initiative measures in the states of Washington and Arkansas. In Arkansas, the proposal which the liquor industry opposed was statewide prohibition. In the state of Washington, the measure which the liquor industry spent money to oppose proposed to place the retail liquor business entirely in state hands. The two federal courts of appeals both upheld the Treasury Regulations and disallowed as deductions the publicity expenses incurred by the liquor interests in attempting to defeat initiative measures which they opposed.

Mr. Justice HARLAN delivered the opinion of the Court.

* * *

Petitioners' reading of these Regulations would make all but the reference to "lobbying" pure surplusage. We think that the Regulations must be construed to mean what they say—that not only lobbying expenses, but also sums spent for "the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising" are nondeductible.[8]

[8] Petitioners point to United States v. Rumely, 345 U.S. 41, and United States v. Harriss, 347 U.S. 612, where this Court interpreted the term "lobbying" in a congressional resolution and in the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261–270, 2 U.S.C.A. §§ 261–270, to mean only representations and communications made directly to Congress and its members concerning pending or proposed legislation. These cases do not ad-

* * *

Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not " 'aimed at the suppression of dangerous ideas.' " 357 U.S., at page 519. Rather, it appears to us to express a determination by Congress that since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned.

Affirmed.

Mr. Justice DOUGLAS (concurring).

Valentine v. Chrestensen, 316 U.S. 52, 54, held that business advertisements and commercial matters * did not enjoy the protection of the First Amendment, made applicable to the States by the Fourteenth. The ruling was casual, almost offhand. And it has not survived reflection. That "freedom of speech or of the press," directly guaranteed against encroachment by the Federal Government and safeguarded against state action by the Due Process Clause of the Fourteenth Amendment, is not in terms or by implication confined to discourse of a particular kind and nature. It has often been stressed as essential to the exposition and exchange of political ideas, to the expression of philosophical attitudes, to the flowering of the letters. Important as the First Amendment is to all those cultural ends, it has not been restricted to them. Individual or group protests against action which results in monetary injuries are certainly not beyond the reach of the First Amendment, as Thornhill v. State of Alabama, 310 U.S. 88, which placed picketing within the ambit of the First Amendment, teaches. * * * A protest against government action that affects a business occupies as high a place. The profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise. Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive. * * *

In spite of the overtones of Valentine v. Chrestensen, supra, I find it impossible to say that the owners of the present business who were fighting for their lives in opposing these initiative measures were not exercising First Amendment rights. If Congress had gone so far as to deny all deductions for "ordinary and necessary business expenses" if a taxpayer spent money to promote or oppose initiative measures, then it would be placing a penalty on the exercise of First Amendment rights. That was in substance what a State did in Speiser v. Randall, 357 U. S. 513. "To deny an exemption to claimants who engage in certain forms of

vance petitioners' cause, since the regulatory provisions here explicitly embrace more than "lobbying." Cf. United States v. Rumely, supra, 345 U.S. at page 47.

* Two decisions prior to the Valentine case approved broad regulation of commercial advertising. Fifth Avenue Coach Co. v. City of New York, 221 U.S. 467, was decided long before Stromberg v. People of State of California, 283 U.S. 359, extended the application of the First Amendment to the States. In Packer Corporation v. State of Utah, 285 U.S. 105, the First Amendment problem was not raised. The extent to which such advertising could be regulated consistently with the First Amendment (cf. Cantwell v. State of Connecticut, 310 U.S. 296; Martin v. City of Struthers, Ohio, 319 U.S. 141; Breard v. City of Alexandria, 341 U.S. 622; Roth v. United States, 354 U.S. 476) has therefore never been authoritatively determined.

speech is in effect to penalize them for such speech." Id., 357 U.S. at page 518. Congress, however, has taken no such action here. It has not undertaken to penalize taxpayers for certain types of advocacy; it has merely allowed some, not all, expenses as deductions. Deductions are a matter of grace, not of right. Commissioner of Internal Revenue v. Sullivan, 356 U.S. 27. To hold that this item of expense must be allowed as a deduction would be to give impetus to the view favored in some quarters that First Amendment rights must be protected by tax exemptions. But that proposition savors of the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State. Such a notion runs counter to our decisions, and may indeed conflict with the underlying premise that a complete hands-off policy on the part of government is at times the only course consistent with First Amendment rights.

* * *

### REFLECTIONS ON VALENTINE AND CAMMARANO

1. If the *Valentine* case is read to mean that printed matter devoted to commercial advertising may be regulated to a greater extent than printed matter devoted to political debate, then the Court makes it necessary to explore very carefully each of the diverse varieties of communication. Expression with ideological significance is extended constitutional protection, but not, for example, commercial advertising which presumably has no such significance. The cynicism of Chrestensen's effort to exploit the First Amendment to evade the legitimate effort of the city to cope with the problem of litter in the streets can easily be recognized. But separating the commercial aspects of expression from the ideological aspects is a perplexing task, as the *Cammarano* case makes very clear. In *Cammarano* the case disallowed a deduction from gross income of sums expended to promote or defeat legislation. The Court justified the disallowance on the ground that such a decision was non-discriminatory.

Mr. Justice Douglas' opinion in *Cammarano* makes clear his misgivings about the *Valentine* case's effort to put commercial advertisements and means of communication devoted to commercial ends beyond the reach of constitutional protection. For Douglas, publicity efforts of the liquor industry constitute the exercise of First Amendment rights. But he concurs with the Court on the ground that the Congress has the right to refuse to protect First Amendment rights. (To turn the issue around—could it be argued that Congress has a duty to protect First Amendment rights?)

2. Mr. Justice Douglas makes clear his objection to the view that First Amendment rights are "somehow not fully realized unless they are subsidized by the state." Douglas argued that a "complete hands-off policy on the part of government is the only course consistent with First Amendment rights." Is the second class mailing rate for the press consistent with these views? *Cf. Hannegan v. Esquire, 327 U.S. 146 (1946)*, reported, text, supra, p. 148.

## PITTSBURGH PRESS CO. v. PITTSBURGH COMMISSION ON HUMAN RELATIONS

413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973).

Mr. Justice POWELL delivered the opinion of the Court.

The Human Relations Ordinance of the City of Pittsburgh (the "Ordinance") has been construed below by the courts of Pennsylvania as forbidding newspapers to carry "help-wanted" advertisements in

sex-designated columns except where the employer or advertiser is free to make hiring or employment referral decisions on the basis of sex. We are called upon to decide whether the Ordinance as so construed violates the freedoms of speech and of the press guaranteed by the First and Fourteenth Amendments. This issue is a sensitive one, and a full understanding of the context in which it arises is critical to its resolution.

The Ordinance proscribes discrimination in employment on the basis of race, color, religion, ancestry, national origin, place of birth, or sex. In relevant part, § 8 of the Ordinance declares it to be unlawful employment practice, "except where based upon a bona fide occupational exemption certified by the Commission":

"(a) For any employer to refuse to hire any person or otherwise discriminate against any person with respect to hiring * * * because of * * * sex.

"(e) For any 'employer,' employment agency or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to 'employment' or membership which indicates any discrimination because of * * * sex.

"(j) For any person, whether or not an employer, employment agency or labor organization, to aid * * * in the doing of any act declared to be unlawful by this ordinance * * *."

The present proceedings were initiated on October 9, 1969, when the National Organization for Women, Inc. (NOW) filed a complaint with the Pittsburgh Commission on Human Relations (the "Commission"), which is charged with implementing the Ordinance. The complaint alleged that the Pittsburgh Press Co. ("Pittsburgh Press") was violating § 8(j) of the Ordinance by "allowing employers to place advertisements in the male or female columns, when the jobs advertised obviously do not have bona fide occupational qualifications or exceptions * * *." Finding probable cause to believe that Pittsburgh Press was violating the Ordinance, the Commission held a hearing, at which it received evidence and heard argument from the parties and from other interested organizations. Among the exhibits introduced at the hearing were clippings from the help-wanted advertisements carried in the January 4, 1970, edition of the Sunday Pittsburgh Press, arranged by column. In many cases, the advertisements consisted simply of the job title, the salary, and the employment agency carrying the listing, while others included somewhat more extensive job descriptions.

On October 23, 1970, the Commission issued a Decision and Order. It found that during 1969 Pittsburgh Press carried a total of 248,000 help-wanted advertisements; that its practice before October, 1969, was to use columns captioned "Male Help Wanted," "Female Help Wanted," and "Male-Female Help Wanted"; that it thereafter used the captions "Jobs—Male Interest," "Jobs—Female Interest," and "Male-Female"; and that the advertisements were placed in the respective columns according to the advertiser's wishes, either volunteered by the advertiser or offered in response to inquiry by Pittsburgh Press. The Commission first concluded that § 8(e) of the Ordinance forbade employers, employment agencies, and labor organizations from submitting advertisements for placement in sex-designated columns. It then held that Pittsburgh Press, in violation of § 8(j), aided the advertisers by maintaining a sex-designated classification system. After specifically considering and rejecting the argument that the Ordinance violated the First Amendment, the Commission ordered Pittsburgh Press to cease and desist such violations and to utilize a classification system with no reference to sex. This order was affirmed

in all relevant respects by the Court of Common Pleas.

On appeal in the Commonwealth Court, the scope of the order was narrowed to allow Pittsburgh Press to carry advertisements in sex-designated columns for jobs exempt from the antidiscrimination provisions of the Ordinance. As pointed out in that court's opinion, the Ordinance does not apply to employers of fewer than five persons, to employers outside the city of Pittsburgh, or to religious, fraternal, charitable or sectarian organizations, nor does it apply to employment in domestic service or in jobs for which the Commission has certified a bona fide occupational exception. The modified order bars "all reference to sex in employment advertising column headings, except as may be exempt under said Ordinance, or as may be certified as exempt by said Commission." 4 Pa. Cmwlth. 448, 470, 287 A.2d 161, 172 (1972). The Pennsylvania Supreme Court denied review, and we granted certiorari to decide whether, as Pittsburgh Press contends, the modified order violates the First Amendment by restricting its editorial judgment. We affirm.

* * *

In a limited way, however, the Ordinance as construed does affect the make-up of the help-wanted section of the newspaper. Under the modified order, Pittsburgh Press will be required to abandon its present policy of providing sex-designated columns and allowing advertisers to select the columns in which their help-wanted advertisements will be placed. In addition, the order does not allow Pittsburgh Press to substitute a policy under which it would make an independent decision regarding placement in sex-designated columns.

Respondents rely principally on the argument that this regulation is permissible because the speech is commercial speech unprotected by the First Amendment. The commercial speech doctrine is traceable to the brief opinion in Valentine v. Chrestensen, 316 U.S. 52 (1942), sustaining a city ordinance which had been interpreted to ban the distribution by handbill of an advertisement soliciting customers to pay admission to tour a submarine. Mr. Justice Roberts, speaking for a unanimous Court, said:

> "We are * * * clear that the Constitution imposes no such restraint * * * on government as respects purely commercial advertising." 316 U.S., at 54.

* * * If a newspaper's profit motive were determinative, all aspects of its operations—from the selection of news stories to the choice of editorial position—would be subject to regulation if it could be established that they were conducted with a view toward increased sales. Such a basis for regulation clearly would be incompatible with the First Amendment.

The critical feature of the advertisement in Valentine v. Chrestensen was that, in the Court's view, it did no more than propose a commercial transaction, the sale of admission to a submarine. * * *

In the crucial respects, the advertisements in the present record resemble the *Chrestensen* rather than the *Sullivan* advertisement. None expresses a position on whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex, nor does any of them criticize the Ordinance or the Commission's enforcement practices. Each is no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech.

But Pittsburgh Press contends that *Chrestensen* is not applicable, as the focus in this case must be, upon the exercise of editorial judgment by the newspaper as to where to place the advertisement

rather than upon its commercial content. The Commission made a finding of fact that Pittsburgh Press defers in every case to the advertiser's wishes regarding the column in which a want-ad should be placed. It is nonetheless true, however, that the newspaper does make a judgment whether or not to allow the advertiser to select the column. We must therefore consider whether this degree of judgmental discretion by the newspaper with respect to a purely commercial advertisement is distinguishable, for the purposes of First Amendment analysis, from the content of the advertisement itself. Or, to put the question differently, is the conduct of the newspaper with respect to the employment want-ad entitled to a protection under the First Amendment which the Court held in *Chrestensen* was not available to a commercial advertiser?

Under some circumstances, at least, a newspaper's editorial judgments in connection with an advertisement take on the character of the advertisement and, in those cases, the scope of the newspaper's First Amendment protection may be affected by the content of the advertisement. In the context of a libelous advertisement, for example, this Court has held that the First Amendment does not shield a newspaper from punishment for libel when with actual malice it publishes a falsely defamatory advertisement. New York Times v. Sullivan, 376 U.S., at 279–280. Assuming the requisite state of mind, then, nothing in a newspaper's editorial decision to accept an advertisement changes the character of the falsely defamatory statements. The newspaper may not defend a libel suit on the ground that the falsely defamatory statements are not its own.

Similarly, a commercial advertisement remains commercial in the hands of the media, at least under some circumstances. In Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972), aff'g 333 F.Supp. 582 (D.D.C.1971), this Court summarily affirmed a district court decision sustaining the constitutionality of 15 U.S.C. § 1335, which prohibits the electronic media from carrying cigarette advertisements. The District Court there found that the advertising should be treated as commercial speech, even though the First Amendment challenge was mounted by radio broadcasters rather than by advertisers. Because of the peculiar characteristics of the electronic media, National Broadcasting Co. v. United States, 319 U.S. 190, 226–227 (1943), *Capital Broadcasting* is not dispositive here on the ultimate question of the constitutionality of the Ordinance. Its significance lies, rather, in its recognition that the exercise of this kind of editorial judgment does not necessarily strip commercial advertising of its commercial character.

As for the present case, we are not persuaded that either the decision to accept a commercial advertisement which the advertiser directs to be placed in a sex-designated column or the actual placement there lifts the newspaper's actions from the category of commercial speech. By implication at least, an advertiser whose want-ad appears in the "Jobs—Male Interest" column is likely to discriminate against women in his hiring decisions. Nothing in a sex-designated column heading sufficiently dissociates the designation from the want-ads placed beneath it to make the placement severable for First Amendment purposes from the want-ads themselves. The combination, which conveys essentially the same message as an overtly discriminatory want-ad, is in practical effect an integrated commercial statement.

Pittsburgh Press goes on to argue that if this package of advertisement and placement is commercial speech, then commercial speech should be accorded a higher level of protection than *Chrestensen* and its progeny would suggest. In-

sisting that the exchange of information is as important in the commercial realm as in any other, the newspaper here would have us abrogate the distinction between commercial and other speech.

Whatever the merits of this contention may be in other contexts, it is unpersuasive in this case. Discrimination in employment is not only commercial activity, it is *illegal* commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want-ad proposing a sale of narcotics or soliciting prostitutes. Nor would the result be different if the nature of the transaction were indicated by placement under columns captioned "Narcotics for Sale" and "Prostitutes Wanted" rather than stated within the four corners of the advertisement.

The illegality in this case may be less overt, but we see no difference in principle here. Sex discrimination in non-exempt employment has been declared illegal under § 8(a) of the Ordinance, a provision not challenged here. And § 8(e) of the Ordinance forbids any employer, employment agency, or labor union to publish or cause to be published any advertisement "indicating" sex discrimination. This, too, is unchallenged. Moreover, the Commission specifically concluded that it is an unlawful employment practice for an advertiser to cause an employment advertisement to be published in a sex-designated column.

Section 8(j) of the Ordinance, the only provision which Pittsburgh Press was found to have violated and the only provision under attack here, makes it unlawful for "any person * * * to aid * * * in the doing of any act declared to be unlawful by this ordinance." The Commission and the courts below concluded that the practice of placing want-ads for nonexempt employment in sex-designated columns did indeed "aid" employers to indicate illegal sex preferences. The advertisements, as embroidered by their placement, signaled that the advertisers were likely to show an illegal sex preference in their hiring decisions. Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.

It is suggested, in the brief of an *amicus curiae,* that apart from other considerations, the Commission's order should be condemned as a prior restraint on expression. * * *

The present order does not endanger arguably protected speech. Because the order is based on a continuing course of repetitive conduct, this is not a case in which the Court is asked to speculate as to the effect of publication. Cf. New York Times v. United States. Moreover, the order is clear and sweeps no more broadly than necessary. And because no interim relief was granted, the order will not have gone into effect until it was finally determined that the actions of Pittsburgh Press were unprotected.

We emphasize that nothing in our holding allows government at any level to forbid Pittsburgh Press to publish and distribute advertisements commenting on the Ordinance, the enforcement practices of the Commission, or the propriety of sex preferences in employment. 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. We hold only that the Commission's modified order, narrowly drawn to prohibit placement in sex-designated columns of

advertisements for nonexempt job opportunities, does not infringe the First Amendment rights of Pittsburgh Press.

Affirmed.

Mr. Chief Justice BURGER, dissenting.

Despite the Court's efforts to decide only the most narrow question presented in this case, the holding represents, for me, a disturbing enlargement of the "commercial speech" doctrine, Valentine v. Chrestensen, 316 U.S. 52 (1942), and a serious encroachment on the freedom of press guaranteed by the First Amendment. It also launches the courts on what I perceive to be a treacherous path of defining what layout and organizational decisions of newspapers are "sufficiently associated" with the "commercial" parts of the papers as to be constitutionally unprotected and therefore subject to governmental regulation. Assuming, *arguendo,* that the First Amendment permits the States to place restrictions on the content of commercial advertisements, I would not enlarge that power to reach the layout and organizational decisions of a newspaper.

Pittsburgh Press claims to have decided to use sex-designated column headings in the classified advertising section of its newspapers to facilitate the use of classified ads by its readers. Not only is this purpose conveyed to the readers in plain terms, but the newspaper also explicitly cautions readers against interpreting the column headings as indicative of sex discrimination. Thus, before each column heading the newspaper prints the following 'Notice to Job Seekers":

"Jobs are arranged under Male and Female classifications for the convenience of our readers. This is done because most jobs generally appeal more to persons of one sex than the other. Various laws and ordinances—local, state and federal, prohibit discrimination in employment because of sex unless sex is a bona fide occupational requirement. Unless the advertisement itself specifies one sex or the other, job seekers should assume that the advertiser will consider applicants of either sex in compliance with the laws against discrimination."

To my way of thinking, Pittsburgh Press has clearly acted within its protected journalistic discretion in adopting this arrangement of its classified advertisements. Especially in light of the newspaper's "Notice to Job Seekers," it is unrealistic for the Court to say, as it does, that the sex-designated column headings are not "sufficiently dissociate[d]" from the "want-ads placed beneath [them] to make the placement severable for First Amendment purposes from the want-ads themselves." In any event, I believe the First Amendment freedom of press includes the right of a newspaper to arrange the content of its paper, whether it be news items, editorials or advertising, as it sees fit. In the final analysis, the readers are the ultimate "controllers" no matter what excesses are indulged in by even a flamboyant or venal press; that it often takes a long time for these influences to bear fruit is inherent in our system.

The Court's conclusion that the Commission's cease and desist order does not constitute a prior restraint gives me little reassurance. That conclusion is assertedly based on the view that the order affects only a "continuing course of repetitive conduct." P. 2561, *ante.* Even if that were correct, I would still disagree since the Commission's order appears to be in effect an outstanding *injunction* against certain publications—the essence of a prior restraint. In any event, my understanding of the effects of the Commission's order differs from that of the Court. As noted in the Court's opinion, the Commonwealth Court narrowed the injunction to permit Pittsburgh Press to use sex-designated column headings for want-ads dealing with jobs exempt under

the Ordinance. The Ordinance does not apply, for example,

"to employers of fewer than five persons, to employers outside the city of Pittsburgh, or to religious, fraternal, charitable or sectarian organizations, nor does it apply to employment in domestic service or in jobs for which the Commission has certified a bona fide occupational exception." P. 2556, *ante*. If Pittsburgh Press chooses to continue using its column headings for advertisements submitted for publication by exempted employers, it may well face difficult legal questions in deciding whether a particular employer is or is not subject to the Ordinance. If it makes the wrong decision and includes a covered advertisement under a sex-designated column heading, it runs the risk of being held in summary contempt for violating the terms of the order.

In practical effect, therefore, the Commission's order in this area may have the same inhibiting effect as the injunction in Near v. Minnesota, 283 U.S. 697 (1931), which permanently enjoined the publishers of a newspaper from printing a "malicious, scandalous or defamatory newspaper, as defined by law." We struck down the injunction in *Near* as a prior restraint. In 1971, we reaffirmed the principle of presumptive unconstitutionality of prior restraint in Organization For A Better Austin v. Keefe, 402 U.S. 415. Indeed, in New York Times Co. v. United States, 403 U.S. 713 (1971), every member of the Court, tacitly or explicitly, accepted the *Near* and *Keefe* condemnation of prior restraint as presumptively unconstitutional. In this case, the respondents have, in my view, failed to carry their burden. * * *

Mr. Justice DOUGLAS, dissenting.

* * *

I believe that Pittsburgh Press by reason of the First Amendment may publish what it pleases about any law without censorship or restraint by Government. The First Amendment does not require the press to reflect any ideological or political creed reflecting the dominant philosophy, whether transient or fixed. It may use its pages and facilities to denounce a law and urge its repeal or at the other extreme denounce those who do not respect its letter and spirit.

Commercial matter, as distinguished from news, was held in Valentine v. Chrestensen, 316 U.S. 52, not to be subject to First Amendment protection. My views on that issue have changed since 1942, the year *Valentine* was decided. *As I have stated on earlier occasions I believe that commercial materials also have First Amendment protection.* (Emphasis added.) If Empire Industries Ltd., doing business in Pennsylvania, wanted to run full page advertisements denouncing or criticizing this Pennsylvania law, I see no way in which Pittsburgh Press could be censored or punished for running the ad, any more than a person could be punished for uttering the contents of the ad in a public address in Independence Hall. The *pros* and *cons* of legislative enactments are clearly discussion or dialogue that is highly honored in our First Amendment traditions.

The want ads which gave rise to the present litigation express the preference of one employer for the kind of help he needs. If he carried through to hiring and firing employees on the basis of those preferences, the state commission might issue a remedial order against him, if discrimination in employment was shown. Yet he could denounce that action with impunity and Pittsburgh Press could publish his denunciation or write an editorial taking his side also with impunity.

Where there is a valid law, the Government can enforce it. But there can be no valid law censoring the press or punishing it for publishing its views or the views of subscribers or customers who ex-

press their ideas in letters to the editor or in want ads or other commercial space. There comes a time, of course, when speech and action are so closely brigaded that they are really one. False shouting "fire" in a crowd, the example given by Mr. Justice Holmes, Schenck v. United States, 249 U.S. 47, 52, is one example. Giboney v. Empire Storage Co., 336 U.S. 490, written by Mr. Justice Black is another. There are here, however, no such unusual circumstance.

As Mr. Justice STEWART says, we have witnessed a growing tendency to cut down the literal requirements of First Amendment freedoms so that those in power can squelch someone out of step. Historically the miscreant has usually been an unpopular minority. Today it is a newspaper that does not bow to the spreading bureaucracy that promises to engulf us. It may be that we have become so stereotyped as to have earned that fate. But the First Amendment presupposes free-wheeling, independent people whose vagaries include ideas spread across the entire spectrum of thoughts and beliefs. I would let any expression in that broad spectrum flourish, unrestrained by Government, unless it was an integral part of action—the only point which in the Jeffersonian philosophy marks the permissible point of governmental intrusion.

I therefore dissent from affirmance of this judgment.

Mr. Justice STEWART, with whom Mr. Justice DOUGLAS joins, dissenting.

I have no doubt that it is within the police power of the city of Pittsburgh to prohibit discrimination in private employment on the basis of race, color, religion, ancestry, national origin, place of birth, or sex. I do not doubt, either, that in enforcing such a policy the city may prohibit employers from indicating any such discrimination when they make known the availability of employment opportunities. But neither of those propositions resolves the question before us in this case.

That question, to put it simply, is whether any government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot. Under the First and Fourteenth Amendments I think no government agency in this nation has any such power.

It is true, of course, as the Court points out, that the publisher of a newspaper is amenable to civil and criminal laws of general applicability. For example, a newspaper publisher is subject to nondiscriminatory general taxation, and to restrictions imposed by the National Labor Relations Act, the Fair Labor Standards Act, and the Sherman Act. In short, as businessman or employer, a newspaper publisher is not exempt from laws affecting businessmen and employers generally. Accordingly, I assume that the Pittsburgh Press Company, as an employer, can be and is completely within the coverage of the Human Relations Ordinance of the city of Pittsburgh.

But what the Court approves today is wholly different. It approves a government order dictating to a publisher in advance how he must arrange the layout of pages in his newspaper.

Nothing in Valentine v. Chrestensen, 316 U.S. 52, remotely supports the Court's decision. That case involved the validity of a local sanitary ordinance that prohibited the distribution in the streets of "commercial and business advertising matter." The Court held that the ordinance could be applied to the owner of a commercial tourist attraction who wanted to drum up trade by passing out handbills in the streets. The Court said it was "clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. 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 of legislative judgment." *Id.*, at 54. Whatever validity the *Chrestensen* case may still retain when limited to its own facts, it certainly does not stand for the proposition that the advertising pages of a newspaper are outside the protection given the newspaper by the First and Fourteenth Amendments. Any possible doubt on that score was surely laid to rest in New York Times Co. v. Sullivan, 376 U.S. 254.

So far as I know, this is the first case in this or any other American court that permits a government agency to enter a composing room of a newspaper and dictate to the publisher the layout and make-up of the newspaper's pages.

So long as Members of this Court view the First Amendment as no more than a set of "values" to be balanced against other "values," that Amendment will remain in grave jeopardy. See Paris Adult Theatre I v. Slaton, 413 U.S. 49. (First and Fourteenth Amendment protections outweighed by public interest in "quality of life," "total community environment," "tone of commerce," "public safety"); Branzburg v. Hayes, 408 U.S. 665. (First Amendment claim asserted by newsman to maintain confidential relationship with his sources outweighed by obligation to give information to grand jury); New York Times Co. v. United States, 403 U.S. 713, 748 (dissenting opinion) (First Amendment outweighed by judicial problems caused by "unseemly haste"); Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 192 (dissenting opinion) ("balancing of the competing First Amendment interests").

* * *

The Court today holds that a government agency can force a newspaper publisher to print his classified advertising pages in a certain way in order to carry out governmental policy. After this decision, I see no reason why Government cannot force a newspaper publisher to conform in the same way in order to achieve other goals thought socially desirable. And if Government can dictate the layout of a newspaper's classified advertising pages today, what is there to prevent it from dictating the layout of the news pages tomorrow?

Those who think the First Amendment can and should be subordinated to other socially desirable interests will hail today's decision. But I find it frightening. For I believe the constitutional guarantee of a free press is more than precatory. I believe it is a clear command that Government must never be allowed to lay its heavy editorial hand on any newspaper in this country.

Mr. Justice BLACKMUN, dissenting.

* * *

### NOTES AND QUESTIONS

1. The Court tries hard to cast the advertisements in *Pittsburgh Press* as analogous to "commercial" advertisements rather than to "editorial" advertisements as in *New York Times v. Sullivan, 376 U.S. 254 (1964).* The Court says the publication by newspapers of help wanted ads on the basis of sex does not "express a position on whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex, nor does any of them criticize the Ordinance or the Commission's enforcement practices." The Court says per Mr. Justice Powell: "The advertisements are thus classic examples of commercial speech."

But surely this position is open to powerful rebuttal. An issue of equal rights similar to that of the civil rights issue in *New York Times v. Sullivan* is involved in *Pittsburgh Press.* The controversial issue of social policy in *Pittsburgh Press* is whether newspapers should be permitted

to aid a policy of limiting job opportunities on the basis of sex. A newspaper opposed to a pattern of discrimination which is aided by characterizing the help wanted ads on the basis of sex might choose simply not to run such ads. This of course would be an ideological preference. The social policy behind the Pittsburgh ordinance at issue is to help the cause of equality of job opportunity and to inhibit job discrimination against women. Are the problems presented by *Pittsburgh Press* in any way illuminated by ascribing the tag "commercial speech" to the advertisements there in question?

The case presents a very difficult clash between competing constitutional considerations: Fourteenth Amendment rights to legal equality and freedom from discrimination on the basis of sex versus the First Amendment guarantee of freedom of the press. What *Pittsburgh Press* involves is a content restriction on what can be published, a direct restraint on the press. This restriction is taken to implement a constitutional right of sexual equality. In cases of ultimate conflict between constitutional protection against sex discrimination and constitutional protection against governmental restrictions on the content of newspapers, which constitutional guarantee should be given preference? Doesn't this issue in itself present a philosophical question of great dimension, contrary to Mr. Justice Powell's easy assertion that the advertisements in questions are "classic examples of commercial speech"?

To put the matter simply, if advertisers wish to manifest their desire to discriminate in print, are they not exercising First Amendment rights? If they are, is not a ban on such advertising a violation of the First Amendment? The fact that advertisements are sold for profit, whereas editorials are not paid for specifically by the readership, is surely not much of a guide to whether something is or is not commercial speech. As Mr. Justice Douglas said in dissent *Cammarano*, First Amendment rights should not be "hitched" to the presence or absence of a "profit motive."

2. The student should note that common law freedom from prior restraint historically applied only to administrative censorship. In this respect, *Pittsburgh Press* is more of a prior restraint case than was the leading prior restraint case of *Near v. Minnesota*, which involved judicial censorship. The majority appears to support a doctrine in *Pittsburgh Press* that freedom from prior restraint does not apply to unprotected speech, i. e., "commercial speech."

3. Mr. Justice Douglas' dissent constitutes a repudiation of the commercial speech concept. Is it possible to salvage that concept's central idea, which is that in some circumstances commercial speech merits a lesser protection than other speech, even if one believes the concept was misapplied in *Pittsburgh Press*? Mr. Justice Stewart's dissent appears to take the view that the difficulty with the extension of the commercial speech concept of *Chrestensen* was in extending its reach to the pages of the daily newspaper.

4. A case somewhat similar to *Pittsburgh Press* is *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972). That case involved the constitutionality of § 804(c) of the Civil Rights Act of 1968, 42 U.S.C. § 3604(c), which provides as follows:

> § 3604 Discrimination in the Sale or rental of housing
>
> (c) (It shall be unlawful) to make, print or publish, or cause to be made, printed or published, any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination.

The *Hunter* case involved a suit by the Attorney General to enjoin one Bill Hunter, editor and publisher of *The Courier,* a county weekly in Maryland, from further publication of classified advertisements for sale or rent which violated § 3604(c). Hunter had published an ad for rent of a furnished apartment in a house characterized as a "white home".

The Federal District Court declined to issue an injunction but held in a declaratory judgment that § 3604(c), applied to newspapers, constitutionally barred discriminatory advertisements, including newspaper ads, and that § 3604(c) was violated by the advertisements published in *The Courier.*

The Court of Appeals for the Fourth Circuit affirmed. The Court affirmed on the ground, among others, that a newspaper should not be insulated from otherwise valid regulation of economic activity merely because the newspaper also engaged in constitutionally protected dissemination of ideas.

In *Hunter*, a segment from the totality of expression, the area of distinctions on the basis of race in newspaper classified advertisements, is removed from First Amendment protection, just as distinctions on the basis of sex in classified advertisements were prohibited in *Pittsburgh Press.* A federal statute which restricts expression was held valid in *Hunter* in order to enforce the federal interest in protecting the guarantees against racial discrimination provided in the Fourteenth Amendment. Yet the implicit choice made by the court in favor of equality at the expense of liberty of expression was no more articulated by the federal court in *Hunter* than was the implicit exercise of a similar choice by the Supreme Court in *Pittsburgh Press.* The ostensible rationale of *Hunter* was that the statutory provision in question regulated commercial speech rather than political speech.

# Chapter II

# LIBEL AND THE NEWSMAN

## SECTION 1. THE PRIVATE LAW OF LIBEL

### A. WHAT IS LIBEL?

1. In his authoritative work on the law of torts, William L. Prosser warns that "there is a great deal of the law of defamation which makes no sense." See Prosser, Handbook of the Law of Torts 737 (4th ed. 1971). [Black's Law Dictionary (Rev. 4th ed. 1968), p. 1660, defines a tort as a private or civil wrong or injury, a breach of duty to an individual resulting in damage to him.] And he observes that no very comprehensive attempt, unhappily, has been made to overhaul and untangle this field of law.

Prosser's gloomy appraisal is in part the consequence of a judicial system of 51 jurisdictions, each with idiosyncracies, which can become legal booby traps for the unwary newsman. The reporter must know the libel laws of the state in which he functions; and if there are special hazards in that jurisdiction, he must be alerted to them.

The complexity of our libel laws is not simply a consequence of our federalism. Libel, a perplexing legal concept at best, is defined in terms of time, place, context and the condition of public sentiment. That is, what is actionable libel at one time and place may not be so at another time and place. The state of mind of the community can be a determining factor. For example, it has become extremely dangerous to say or write that a person is a Communist. It was not always so, especially early in World War II when the Soviet Union was an ally.[1]

"Communist" is by no means the only ambiguous appellation in our language. Saul Cohen has deftly traced the checkered linguistic and legal history of the term "son-of-a-bitch." *A Study in Epithetical Jurisprudence,*—14 Case and Comment (September-October, 1966). In a 1959 case, the Court of Civil Appeals of Texas concluded that the word "queer" was slanderous per se because it implied the commission of the crime of sodomy which is a penal offense in Texas. The plaintiff was awarded $25,000 in actual damages and the same amount in exemplary or punitive damages. *Buck v. Savage, 323 S.W.2d 363 (Tex.Civ. App.1959).* In *Munafo v. Helfand, 140 F.Supp. 234 (S.D.N.Y.1956),* the court said that in determining whether words are slanderous per se, the true connotation of words should be cast in our times, for the harmless word of yesterday may today be one of reproach and odium. A certain amount of vulgar name-calling is tolerated, of course, on the theory that it will necessarily be understood to amount to nothing more; a common insult, such as referring to someone as a "damned

[1] Compare Garriga v. Richfield, 174 Misc. 315, 20 N.Y.S.2d 544 (1940) and Mencher v. Chesley, 297 N.Y. 94, 75 N.E.2d 257, 259 (1947) modified 63 N.Y.S.2d 108 (App.Div.). See also Gertz v. Robert Welch, Inc., 306 F.Supp. 310 (D.C.Ill.1969); Phoenix Newspapers Inc. v. Church, 447 P.2d 840 (Ariz. 1968); Herrmann v. Newark Morning Ledger Co., 49 N.J.Super. 551, 140 A.2d 529, 533 (1958); McAndrew v. Scranton Republican Pub. Co., 364 Pa. 504, 72 A.2d 780, 784 (1950); Remington v. Bentley, 88 F.Supp. 166 (S.D. N.Y.1949); Grant v. Reader's Digest Ass'n, Inc., 151 F.2d 733 (2d Cir. 1945), cert. den. 326 U.S. 797 (1946).

liar," is not actionable unless special damages are proved. Under South Carolina law, for example, words such as "bastard" or "son of a bitch," understood as words merely uttered in anger, amounting to vulgar name-calling, are not actionable when those who heard the words testified that they did not believe them and no special damages were shown. *Smith v. Phoenix Furniture Co., 339 F.Supp. 969 (D.C.S.C.1972).* But the writer must be cautious if he is to avoid the full force of the law. And, of course, there are ethical questions to consider.

A few states (Alabama, Mississippi, Virginia) have "insulting words" statutes which permit recovery for insults which do not fit the definitions of defamation. See Hanson, Libel and Related Torts. Vol. 1, Case and Comment, 1969, § 17.

2. The law of libel is based on both judicial precedent and statute. In the beginning, defamation, whether spoken (slander) or written (libel) was a sin under canon law and was punished by ecclesiastical tribunals. For the laboring class, public penance was vindication enough. Gentlemen settled their differences with steel. At a later date, Star Chamber assumed responsibility for protecting the church and secular aristocracy from scandal, or what came to be called seditious libel—in reality, the criticism or questioning of authority. Seditious libel was a criminal offense against which no defense was possible. The only question for the jury was whether or not the defendant had published the libel. Finally the common law courts assumed jurisdiction, brought the law of libel to the people, permitted truth with qualifications as a defense, and began to fashion those intricate rules which so complicate the jurisdiction of libel today.[2]

[2] Useful works on the evolvement of freedom of the press are: Emery, Broadcasting and Government: Responsibilities and Regulations (1971); Emerson, The System of Freedom of Expression (1970); Nelson, Freedom of the Press from Hamilton to the Warren Court (1966); Levy, Legacy of Suppression (1960), and Freedom of the Press from Zenger to Jefferson (1966); Hudon, Freedom of Speech and Press in America (1963); Smead, Freedom of Speech by Radio and Television (1959); Siebert, Freedom of the Press in England, 1476–1776 (1952); Meiklejohn, Free Speech and Its Relation to Self Government (1948); Chafee, Free Speech in the United States (1941).

In a famous Florida contempt case, *Pennekamp v. Florida, 328 U.S. 331, 371 (1946),* Mr. Justice Rutledge sympathized with newsmen when he said in a concurring opinion:

"There is perhaps no area of news more inaccurately reported factually, on the whole, though with some notable exceptions, than legal news. Some part of this is due to carelessness, often induced by the haste with which news is gathered and published, a smaller portion to bias or more blameworthy causes. But a great deal of it must be attributed, in candor, to ignorance which frequently is not at all blameworthy. For newspapers are conducted by men who are laymen to the law. With rare exceptions their capacity for misunderstanding the significance of legal events and procedures, not to speak of opinions, is great. But this is neither remarkable nor peculiar to newsmen. For the law, as lawyers best know, is full of perplexities."

The point is that statutes as well as the opinions of its courts must be consulted if the complexities of a state's libel laws are to be appreciated. See Hanson, Libel and Related Torts. vol. 2 Statutes, 1969.

3. Carelessness is the greatest enemy of the newsman. A California trial court awarded $10,000 compensatory and $15,000 punitive damages for a news story which reported that the plaintiff had been arrested, charged with the theft of narcotics, and had himself used the stolen narcotics as an addict until his health had become impaired. The plaintiff was a 32-year-old physician named R. Allen Behrendt. The person actually arrested

was another physician, Ralph A. Behrend. Both had been resident physicians at the Metropolitan Water District Hospital at Banning, Calif., but at different times. The reporter had failed to distinguish the names. A retraction printed with a photo of the plaintiff did not overcome the plaintiff's sense of physical suffering and mental anguish. *Behrendt v. Times-Mirror Co., 30 Cal.App.2d 77, 85 P.2d 949 (1939).* See also *Michaels v. Gannett Co., 10 A.D.2d 417, 199 N. Y.S.2d 778 (1960)* (wrong address). Such examples are legion.

A judge was acquitted of misconduct in office; a subsequent dispatch said that he was acquitted of a criminal charge. An indictment charged defendants with attempting to influence a witness; a news story reported that the defendants tried to intimidate a witness, an imputation of criminal misconduct. A trainer and two stable employees were suspended by a race track on suspicion of having drugged a horse. One dispatch gave the name of the owner of the horse, which was appropriate, but a condensed rewrite of the first story included him among those administering stimulants. An officer of an insurance company was indicted for fraud; a second officer was indicted for transacting insurance business without a license. A news story reported that both were indicted on charges of fraud. Examples cited in Associated Press, The Dangers of Libel (1964), 1.

4. Libel suits can be ruinous; stable, long-established properties have been crippled by them. At best they are costly to defend; higher and higher claims are being made. In an important case which will be discussed in detail later, Wallace Butts, athletic director at the University of Georgia, brought a $10 million libel suit against the old *Saturday Evening Post* for a story alleging that he and Paul (Bear) Bryant, University of Alabama coach, had conspired to rig a football game between the two schools. Graham, *Story of a College Football Fix*, 236 Saturday Evening Post 80–3 (March 23, 1963). The United States Supreme Court upheld an award to Butts of $60,000 in compensatory damages and $400,000 in punitive damages. *Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967).* Bryant settled out of court for an estimated $300,000. Here, the Court said, carelessness had escalated into actual malice. The ailing *Post* was grievously hurt by the judgment.

Mistakes can be predicted with certainty. Every news medium, therefore, should retain an attorney learned in the law of libel, for the skill of a lawyer will often determine the outcome of a case.

5. A further protection is libel insurance. These policies, although usually carrying something on the order of a $2,000 deductible clause to protect the insurer against smaller claims and initial attorney's fees, should be written expressly to cover punitive damages, the most fatal form of damages, as well as general and special damages. More substantial lawyer's fees and court costs should also be covered. It cost an insured Minnesota newspaper $23,000 in such fees to defend itself against a frivolous suit by 22 members of a grand jury, a suit which had been instigated by a county attorney. After a lengthy exchange of affidavits, depositions and motions, the defendant newspaper was granted summary judgment. *Standke v. B. E. Darby & Sons, Inc., 193 N.W.2d 139 (Minn.1971).* Libel insurance will also encourage newspapers to reject tempting offers of out-of-court settlements where debatable questions of free press and the public interest are raised which are better answered in the courts.

The Las Vegas *Sun* lost a $190,000 libel suit to an attorney, George E. Franklin, Jr., when it implied that he had used blackmail in a "black-market babies" case. See Phelps and Hamilton, Libel 358–359 (1966). The *Sun's* insurance company

preferred a $90,000 negotiated settlement to an appeal. H. M. Greenspun, the *Sun's* publisher, consulted a knowledgeable attorney who pointed out to the insurance company that a crusading newspaper could not afford the reputation of agreeing to costly settlements. The insurance company consented to pay the *Sun* the $90,000 in return for complete release from its liability as the insurer. (The insurance company should have known at this point that appellate courts seldom increase jury awards in libel cases.) The *Sun* went all the way to the Nevada Supreme Court and won a new trial. Before the new trial began, the plaintiff asked for a $7,000 settlement, and the *Sun* agreed. *Las Vegas Sun, Inc. v. Franklin, 74 Nev. 282, 329 P.2d 867 (1958).* Phelps and Hamilton note that "this is probably the only case on record in which a newspaper made money ($83,000) on a libel case." But the libel law is not to be perverted into a scheme for making money. Its sole purpose is to afford a public forum for vindicating one's reputation and compensation for mental anguish, if no actual pecuniary loss is suffered. It is not designed to ruin defendants. *Clark v. Pearson, 248 F.Supp. 188 (D.C.D.C. 1965).*

6. In a libel action the presumption of innocence, a precept of Anglo-American law, is reversed. A publisher-defendant, the party being sued, is looked upon as an accuser, or prosecutor, and must in most cases prove his case against the person he has libeled. The plaintiff-accused, i. e., the person libeled and suing for damages, is presumed innocent until proven guilty. The publisher-defendant is presumed guilty until he can show, either by a test of truth or privilege, that he is innocent under the law.

7. There are difficulties for the plaintiff as well. Damages are uncertain. A small award may suggest to the public that the plaintiff's reputation is not worth very much. Victory in court may not be sufficiently publicized to overcome the effects of the original defamatory publication. On the other hand, there may be too much publicity and it may be the kind that further impairs the plaintiff's reputation.

A detailed account of the legal steps in a libel trial is to be found in Franklin, The Dynamics of American Law, "The Biography of a Legal Dispute—A Suit for Libel," (1968), pp. 1–189.

An attempt will be made in the following pages of cases and comment to elucidate those principles of the law of libel crucial to both the protection of the newsman and the welfare of the public.

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## B. LIBEL DEFINED

Libel or written defamation "is an invasion of the interest in reputation and good name." Prosser, Handbook of the Law of Torts, supra, 737. Reputation is what others think of you. "Defamation is * * * that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings against him." Ibid., p. 739. See also Bower, Actionable Defamation 4 (2d ed. 1923); Restatement of Torts § 559; Salmond, Law of Torts 398 (8th ed. 1943).

In *Kimmerle v. New York Evening Journal, 262 N.Y. 99, 186 N.E. 217 (1933),* libel was defined as follows: "Words which tend to expose one to public hatred, shame obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive

one of their confidence and friendly intercourse in society."

The New York Penal Law uses the following definition: "A malicious publication, by writing, printing picture, effigy, sign or otherwise than by mere speech, which exposes any living person, or the memory of any person deceased, to hatred, contempt, ridicule or obloquy, or which causes, or tends to cause any person to be shunned or avoided, or which has a tendency to injure any person, corporation or association of persons, in their business or occupation, is a libel."

Other definitions include words which impute the commission of a penal offense, the possession of a moral vice or physical defect, or notorious, bad or infamous character, vicious motives or antisocial conduct, or words which imply a low mentality or a loathsome physical disease. See Wittenberg, Dangerous Words, A Guide to the Law of Libel 6–7 (1947). A defamatory publication is a false and malicious one which tends to hold a person up to hatred, contempt or ridicule, or to cause him to be shunned or avoided. Libel, a tort or civil wrong, is basically, then, *an attack on personality.* Writing constituting libel may take the form of pictures, signs, statues, film, cartoons, symbols, phonographs, tapes, advertisements, or caricatures. It may also grow out of conduct such as hanging a plaintiff in effigy; or the bumbling and embarrassingly obvious shadowing of a person. *Schultz v. Franfort Marine Accident & P. G. Ins. Co., 151 Wis. 537, 139 N.W. 386 (1913).* Or it may appear in a telegram, in dictation to a stenographer, or in an interview with a reporter. Broadcast material, i. e., writing read aloud, is generally classified as libel. To be on the safe side broadcast defamation should be considered libel. The landmark case is *Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A.2d 302 (1939).* See also *Sorensen v. Wood, 123 Neb. 348, 243 N.W. 82 (1932).*

In another important case, *American Broadcasting-Paramount Theatres, Inc. v. Simpson, 106 Ga.App. 230, 126 S.E.2d 873 (1962),* the court coined a new word "defamacast" to represent broadcast defamation or a defamation falling somewhere between libel, written defamation, and slander, spoken defamation. The libel designation has been favored by most courts because of the great breadth of distribution that is possible, and because radio scripts are written before they are spoken.

The broadcasting industry, however, has successfully influenced lawmakers in some jurisdictions to define broadcast defamation as slander. Libel is a more serious offense partly because of our traditional veneration for the printed word, the likelihood of wider dissemination, and the greater permanence of print. Also, premeditation may be implied in the written word.

It is for the court in the first instance to determine whether words are capable of a defamatory meaning. And the court considers the effect of language, as interpreted by the ordinary reader, in judging the actionable quality of a libel. The question is not what the writer intended but what the consequences were for the plaintiff, and this is a question for the jury. Ambiguity, whether or not the libelous words are capable of more than one meaning, is also a problem for the jury, and in a few jurisdictions, for the court. *Harkaway v. Boston Herald Traveler Corp., 418 F.2d 56 (1st Cir. 1969).*

Libel may lurk in irony, sarcasm, invective and sometimes, unfortunately, in well intentioned humor: "The principle is clear," said a New York court, "that a person shall not be allowed to murder another's reputation in jest * * *" *Triggs v. Sun Printing & Pub. Ass'n, 179 N.Y. 144, 71 N.E. 739*

*(1904). See* also *Middlebrooks v. Curtis Pub. Co. 413 F.2d 141 (4th Cir. 1969).*

In a column in the Westbrook (Me.) *American* (June 26, 1957) a writer observed, with tongue in cheek, that George Powers, a paper mill employee, was a "classic example of typical Yankee thrift" for he was building his own casket and would soon be digging a hole for it. Powers objected to being ridiculed and testified in a libel action against the newspaper that he was neither building his own casket nor digging his own grave. What he had said to someone in a passing conversation was that prices were getting so high that a man would soon have to build his own casket. The misused metaphor cost the newspaper a nominal $50. Powers had asked for $5,000. *Powers v. Durgin-Snow Pub. Co., 144 A.2d 294 (Me.1958).*

Courts—probably because most judges are men—have shown a cavalier sensitivity to publications calling into question the chastity of a woman or making otherwise ungentlemanly—or unladylike—aspersions. See *Menefee v. Codman, 155 Cal.App.2d 396, 317 P.2d 1032 (1957).*

Some states—Florida, Georgia, South Carolina and Wisconsin—prohibit the publication of the names of rape victims, and the constitutionality of these laws has been upheld. *State v. Evjue, 254 Wis. 581, 37 N.W.2d 50 (1949).*

### NOTES ON SOME ASPECTS OF LIBEL

1. Typical libelous per se expressions (i. e., words libelous on their face without need of proof of special damages) are: atheist, Nazi, nudist, shyster, plagiarist; to call a place of business filthy, insolvent, or a place where people are robbed; to say that a politician bought votes, is corrupt, dishonest or immoral; to suggest that a clergyman has trouble with women, drinks to excess; to refer to a doctor as a quack or a drug addict; to call a lawyer an ambulance chaser; to say that a teacher is incompetent; that a hotel is a brothel; to print falsely that a person committed suicide. Suicide in some jurisdictions is considered a homicide, and in the public mind it suggests moral fault.

Imputations of draft avoidance, poverty, marital discord, illegitimacy, insanity, unpopular political, social or religious practice and prejudice have also been held libelous per se. There are precedents, however, to suggest that calling a person a "bigot" or any other appropriate name descriptive of political, racial, economic, or social philosophies generally affords no cause for a libel action. *Raible v. Newsweek, Inc., 341 F. Supp. 804 (D.C.Pa.1972).*

In summary, libel per se is spread by publications (a) charging the commission of a crime, (b) imputing some offensive or loathsome disease which would tend to deprive a person of society, (c) labeling a woman unchaste, or (d) tending to injure a person in his trade, business, office or occupation. *Munafo v. Helfand, 140 F.Supp. 234 (S.D.N.Y.1956).*

2. Courts have held that a plaintiff may suffer real damage if he is lowered in the esteem of any substantial and respectable group, even though it may represent only a small minority of a larger population. The line is drawn when the audience is so small as to be negligible or the standards of the audience are so clearly anti-social as to be unworthy of consideration. Prosser, Handbook of the Law of Torts, supra, 743–744.

In the common law, intentional communication to a single person about a third person may be sufficient grounds for a libel suit. Accidental or unforeseeable libelous communication to a third person is generally not actionable.

3. Libelous words are to be considered in their ordinary, commonly accepted meanings. They are to be read in

context. *Robert v. Troy Record Co., 294 N.Y.S.2d 723 (1968).* The test for a jury is the effect of the words on the minds of average persons among whom they are intended to circulate. *MacRae v. Afro-American Co., 172 F.Supp. 184 (E.D.Pa.1959), affirmed, 274 F.2d 287 (1960).* See also *Mrozek v. Schwimmer, 249 N.Y.S.2d 287 (1964).* In some states (e. g., Alabama and Colorado) the jury has the right to judge *both* the law and the fact in civil and criminal libel cases. Some have interpreted this to be consistent with the English Fox Libel Act of 1792 and the landmark New York case. *People v. Croswell, 3 Johns Cas. 337 (1804).*

A letter to the editor of a weekly newspaper referred to a campaign manager of candidates for municipal office as being influenced "by a foreign philosophy alien to the American way," and as using "un-American tactics." A New Jersey court ruled that where a substantial number of respectable people in the community concluded from the letter that the campaign manager was a Communist or a Communist sympathizer the publication was defamatory as a matter of law, i. e., per se, even though other segments of public opinion might disagree and reach contrary conclusions. *Mosler v. Whelan, 48 N.J.Super. 491, 138 A.2d 559 (1958).* See also *Trexler v. El Paso Times, Inc., 439 S.W.2d 883 (Tex.Civ. App.1969), rev'd 447 S.W.2d 403* and *Moriarty v. Lippe, 162 Conn. 371, 294 A. 2d 326 (1972)* for suits resulting from letters to editors.

Libel may hinge upon colloquialisms and connotations. But when a plaintiff attaches an unfamiliar or a special meaning to a word or expression the burden rests on him to prove its defamatory quality. On the other hand, it is always open to the defendant to show that the words were not understood in a defamatory sense, that they were taken entirely in jest, or that some meaning other than the obvious one was applied by the reader or listener. Prosser, Handbook of the Law of Torts, supra, 746–747.

4. Some jurisdictions have adopted an "innocent construction rule." Under this rule, if language is capable of an innocent construction, it should be declared non-libelous. *Crosby v. Time, Inc.,* 254 *F.2d 927 (7th Cir. 1958); Porcella v. Time, Inc., 300 F.2d 162 (7th Cir. 1962).* For example, 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 government had to be paid for. The trustee, on the other hand, read the editorial as suggesting that he, the trustee, regarded the alternative to adequate salaries to be the illegal practice of taking money on the side. In a subsequent libel suit against a Niles, Illinois 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. *Kaplan v. Greater Niles Tp. Pub. Corp., 278 N.E.2d 437 (Ill.App.1971).*

In a case reviewed by the United States Supreme Court in 1909 it was held that the picture of the defendant over a false name and a testimonial to Duffy's Pure Malt Whisky was actionable. *Peck v. Tribune Co., 214 U.S. 185 (1909).* A wrong picture, used in connection with a seduction story involving a person with a similar name, was also actionable, *Farrington v. Star Co., 244 N.Y. 585, 155 N.E. 906 (1927).* The Boston *Herald-Traveler* printed the 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." Even though no reference was

made to the witness in an accompanying article, the court said the innuendo entitled him to a jury trial in his libel suit. *Mabardi v. Boston Herald-Traveler Corp., 198 N.E.2d 304 (Mass.1964).*

Headlines alone may convey a defamatory meaning which a story will not remedy: "Doctor Kills Child" (in automobile accident). Or a headline may make libelous per se an otherwise innocuous article: "Smith Got Rich Fast" (while a tax collector). Or an article may become libelous by juxtaposition with other articles or photographs. *Empire Printing Co. v. Roden, 247 F.2d 8 (Alaska 1957).*

A person may be libeled in a story in which he is not named if he had been identified in a previous story of a series. All parts of a series should be read together where libel is a possibility. Persons defamed need not be named at all if other identifying characteristics are included: "Vietnam Hero's Wife Says He Beat Her and Year-Old Triplets."

5. Libel may lie in a statement that a person associates with others of notoriously disreputable character, or that he possesses the characteristics of literary or historical figures of ill repute.

6. Facts unknown to a reporter or editor at the time of publication can make an otherwise innocent story libelous. A Kansas newspaper carried a routine birth announcement originating from a hospital. What the newspaper didn't know was that the father identified in the story was a bachelor and the mother an unmarried woman who had given birth to this child and three others out of wedlock. *Karrigan v. Valentine, 184 Kan. 783, 339 P.2d 52 (1959).* Extrinsic circumstances of this kind may mitigate or lessen damages but they will not relieve the publication of responsibility. The exuberant mother in this case apparently fancied herself as the plaintiff's wife.

7. To avoid libel actions resulting from similarities in names, it is important to identify people as completely as possible—full name (nickname), age, address, and occupation. Where fictitious names are used—and in journalism this is seldom—the litigation-shy journalist should particularly avoid the names of clergymen, lawyers or other "pillars" of the community.

Bitter social commentary though it is, in at least one state it is still considered libelous to call a white person a Negro. *Bowen v. Independent Pub. Co., 230 S. C. 509, 96 S.E.2d 564 (1957).* It may also be libelous to refer to a Northern Negro as an "Uncle Tom," although that conclusion was overruled by the Ohio Supreme Court, which stated that the allusion was not libelous per se but libelous per quod, or due to special circumstances, and therefore required proof of special damages. *Moore v. P. W. Pub. Co., 3 Ohio St.2d 183, 209 N.E.2d 412 (1965).*

8. A man may be injured in his occupation by false and defamatory publication. His means of making a livelihood may be impaired, or he may be discredited in his business or profession. The libel laws protect individuals from charges of unethical conduct, unfitness or inefficiency, bankruptcy or insolvency, fraud or dishonesty. For example, it has been held libelous *per se* to refer to a policeman as "beer sipping," *Thompson v. Upton, 218 Md. 433, 146 A.2d 880 (1958),* or as having been involved in the brutal beating of a suspect. *Afro-American Pub. Co. v. Rudbeck, 248 F.2d 655 (D.C.Cir. 1957).* The defamation generally must be related to the occupation of the plaintiff because what might defame one occupation might not defame another.

On the premise that we all make at least one mistake in our lives, it is generally not libelous to charge a physician, or any other professional or business person, with a single, specific mistake, whether

due to ignorance or carelessness. *Blende v. Hearst Publications, 200 Wash. 426, 93 P.2d 733 (1939); Mason v. Sullivan, 26 A.D. 115, 271 N.Y.S.2d 314 (1966).* The danger is that of implying general ignorance or lack of skill, applicable to past, present, and future. *Cowan v. Time, Inc., 245 N.Y.S.2d 723 (1963); November v. Time, Inc., 13 N.Y.2d 175, 194 N.E.2d 126 (1963).*

9. Corporations and partnerships may sue for damages. For some purposes the law extends, by means of a legal fiction, the rights of individual persons to corporations. So a corporation may collect general damages for libel when its reputation for honesty is impugned, its credit rating is questioned, or it is charged with fraud or mismanagement. Special damages need not be proven. Again, as in the case of the medical doctor, there may be no libel in writing that a corporation has made a single mistake. Imputations of unfair competition or infiltration by criminals are defamatory because they are likely to affect the credit and management of the business.

Some courts have held that, since a firm's general reputation does not depend upon the reputation of its officers, a libel against the officers is not a libel against the corporation as such, and the corporation in such circumstances has no right to bring an action for libel. *Adirondack Record, Inc. v. Lawrence, 202 App.Div. 251, 195 N.Y.S. 627 (1922).*

Courts have also ruled that no libel is committed in writing that wrongdoing took place on the premises of an establishment open to the general public, e. g., amusement parks, hotels, restaurants, bars, hospitals, and bus depots. Managers, proprietors, superintendents, in such cases, cannot be expected to exert complete control over their clients and customers. *Richwine v. Pittsburgh Courier Pub. Co., 142 A.2d 416 (Pa.1958).*

A libel action may be brought by a union in defense of its reputation which is the common property of the members. *Daniels v. Sanitarium Ass'n, Inc., 30 Cal.Rptr. 828, 381 P.2d 652 (1963); Kelly v. New York Herald Tribune, Inc., 175 N.Y.S.2d 598 (1958).* Individual union members, usually officers, may sue for libel that adversely affects the common business reputation of the union. *Kirkman v. Westchester Newspapers, Inc., 287 N.Y. 373, 39 N.E.2d 919 (1942).* Unions also can be charged with a specific error; and unions are particularly sensitive to unsubstantiated implications of crime and racketeering.

Until 1966, civil suits for libel were barred in areas covered by the National Labor Relations Act, in the interests of a single, uniform federal rule allowing a wide latitude of speech and counter-speech to competing parties. When vying for membership, unions are prone to denounce one another, and, as the United States Supreme Court has noted, "both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language."

See *Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53 (1966)* in which the Supreme Court ruled in a 5–4 decision that where a party to a labor dispute circulates false and defamatory statements during a union organizing campaign the court has jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him. But the *New York Times* case definition of malice is to be applied: knowledge of falsity or reckless disregard of whether a publication is false or not. See *New York Times Co. v. Sullivan, 376 U.S. 255 (1964).* The Court's rationale was that state remedies are designed to compensate the victim and enable him to vindicate his reputation; so the state must have power to act where

the regulated conduct touches interests deeply rooted in local feeling and responsibility.

Linn, an official of Pinkerton's National Detective Agency, Inc., had filed a civil suit against an employee, a union, and two of its officers, alleging that statements in leaflets circulated in connection with a campaign to organize the company, applied to him, were "false, defamatory and untrue," and therefore libelous per se.

Non-profit organizations such as foundations and special interest societies can also bring suits for libel. *New York Soc. for the Suppression of Vice v. MacFadden Publications, Inc., 260 N.Y. 167, 183 N.E. 284 (1932). Munhall Homestead Housing v. Messinger Pub. Co., 25 D. & C.2d 1, 109 P.L.J. 225 (Pa.Com. Pl.1961).*

Units of government, political parties and broadly based political interest groups, however, can be criticized with impunity. Municipal corporations, and other governmental bodies, cannot sue for libel because the right of the citizen to criticize is overriding, no matter how grossly he may be in error. A municipal corporation does not possess a reputation which may be the subject of libel. Generally, utterances or publications against the government may be considered absolutely privileged. *Johnson City v. Cowles Communications, Inc., 477 S.W. 2d 750 (Tenn.1972).*

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., 307 Ill. 595, 139 N.E. 86 (1923).* See also State v. Time, Inc., 249 So.2d 328 (La.App.1971).

10. It is not libelous to accuse a man of something he has a legal right to do. A news report that John Chaloner shot John Gillard "while the latter was abusing his wife * * *" was held to be non-defamatory. *Washington Post Co. v. Chaloner, 250 U.S. 290 (1919).* Minor crimes (misdemeanors) ordinarily do not constitute libel per se because no moral turpitude is implied, unless, of course, special damages can be proven. However, the surrounding circumstances may sometimes make the reference unusually damaging.

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## C. SLANDER

1. Slander has come to mean oral or spoken defamation, that is defamation over a cup of coffee or a loudspeaker, or the vocal indictment of a suspected shoplifter in a crowded store, speech absorbed through the organs of hearing. Slander requires proof by the plaintiff of special damages except where there have been imputations of (i) crime punishable by either imprisonment or death and involving moral turpitude (inherent baseness or vileness of principle in the human heart), a legal definition with an early Victorian ring to it; (ii) loathsome disease (syphilis and leprosy appear to be particularly loathsome in law; an allegation of mental illness was recently held not to fit

the loathsome category. *Fort v. Holt, 508 P.2d 792 (Colo.App.1973)*; (iii) incompetency or lack of integrity in business, trade, profession, office or calling; or (iv) unchastity to a woman—and possibly imputations of homosexuality to either sex, although in common law, suggestions of male sexual immorality were considered more flattering than slanderous. These examples constitute what is sometimes called *slander per se*. In all other cases actual damages in the form of pecuniary loss must be shown. Once shown, general damages also may then be recovered for injury to the plaintiff's reputation, his mental anguish, or his humiliation. Libel per se, the more serious offense, requires no showing of special damages. In a few jurisdictions—Louisiana, Minnesota, Washington, Manitoba, Alberta, England and Scotland—all defamation, oral or written, is actionable without proof of special damages.

2. Prosser would favor combining libel and slander into a single tort in which the primary consideration would be the degree of defamation. Serious defamation, based in part on the extent of publication, would be actionable without proof of special damages, for example, mass media defamation. Defamation by private letter or conversation, of lesser potential for harm, would still require proof of special damages. Prosser, Handbook of the Law of Torts, supra, 764–766.

In *Hartmann v. Winchell, 296 N.Y. 296, 73 N.E.2d 30 (1947)*, the New York Court of Appeals ruled that defamatory remarks broadcast by radio and actually read from a script were libelous. See also *Christy v. Stauffer Publications, Inc., 437 S.W.2d 814 (Tex.1969)* But the court did not decide "whether broadcasting defamatory matter which has not been reduced to writing should be held to be libelous because of the potentially harmful and widespread effects of such defamation." The ad lib, still at issue, has frequently been defined as slander, but many states give statutory protection for defamatory statements made by nonemployees where the broadcaster has taken reasonable care.

In a telecast of "The Stork Club Show" over the ABC network Sherman Billingsley, the New York restaurateur, implied in a conversation with a guest on the program that his competitor, Toots Shor, owed a lot of people a great deal of money. Shor brought a $1 million libel suit. A New York court resolved the ad lib problem by deciding the case on the bases of widespread dissemination and permanence found in broadcast, telecast and motion picture communication. *Shor v. Billingsley, 158 N.Y.S.2d 476 (1957)*. In *Ostrowe v. Lee, 256 N.Y. 36 (1931)*, Judge Cardozo said, "What gives the sting to the writing is its permanence of form." The spoken word dissolves, but the written one abides and "perpetuates the scandal." Does broadcasting, with its vast and sharply attentive audiences, make Cardozo's statement passé?

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## D. DAMAGES

(1) Compensatory: Compensatory or general damages are intended to compensate for injury to reputation. In the most common form of libel—libel per se—damage is presumed, and it is for the jury to fix the amount. The court has the power to review the jury's award of damages and, if it is excessive and out of all proportion to the injury inflicted, it will be lowered. Compensatory damages are based on injured feelings, humiliation, shame or insult; mental and physical anguish; and injury to business or occupation. The plaintiff need not prove damages. In libel per se malice is presumed, and this is called malice in law.

But additional evidence of malice, demonstrated by the plaintiff, may in part determine the amount of damages. In addition, the jury may consider the nature of the publication, the character, condition and status of the parties, the peculiar circumstances of the case, the breadth of the publicity, and the intensity of pain as a consequence.

(2) Special: Special or actual damages represent the real, tangible pecuniary loss suffered by the plaintiff as a result of a false statement, whether or not it is libelous. The plaintiff must prove such damages in a precise, concrete way. Malice is not an issue. There can be no mitigation of special damages—they either have occurred or they have not. Special damages cannot include projected future losses. As a corollary there are no partial defenses against special damages. As we shall see, libel per quod, i. e., by innuendo, insinuation or implication, supports only the recovery of special damages.

The Oakland *Tribune* carried an article reporting that the San Francisco *People's World,* which it characterized as a mouthpiece of the Communist Party, had recommended Grover H. MacLeod, an Oakland dentist, as a candidate for public office. MacLeod asked for a correction but none was made. He then brought a libel action on grounds that the publication had caused him to suffer severe and continuing nervous shock and strain and great mental anguish. He also complained that he "suffered pecuniary loss in his profession as a dentist" in that an "unusually large percentage of old and established patients have been cancelling appointments," and there "has been a sharp decline in the number of new patients normally to be expected."

MacLeod asked for $200,000 in general damages, $200,000 in exemplary or punitive damages, and $5,000 in special damages, the latter a close estimate of his business losses. The California Supreme Court said the article was libelous on its face and agreed with the dentist that special damages had been described in sufficient detail for him to proceed with the case. Two dissenting judges disagreed that the pecuniary loss had been stated with sufficient particularity. *MacLeod v. Tribune Pub. Co., 343 P.2d 36 (Cal. 1959).*

(3) Punitive: Punitive or exemplary damages—sometimes called "smart" money—are meant to punish past libelous conduct and to discourage similar conduct in the future. They are a direct punishment for actual malice or malice in fact. Actual malice must be proved and the burden of proof is on the plaintiff. A high degree of fault is necessary to sustain an award for punitive damages. Some states, Massachusetts, for example, have abolished punitive damages on grounds that the penalty inhibits the free flow of information; others have modified the penalty through statutes, allowing such damages only on proof of refusal to print a retraction. Some authorities view retraction laws as discriminatory, favoring wealthy publishers. It is entirely at the discretion of the jury to decide whether punitive damages shall be added to compensatory damages, and the courts are empowered to reduce outrageously high awards of such damages. A jury generally cannot award punitive damages unless it awards a plaintiff at least nominal general damages. (Contra *Tunnell v. Edwardsville Intelligencer, Inc., 99 Ill.App.2d 1, 241 N.E.2d 28 (1968).* Generally punitive damages must have a reasonable relationship to the amount of compensatory damages. But punitive damages do not depend upon the award of special damages. *Kent v. City of Buffalo, 304 N.Y.S.2d 949 (N.Y.Sup. 1969), rev'd* 327 N.Y.S.2d 653. And punitive damages may sometimes be awarded in the absence of compensatory damages. *Kent v. City of Buffalo, 319*

*N.Y.S.2d 305 (App.Div.1971), rev'd,* 327 N.Y.S.2d 653.

On instructions from the Dallas Naval Air Station, Bruce Mohs, a Madison, Wisconsin flyer, landed his sea plane at a suburban Dallas marina. A UPI reporter, depending for his facts on a string correspondent, fabricated a story about how Mohs had recklessly landed on a lake in the middle of a residential area on the pretense of being out of gas, had been arrested for violation of a city ordinance, and had been handcuffed and taken away. The story of the "pilot who would use any port in a pinch" was widely circulated and, of course, got to Madison where Mohs lived and operated an aircraft business.

Mohs was awarded $2,500 general damages for injury to his character and reputation, for embarrassment, shame and mental anguish. In addition he was awarded $5,000 exemplary damages. On appeal, UPI complained only of exemplary damages, arguing lack of malice. The Texas Civil Appeals court disagreed, taking exception to the fictional quality of the story (reckless disregard of the truth) sent out with no attempt at verification and purely for the amusement of readers. The award of exemplary damages was upheld for the purpose, said the court, of setting a wholesome example to others. *United Press International, Inc. v. Mohs, 381 S.W.2d 104 (Tex.Civ. App.1964).*

(4) Nominal: Nominal damages are in effect token damages awarded in libel actions where there has been a breach of duty, a violation of a right, but no real, substantial or serious harm to a plaintiff's reputation or financial position. An award of six cents was considered adequate in a recent case involving corporation executives. *Eulo v. Deval Aerodynamics, Inc., 47 F.R.D. 35 (D.C.Pa. 1969), aff'd in part, rev'd in part 430 F.2d 325 (3d Cir. 1970).*

## E. LIBEL PER SE

It has been noted that one type of civil or ordinary libel is libel per se. By libel per se we mean words that a court judges are defamatory on their face, in and of themselves, and actionable without proof of special damages, malice or falsity. Damages are assumed from publication, and the plaintiff is compensated for injury to his reputation and the attendant mental suffering.

## F. LIBEL PER QUOD

A second type of civil libel is libel per quod, and it is sometimes so difficult to distinguish the terms per quod and per se that some authorities suggest doing away with the distinction altogether. Prosser, Handbook of the Law of Torts, supra, p. 764, fn. 45.

Libel per quod is a publication *not* libelous on its face but libelous because of associated facts or extrinsic circumstances, designated in law as *inducement.* For example, a newspaper might erroneously report that "Mrs. A gave birth to a baby last night." Mrs. A has been married only a month. It is charged in the press that all the college students at the meeting were Communists, and you were the only college student there. College students as a group would have no cause of action, but special circumstances could make the charge defamatory to you. Armour & Co. ran an ad for its bacon and listed among its retailers one Braun who sold only kosher food. Braun sued. *Braun v. Armour & Co., 254 N.Y. 514, 173 N.E. 845 (1930).* All members of a city council have been involved in documentable graft except A, B and C—and formal complaints were to be filed in the

morning. The morning paper meant to exclude C, but a copyreader erred. Libel by omission. A newspaper story stated that the police had been unable to learn where Tracy had taken the luggage of a person who had forfeited bail and Tracy was the last person to hear from the culprit before he vanished. A New York court said that an average reader would conclude that Tracy had assisted the bail jumper. *Tracy v. Newsday, Inc., 5 A.D.2d 865, 171 N.Y.S.2d 717 (1958).*

Note that in the above cases the defamation is indirect or due to the particular context in which the words are written. It is not obviously defamatory to have a baby, to sell bacon, or to help someone with his luggage. Nor is there anything shameful about being a college student or a city councilman. But particular circumstances can make almost any statement a basis for actionable libel. There is a catch, however.

In every jurisdiction the plaintiff has the burden of proving the defamatory sense of the publication, or what the courts call *innuendo*. And again it is a question for the court whether the meaning claimed could reasonably be presumed. It is for the jury to decide whether the words were understood as such. There is yet another bar to this kind of action.

In almost every jurisdiction special damages must be pleaded and proven in libel per quod. (Among the exceptions are Delaware, Minnesota, Mississippi, New Jersey, Wisconsin and Texas, and no special damages need be shown in cases of libel per quod in England.) Certainly this requirement will discourage frivolous suits; but special damages are sometimes difficult, or impossible, to prove even where the cause is a good one.

To illustrate: back to Mrs. A. who gave birth to the baby. The language of the news report will have a defamatory meaning only to those who know that Mrs. A. has been married for only a month, and at least some of these readers will realize that the paper has made an innocent mistake, and that Mrs. A. is not in fact pregnant. In such a case, damage to reputation may be trivial, and the apparent innocence of the report does not alert the newspaper to the possibility of libel. It seems reasonable in such cases to require proof of special damages for a libel action to proceed.

But suppose the newspaper reports that "Mrs. A., who was married last month, gave birth to a baby last night." Now the defamation is direct and obvious, a charge of immoral conduct having been made. The newspaper is aware of the defamatory implication. It would be patently unfair in such a case to allow an innocent construction of the sentence, e. g., that Mrs. A. could have been widowed or divorced a few months before her recent marriage and the child would be the offspring of her former husband.

The law of libel per quod is designed to protect the innocent defamer whose words are libelous only because of facts unknown to him at the time of publication. He who would deliberately cast a grossly defamatory imputation in ambiguous language may escape the full force of the law, but such is not intended.

Libel per quod, then, is libel by implication or innuendo. The defamatory sense of the publication must be established by the plaintiff. In most jurisdictions, special damages must be proven as well.

Under the headline, " 'Towhead Pete's' Gang of 5 Boys, 4 Girls Seized," a Missouri newspaper reported that "Joseph H. Langworthy, an attorney of 512 Ivy Avenue, Times Beach, reported someone had pushed open a window at his home and had taken three pieces of Swiss cheese, a piece of cake, some jello and $20. He wanted something done about it and told police so in emphatic terms.

"The children, ranging in age from 13 to 2 admitted getting into the house, but insisted they had found only 28 cents, not $20. They were lectured by police and released to juvenile authorities for another lecture, all except the 2-year-old, who was in diapers, and police said they "couldn't pin anything on him, anyway."

Langworthy complained that the newspaper report was so exaggerated as to be false, malicious and defamatory to him, painting him in a ridiculous light as a selfish, egocentric person. So great was his "humiliation, mortification, shame, embarrassment, and mental suffering" that he asked for $10,000 in general damages and $10,000 in punitive damages.

But Langworthy had not pleaded special damages, and in Missouri this is necessary to support a claim of libel per quod. The words of the feature story did not constitute libel per se for it is not shameful to be robbed, although, in this situation, the attorney did look slightly ridiculous. Damages for an invasion of privacy were also rejected by the Supreme Court of Missouri because, it said, the right of privacy is not absolute and protects only the ordinary sensibilities of an individual and not supersensitiveness. *Langworthy v. Pulitzer Pub. Co., 368 S. W.2d 385 (Mo.1963).* See also *Ragland v. Household Finance Corp., 119 N.W.2d 788 (Iowa 1963); Martin v. Wagner, 220 N.Y.S.2d 324 (1961).*

Prosser, Handbook of the Law of Torts, supra, 763 observes that 35 state courts treat libel per quod like slander and require proof of special damages. And, as is the case with slander, if the imputation falls into one of the four categories (crime involving moral turpitude, loathsome disease, incompetency, female unchastity), it is actionable without proof of special damages. It is at this point that the distinction among libel per se, libel per quod, and slander becomes blurred. And Prosser is concerned about a situation in which it is actionable to write that the plaintiff is a damned liar on a postcard, which is read by a single third person, but it may not be actionable to say the same thing in a speech to an audience of a thousand people. Prosser is assuming, of course, that lying is not in itself a crime involving moral turpitude. And if a libel per quod falls into one of the four categories of slander, how is it distinguishable from libel per se, which depends on the same basic categories for its definition? There is much confusion in legal circles on this point. Nor is it clear whether the plaintiff in a per quod libel action is limited to the recovery of special damages or, having established a basis for the tort, is also entitled to general damages for loss of reputation. It may be noteworthy that The Restatement of Torts § 569 requires no showing of special damages in libel per quod, and this is true also in a minority of American jurisdictions, as has been noted. In these courts the plaintiff has only the burden of proving defamation through innuendo or extrinsic circumstances.

## G. THE NECESSARY ELEMENTS OF ACTIONABLE LIBEL

Actionable libel requires (1) defamation, (2) identification, and (3) publication.

(1) DEFAMATION, which we have defined generally as injury to reputation, must apply to an identifiable person, and it must be published. If any one of these elements is missing, there is no libel.

(2) IDENTIFICATION: No libel action is possible unless the plaintiff can prove that the defamatory meaning applies to him. Someone must understand that the reference is to the plaintiff whether by nickname, pseudonym or cir-

cumstance (caution dictates that fictitious names be as far-fetched as possible). One authority expands upon this notion: "It is sufficient if he is described by his initial letters, or by the first and last letters 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.

Someone other than plaintiff or defendant must reasonably infer from the publication that the defamatory reference is to the plaintiff. And that someone may be a single person. *Gnapinsky v. Goldyn, 23 N.J. 243, 128 A.2d 697 (1957); Robinson v. Guy Gannett Pub. Co., 297 F.Supp. 722 (D.C.Me.1969).* For a general discussion see Yankwich, *Certainty in the Law of Defamation,* 1 U.C.L.A.L.Rev. 163 (1954); *Peterson v. Rasmussen, 47 Cal.App. 694, 191 P. 30* (1920).

A New York newspaper described how a 28-year-old theatrical agent, dying of poison, had, between convulsions, incriminated a young woman—"She is responsible for this. She gave me the dose." The newspaper did not identify the woman directly except to report that the dying man had identified her by her place of employment, her home address, and as his former companion. The clincher might have been that, as a result of the news story, the woman lost her job and, on that basis, sued for special damages. *Nunnally v. Tribune Ass'n, 111 App.Div. 485, 97 N.Y.S. 908 (1906).*

In 1906 the borough of Manhattan had four coroners and each coroner had a deputy who was a qualified physician. One of the coroners was convicted of attempted bribery in the performance of his duties (he would threaten bereaved parents or commercial establishments such as hotels with unnecessary autopsies). A newspaper, in a broad exposé of the entire department, described how the shakedown worked and concluded that corruption pervaded the entire system. The convicted coroner's deputy-physician brought a successful libel action, although he had not been named in the news story. *Weston v. Commercial Advertiser Ass'n, 184 N.Y. 479, 77 N.E. 660 (1906).*

But an article which referred to a "parking lot racket" in Washington, D. C. was held to be too general to permit the operator of one of the lots to sue. *Service Parking Corp. v. Washington Times Co., 92 F.2d 502 (D.C.Cir. 1937).* And when *Time* magazine charged that Western officials of a union were conspiring with Seattle gamblers to control Portland's law enforcement agencies, the Oregon representative of the union was not sufficiently identified with the libel, said a federal court, to warrant his bringing an action. *Crosby v. Time, Inc., 254 F.2d 927 (7th Cir. 1958).*

When Joe Julian, a radio-television actor, brought a libel action against a blacklisting anti-Communist organization, he faced the same problem. The publication, "Red Channels," correctly reported that the actor had participated in Communist-front meetings in 1942 and 1949, and in its introduction used words like Communist dupe, tool, sucker, part of transmission belt, fellow traveller and red channel to describe those of whom it disapproved. There were 151 such persons mentioned in the book, but there was no indication as to which category applied to Julian. The actor was faced with the burden of proving that the alleged libelous material was published of and concerning him. *Julian v. American Business Consultants, Inc., 2 N.Y.2d 1, 155 N.Y.S.2d 1, 137 N.E.2d 1 (1956).* A vigorous dissent was registered in this case, and a subsequent case—*Faulk v. Aware, Inc., 155 N.Y.S.2d 726 (1956)*—has made blacklisting a rather

dangerous business. The latter case and the events leading up to it are described in detail in John Henry Faulk's Fear on Trial (1963). Louis Nizer was able to win for his client a final judgment of $550,000 in damages.

(3) PUBLICATION: For there to be publication, the accusation must be brought to the attention of a third person and interpreted by him in a defamatory sense. A third person can be anyone, including a member of the plaintiff's family, although publication to one's spouse or attorney is generally insufficient. Publication may be effected orally, by gesture, or picture. Printing, posting or circulating is the first step in publication; someone reading or hearing the message is the second step. The third person, of course, must know to whom the defamatory publication refers, for this is identification, one of the necessary prerequisites to actionable libel.

At least 20 jurisdictions 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 cause of action.

In other words, one publication is only one libel, one wrong, one tort, regardless of how many people read it. The number of readers neither increases the libel nor allows for multiple causes of action, although a plaintiff is permitted to plead and prove the extent of circulation of the libel as evidence bearing on damages. *Rives v. Atlanta Newspapers, Inc., 220 Ga. 485, 139 S.E.2d 395 (1964).* In a 1964 case, the Supreme Court of Georgia said that "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." Ibid., p. 398. See also *Waskow v. Associated Press, 462 F.2d 1173 (D.C.Cir. 1972).* A few states follow the common law rule which considers every reappearance of an article —for example, the sale or exhibit of a back number—as a new libel or a republication of the libel. But most states, Illinois for example, follow the rule that in cases of multistate circulation of newspapers or magazines, a cause of action for libel is absolutely complete at the time of first publication, and subsequent circulation provides no cause of action beyond its relevance for computing damages. *Insull v. New York World Telegram Corp., 273 F.2d 166 (7th Cir. 1959).* The single publication rule safeguards the libelor from continuous harassment by a multiplicity of actions. *Sorge v. Parade Publications, Inc., 20 A.D.2d 338, 247 N.Y.S.2d 317 (1964).*

A suit is generally brought in the place or venue where the defendant resides. Where the single publication rule is in effect, the suit may have to be brought in the place where the libel was published or where the publication first occurred. Several courts have refused to let the single publication rule cross state lines and have allowed a separate cause of action for each state in which the publication was distributed. A Pennsylvania rule recognizes one aggregate cause of action for all single publication states plus additional causes of action for persons libeled in multiple publication states. *Hartmann v. Time, Inc., 166 F.2d 127 (3d Cir. 1948), cert. den. 334 U.S. 838 (1948).* Other courts in deciding venue have considered the plaintiff's domicile, the place of largest circulation of the offending publication, the place where the greatest harm was done the plaintiff, or the defendant's principal place of business. For elaboration on this complex question see Hanson, Libel and Related Torts, Vol. I, Case and Comment, Chapt. 18.

The second step in publication is taken when the libel reaches effectively the mass of readers for which the periodical was intended, and not merely a small and

atypical segment of it. *Osmers v. Parade Publications, 234 F.Supp. 924 (S.D.N.Y.1964).* This means that in mass communication the third person is defined as a collectivity of readers.

In *Zuck v. Interstate Pub. 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 magazine went on sale. But the moment the newspaper or magazine begins to circulate to the great mass of subscribers for whom it is intended, publication is complete. *Osmers v. Parade*, supra, p. 927. More recently 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 Pub. Co., 293 N.Y.S.2d 861 (1968); Novel v. Garrison, 294 F.Supp. 825 (D.C.Ill.1969).* And there is no necessity to prove that any part of its content has actually been read. *Hornby v. Hunter, 385 S.W.2d 473 (Tex.Civ.App. 1964); Rives v. Atlanta Newspapers, Inc.*, supra, p. 398.

Closely related to the concept of publication are the *statutes of limitations,* which define the time span within which legal actions can be brought. Their purpose is to protect the alleged wrongdoer against stale claims which he may be totally unprepared to meet. The statutes of limitations for libel are one or two years in all jurisdictions except Arkansas, Delaware, New Mexico and Vermont, where it is three years, and Hawaii where it is six. They provide an absolute defense against libel actions.

*Parade* magazine tried to deny liability in a case 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 punishment simply by selling a few advance copies and keeping the date secret until a libel action is brought. This would be particularly easy where the statute is a single year. So the statute, said the court, starts running when the publication goes into general circulation. *Osmers v. Parade,* supra, p. 927.

Of course every purposive repetition of a defamation (picking up a libel from another publication) is a new publication, even though the source is identified and the writer, by an attribution such as "it is alleged," implies that he does not necessarily believe the charge. *Maloof v. Post Pub. Co.*, 306 *Mass. 279, 28 N.E.2d 458 (1940).* In such a case one would not only have to prove that his reprint was accurate but that the original libel was true or privileged. *Larkin v. Gerhardt, 21 Ill.App.2d 122, 157 N.E.2d 426 (1959).* However, there would not be liability if the allegedly libelous article is reprinted elsewhere without consent. *Di Giorgio Corp. v. Valley Labor Citizen, 67 Cal.Rptr. 82 (Cal.1968).*

A new edition of a book would constitute republication as would a rebroadcast or a second showing of a movie in a theater.

Dictation of a defamatory letter, by an officer of a corporation to the corporation's secretary, has been ruled a publication. *Arvey Corp. v. Peterson, 178 F. Supp. 132 (D.C.Pa.1959).*

The main point to be remembered is that actionable libel is composed of three elements: defamation, identification, and publication. Absent any one and no successful libel action can be brought.

## H. LIABILITY

Everyone who takes part in a publication is theoretically liable for damages, the owner, editor, reporter, printer, vendor, network, station, sponsor, engineer, and even the carrier boy. Usually the corporation—the party with the most money—is sued, particularly where there is no actual malice. A news source who generates a libel and authorizes its publication is also liable for damages. *Roberts v. Breckon, 31 App.Div. 431 (N.Y. 1898)*; *Storch v. Gordon, 23 Misc.2d 477, 197 N.Y.S.2d 309 (1960), reargument 23 Misc.2d 477, 202 N.Y.S.2d 43; Campo v. Paar, 239 N.Y.S.2d 494 (1963).* As a general rule it must be shown that the participation of a person being sued for libel is related to the defamatory publication, not simply to the general communication of which the defamation was a part. *Seroff v. Simon & Schuster, Inc., 162 N.Y.S.2d 770 (1957).* The defendant must have played a conscious role in the presentation of the offending material. He must be something more than an innocent coworker.

It is no defense to say that the libel came from a regular and usually reliable news agency. A Georgia court said in *Wood v. Constitution Publishing Co., 57 Ga.App. 123, 194 S.E. 760 (1937):* "While the Associated Press no doubt deserves all that is said for it as being a trustworthy, honest, and accurate news gatherer, a newspaper, in publishing Associated Press news reports, cannot justify itself as publishing a privileged communication * * *." The wrong is in the publication, in the spreading of the falsehood. An earlier Florida case, *Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933),* reached the contrary conclusion that reprinting an Associated Press dispatch containing libel is non-actionable in the absence of wantonness, recklessness or carelessness.

A Louisiana appeals court ruled recently that a radio station which invited the public to call in and speak freely and anonymously through its facilities on a public interest "open mike" program without monitoring equipment or a delay device to edit out defamatory comments was liable for everything said on the program. An unsuspecting sponsor was not liable, however. *Snowden v. Pearl River Broadcasting Corp., 251 So.2d 405 (La. App.1971).*

## I. GROUP LIBEL

The question arises as to how small a group must be before a libel against it will permit individual members to sue; or, conversely, how large must a group be before its members become sufficiently anonymous to defy personal identification? Generally speaking a group must be small enough to permit individual identification of its members. A plaintiff in such circumstances must show that he is a member of the defamed group, and he must indicate how the offending words apply to him. Journalistic caution is required for groups of less than 100.

The largest group allowed damages in a group libel suit were the 60 members of the University of Oklahoma football team. *True* magazine lost a large judgment when it implied that the 1956 national championship team had used stimulative drugs in its dressing room. *Fawcett Publication, Inc. v. Morris, 377 P.2d 42 (Okl.1962) cert. den. 376 U.S. 513 (1963).*

Jack Lait and Lee Mortimer, authors of U.S.A. Confidential, found themselves in court as a result of the following para-

graphs as reported in *Neiman-Marcus Co. v. Lait, 13 F.R.D. 311 (S.D.N.Y. 1952):*

* * *

"He [Stanley Marcus, president of plaintiff Neiman-Marcus Company] may not know that some Neiman models are call girls—the top babes in town. The guy who escorts one feels in the same league with the playboys who took out Ziegfeld's glorified. Price, a hundred bucks a night.

"The sales girls are good, too—pretty, and often much cheaper—twenty bucks on the average. They're more fun, too, not as snooty as the models. We got this confidential, from a Dallas wolf.

"Neiman-Marcus also contributes to the improvement of the local breed when it imports New York models to make a flash at style shows. These girls are the cream of the crop. Oil millionaires toss around thousand-dollar bills for a chance to take them out.

"Neiman's was a women's speciality shop until the old biddies who patronized it decided their husbands should get class, too. So Neiman's put in a men's store. Well, you should see what happened. You wonder how all the faggots got to the wild and wooly. You thought those with talent ended up in New York and Hollywood and the plodders got government jobs in Washington. Then you learn the nucleus of the Dallas fairy colony is composed of many Neiman dress and millinery designers, imported from New York and Paris, who sent for their boy friends when the men's store expanded. Now most of the sales staff are fairies, too.

* * *

"Houston is faced with a serious homosexual problem. It is not as evident as Dallas', because there are no expensive imported faggots in town like those in the Neiman-Marcus set."

* * *

Nine models, the total number then employed, and 15 of 25 salesmen were allowed to bring suit. But 30 sales girls, acting in behalf of 385, 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. *Neiman-Marcus Co. v. Lait, 13 F.R.D. 311 (S.D.N.Y.1952); International Text-Book Co. v. Leader Printing* Co., *189 F. 86 (N.D. Ohio 1910); Robinson v. Guy Gannett Pub. Co., 297 F.Supp. 722 (D.C.Me.1969).*

In *American Broadcasting-Paramount Theaters, Inc. v. Simpson, 106 Ga. 230, 126 S.E.2d 873 (1962),* two prison guards were both said to have a cause for action when a TV program portrayed a guard who was transporting Al Capone from Atlanta to Alcatraz as accepting a bribe.

The last point suggests that size alone may not be the only consideration. Circumstances surrounding a publication may focus an attack on a particular party. For example, when a correspondence school was the object of an attack, and it was the only enterprise of that kind in the town in which the newspaper was circulated, the impact of the publication became apparent. And when a bigot damned the Jewish religion in a public lecture, a Canadian court allowed 75 families of the Jewish faith to bring an action because they were the only Jews in a Quebec city's population of 80,000.

*Ortenberg v. Plamodon, 35 Can.L.T. 262 (1914).* Certainly pictorial identification would assist plaintiffs suing as members of a large class. Lewis, *The Individual Member's Right to Recover for a Defamation Leveled at the Group,* 17 U. Miami L.Rev. 519 (1963).

A number of courts have taken the quite realistic view that defamation of a group clearly and simply reaches every member of that group, so that all are entitled to maintain an action. When Singer Eddie Cantor maligned in a magazine article all 12 New York City radio reviewers—except one whom he did not identify—11 brought suit. *Gross v. Cantor, 270 N.Y. 93, 200 N.E. 592 (1936).* One of 13 township commissioners had a cause for action when a newspaper article falsely reported that the District Attorney's office was investigating corruption in the township office and all 13 commissioners would be questioned. *Farrell v. Triangle Publications, Inc., 159 A.2d 734 (Pa.1960).*

Group libel, especially where groups are large, propels us into an area which, although affecting the news media rarely, represents an important arena of public policy and debate. For a discussion of group libel problems in the electronic media, see this text, pp. 846–849.

## J. CRIMINAL LIBEL

So far we have talked about civil or ordinary libel by means of which individuals, corporations, and small groups seek redress for wrongs done to their reputations through civil actions against other individuals and groups.

Some states use criminal statutes to protect racial, religious, and political groups against defamation, but prosecutions now are extremely rare. The original theory of criminal libel was that it would provoke riots, mob violence, or other breaches of the public peace. The state, therefore, had an obligation to intervene in behalf of the public, in the absence of a civil remedy. Truth was irrelevant. Indeed criminal libel is civil libel run riot. It is usually classified as a misdemeanor, and a conviction may result in a fine or imprisonment or both. As in all crimes, the state must prove criminal libel beyond a reasonable doubt. Actual malice, either evident or implied in the publication itself, must be demonstrated by the prosecution. A criminal libel need not be published to a third person; rather, it is judged by its tendency to incite violations of the criminal law, for example, to provoke an injured person or his friends and family to acts of revenge. In many states it is a criminal offense by statute to impugn falsely the morals of a woman.

In most states, truth if published with good motives and for justifiable ends is now a defense. Truth alone is a defense in others. Privilege is also a defense if it is not destroyed by actual malice. No partial defenses, or mitigating factors, are available in criminal libel prosecutions. The jury, judging the law as well as the facts, determines the potential danger of the libel.

Criminal libel, because it is almost if not entirely synonymous with sedition, a common law crime of monstrous lineage, has not found favor in American courts. As Cooley noted:

"The English common law rule which made libels on the constitution or the government indictable, as it was administered by the courts, seems to be unsuited to the conditions and circumstances of the people of America and therefore to have never been adopted in the several States. If we are correct in this, it would not be in the power of the state legislatures to pass laws which should make mere criticisms of the constitution or of the mea-

sures of government a crime, however sharp, unreasonable and intemperate it might be." Cooley, Constitutional Limitations 614 (7th ed. 1903). See Levy, Legacy of Suppression (1960) for a fresh and iconoclastic interpretation of the history of sedition (criminal libel) in America.

Of course, sedition laws were enacted by Congress in both world wars, and are still in force.

The Nazis used group libel to purge their opposition and set up scapegoats. Riesman, *Democracy and Defamation: Control of Group Libel,* 42 Colum.L. Rev. (1942), 727–780. Similarly, today group libel is a major weapon of extremist groups who would twist and tear the fabric of society. Who will protect identifiable classes of citizens from the wrath of the bigot? At what point does the hateful, though sincere, expression of personal opinion become punishable by the state? Can the same argument be used to reject criminal libel laws which discourage criticism of government and laws which proscribe malicious defamation of minority groups?

The high-water mark of criminal libel in the United States was reached in 1952 when the Supreme Court decided *Beauharnais v. Illinois, 343 U.S. 250 (1952).* Joseph Beauharnais was a hatemonger who circulated literature calling for "[O]ne million self-respecting white people in Chicago to unite. * * * If persuasion and the need to prevent the white race from becoming mongrelized by the negro (sic) will not unite us, then the aggressions * * * rapes, robberies, knives, guns and marijuana of the negro, surely will."

Beauharnais was convicted under a 1949 Illinois criminal libel law which 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, of any race, color, creed or religion." The constitutionality of the statute was upheld in a close 5–4 decision, which pitted Justice Frankfurter and his doctrine of judicial restraint (deference toward the legislature) against the liberal activists and their doctrine of preferred freedom. Is speech devoted to racial hatred to be ranked so high on the scale of constitutional values that it cannot be abridged by lawmakers?

Justices Black and Douglas argued that free speech is too important a part of the democractic commitment to be sacrified to the comfort and protection of any single social group. Frankfurter argued that the importance of protecting groups from harassment and vilification is so fundamental that it justifies some limitations on free speech. Furthermore, Frankfurter contended, relying on an earlier Court opinion, *Chaplinsky v. New Hampshire, 315 U.S. 568 (1942),* 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.

In *Beauharnais* we have a confrontation between two fundamental constitutional values: free speech and social equality. How do we decide which should be preferred?

There were unique features to *Beauharnais.* The trial court did not permit the defendant to rely on the traditional defense of truth, on the theory that it might do more to expound the defamer's views. The clear and present danger test, a standard then used by some liberals on the Court, was rejected. And the jury was charged only on the issue of publication, a limitation the dissenting justices assumed had been overcome by the Fox Libel Act of 1792. It is perhaps fair to say that *Beauharnais* has neither been followed nor reversed. *Beauharnais* stands in the U. S. Reports in a kind of

unacknowledged isolation. See also *Anti-Defamation League of B'nai B'rith v. F.C.C., 403 F.2d 169 (D.C.Cir. 1968), cert. den. 394 U.S. 930 (1969).* For discussion, see this text, p. 847.

The liberal argument is that social commentary of all kinds is stifled by criminal group libel laws, that advocating integration or abolition of the Ku Klux Klan might be considered illegal tomorrow in light of the decision, and that criminal libel laws were meant to be restricted to defamation of individuals, not to protect large groups as a matter of public policy.

Although some authorities plead for the reinstatement of criminal libel laws to cover large-group defamation, and they do so with the best of intentions, *Group Defamation Symposium,* 13 Clev.-Mar. L.Rev. 1 (1964) others have endorsed the minority view in *Beauharnais* that criminal libel would eventually result in suppressing unpopular expression and would not be greatly different in its impact than the law of seditious libel. See Emerson, *Toward a General Theory of the First Amendment,* 72 Yale L.J. 877 (1963). Whatever is added to the field of libel is taken from the field of free debate. *Sweeney v. Patterson, 128 F.2d 457, 458 (D.C.Cir. 1942).* But there are still pockets of resistance.

A labor organizer received a six-months sentence and was fined $3,000 under Kentucky's common law of criminal libel for printing a pamphlet in support of striking miners, which turned out to be 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 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.' " *Ashton v. Kentucky, 384 U.S. 195 (1966).*

The American Civil Liberties Union has opposed criminal and group libel laws on the basis of their repressive effect on free expression, preferring more speech rather than enforced silence. One writer suggests 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. Beth, *Group Libel and Free Speech,* 39 Minn.L.Rev. 167 (1955).

Although it is dependent upon the constitutional doctrine of a monumental libel opinion which has not yet been discussed, [*New York Times Co. v. Sullivan, 376 U.S. 254 (1964)*], the leading criminal libel case is one involving the controversial Jim Garrison, former New Orleans District Attorney.

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## GARRISON v. STATE OF LOUISIANA

379 U.S. 64, 85 S.Ct. 209, 3 L.Ed.2d 125 (1964).

Mr. 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."[1]

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. * * *

[1] The dispute between appellant and the judges arose over disbursements from a Fines and Fees Fund, which was to be used to defray expenses of the District Attorney's office; disbursements could be made only on motion of the District Attorney and approval by a judge of the Criminal District Court. After appellant took office, one of the incumbent judges refused to approve a disbursement from the Fund for furnishings for appellant's office. When the judge went on vacation prior to his retirement in September 1962, appellant obtained the approval of another judge, allegedly by misrepresenting that the first judge had withdrawn his objection. Thereupon, the eight judges, on October 5, 1962, adopted a rule that no further disbursements of the District Attorney from the Fund would be approved except with the concurrence of five of the eight judges. On October 26, 1962, the judges ruled that disbursements to pay appellant's undercover agents to conduct investigations of commercial vice in the Bourbon and Canal Street districts of New Orleans would not be approved, and expressed doubt as to the legality of such a use of the Fund under the State Constitution. A few days later, on November 1, 1962, the judge, now retired, who had turned down the original motion issued a public statement criticizing appellant's conduct of the office of District Attorney. The next day, appellant held the press conference at which he made the statement for which he was prosecuted.

In New York Times Co. v. Sullivan, 376 U.S. 254, we held that the Constitution limits state power, in a civil action brought by a public official for criticism of his official conduct, to an award of damages for a false statement "made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." * * * 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." Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 924 (1963). The absence in the Proposed Official Draft of the Model Penal Code of the American Law Institute of any criminal libel statute on the Louisiana pattern reflects this modern consensus: * * * "It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security. * * * It seems evident that personal calumny falls in neither of these classes in the U. S. A., that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country. * * *" Model Penal Code, Tent. Draft No. 13, 1961, § 250.7, Comments, at 44.

The [ALI] therefore recommended only narrowly drawn statutes designed to reach words tending to cause a breach of the peace, such as the statute sustained in Chaplinsky v. New Hampshire, 315 U.S. 568, or designed to reach speech, such as group vilification, "especially likely to lead to public disorders," such as the statute sustained in Beauharnais v. Illinois, 343 U.S. 250, * * *. But Louisiana's rejection of the clear-and-present-danger standard as irrelevant to the application of its statute, * * * coupled with the absence of any limitation in the statute itself to speech calculated to cause breaches of the peace, leads us to conclude that the Louisiana statute is not this sort of narrowly drawn statute.

We next consider whether the historical limitation of the defense of truth in criminal libel to utterances published "with good motives and for justifiable ends" should be incorporated into the New York Times rule as it applies to criminal libel statutes; in particular, we must ask whether this history permits negating the truth defense, as the Louisiana statute does, on a showing of malice in the sense of ill-will. * * * 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. * * *

Moreover, even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. 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. Under a rule like the Louisiana rule, permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood, "it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded." Noel, Defamation of Public Officers and Candidates, 49 Col. L.Rev. 875, 893 (1949). Moreover, "[i]n the case of charges against a popular political figure * * * it may be almost impossible to show freedom from ill-will or selfish political motives." Id., at 893, n. 90. Similar considerations supported our holdings that federal officers enjoy an absolute privilege for defamatory publication within the scope of official duty, regardless of the existence of malice in the sense of ill-will. Barr v. Matteo, 360 U.S. 564. * * * What we said of Alabama's civil libel law in New York Times, * * * applies equally to the Louisiana criminal libel

rule: "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 held in New York Times that a public official might be allowed the civil remedy only if he establishes 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 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' * * *," *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 First and Fourteenth Amendments embody our "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." New York Times Co. v. Sullivan, 376 U.S. at 270.

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.

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.

## NOTES AND QUESTIONS

1. In a concurring opinion, Justice Black rejected qualifications such as "malicious" and "defamatory" which appeared in the majority opinion and said, as he had said so many times before, that there can be no punishment for expressions of opinion on public affairs, whatever the circumstances. Justice Douglas agreed, and, in a separate concurrence threw out even "actual malice" as a constitutional standard. He elucidated his position in the following reference to the *Beauharnais* case:

"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 * * *' "

2. Would that which would protect the good name of a group also protect the incompetence of the thin-skinned public official? Criminal libel, according to *Garrison,* is not to be a remedy in an era of expanding social dialogue, unless there is a demonstrable disregard of the truth or falsity of the publication. No more, said Douglas, should public officials protect themselves from criticism by disguising sedition with a mask of criminal libel. But why didn't the court in *Garrison* directly reverse *Beauharnais?* What do you think the authoritative status of *Beauharnais* is today?

## K. LIBEL OF THE DEAD

In an effort to avoid assaults on publishers by sensitive survivors, and endless chain suits by brothers, sisters, aunts, uncles and cousins, only a criminal action is permitted for a libel of the dead, the intention being to prevent breaches of the public peace and good order rather than to protect individual reputation. If direct or indirect defamatory references are made to the living, however, a civil action can be brought, but the defamatory implication has to be clear.

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, 284 N.Y. 335, 31 N.E. 2d 182 (1940).* The Court of Appeals 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."

"To libel the dead is not an offence known to our law; the dead have no rights and can suffer no wrongs." Justice Stephen in *R. v. Ensor, 3 L.T.R. 366 (1887).*

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." Miss 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, Miss 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 non-defamatory. The court implied that Stevens' 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.

"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).* See also *Hayes v. Rodgers, 477 S.W.2d 597 (Ky.1969).*

## L. TRADE LIBEL OR LIBEL TO PROPERTY

1. A final category of libel is not libel at all because it does not directly involve personal reputation. Rather, it is a form of unfair competition by which property, goods, products or services are disparaged falsely to the financial disadvantage of their owner. Or a title is slandered, as when the sale of a mill property is prevented because the defendant reported that a bank rather than the plaintiff owned the property. *Bourn v. Beck, 116 Kan. 231, 226 P. 769 (1924).*

False advertising and the pretence that one's products are the products of another in violation of a trade mark, trade name, copyright or patent is another form of unfair competition.

Since personal reputation is not at stake, trade defamation or disparagement is simply defined as falsity. Of course, identification and publication are required as in all forms of libel. But, in addition, a plaintiff must demonstrate:

(1) malice, either actual or implied, and

(2) special damages, i. e., actual money loss.

In an oft-cited case, *Recreation* magazine criticized the Marlin rifle but did not charge its maker with deceit or lack of skill. The company could not collect because it had shown no special damages. *Marlin Firearms Co. v. Shields, 171 N. Y. 384, 64 N.E. 163 (1902).* And when *Motor Trend* magazine questioned the usefulness of a battery additive, National Dynamics Corporation was without a claim in the absence of a showing of special damages. In *National Dynamics Corp. v. Petersen Publishing Co., 185 F. Supp. 573 (S.D.N.Y.1960),* the 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 and not of the manufacturer. In such a case no fair inference can be drawn that the producer is practicing a deceit on the public simply because he is selling an article which is not the best in its field. The Court added that under New York law, disparagement of a manufacturer's 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.

2. Jerry Lewis said on a television program that a product called "Snooze," a new aid for sleep, was full of habit-forming drugs, that nothing short of a hospital cure would make one stop taking "Snooze," and that one would feel like a run-down hound dog and lose weight under its effects. A New York court 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 plea of special damages was unnecessary. See *Harwood Pharmacal Co. v. National Broadcasting Co., 214*

*N.Y.2d 725, 9 N.Y.2d 460, 174 N.E.2d 602 (1961).*

An attack on a product, then, is not necessarily an attack on its producer, but it is up to the publisher to draw the distinction in his report. This is sometimes difficult to do, and requires a pure heart and a concern only for the public welfare.

As an advertiser you may praise your own goods to the skies as long as you stop short of false statements which result in special damages to a competitor.

Consent and qualified privilege are defenses in this form of libel.

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## M. MALICE

1. Malice is one of the most perplexing concepts in the law of libel. Malice can never be proved; it can only be inferred from what one does or says. It is therefore the measure of a man's mind —his deeper motivations, his unspoken attitudes, his unexpressed intentions.

In 1964, the Supreme Court narrowed the definition of actual malice or malice in fact—at least where public officials and public figures are concerned—to knowledge that a libel is false or reckless disregard as to whether it is false or not. And malice would have to be demonstrated, said the Court, with evidence of convincing clarity. *New York Times Co. v. Sullivan,* supra. In the *Garrison* case the Court said that only those false statements made with a high degree of awareness of their probable falsity were actionable. This means that such notions as ill will, evil motives, and gross negligence are excluded—an amelioration of the problem of definition, if not its resolution.

Where ordinary, private persons are the focus of attention, there is a more subtle danger to the newsman: presumed malice or malice in law. Malice in law is the concomitant of libel per se. What it really means is that the plaintiff is being given any benefit of doubt, that a showing of malice isn't necessary to a successful libel action and an award of general damages. The point is that "the law looks to the tendency and consequences of a publication, rather than to the intention of the publisher." *Hatfield v. Gazette Printing Co., 103 Kan. 513, 175 P. 382 (1918).* A publisher may not intend to make a defamatory statement; he may not intend it to refer to the plaintiff; he may not intend to lie; he may not intend to damage a reputation. Nevertheless, he is liable. His only excuse could be that he did not intend his statement to be published. There is no liability for a defamatory publication which the defendant did not intend to be published; but there is liability for that which is published intentionally but is accidentally defamatory. Again, the wrong is in the publication, in the spreading of the libel.

2. Malice has been presumed in cases of typographical errors, where the defendant honestly believed his report to be true and was repeating it on good authority, where praise rather than defamation was intended, where a name believed to be fictitious was used, and where there were mistakes in names, photographs or addresses.

Five Boston newspapers paid damages totalling $65,000 for articles stating that Lt. Col. Richard S. Whitcomb, a person of substantial reputation, had been found guilty by a military court of removing valuable articles from a private house in Garmisch, Germany, and had been sentenced to two years hard labor and dismissed from the service.

The story began when a report of a court martial in Augsburg, Germany was made by a public information officer to a

reporter on the European staff of *Stars and Stripes*. Because of a bad phone connection, the reporter heard the middle initial "S" instead of "F". Following good journalistic practice, the reporter checked the name in the Munich military post telephone book which also erroneously and coincidentally gave the middle initial "S" for the convicted officer, Richard F. Whitcomb. An Associated Press correspondent picked up the story and sent it home with the perilous "S" included.

The Boston newspapers did their own biographical research and, except for minor errors, it was descriptive of Richard S. Whitcomb, who was soon to become the plaintiff in a libel suit. Some of the papers printed his picture. Richard S., though he had a splendid military record, had never been in Germany.

All five papers retracted satisfactorily, for no actual malice was charged or special damages claimed. But any privilege that might have applied to the report was destroyed by its inaccuracy. *Whitcomb v. Hearst Corp., 329 Mass. 193, 107 N. E.2d 296 (1952).* "The question is not who was aimed at, but who was hit." *Laudati v. Stea, 44 R.I. 303, 117 A. 422 (1922).*

Malice may defeat privilege depending upon the circumstances of the publication, the occasion, the purpose. If it does, the defendant may have to pay punitive damages [*Hoffman v. Trenton Times, 17 N.J.Misc. 339, 8 A.2d 837 (1939)*]. The court will look to the primary motive or purpose of the defendant. If it appears that he acted chiefly from ill will, he will be liable. *Mullen v. Lewiston Evening Journal, 147 Me. 286, 86 A.2d 164 (1952).* Hatred or a desire to do another harm may also be interpreted as malice. *Vojak v. Jensen, 161 N.W.2d 100 (Iowa 1968).* Vehemence of language may suggest malice. So will repetition of libelous matter. If it can be shown that the defendant does not believe what he says, that he has published a deliberate lie, privilege is lost. Express malice, then, frequently defined as ill will, envy, spite, or desire for revenge, will support an award of punitive damages in cases involving private persons.

The *Whitcomb* case is an example of the rule of strict liability. Prosser observes that "The opportunity for extortionate suits is great, and it is an open secret that plaintiffs frequently take advantage of it; and while the law of libel provides a useful restraint upon irresponsible journalism, it is achieved at the expense of a heavy burden upon innocent and careful publishers." Prosser, Handbook of the Law of Torts, supra, p. 773. There has been, as a consequence, sufficient dissatisfaction with the strict liability rule to encourage a tendency to hold that negligence is essential in such a case for a successful suit.

But for practical purposes, to avoid negligence a reporter much check and recheck and make every reasonable effort to get the libeled person's side of the story, either directly from him or from his spokesman.

3. In its Sept. 18, 1958 issue, *Jet Magazine* carried the following paragraphs in a prominently displayed story:

"Actually, the minister (Martin Luther King) had come to sit in on the courtroom hearing of bus boycott lieutenant Rev. Ralph D. Abernathy, who was pressing charges against schoolteacher Edward Davis, 24.

"Earlier, Davis had attacked Rev. Abernathy with a hatchet and pistol after accusing him of an affair with his (Davis') wife. Held on an attempted murder charge, he was the same Davis who resigned in June from a Greenville, Ala. grade school following charges of having sex relations with students. Montgomery Negroes speculated he was the pawn of persons seeking to embarrass Reverends Abernathy and King."

No one from *Jet* had bothered to talk with Davis about the charges. He had not resigned or been asked to resign from his teaching job, and, in fact, had an unblemished record as a teacher. Two requests by Davis for a retraction were ignored.

In the trial, Davis testified that after the publication (10,500 copies had circulated in Alabama alone) his students brought copies of the magazine to class and circulated them in his presence. They yelled, "Jet, Jet" at him. Parents demanded that he be forced to resign or be discharged, and, he said, he was ostracized and shunned. Although the defendant magazine presented witness after witness, none could substantiate the sex charges against Davis.

Noting that malice had been defined by evidence of hostility, rivalry, and violence of language, the Alabama Supreme Court upheld a $45,000 judgment in Davis' favor. *Johnson Publishing Co. Inc. v. Davis, 271 Ala. 474, 124 So.2d 441 (1960).*

4. Actual malice is a heavy burden for a publisher to overcome. It may destroy any possible defense to a libel suit except truth. But truth is often difficult to prove in all of its particulars, and, as shall be noted, it can be a precarious defense. Actual malice destroys the privilege of reporting official proceedings except in New York, California, Georgia, Michigan, Oklahoma, Texas and Wisconsin. Phelps and Hamilton, Libel, 126. Actual malice destroys the defense of fair comment and criticism in all states.

Take heed of denials of defamatory charges before publication, and respond to demands for retraction after publication. Act as a reasonable person and correct errors honestly, promptly and sincerely, with the public interest ever in mind.

The disastrous consequences of actual malice, as measured by punitive damages, were dramatically illustrated in the famous pre-*New York Times* suit brought by author Quentin Reynolds against columnist Westbrook Pegler, the facts of which were made the subject matter of a dramatic ABC-TV presentation, "A Case of Libel" (Feb. 11 and Aug. 11, 1968). The facts are set out in Judge Medina's opinion for the United States Court of Appeals, upholding a $175,000 verdict against Pegler and his publisher. Note also the judge's comments on the qualified privilege of reply.

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## REYNOLDS v. PEGLER

223 F.2d 429 (2d Cir. 1955).

MEDINA, Circuit Judge. This is a libel action based upon a column of defendant Westbrook Pegler, published on November 29, 1949, by defendant Hearst Consolidated Publications, Inc. * * * [and carried in] a large number of other publications throughout the United States. The result of the trial was a verdict against all defendants in the sum of $1.00 as compensatory damages and, in addition, punitive damages against Pegler in the sum of $100,000, against Hearst Corporation in the sum of $50,000, and against Hearst Consolidated Publications, Inc. in the sum of $25,000, or smart money of $175,000 in all. [The defendants paid the judgment with a certified check representing more than $400,000 in "real" money to Reynolds since the law exempts awards for punitive damages from taxation as income.]

The controversy revolves about a book review of Dale Kramer's "The Heywood Broun His Friends Recall," which plaintiff wrote for the New York Herald Tribune Book Review of November 20, 1949, some ten years after Broun's death, and the Pegler column "On Heywood Broun and Quentin Reynolds," published in the November 29, 1949 issue of the Journal-American, above referred to. By

counterclaim it was alleged that the book review itself was defamatory of Pegler, and this question was not resolved, as the jury disagreed. In any event, defendants claim that, whether or not based upon excerpts from Kramer's book or upon the book as a whole, the effect of what plaintiff wrote was to assert that Pegler had called Broun a liar, that Broun brooded over this allegedly false charge, and that, although suffering from a cold at the time, Broun couldn't sleep or relax and that he died. This is interpreted as a charge of "moral homicide." The Pegler column is supposed to be a reply to this charge. And the first few paragraphs, with well salted digressions, bear some resemblance to a reply, as they state that "Broun was a notorious liar," that he was a "dirty fighter" and "made his living at controversy," and it is broadly suggested that any notion that Broun sank into despondency and finally died because of anything written about him by Pegler was scarcely credible. There were a few shafts in plaintiff's direction also in these opening paragraphs. The Pegler column then continues: "Reynolds gives some false impressions. So I offer some corrective data."

What follows is a scathing denunciation of plaintiff, which the trial judge held had no conceivable relevancy to any part of plaintiff's review of Kramer's book. Many of the statements concerning plaintiff are plainly defamatory *per se* and the column read as a whole undoubtedly held plaintiff up to "public hatred, contempt, scorn, obloquy or shame." * * * Thus it is asserted in "As Pegler Sees It," the column in suit, "that Reynolds and his girl friend of the moment were nuding along the public road," that the neighbors might not understand, and if "they saw Reynolds and his wench strolling along together, absolutely raw, they would call the State police;" that "as Reynolds was riding to Heywood's grave with her, he proposed marriage" to the widow; that Reynolds "became one of the great individual profiteers of the war" and "cleaned up $2000 of the ill-gotten loot of the Garsson brothers who, with Congressman Andy May, later were convicted of fraud in war contracts"; that he was a "four-flusher," with "an artificial reputation as a brave war correspondent in the London blitz," one of the " 'let's you and him fight' school of heroes" and that Clare Boothe had "peeled him of his mangy hide and nailed it to the barn door with the yellow streak glaring for the world to see"; and more to the same effect.

Various and sundry explanations are furnished by defendants to support their contention that these charges are innocuous and susceptible of innocent and harmless interpretations, but these explanations are wholly without merit or substance. For example it is suggested that "[P]erfectly honorable people are nudists," and that "[A]t common law, nudism was not a crime." The ride to the grave may have been "years after the date of Broun's death," and the Mosaic Code is cited as imposing "upon a brother the duty of proposing to his dead brother's widow;" and so on.

Defendants' counsel in his brief referred to the part about the "yellow streak" as "political gloating in jesting terms," and it may well be that many readers of the column were highly amused by what they read. But this is a curious and unprofitable sort of jesting, as others may not view the humor in the same light. After all, it is elementary that the alleged defamatory article must be read as a whole. * * * Defendants argue that the judgment must be reversed because the trial judge ruled, as matter of law, that Pegler's article of November 29, 1949 "exceeded the limits of the qualified privilege of reply." The claim is made that, under New York law, this issue is one which must necessarily be submitted to the jury. But defendants

evidently misconceive the nature of this defense and fail to distinguish the separate functions of judge and jury in the trial of cases in which the qualified privilege of reply is sought to be invoked as a defense.

By way of background it is well to bear in mind that the defense under consideration is one of "qualified" privilege. Thus, even when applicable, it affords no protection to defendants, unless it is found as a fact that the alleged defamatory matter was published in good faith. Accordingly, where the alleged libel is justified by way of defense as a reply to a prior attack upon the defendant by the plaintiff, the New York cases, assuming them to be applicable, place upon the trial judge the duty to determine *in limine,* as matter of law, whether the content of the alleged libel is pertinent or relevant to the matter contained in the purported initial attack, * * * and, in this connection, the New York courts have held that the requirement is satisfied if the alleged libel is addressed to the plaintiff's motive in taking the initiative, * * *. If pertinency is absent, the defense of privilege is unavailable and there is no need for further inquiry. If, however, the court is satisfied that the content of the alleged libel is related to the subject matter of the plaintiff's claimed attack or to the plaintiff's motive in making the attack, the case is an appropriate one for the invocation of the privilege of reply, and the remaining question is whether the defendant's reply was made in bad faith, in which event the defense fails. It is the function of the jury to pass upon the question of whether or not defendant published the alleged defamatory matter in good faith, as this is a subject on which reasonable men may differ. * * * In this case, it is apparent that Judge Weinfeld concluded that the content of Pegler's article was in no way related to the matter contained in Reynolds' book review or to Reynolds' motive in writing it, but was, rather, a wholly separate personal attack upon Reynolds, inspired perhaps by resentment engendered by the references made to Pegler in the book review. We have examined both writings and are persuaded that this conclusion was justified. Consequently, there was no error in dismissing the alleged defense of privilege.

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5. Judge Weinfeld, in his opinion for the federal district court, expanded upon the evidence of actual malice on the part of Pegler, or what he called "a calculated design to injure the plaintiff:"

REYNOLDS v. PEGLER, 123 F. Supp. 36, 40, 41 (S.D.N.Y.1954), WEINFELD, District Judge. "First, the amended answer of all the defendants, filed some four months after plaintiff had commenced this action and after he had denounced the article as false, not only repeated but expanded the charge. Thus, instead of a retraction, there was a reiteration and broadening of the original charges.

"Second, about fifteen months after the original publication and during the pendency of the action, the individual defendant learning that plaintiff had been engaged to address a credit group, made pointed inquiry as to the amount plaintiff was to receive and also sought other information in connection with this appearance. He then wrote a column which was published and distributed by the other defendants, purporting to set forth the 'facts' about plaintiff's activities. The jury could reasonably draw the conclusion that the article was inspired by malice and ill-will toward the plaintiff and was deliberately written for the purpose of dissuading prospective employers from engaging the services of the plaintiff.

"On another occasion, subsequent to the original publication, the individual defendant called a well-known radio commentator with reference to work plaintiff

was about to do on a motion picture concerning a famous air force general. The individual defendant stated that his purpose was 'to inform a friend of some facts' so that his friend, the radio commentator, could 'use his own judgment' with respect to hiring plaintiff.

"Finally, more than four years after publication of the original article and on the very eve of trial, after the plaintiff had been invited to appear as a guest speaker at a public function to honor one of the nation's great public servants, the individual defendant communicated with another scheduled guest speaker, a former Cabinet Officer, 'to place information at [his] command.' He also attempted to communicate with the guest of honor for the same purpose. Then following that dinner, he called a sports writer of a local New York paper of wide circulation to have him exercise his 'judgment' with respect to plaintiff and his appearance at the public function. The defendant was neither an officer or member of, nor in any way affiliated with, the organization sponsoring the function."

6. Note Judge Medina's reaction to the proof of malice point in *Reynolds v. Pegler, 223 F.2d 429 at 434 (2d Cir. 1955):*

> The mere fact that there was no proof of personal ill-will or animosity on the part of any of the corporate executives toward plaintiff does not preclude an award of punitive damages. Malice may be inferred from the very violence and vituperation apparent upon the face of the libel itself, especially where, as here, officers or employees of each corporate defendant had full opportunity to and were under a duty to exercise editorial supervision for purposes of revision, but permitted the publication of the column without investigation, delay or any alteration whatever of its contents. The jury may well have found on this evidence a wanton or reckless indifference to plaintiff's rights.

7. Reynolds' attorney, Louis Nizer, in one of his autobiographies, Nizer, My Life In Court 152 (1961), divulges how he talked his client out of suing the 186 newspapers which carried the libelous column. "A pursuit for more money," says Nizer, "would taint the ideals that had motivated him and me. He could always be proud of the fact that he had fought for his personal vindication against great odds and in gaining it had scored a significant triumph for responsible journalism."

In Nizer's view the Pegler defense suffered from two major weaknesses: his counterclaim for libel against Reynolds (the basis for his defense of the qualified privilege of reply) which opened him up to scorching cross-examination; and his answer to the libel compliant which amounted to "a diatribe" repeating the libels and thereby suggesting actual malice.

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## N. BURDEN OF PROOF

In the first instance, the person bringing a libel action must persuade the court that a defamatory publication has been made concerning him. Ambiguity is for the jury. Since the law presumes that a defamation is false, the publisher then has the burden of pleading an affirmative defense such as truth, good motives, privilege, or fair comment. The burden then shifts to the plaintiff to show that a defense of privilege or fair comment has been nullified by malice on the part of the publisher, or that a defense of truth has been lost for want of good motives and justifiable ends. Malice is presumed, of course, in cases of libel per se, but, where punitive damages are sought, the burden is on the plaintiff to prove ac-

tual malice. Actual malice will defeat a defense of qualified privilege, for example, the defamatory report of a governmental proceeding, but the burden of proving actual malice is always on the plaintiff. *Lulay v. Peoria Journal-Star, Inc., 34 Ill.2d 112, 214 N.E.2d 746 (1966); Ponder v. Cobb, 257 N.C. 281, 126 S.E.2d 67 (1962).* The onus is on the defendant, however, to establish in the first instance that the report is qualifiedly privileged as the publication of a governmental act.

## O. THE PRIMARY DEFENSES AGAINST LIBEL

The beginning of wisdom for the newsman in this area of law is the recognition that libel is a defensible tort. Without an understanding of the primary defenses against libel, the newsman would be reluctant to print anything critical of men, measures, and institutions of public concern. Timidity is no guardian of the public interest. But there are private interests to be considered also. In recent years, as shall be noted, the primary defenses have been so liberally defined that often the question for the newsman is not the extent of his liability but the quality of his mercy. The newsman must continually weigh individual against social rights in deciding whether or not to publish. Only when the public's right to know is overriding should the newsman print that which will injure individual reputation.

The primary defenses are (1) truth, or justification (2) qualified privilege, (3) absolute privilege, and (4) fair comment and criticism, a special form of privilege which, because of its importance, will be discussed separately.

(1) TRUTH: Truth alone is a complete defense against libel in California, Colorado, Indiana, Missouri, Nebraska, New Mexico, North Carolina, South Carolina, and Vermont. The following states have traditionally allowed greater scope for the defense of truth where criticism of the official conduct of public officials is concerned: Alabama, Delaware, Kentucky, Maine, New Hampshire, Pennsylvania, Tennessee, and Texas. Arkansas, Georgia, Maryland and Virginia have constitutional or statutory provisions under which evidence of the truth may be introduced, but it is unclear whether truth is a complete defense. In West Virginia there is no authority in point. In the following jurisdictions constitutional or statutory provisions make truth a defense only if published with good motives and for justifiable ends; malice, therefore, effectively destroys the defense of truth in Alaska, Arizona, the District of Columbia, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Washington, Wisconsin, and Wyoming. *Garrison v. Louisiana,* supra, *fn. 7, pp. 70–72.* The Supreme Court survey does not include Louisiana and Connecticut.

In all jurisdictions the defendant publisher has the burden of proving the truth of his general imputation by a preponderance of the evidence. Where defamatory charges are general, a plea of justification (truth) must state specific facts. Where the libelous charge is specific, a general plea of truth will suffice. *Totero v. World Telegram Corp., 245 N.Y.S.2d 874, 41 Misc.2d 33 (1963).* The point is that the proof must be at least as broad as the charge. "[I]t is generally agreed," says Prosser, "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 imputation is substantially true, or, as it is often put, to

justify the 'gist,' the 'sting,' or the 'substantial truth' of the defamation." Prosser, Handbook of the Law of Torts, supra, p. 798.

A guild's newsletter stated that a former official of another union had as his ally an unnamed publication described as the "slimiest, dirtiest, most despised scandal sheet, and as a disreputable, lying blackguard, yellow rag." Noting these terms of general abuse, the court said that, even if they were meant to be applied to the former union official, the publishers of the newsletter were not required to justify each and every word of the alleged defamatory matter. West's Ann.Cal.Civ.Code, § 45. *Jeffers v. Screen Extras Guild, Inc., 328 P.2d 1030 (Cal.1958).* Where a plaintiff, in testifying before a congressional committee, attacked "political Zionist planners for absolute rule via a one-world government," a newspaper article alleging that the plaintiff had attacked Jews was held substantially true and therefore not actionable. *Dall v. Pearson, 246 F.Supp. 812 (D.C.D.C.1963). See also Griffin v. Clemow, 251 A.2d 415 (Conn.Super. 1968).*

A most important point for newsmen to understand is that they must be prepared to prove a defamatory charge, not simply 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 the truth. *Miller, Smith & Champagne v. Capital City Press, 142 So.2d 462 (La.1962).* The defense of truth is never satisfied by simply showing that the report was an accurate repetition of a libelous charge. For the newsman, the basic question is whether the facts he has stated are provably true.

An accused publication must be read as a whole. Its content must be considered in its entirety and in relation to its structure, nuances, implications and connotations. It is not sufficient to take sentences separately and demonstrate their individual accuracy, detached and wrenched out of context. While in a civil suit for libel the truth of a charge of a crime need not be established beyond a reasonable doubt, it must nevertheless be shown by a fair preponderance of evidence. *Clark v. Pearson, 248 F.Supp. 188, 191 (D.C.D.C.1965).*

Sometimes the evidence needed to prove the truth is just not available. In pleading the truth a defendant may need depositions, affidavits, exhibits—difficult to obtain after the fact—as well as other kinds of legal documents.

When Ben Bagdikian, then a reporter for the Providence *Journal-Bulletin,* charged that Harold Noel Arrowsmith was a "sophisticated fascist" and "a shy, reticent anti-Semite," the truth was proved by cross-examination in the courtroom. It was demonstrated to the jury that Arrowsmith believed Franklin D. Roosevelt was part of an international Zionist conspiracy, and that Arrowsmith had a working relationship with the late Nazi leader George Lincoln Rockwell to disseminate viciously anti-Jewish propaganda. *Arrowsmith v. United Press International, 205 F.Supp. 56 (D.C.Vt. 1962).* But few defendants are this fortunate, for truth, an elusive concept at best, is generally of more subtle definition.

The strength of one's belief in a defamatory publication does not constitute justification. Truth may be a dangerous defense because, if it cannot be proven, its very pleading becomes a republication of the libel and may be interpreted as malice. The courts discourage those who would insist upon defending a falsehood. Attorneys for the news media, when they suspect a defamation is false or that

proof of its truth is unlikely, prefer a plea of qualified privilege or fair comment.

In the absence of malice, however, an honest defense of truth should not compound the risk to a defendant. Where a jury can be persuaded that the defendant had sound reasons to believe the general thrust of the libel, or where there is at least some evidence in support of a defendant's suspicions, there will be mitigation of damages, particularly punitive damages. A defendant should not be penalized simply because the evidence he presents fails to convince the jury. *Las Vegas Sun, Inc. v. Franklin, 74 Nev. 282, 329 P.2d 867 (1958); Aacon Contracting Co. v. Herrmann, 208 N.Y.S.2d 659 (1960).* But the general rule is that the onus of proving the truth of a defamatory statement is on the publisher, and such proof depends upon tangible and persuasive evidence. In the absence of definitive evidence, the jury will assess the motivation of the publisher and the ends to be served by the publication.

(2) QUALIFIED OR CONDITIONAL PRIVILEGE: The theory of the defense of privilege is that in some situations the social or public interest overrides harm to individual reputation. "Under proper circumstances," said a California appeals court, "the interest and necessities of society become paramount to the welfare or reputation of a private individual, and the occasion and circumstances may for the public good absolve one from punishment for such communication even though they be false." *Jones v. Express Publishing Co., 87 Cal.App. 246, 255, 262 P. 78, 83 (1927).*

A news medium may publish with impunity a fair and impartial report of judicial, quasi-judicial, legislative, executive or other public and official proceedings. Reports bearing on official documents such as formal complaints, written interrogatories, affidavits, depositions and judicial opinions are also protected. Fairness is measured in terms of accuracy, good faith, and the absence of malice. Originating in the common law, the doctrine of qualified privilege is today statutory in most states. Although basically similar, these laws may differ in detail and in interpretation, and therefore deserve close attention.

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## COLEMAN v. NEWARK MORNING LEDGER CO.

29 N.J. 357, 149 A.2d 193 (1959).

**Editorial Note:**

One of Sen. Joseph R. McCarthy's frequent exercises in character assassination reveals the breadth of privilege in protecting legislative proceedings. McCarthy, in corridor press conferences, had linked Aaron H. Coleman, a Fort Monmouth, N. J., radar scientist, to the Rosenberg spy ring and the theft of classified government documents. McCarthy also charged that Coleman's testimony before the Senate investigations subcommittee had contradicted that of Julius Rosenberg, executed atom spy, and that a perjury indictment was pending against him.

The Newark *Star-Ledger* printed these falsehoods routinely, and Coleman sued for libel. Among its defenses, the newspaper pleaded that its news stories "related to matters of public interest and concern and to the public acts of a public employee, and constituted fair comment based upon facts which were true in substance and in fact;" that the words of the articles "related to, and constituted, a full, fair and impartial report of a legislative proceeding and were printed and published without malice and with an honest belief of their truth," and "with the intent and purpose to inform the public on matters of public interest pertaining to the welfare and safety of the United States of America."

In behalf of the defendant newspaper, McCarthy testified that the news articles were accurate reports and summations of what he had told reporters after an executive session of the subcommittee. It should be noted that the parent Committee on Government Operations had adopted a rule under which any member of the subcommittee constituted a quorum for the purpose of administering oaths. In a significant opinion the Supreme Court of New Jersey affirmed a lower court verdict for the newspaper. The court said in part per HEHER, J.:

* * *

The rule of conditional or qualified privilege, whereby a person is protected from legal liability for defamatory words in fact untrue, if uttered honestly and without any indirect or improper motive, is founded on the general welfare of society and so new occasions for its application will necessarily arise with continually changing conditions. * * * The policy is an accommodation of competing social and political interests for the good of all: the protection of the reputation of individuals, on the one hand, and on the other the collective security and the "interest of the public in the fullest freedom of officials to make disclosures on matters within the scope of their public duties * * *." Barr v. Matteo, 355 U. S. 171 (1957). This, on the ground that it is "in the public interest that persons should be allowed to speak freely on occasions when it is their duty to speak, and to tell all they know or believe, or on occasions when it is necessary to speak in protection of some [self or] common interest": and the question is whether the occasion has been abused "by making it the opportunity of indulging in some private spite, or for using the occasion for some indirect purpose or under the influence of some indirect motive"; yet " 'to submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, that protection which the law throws over privileged communications.' " * * * The restraint upon freedom of speech or writing would in its evil public consequences outweigh the private injury. * * *

A defamatory publication is deemed "malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." * * *

Thus, the occasion is privileged if it is concerned with matters materially affecting the public interest; and the principle is *a fortiori* applicable to reports of legislative and public proceedings involving the public security. The privilege, says Dean Prosser, * * * "rests upon the idea that any member of the public, if he were present, might see for himself, and the reporter is merely a substitute for the public eye"; this "privilege of reporting extends to all legislative proceedings, including the investigations of committees and the deliberations of municipal councils, and to the acts of executive or administrative officials of the national, state or municipal governments, including their official reports and communications." But it is of the essence of the privilege that the report be fair and accurate, both as to fact and comment, and comment may itself be privileged because

the "subject of the proceedings affects the public interest."

The rule given in the Restatement, Torts, § 611, is that the qualified privilege extends to the "proceedings of a legislative or administrative body or an executive officer of the United States, a State or Territory thereof, or a municipal corporation or of a body empowered by law to perform a public duty," although the publication contains false and defamatory matter, if it is (a) accurate and complete or a fair abridgment of such proceedings, and (b) not made solely for the purpose of causing harm to the person defamed; and it is there commented (a) that the privilege is lost "if the report is published solely for the purpose of defaming the other and not for the purpose of informing the public," and the privilege "differs from the usual conditional privilege in that it affords protection even though the defamatory statement reported is known to be false." * * * And it is not requisite to privilege that the act done be within the scope of official authority; it is enough if it be done by "an officer '*in relation* to matters committed by law to his control or supervision,' " or that it have " '*more or less connection with* the general matters committed by law to his control or supervision.' " * * *

It cannot be that evidence adduced and information acquired in the course of an executive session of a congressional investigating committee are sealed against public disclosure for all time save as unprivileged communications subjecting the members of the committee to the risk of suit and personal civil liability for libel and slander and the like, even though the publications are made in what the committee conceived to be the interest of internal security and defense or other public exigency or matter of legitimate common concern. The collective interest then overrides the risk of harm to individual reputation, as a basic tenet of the social order. The converse of this would plainly subvert the imperative principle and policy of privilege in the service of the essential public welfare. Executive or closed sessions are ofttimes indispensable to the due prosecution of such inquiries, in the interest of the common safety; but this does not preclude the publication of such information as the committee may in its discretion deem fit and proper for the general good; and when the judicial process is invoked, it is for the jury to say whether the privilege was abused, unless there be an absolute privilege in the circumstances irrespective of malice. Here, the evidence of a committee-authorized publication stood uncontradicted; and even if the proofs be open to contradictory interpretations in this regard, then the issue was within the exclusive province of the jury. And it is a good defense to an action for defamation that the words used are but fair comment on a matter of public interest or concern. Fair comment is not libelous at all and requires no justification. Fair and *bona fide* comment and criticism upon matters of public concern is not libel, and the words are not defamatory. The freedom of the journalist is in essence an ordinary part of the freedom of the subject, "and to whatever length the subject in general may go, so also may the journalist, but, apart from statute law, his privilege is no other and no higher." * * *

Affirmed.

### NOTES AND QUESTIONS

1. *Coleman* by no means answers all of the delicate questions revolving around qualified privilege as a defense. In this case the newspaper's privilege flowed from the Senator's. But what is the status of secret, incomplete, and one-sided reports from legislative committee counsel or investigators? And how does the reporter determine what is a bona fide official proceeding? Definitive guidance is not available, although *Cole-*

*man* does represent a trend toward a broadening of the qualified privilege defense, and some state statutes are consistent with it. New York, for example, no longer requires that a proceeding be public to allow for a defense of qualified privilege, and the law there would seem to grant immunity to coverage of closed sessions and to reports concerning sealed documents gathered by a reporter through irregular channels.

If a legislative meeting lacks a quorum and is thereby unofficial, the press would probably retain its privilege, although caution is still advisable. "If the reporter has any doubts about the legality of such hearings, the safest thing for him to do is to ask the legislator in charge to put on the record a statement giving the legal basis for the proceedings. This should be sufficient to guarantee the privilege of reporting, since the courts do not require that newsmen be constitutional lawyers." Phelps and Hamilton, Libel, 128. *Lee v. Brooklyn Union Publishing Co., 209 N. Y. 245, 103 N.E. 155 (1913),* noted that a hearing that has all the appearance of a legal and official hearing may be safely reported even though it turns out to be defective later on. The reporter is not required, said the court, to determine doubtful questions of law. See Nelson, Libel in News of Congressional Investigating Committees, Ch. 8 (1961). At least this is becoming the prevalent view.

2. A reporter's efforts alone in seeking from a legislator the authority for the lawmaker's statements may protect him in subsequent libel suits. It is also advisable for the reporter to get a defamed person's side of the story. And this raises a question much more important than the question of liability. What is the ethical responsibility of the press? It is hoped that the news media will never again be a willing or unconscionable accomplice to a congressional pogrom, as it was when it published without qualification the accusations of the late Senator from Wisconsin. [See Rovere, Senator Joe McCarthy (1959) for an excoriating review of the performance of the press in the McCarthy period.] It is the reporter's moral duty to weigh the public interest against injury to personal reputation, and, in every case, to write a balanced account which might include relevant comments from the person against whom a charge has been made.

3. There is little risk in reporting a petition or a complaint once it has been filed with a legislative body. The broadening interpretation of privilege means that municipal councils [*Swede v. Passaic Daily News, 30 N.J. 320, 153 A.2d 36 (1959)*], or school boards which go into informal, closed, executive sessions must be prepared for news coverage, however inaccurate it may be.

Some jurisdictions apply privilege to reports of all public meetings at which public issues are discussed. These might include chambers of commerce forums, [*Phoenix Newspapers v. Choisser, 82 Ariz. 271, 312 P.2d 150 (1957)*], public meetings of stockholders, union members, church boards, political parties, or corporations vested with a broad public interest, for example, medical or bar associations acting against the unethical conduct of their practitioners. In writing stories of this kind the source of the materials should be included. California, Idaho, South Carolina, Utah, and Texas have extended privilege by statute to all public meetings. Phelps and Hamilton, Libel, 144.

There is generally a qualified privilege to publish defamatory matter in defense of one's own reputation or property rights, for example, in external or internal office communications; or to circulate defamation among members of an organized group in pursuit of their mutual interests; or among members of a family; or in fulfilling one's social obligation to assist in law enforcement. *Zeinfeld v. Hayes Freight Lines, Inc.,*

*243 N.E.2d 217 (Ill.1968); Levesque v. Kings County Lafayette Trust Co., 293 F.Supp. 1010 (D.C.N.Y.1968).*

A qualified privilege is also extended to a communication upon any subject in which the communicating party has a legitimate interest to persons having a corresponding interest. The burden of defeating the privilege by proving the existence of malice is on the plaintiff. A father's letter objecting to the involvement of a suspended policeman facing trial for burglary with a planned Boy Scout bus trip in which the father's 15-year-old son was a participant was conditionally privileged. The father had complained to the directors and officers of the corporation planning the trip. The policeman had the burden of showing malice on the part of the father in order to recover for libel. *Coopersmith v. Williams, 468 P. 2d 739 (Colo.1970).*

Private social gatherings are not included. When the San Jose *Daily Mercury* reported that a dance teacher, who also ran a rooming house, had somehow contracted leprosy and was voluntarily moving to the Hawaiian islands for treatment, the young woman won a substantial judgment in both general and special damages (her customers, both dancers and roomers, had fled). The newspaper, claiming privilege, contended that a public health officer had issued the report at an official meeting of the county board of health, though he had erroneously identified the plaintiff instead of her sister, who was suffering not from leprosy but from a severe form of eczema. It turned out that the whole fairy tale had originated over cocktails at a banquet of the Santa Clara County Medical Society in a casual conversation among the health officer, other physicians, and a reporter. *Lewis v. Hayes, 165 Cal. 527, 132 P. 1022 (1913).*

Generally no privilege attaches to the informal conversation of any official, although precedents are in conflict. When a policeman was quoted in print as saying that a former Marine had threatened to kill his wife, a New York court ruled that assertions by policemen do not constitute official proceedings. *Kelley v. Hearst Corporation, 2 A.D.2d 480, 157 N.Y.S.2d 498 (1956).* However, when a plaintiff's picture appeared in the Topeka *Daily Capital* in connection with an incriminating article on a grain theft ring, based on an interview with the state attorney general, the Kansas Supreme Court reached a contrary conclusion. The newspaper has the qualified privilege, said the court, to publish in good faith anything involving violations of the law, justifying police interference—particularly where the source of information is the highest law enforcement officer of the state. Express malice, of course, would have destroyed the privilege. *Beyl v. Capper Publications, Inc., 180 Kan. 525, 305 P.2d 817 (1957).*

Reports of the acts of executive or administrative officials, or their committees, of local, state, and national governments are privileged, in the absence of actual malice.

A newspaper article reporting a market gardner's specific violations of the city health department's sanitary code was held non-actionable. *Lulay v. Peoria Journal-Star, Inc., 34 Ill.2d 112, 214 N. E.2d 746 (1966).* Qualified privilege protected a newspaper's summary of a fire chief's report to a city manager that a discharged fireman was in "cahoots" with other discharged firemen, who were trying to sabotage city equipment. The word "cahoots," defined as partnership or collusion, did not appear in the report, but accurately described the relationship which the fire chief said existed among dissident former members of the force. *Fairbanks Publishing Co. v. Francisco, 390 P.2d 784 (Alaska 1964).* See also *Hayward v. Watsonville Register-Pajaronian and Sun, 71 Cal.Rptr. 295* (Cal.

App.1968), involving a police department report.

A fair and accurate UPI report based on a press release from the Florida State Racing Commission and dealing with the drugging of horses was held to be the privileged "report of an official proceeding." The Commission was said to be a quasi-judicial administrative body; a well known horse trainer, alleged to have been negligent in protecting horses from being drugged, could not recover damages in the absence of a showing of actual malice because he qualified as a public figure. *Lloyds v. United Press, Intern., Inc., 311 N.Y.S.2d 373 (Sup.Ct.1970).*

A psychologist, acting as a public official, filed a professional report on a plaintiff's mental level as being that of a high grade moron. Such a report, said a federal court, made in good faith and representing the psychologist's best judgment, was free from actionable malice and therefore not libelous. *Iverson v. Frandsen, 237 F.2d 898 (10th Cir. 1956).*

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## SCIANDRA v. LYNETT

409 Pa. 595, 187 A.2d 586 (1963).

**Editorial Note:**

After the sinister "Apalachin" meeting of underworld kingpins, Gov. Averell Harriman of New York directed Arthur L. Reuter, Acting Commissioner of Investigation, to inquire into the activities and associations of those who had attended. The result was the Reuter Report, portions of which became a series of articles in the Scranton *Times*. In one article, Angelo Sciandra was identified as having been arrested in Buffalo in 1935 on a rape charge. That fact was incorrect; someone with a similar name had actually been involved. Sciandra sued. The Supreme Court of Pennsylvania, ruling in favor of the newspaper, declared that the news reports were a fair, accurate, and complete abridgment of the Reuter Report, even to its incriminatory tone. Comparing the two versions carefully, the court concluded per EAGEN, J.:

* * *

Unfortunately, the material in the report in reference to the fact that the plaintiff had been arrested for rape and convicted of third degree assault in the City of Buffalo was not correct or true. Apparently, some other similarly named individual was involved. However, the defendant newspaper was merely quoting the "Reuter Report" in this connection. The fact that the news article inadvertently omitted the date of birth of the individual actually involved is immaterial and does not warrant a finding of an abuse of the "occasion of privilege." It is noted that the date of birth of the other individuals mentioned in the article was also omitted. Under all of the circumstances, this omission had no material effect. * * * It is, therefore, our considered conviction that, under the evidence in the record, reviewed in a light most favorable to the plaintiff and giving him the benefit of every reasonable inference, it has not been established that the defendant abused the "occasion of privilege." The articles were a fair and a substantially correct summary of the "Reuter Report." There is absolutely no evidence that they were published "solely for the purpose of causing harm to the plaintiff."

It is the duty of the court to declare as a matter of law that no abuse of the "occasion of privilege" exists where the evidence adduced leads to but one conclusion. * * * Here in view of the extensive probe conducted, the issuance of an official report thereon, the sinister implications and innuendos included in the report, and the vital public importance surrounding the entire incident, the articles published, based on the report were completely justified as privileged commu-

nications and it was the duty of the court to enter a judgment for the defendant as a matter of law.

Finally, to impose liability upon the defendant under the circumstances presented, would render, "Freedom of the Press" a lie, seriously impinge upon priceless constitutional guarantees and be a substantial deprivation of the public's right to know.

* * *

Judgment reversed and is herewith entered for the defendant.

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## QUALIFIED PRIVILEGE IN JUDICIAL PROCEEDINGS

Most perplexing—and dangerous—to the newsman are the rules of qualified privilege relating to judicial proceedings. Generally privilege rests on some official action having been taken by a judge or some other officer of the court. A pleading or deposition filed in a case but not yet acted upon may not be privileged, on the assumption that such documents, containing possibly false and scurrilous charges, are addressed to the courts and not to the public at large.

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## CAMPBELL v. NEW YORK EVENING POST

245 N.Y. 320, 157 N.E. 153 (1927).

**Editorial Note:**

The trend, beginning in 1927 with an important case, *Campbell v. New York Evening Post,* has been to extend qualified privilege to all proceedings in a legal action, including the pleadings on file in a court, whether or not any formal judicial action has been taken. Under the headline, "Healer and Inventor Face Swindle Charge: Mrs. Elizabeth Nichols Says They Took $16,000 From Her Through Fraud," a story in the *Post* quoted Mrs. Nichols, a wealthy widow, as saying that Mrs. Anne McCoy Campbell, a widely known Christian Science practitioner, and a male companion, had succeeded in winning control over her mind.

The legal papers in the action had been filed in the office of the clerk of court. But before any judicial action was taken in the proceeding, Mrs. Nichols withdrew her charges and dropped the suit. Mrs. Campbell brought a libel action against five newspapers; the newspapers raised the shield of qualified privilege. Mrs. Campbell won in the trial court, but the highest New York court, the Court of Appeals, turned its back on precedent and in a historic decision said per POUND, J.:

* * *

Judicial proceedings in New York include in common parlance all the proceedings in the action. We may as well disregard the overwhelming weight of authority elsewhere and start with a rule of our own, consistent with practical experience. * * *

Questions of public policy should be considered. In this case it appears that the action against plaintiff was discontinued; that Mrs. Nichols thus got her alleged false and scurrilous charges before the public as news and then dropped her case. It is contended that such acts should not be deemed privileged so as to protect the publisher. The contention is too far reaching. Scandalous matter may come before the public in connection with law suits. Personal malice may thus be given a hearing. A complaint withdrawn may not be the vindication that a decision favorable to the accused would be. But complaints are withdrawn after applications have been made to the courts and suits have been dropped before verdicts. Consistency requires us to go forward or we go back. We cannot go back and exclude the publication of daily reports of trials before a final decision is reached. The present distinction is inde-

fensible. Therefore, we proceed to a logical conclusion and uphold the claim of privilege on the ground that the filing of a pleading is a public and official act in the course of judicial proceedings.

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2. Under the onus of the *Campbell* case, a reporter must be *certain* that a legal document has been served on the party named as defendant before the contents of that document are divulged. If legal papers are filed in the office of the clerk of the court, but the defendant has not been served with process, there is no privilege, for no legal proceeding has begun.

The *Campbell* doctrine, still a minority rule, has been adopted in California, Ohio and Pennsylvania. Most states still require that some more significant judicial action be taken before privilege can be invoked. In the federal courts a complaint has to be filed before a summons can be issued, but when this is done the document becomes public property and can be examined by anyone. *Phillips v. Murchison, 252 F.Supp. 513 (S.D.N.Y. 1966).*

3. In most jurisdictions sealed records and documents withheld from public scrutiny by court order, or affidavits which have not become part of a judicial proceeding, are distinctly not privileged. The girl friend of a convicted robber charged in an affidavit to a district attorney that a police sergeant, searching her home after a robbery, had taken a large sum of money from a clothes closet and had not returned it after her release from arrest. The girl's attorney then passed the document on to a newspaper and it became part of a general news story. Truth could be the newspaper's only defense here, for the affidavit was not part of an official proceeding The policeman was awarded $1,500 in compensatory damages. *Lubore v. Pittsburgh Courier Pub. Co., 101 F.Supp. 234 (D.C.1951).*

In some states court rules or statutes provide that papers filed in juvenile, matrimonial, divorce, and morals cases are sealed and are not open to the public generally. Court sessions dealing with such matters, even though closed, may be privileged in the absence of statutory authority for secrecy. A fair and factually accurate report of a judicial proceeding involving a youthful offender not open to the public was nevertheless held privileged recently by a New York court. *Civil Rights Law § 74. Gardner v. Poughkeepsie Newspapers Inc., 68 Misc. 2d 169, 326 N.Y.S.2d 913 (1971).* But here the terrain is swampy. Ordinarily, the privilege accorded to reports of judicial proceedings relates to judicial proceedings which are public and have retained their public character.

A New York newspaper learned that the filing of a divorce complaint in a sensational case involving a man, his wife, and two other women was privileged news, but that the contents of the complaint were not. Privilege was also denied in this case because the news story was a distortion of the facts of a withdrawn motion. *Stevenson v. Hearst Consolidated Publications, 214 F.2d 902 (2d Cir. 1954).*

Phelps and Hamilton observe that depositions taken after a suit has begun are privileged in the same way as is evidence in a trial. Even in the absence of the judge and jury, the examination of witnesses is part of the judicial proceeding. And the fact that some of the statements made in such proceedings will not be admissible later in evidence does not bar their use in news stories. If the deposition-taking is closed, news stories can be based on the comments of those who were there, but, of course, they must be balanced and fair. Phelps and Hamilton, Libel, 137.

Many statements made from the witness stand in open court are stricken from the record. Generally such testimony was thought not to be privileged, although in rare cases it may have been. *Williams v. Journal Co., 247 N.W. 435, 438 (Wis.1933).* Recently a New York court shed light on this question by declaring that statements made in open court are privileged if they are in any way pertinent to the litigation. In making such a determination the court is not limited to the narrow and technical rules applied to the admissibility of evidence. Nothing that is said in the courtroom may be the subject of a libel suit unless "it is so obviously impertinent as not to admit of discussion, and so needlessly defamatory as to warrant inference of express malice." The court added that "to be outside of privilege, 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." *Martirano v. Frost, 25 N.Y.2d 505, 307 N.Y.S.2d 425, 255 N.E.2d 693 (1969).*

A California appeals court ruled recently that the absolute privilege accorded to judicial proceedings also attaches to any publication that has any reasonable relation to the judicial proceeding even though the publication is made outside the courtroom and no function of the court or its officers is involved. The court added that the defamatory matter need not be relevant, pertinent or material to any issue before the court; it need only have some connection or some relation to the judicial proceeding. This absolute privilege accorded to judicial and quasi-judicial proceedings extends to preliminary conversations and interviews between a prospective witness and an attorney if they are in some way related to or connected with a pending or contemplated action. *Ascherman v. Natanson, 100 Cal.Rptr. 656 (Cal.App.1972).* This, of course, is a very liberal construction of the privilege to report judicial proceedings. And note that it is an absolute privilege. The difference between a qualified and an absolute privilege, as we shall see, is that malice destroys the qualified privilege but does not affect the absolute privilege.

4. All reports of judicial proceedings must be balanced, fair, and substantially accurate, whether or not they are abridgments. Seldom are they verbatim. Nor do such reports have to be technically accurate in a legal sense. The reporter must avoid mistakes in names, embellishments of news accounts of judicial proceedings with facts from the newspaper's own extra-legal "investigation," *Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167, 191 A.2d 662 (1963);* reporting what an official document merely stated to be "alleged" as a fact; and, of course, the epitome of malice: reckless disregard of the truth, *Hogan v. New York Times Co., 313 F.2d 354 (2d Cir. 1963).* So as to avoid giving the impression of reporting an official document when it is not official, some courts have held that the source of what is being reported must be included if privilege is to be invoked. *Hughes v. Washington Daily News, 90 App.D.C. 155, 193 F.2d 922 (1952).*

Following the New York rule in *Campbell* the Associated Press advises its reporters that it is safe to repeat a libel in reporting the filing of a suit "so long as we let the plaintiff tell in the words of his own complaint, and without adding words of our own, what was said about him and why he considered himself libeled." Associated Press, The Dangers of Libel, 13.

5. It can safely be reported that a crime has been committed and a particular person is being held for questioning. The assumption is that the statement, while not privileged, is provably true. An arrest should not be reported until a

suspect is booked, that is, his name has been entered on a police blotter, and a charge is made against him. When a police blotter or log book is an official public record, required by law to be kept, a news story based on the blotter is protected by qualified privilege, if the report is fair and accurate. A Louisiana court ruled in favor of a newspaper whose correspondent, relying on a police log book, reported that the plaintiff had been arrested and charged with possession of narcotics and contributing to the delinquency of a juvenile. There was no presumption of guilt in the news story. "We feel," said the court, "that since a newspaper may report the fact that a person was arrested and the charge for which he was arrested, it may rely for such a report upon the principal record kept by the arresting authority, which record is a 'public record,' to show accurately whether the arrest was made and the specific charges which were being filed against the arrested person. This is particularly true where there has been nothing to indicate to the publisher that such public record may not be reliable, * * * even though the Log Book may have contained an incorrect statement of the charges for which plaintiff was arrested." *Francois v. Capital City Press, 166 So.2d 84 (La.1964).* Good journalistic practice in such cases is to seek a comment from the defamed person or his spokesman, an attorney, for example, in the interests of a balanced story.

Where a newspaper article concerning a suspected counterfeiter gave not only the details of the arrest but added inaccurate additional language about engraving plates hidden in a false panel of the suspect's truck, the newspaper's qualified privilege was lost. *Britt v. Knight Publishing Co., 291 F.Supp. 781 (D.C. S.C.1968).*

6. Although some states have by statute extended the protection of privilege to reports of arresting officers, police chiefs, county prosecutors and coroners, collateral details on investigations and speculation on the evidence from these sources are generally not privileged. A newspaper would print at its peril, for example, a statement by an attorney that the victim of his client's alleged rape had consented to it. *Kennedy v. Cannon, 229 Md. 92, 182 A.2d 54 (1962).*

A grand jury indictment can be safely reported after it has been delivered to a judge, if it is reported with reasonable precision. Since grand juries are closed, comment on testimony before them from participants must be handled with great care. *Bridgwood v. Newspaper PM Inc., 276 App.Div. 858 (N.Y.1949).* But by no means is a reporter confined to coverage of the trial alone.

Preliminary proceedings, such as a hearing or the issuance of an injunction, generally may be covered. Conditional privilege applies to any action of a judge in his official capacity.

7. Given the admonitions above, any fair, impartial and accurate summary of a judicial or quasi-judicial proceeding, whether in a courtroom or not, is qualifiedly privileged. A news story based on a judicial proceeding may be lively and filled with human interest, if it remains substantially correct. *Bock v. Plainfield Courier-News, 45 N.J.Super. 302, 132 A.2d 523 (1957)* citing C.J.S. Libel and Slander § 127.

A news story reporting that the plaintiff, driver of an automobile involved in a fatal accident, was indicted on a charge of criminal negligence and prefaced by the headline, "Driver of Death Car Heads Indictment List," was ruled privileged in view of the fact that it was a fair and accurate report of a judicial proceeding. *Rouse v. Olean Times Herald Corp., 219 N.Y.S.2d 835 (1961).*

In an action for libel, based upon a publication claimed to be privileged, the court will decide if the occasion is privi-

leged. It is for the jury to decide whether the report is a fair and impartial one, i. e., the question of malice. Except in New York, California, Michigan, Oklahoma, Texas, and Wisconsin, express malice will destroy qualified privilege. And it is for the defendant to show privilege, the plaintiff to demonstrate malice.

(3) ABSOLUTE PRIVILEGE: In order to protect social interests of paramount importance, absolute immunity from libel or slander actions is extended to a number of situations which involve the news media either directly or indirectly. (Recall that we have described the statutes of limitations as an absolute bar to a successful libel suit; we have noted that units of government are prohibited from suing for libels against them; and in some states we have seen that truth alone is an absolute defense against libel actions.) These will be discussed briefly under the headings, (a) Privileged Communications, (b) Consent of the Plaintiff, and (c) Political Broadcasts.

(a) *Privileged Communications*—Regardless of personal ill will, judges, jurors, witnesses, counsel, and the parties in both civil and criminal actions are absolutely immune to defamation suits. So are executive and legislative bodies at all levels of government, *McNayr v. Kelly, 184 So.2d 428 (Fla.1966),* and all those who take part in executive and legislative proceedings. The immunity extends to all official publications of these proceedings, but not to republication in unofficial journals or in the press. The latter enjoy only a qualified privilege. Malice and bad faith are immaterial in situations of absolute privilege.

An absolute privilege also extends to documents containing libel if their publication is required by statute, administrative regulation or court order. Similar immunity generally applies to communications between a husband and wife, an attorney and his client, a doctor and his patient, and a priest and his parishioner.

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## BARR v. MATTEO

360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959).

**Editorial Note:**

In 1959, the United States Supreme Court extended immunity to executive press releases in a 5–4 decision holding that the acting director of a government agency (Office of Rent Stabilization) was absolutely privileged to state in a press release his intention to suspend two employees for conduct unbecoming to the agency.

Writing for the Court, Justice HARLAN described the interests involved:

"[O]n the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities."

### NOTES

1. Justice Harlan voted for immunity on the grounds that the size and complexity of modern government requires delegation of important governmental functions, and that the duties, not the title, of an officer should determine the privilege. Subordinate officials and employees who execute orders may also be protected. *Heine v. Raus, 399 F.2d 785 (4th Cir. 1968).*

2. "Subjecting him to libel suits for criticizing the way the Agency or its employees perform their duties would certainly act as a restraint upon him," said

Justice Black in a concurring opinion. "So far as I am concerned, if federal employees are to be subjected to such restraints in reporting their views about how to run the government better, the restraint will have to be imposed expressly by Congress and not by the general libel laws of the States or of the District of Columbia." [In a companion case, *Howard v. Lyons, 360 U.S. 593 (1959)*, the Court rejected an attempt to hold a federal employee liable under the libel law of Massachusetts]. See also *Hackworth v. Larson, 165 N.W.2d 705 (S. D.1969)*.

3. Former Chief Justice Warren and Justice Douglas, dissenting, criticized the majority opinion for giving officials no certain guide as to the scope of privilege. The Chief Justice argued that only interoffice reports of lower officials should be absolutely privileged, while the privilege for press releases should be restricted to officials of cabinet rank, and perhaps others whom the President appoints and can hold responsible.

The minority in *Barr v. Matteo* was concerned about the advantage the government official would have enjoying an absolute privilege, while the critic of the government official would be protected by only a qualified privilege. Such a rule would sanctify the powerful and silence debate. This was a humane argument, and the imbalance Warren and Douglas feared was somewhat redressed by the *New York Times* decision five years later. Some legal scholars are still fearful of the opportunity *Barr* provides the unscrupulous public official to attack a defenseless individual with impunity. See Prosser, Handbook of the Law of Torts, supra, 783–784. Becht, *The Absolute Privilege of the Executive in Defamation,* 15 Vand.L.Rev. 1127 (1962). Even the *New York Times* rule does not afford the critic of a public official absolute immunity. Libelous statements protected under this rule are generally limited to words and actions closely related to the official duties of the defamer.

Even though in a *Barr v. Matteo* fact situation a federal employee may not be successfully sued for libel, the constitution does not necessarily prohibit a federal employee's dismissal for engaging in defamation concerning his colleagues. In *Arnett v. Kennedy, 94 U.S. 1633 (1974)*, the Supreme Court held that a non-probationary federal civil servant's dismissal for allegedly defamatory statements about co-workers does not violate due process despite the fact that the dismissed employee was not granted a pre-removal, trial-type hearing.

(b) *Consent of the Plaintiff*—1. A news medium is not open to libel liability if the plaintiff has clearly given his consent to publication. A written release should be as broadly fashioned as the planned publication. Frequently, however, there is only an implication of consent. Mrs. Anne Campbell's comments on the charges against her and her denial of them, in the famous *New York Post* case referred to above, implied her consent to publication, since the denials alone would have been meaningless. This is another argument for balanced presentation by the reporter. Controversial litigation requires balanced reporting. If you cannot get the other side from one of the parties or his spokesman, readers should be told that the information was not available, although you tried to get it.

In 1952, the vice chairman of the Democratic National Committee was fired by the Democratic National Chairman for negotiating a $9 million tungsten contract with the Federal Government in behalf of a Portuguese corporation. In his own defense, the former Vice Chairman gave a New York *Herald Tribune* reporter a detailed statement for publication, and he issued a statement to the wire services. One day before the statute of limitations would have run, the

former Vice Chairman brought libel actions against a number of newspapers.

In PULVERMANN v. A. S. ABELL CO., 228 F.2d 797 (4th Cir. 1956), the United States Court of Appeals noted in part, per PARKER, C. J.: * * *

No false statements of fact, however, are contained in the article here complained of. There is no question as to the truthfulness of the statement that Westbrook had been discharged from his position with the Democratic National Committee, or that he had been discharged because of the contract which he and Pulvermann had made with the government for it to purchase tungsten from the Portuguese corporation, or that he and Pulvermann were to receive a commission of 5% on the contract. 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.) * * *

2. Because of a mix-up in photographs in a printer's backshop, a Methodist minister found his daughter's picture part of a compromising layout in the Vanderbilt University humor magazine. When the minister threatened a libel action, the editor of the college paper and one of his reporters went to him for an interview. The minister, in an expansive mood, granted the interview, permitted the student journalists to take pictures, and gave them his side of the story.

When the suits were filed the two young reporters, in best journalistic fashion, went to court and read the complaints. They charged that the humor magazine pictures, through innuendo, implied that two-year-old Pamela Langford was interested in acts of illicit sexual intercourse, that Mrs. Langford was sleeping in a darkened bedroom with a sailor, and that the Methodist minister, Mr. Langford, was having sexual relations with an unidentified person. A versatile picture layout!

With this information the young men wrote a composite story for the college paper. The minister and his family then filed new suits which were forthrightly dismissed by the Circuit Court. The Tennessee Court of Appeals, upholding that decision, noted that the fair and accurate report of the judicial proceeding was conditionally privileged. But more important, where the plaintiff told the young journalists that he wanted publicity, and publicity printed in his own words, and then referred them to his lawyers for legal details, the newspaper publication was absolutely privileged. *Langford v. Vanderbilt University, 44 Tenn. App. 694, 318 S.W.2d 568 (1958).*

The Tennessee Supreme Court rejected an appeal, and the two cases were never tried.

(c) *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. § 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 cannot be held responsible for damages.

The test case came in North Dakota. On Oct. 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 Farmer's Union was Communist controlled. WDAY had warned Townley that it believed his charge was libelous.

It was, and the Farmer's 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 Farmer's 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 Farmer's Union contended that § 315 did not apply in this case because a third party—the Farmer's Union—was involved, making the case something more than a heated confrontation between opposing political candidates. They cited a Nebraska case, *Sorensen v. Wood, 123 Neb. 348, 243 N.W. 82 (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 Farmer's Union was "in context" with a candidate's criticism of his opponent since "Communism" was a campaign issue. The majority added that the Farmer's 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 Farmer's Union retained Morris Ernst to carry 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 Farmer's Union posed three questions with constitutional implications:

(1) 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?

(2) Did Congress, when it passed the 1934 act, intend to repeal or annul state laws covering liability?

(3) Does § 315 deprive the Farmer's Union of its liberty and property, including reputation, without due process of law (in violation of the intent of the 5th and 14th amendments)?

In a surprisingly close 5–4 decision, the U. S. Supreme Court answered "yes" to the first two questions and affirmed the North Dakota decision upholding WDAY.

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## FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA v. WDAY INC.

360 U.S. 525, 79 S.Ct. 1302, 3 L.Ed.2d 1407 (1959).

Mr. 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 could 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.

## NOTES AND QUESTIONS

1. In a dissent joined by Justices Harlan, Whittaker, and Stewart, Justice Frankfurter appealed broadly for a doctrine of judicial restraint: the Court must not contravene the purpose or play the role of a legislative body. Unable to find evidence that Congress had ever intended immunity for the broadcaster in such situations, Frankfurter declared:

"The attempt to use congressional acquiescence to support the constitutional ruling of supersession of state law raises political stalemate and legislative indecision to the level of constitutional declaration. As we should go slow to read into what Congress has said as the negation of state power, unless it speaks explicitly or there is obvious collision, we should even less willingly find such negation in what Congress has frankly refused to say. * * * Thus, it may well be urged that repeated refusal to relieve from state libel laws amounted to an affirmance that the state laws of defamation should continue in operation since the Congress debated the issue in terms of erecting a defense to these laws, and then declined to do so." (at 541)

The dilemma of WDAY got short shrift from Frankfurter. The state libel laws, he said, merely make political broadcasts potentially less profitable since the station may have to compensate someone libeled during a candidate's broadcast.

2. Should the opinion of the majority in *WDAY* apply to any publication, for example a newspaper, required by law to publish a legal notice? Is the newspaper's claim for immunity for liability in defamation weaker since publishers unlike broadcasters are not dependent on having a federal agency grant them permission to continue in business every three years?

For some general broadcasting implications of *WDAY*, see text, Ch. IX, infra, pp. 799, 800.

3. A Utah court held recently that a radio station was not responsible for the libel of a political candidate during a talk show in which listeners were invited to phone in and express their opinions on controversial subjects, in the absence of a showing of actual malice on the part of the broadcaster. *Demman v. Star Broadcasting Co., 28 Utah 2d 50, 497 P.2d 1378 (1972).*

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## SECTION 2. THE PUBLIC LAW OF LIBEL: FAIR COMMENT AND CRITICISM

### A. THE ADVENT OF THE *NEW YORK TIMES* DOCTRINE

The fourth of the primary defenses against libel has been expanded so generously in recent years that it has come to be identified with a new theory called the public law of libel. Under this theory, public officials, public figures and private persons involved in matters of public interest cannot recover for libel unless they can prove actual malice on the part of the publisher. And actual malice is defined narrowly and uniformly as publication made with knowledge of its falsity or with reckless disregard of whether it is false or not. Actual malice, then, is now synonymous with deliberate lying or lying with wild abandon.

Traditionally, the defense of fair comment and criticism, which Prosser calls a special category of qualified privilege, Prosser, Handbook of the Law of Torts, supra, 792, has protected criticism of men, measures and social institutions seeking public approval. A communications medium under this privilege can go to the utmost lengths of denunciation, satirization, sarcasm, and condemnation if it does so with an honest purpose and thereby a lack of actual malice.

This means that governmental bodies, charitable organizations, businesses, unions, picketers, demonstrators, the creators of books, articles, plays, music, art, films, radio and television programs, sports events, scientific discoveries, and all who invite public controversy or appear to serve a public interest, are open to attack.

The protection applies to all intellectual judgments and opinions, no matter how defamatory. It is still advisable to estimate the degree of public interest inherent in a social situation, because, where public concern is lacking and where purely private persons are involved, the writer may have to distinguish between fact and opinion. Where the distinction between fact and opinion cannot be made clear it might be necessary to plead both truth and fair comment as a defense.

Fair comment is a defense against the libelous expression of an opinion. It is not intended to protect against the libelous misrepresentation of a fact, at least not in the absence of a concrete public interest. And it will not do to attempt a confusion of fact and opinion—"In my opinion Dr. Adams is guilty of murder." Inferences which fair-minded men might reasonably draw from facts truly stated and representing the honest opinion of the writer are safe.

It is also advisable to make a distinction where possible between the private life and the public life of a target of criticism. When an Iowa newspaper referred to a town marshal as a low-browed, ignorant, hard-boiled ruffian, "the most ungentlemanly specimen of white trash we have come across," the Supreme Court of that state ruled that such an ad hominem assault went beyond legitimate criticism of the marshal in his official capacity. *Taylor v. Hungerford, 205 Iowa 1146, 217 N.W. 83 (1927).*

Yet, earlier, the same court had upheld a weekly newspaper's right of fair comment in the classic case of the Cherry Sisters, a vaudeville act of legendary ineptitude:

"Effie is an old jade of 50 summers, Jessie a frisky filly of 40, and Addie, the flower of the family, a capering monstrosity of 35. Their long skinny arms, equipped with talons at the extremities, swung mechanically, and anon waved frantically at the suffering audience. The mouths of their rancid features opened like caverns, and sounds like the wailings of damned souls issued therefrom. They pranced around the stage with a motion that suggested a cross between the *danse du ventre* and fox trot —strange creatures with painted faces and hideous mien. Effie is spavined, Addie is stringhalt, and Jessie, the only one who showed her stockings, has legs with calves as classic in their outlines as the curves of a broom handle." *Cherry v. Des Moines Leader, 114 Iowa 298, 86 N.W. 323 (1901).*

It is rumored that a performance in the trial courtroom had persuaded the jury of the rightness of the defendant's cause.

When the Canadian magazine, *MacLean's,* in reviewing a book accused its author of immorality and indecency toward a young girl who was the book's central figure, a federal district court in New York, dismissing a motion for summary judgment, said that although criticism of an author's work would be entitled to a defense of fair comment, attacks on the personality of the author would not. *Stearn v. MacLean-Hunter Limited, 46 F.R.D. 76 (D.C.N.Y.1969).*

Precedents in the realm of fair comment are reasonably consistent. A letter to the editor of the dignified *New York Herald* in 1907 noted that "all things have their period of growth, flower, and decay," including Richard Outcault, famed cartoonist for Hearst and Pulitzer. Outcault, best remembered for his strip, "The Yellow Kid," from whence came the term "yellow journalism," asked for $50,000 damages. Rejecting his request, a New York court said that the actor, the artist, and the author submit their professional work to the public, and thereby appeal to the public for support. *Outcault v. New York Herald Co., 117 App.Div. 534, 102 N.Y.S. 685 (1907). See also Berg v. Printer's Ink Pub. Co., 54 F. Supp. 795 (D.C.N.Y.1943).*

No more successful in a libel action 20 years later was a Missouri law professor whose fitness to teach had been questioned. "The School of Law," said the court, "is a department of the University of Missouri, which is an institution established by law and governed in accordance with legislative enactments, and supported by taxation. * * * That institution and its various departments therefore become the proper and legitimate subjects of comment through the public press of the state. * * * The appellant having sought to be reinstated as a teacher in the law faculty in the University, a public position of great responsibility and obvious interest to citizens generally of the State, his fitness and qualifications for that position were subjects for public comment, and the comments as such were privileged." *Clark v. McBaine, 299 Mo. 77, 252 S.W. 428 (1923). See also El Paso Times, Inc. v. Trexler, 447 S.W.2d 403 (Tex.1969); Sanders v. Harris, 192 S.W.2d 754 (Va.1972).*

A radio commentator found himself the subject of vitriolic criticism on the editorial page of the *Cincinnati Enquirer* because of his opposition to a fluoridation campaign. The Court of Appeals of Ohio dismissed his suit for $1 million in damages. "A radio news broadcaster," the court declared, "assumes a dual role of private citizen and public figure so that while not an elected public official, his position is one tantamount to that and his broadcasts tantamount to a production

or performance for public exhibition, so that he submits it to fair and reasonable criticism within the class of privileged communications." *McCarthy v. Cincinnati Enquirer, Inc., 101 Ohio App. 297, 136 N.E.2d 393 (1956).*

Drew Pearson, who was both defendant and plaintiff in a disproportionately large number of libel actions, learned that he was a public figure by legal definition when he tried to sue the Fairbanks *Daily News-Miner* for referring to him as the "garbage man of the fourth estate." *Pearson v. Fairbanks Publishing Co., 413 P.2d 711 (Alaska 1966).*

The "Boston Strangler" failed in a claim against a film company's portrayal of his life in the absence of a showing of actual malice. The court, noting the "exceptional public interest" in the series of crimes, disallowed both defamation and invasion of privacy suits. The plaintiff had assisted in the making of the film. *DeSalvo v. Twentieth Century-Fox Film Corp., 300 F.Supp. 742 (D.C.Mass. 1969).*

To no avail, Mayor Yorty of Los Angeles objected to a political cartoon depicting him as a candidate for a straight jacket in believing he was qualified to be President Nixon's Secretary of Defense. *Yorty v. Chandler, 91 Cal.Rptr. 709 (Cal.App.1970).*

A Federal District Court in New York was unsympathetic to Gore Vidal's complaint that William Buckley had labeled one of his novels pornographic. The law, said the court, guarantees the critic an extremely wide range of freedom in expressing an opinion about a published work of art. *Buckley v. Vidal, 327 F. Supp. 1051 (S.D.N.Y.1971).*

Whether or not an art critic's review of an exhibition would have adverse financial effects upon a gallery owner was immaterial where criticism was within the doctrine of fair comment, said a federal appeals court. *Fisher v. Washington Post Co., 212 A.2d 335 (D.C.App.1965).* The court added that so long as the comment is the writer's actual opinion based on fact about a matter of public interest, the words are protected unless they are grounded in malice or go beyond a discussion of public works or acts. In a suit brought by a New York congressman against Drew Pearson and the Washington *Post*, another federal court implied that opinions can be good, bad, or indifferent, immature, premature, or ill-founded. The important question: Is it the writer's honest belief, regardless of his degree of expertise? *Keogh v. Pearson, 244 F.Supp. 482 (D.C.D.C.1965).*

The implication in both cases that the defamatory opinion should be the opinion of the writer and not that of a second party is strengthened by the outcome of Orlando Cepeda's suit against *Look* magazine. The court said that the doctrine of fair comment did not apply where the writer did not purport to give his readers the benefit of his own analysis and comment on either the player's baseball performance or his baseball temperament, but was merely passing on to his readers what he said he learned from officials of the San Francisco Giants organization. *Cepeda v. Cowles Magazine & Broadcasting Inc., 328 F.2d 869 (9th Cir. 1964).*

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## B. THE BACKGROUND OF THE *NEW YORK TIMES* CASE: THE RISE OF THE PUBLIC LAW OF LIBEL

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We have already noted that malice, which destroys the defenses of fair comment and qualified privilege, is a most difficult concept of law, for it requires, in effect, the reading of a man's mind. The landmark *New York Times* case greatly narrowed the definition of actual malice to knowledge that a libel is false

or reckless disregard as to whether it is false or not. *New York Times Co. v. Sullivan, 376 U.S. 245 (1964).* The Court in *New York Times* was talking about conscious lying. As a legal standard it may still be flimsy because it would seem to require psychological data for its demonstration. Nevertheless it gives far less latitude for successful libel actions to hypersensitive public figures, some of whom would relish the control of all news about themselves. No longer is it a broad and obscure question of a publisher's motivations—hatred, ill-will, intent to injure, negligence, lacking an honest opinion, without good faith—terms used for flexible definitions of malice in the past. The burden of proof is now much heavier. And the sometimes impossible distinction between fact and opinion does not have to be made.

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 large headline, "Heed Their Rising Voices." The ad copy began by stating that the non-violent 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 64 prominent Americans, 16 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 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 in 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 spectre of seditious libel, and the Court responded.

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## NEW YORK TIMES CO. v. SULLIVAN

376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

Mr. 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 constitu-

tionally 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, 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. * * *

Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications. Those statements do not foreclose our inquiry here. None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials. * * * In Beauharnais v. Illinois, 343 U.S. 250, the Court sustained an Illinois criminal libel statute as applied to a publication held to be both defamatory of a racial group and "liable to cause violence and disorder." But the Court was careful to note that it "retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel"; for "public men, are, as it were, public property," and "discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled." * * * Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

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 (D.C.S.D.N.Y. 1943). Mr. Justice Brandeis, in his concurring opinion in Whitney v. California, 274 U.S. 357, 375–376, gave the principle its classic formulation. * * *

*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 con-

stitutional 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 or his decision. Bridges v. California. 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 a 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, or either of 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 conviction 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, this Court held the utterance of a federal official to be absolutely privileged if made "within the outer perimeter" of his duties. 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

[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 most resolute, or the most irresponsible, in the unflinching discharge of their duties." Barr v. Matteo. Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer. See Whitney v. California (concurring opinion of Mr. Justice Brandeis). 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 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.

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";[27] 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" respondent. 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

[27] The Times has set forth in a booklet its "Advertising Acceptability Standards." Listed among the classes of advertising that the newspaper does not accept are advertisements that are "fraudulent or deceptive," that are "ambiguous in wording and * * * may mislead," and that contain "attacks of a personal character." In replying to respondent's interrogatories before the trial, the Secretary of the Times stated that "as the advertisement made no attacks of a personal character upon any individual and otherwise met the advertising acceptability standards promulgated," it had been approved for publication.

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.

Mr. Justice BLACK, with whom Mr. Justice DOUGLAS joins (concurring).

I concur in reversing this half-million-dollar judgment against the New York Times Company and the four individual defendants. 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. * * *

The half-million-dollar verdict does give dramatic proof, however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials. * * * [B]riefs before us show that in Alabama there are now pending eleven libel suits by local and state officials against the Times seeking $5,600,000, and five such suits against the Columbia Broadcasting System seeking $1,700,000. Moreover, this technique for harassing and punishing a free press—now that it has been shown to be possible—is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers.

In my opinion the Federal Constitution has dealt with this deadly danger to the press in the only way possible without leaving the free press open to destruction —by granting the press an absolute immunity for criticism of the way public officials do their public duty. * * * Stopgap measures like those the Court adopts are in my judgment not enough. This record certainly does not indicate that any different verdict would have been rendered here whatever the Court had charged the jury about "malice," "truth," "good motives," "justifiable ends," or any other legal formulas which in theory would protect the press. Nor does the record indicate that any of these legalistic words would have caused the courts below to set aside or to reduce the half-million-dollar verdict in any amount.

* * *

An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.

* * *

Mr. Justice GOLDBERG, with whom Mr. Justice DOUGLAS joins (concurring in the result). * * * The impressive array of history and precedent marshaled by the Court * * * confirms my belief that the Constitution affords greater protection than that pro-

vided by the Court's standard to citizen and press in exercising the right of public criticism.

In my view, the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses. The prized American right "to speak one's mind," cf. Bridges v. California, about public officials and affairs needs "breathing space to survive," N. A. A. C. P. v. Button. The right should not depend upon a probing by the jury of the motivation of the citizen or press. The theory of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious. In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be commented upon and criticized. Such criticism cannot, in my opinion, be muzzled or deterred by the courts at the instance of public officials under the label of libel.

It has been recognized that "prosecutions for libel on government have [no] place in the American system of jurisprudence." City of Chicago v. Tribune Co. I fully agree. Government, however, is not an abstraction; it is made up of individuals—of governors responsible to the governed. In a democratic society where men are free by ballots to remove those in power, any statement critical of governmental action is necessarily "of and concerning" the governors and any statement critical of the governors' official conduct is necessarily "of and concerning" the government. If the rule that libel on government has no place in our Constitution is to have real meaning, then libel on the official conduct of the governors likewise can have no place in our Constitution.

* * * It may be urged that deliberately and maliciously false statements have no conceivable value as free speech. That argument, however, is not responsive to the real issue presented by this case, which is whether that freedom of speech which all agree is constitutionally protected can be effectively safeguarded by a rule allowing the imposition of liability upon a jury's evaluation of the speaker's state of mind. If individual citizens may be held liable in damages for strong words, which a jury finds false and maliciously motivated, there can be little doubt that public debate and advocacy will be constrained. And if newspapers, publishing advertisements dealing with public issues, thereby risk liability, there can also be little doubt that the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished. * * * *This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen.* (Emphasis added.) Freedom of press and of speech insures that government will respond to the will of the people and that changes may be obtained by peaceful means. Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment. This, of course, cannot be said "where public officials are concerned or where public matters are involved. * * * [O]ne main function of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues. Where public matters are involved, the doubts should be resolved in favor of freedom of expres-

sion rather than against it." Douglas, The Right of the People (1958), p. 41. * * *

The conclusion that the Constitution affords the citizen and the press an absolute privilege for criticism of official conduct does not leave the public official without defenses against unsubstantiated opinions or deliberate misstatements. "Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgment * * * of free speech * * *."

The public official certainly has equal if not greater access than most private citizens to media of communication. In any event, despite the possibility that some excesses and abuses may go unremedied, we must recognize that "the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, [certain] liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." As Mr. Justice Brandeis correctly observed, "sunlight is the most powerful of all disinfectants." * * *

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**Editorial Note:**

Thomas I. Emerson, an eminent First Amendment scholar, agrees with Goldberg that the Court was willing in *New York Times v. Sullivan* to find instances when the government's interest in not being attacked by the citizen-critic outweighs any interest in freedom of expression. But his criticism of the limitations of *New York Times* went farther:

"When Justice Brennan faces the issue of whether 'calculated falsehood' should be protected from libel action, he rules it is not entitled to protection on the ground that it is 'no essential part of any exposition of ideas.' This is a relapse to the two-level theory (the notion that certain forms of speech are exempt from First Amendment protection). More importantly, it is inconsistent with basic First Amendment theory. It fails to take into account that false statements, whether intentional or not, perform a significant function in a system of freedom of expression by forcing citizens to defend, justify and rethink their positions. Moreover, Justice Brennan's view disregards another tenet of First Amendment theory—that it is no part of the government's business to decide for the citizen-critic what is of social value in communication and what is not. * * * The superrefined attempts to separate statements of fact from opinions, to winnow truth out of a mass of conflicting evidence (but only a part of the total relevant material), to probe into intents, motives and purposes—all these do not fit into the dynamics of a system of freedom of expression." Emerson, The System of Freedom of Expression, p. 530 (1970).

## NOTES AND QUESTIONS

1. *New York Times* brought into the law a uniform, federal definition for actual malice. But it did much more. It buried the common law crime of seditious libel. Harry Kalven, Jr., has made note of this result with undisguised gusto.

"My point is not the tepid one," he said, "that there should be leeway for criticism of the government. It is rather that defamation of the government is an impossible notion for a democracy. In brief, *I suggest that the presence or absence in the law of the concept of seditious libel defines the society.* * * * *If* * * * *it makes seditious libel an offense, it is not a free society no matter what its other characteristics.*" (Emphasis added.) Kalven, *The New York Times Case: A Note on The Central Meaning of the First Amendment,* 1964 Sup.Ct.Rev. 205.

2. In the majority of states in 1964, the fair comment privilege protected only truthful statements. Now, misstatements of fact no longer destroy the privilege. In reaching this conclusion, the Court adopted what had long been the "minority rule".

In an early case, the Topeka *State Journal* seriously questioned the official conduct of a candidate for re-election as attorney-general. The newspaper's curiosity focused on such matters as the management and control of the state school fund, the purchase of county bonds, and "certain manipulations" of public funds. The candidate, C. C. Coleman, sued F. P. MacLennan, publisher of the newspaper. A newspaper containing editorial opinion about a public official, intended to give the electorate information honestly believed to be true, (the trial judge instructed the jury,) is privileged, "although the matters contained in the article may be untrue in fact, and derogatory of the character of the candidate." *Court Syllabus, 78 Kan. 711, 98 P. 281 (1908).* The case, *Coleman v. MacLennan,* and other Anglo-American precedents for the minority rule are discussed in detail in Bliss, *Development of Fair Comment as a Defense to Libel,* 44 Journalism Quarterly (1967), p. 627.

In some jurisdictions, prior to the *Times* case, public officials could not recover unless crime, gross immorality, or gross incompetence was charged and special damages resulted. Others required public officials and candidates to prove that offending statements were false. One may judge, therefore, that the Court in the *Times* case was taking an evolutionary rather than a revolutionary step.

The jury found for the defendant and Coleman appealed to the Kansas Supreme Court, which upheld the lower court decision. Justice Rousseau Burch, from whom the U. S. Supreme Court was later to quote liberally, had given the issue scholarly attention and had concluded that the majority rule put the law about where Blackstone had left it, and on the pretense that criticism would drive good men out of politics. "[A] candidate," said Justice Burch, "must surrender to public scrutiny * * * so much of his private character as affects his fitness for office. * * * The narrow (majority) rule," he added, "leaves no greater freedom for the discussion of matters of the gravest public concern than it does for the discussion of the character of a private individual. * * *" The Kansas jurist recognized the frequent fuzziness between fact and opinion, and he found no insuperable problem in the discovery of malice. See Bliss, supra, pp. 633–634, citing *Coleman v. MacLennan, pp. 281, 290–92.*

Though *Coleman* was decided in the heat of a state election, the U. S. Supreme Court in 1964 not only adopted the Kansas rule, but expanded it.

For an interesting article on the *Times* case arguing for some retrenchment of the *New York Times v. Sullivan* doctrine, see Shapo, *Media Injuries To Personality: An Essay on Legal Regulation of Public Communication,* 46 Tex.L.Rev. 650 (1968). Prof. Shapo argues that the *New York Times* may have been in an inferior power relationship in Alabama under the facts of the *Times* case, but it is not, arguably, elsewhere.

3. In the place of problems resolved by the Court in the *Times* case, new ones arose. One of the most perplexing of these questions was: how did the Court intend to define "public official"?

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## ROSENBLATT v. BAER

383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966).

**Editorial Note:**

Two years later, the Court began to fashion an answer in a case involving a supervisor of a recreation area. A col-

umnist for the Laconia (N.H.) *Evening Citizen* asked, "what happened to all the money last year? and every other year?" Baer, the supervisor, sued for libel on grounds that the column charged mismanagement and peculation. A jury awarded him $31,500, and Rosenblatt, the columnist, appealed.

The unanimity of the Court in *Times* was severely fragmented in this case. The public official designation would apply, the Court held.

Mr. Justice BRENNAN delivered the opinion of the Court.

* * *

We remarked in *New York Times* that we had no occasion "to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included." No precise lines need be drawn for the purposes of this case. The motivating force for the decision in *New York Times* was twofold. We expressed "a profound national commitment to the principle that debate on public issue should be uninhibited, robust, and wide-open, *and* that [such debate] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. *It is clear, therefore, 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 or control over the conduct of governmental affairs.* (Emphasis added.)

* * *

### NOTES AND QUESTIONS

1. The fact that Baer was no longer a county employee when the column appeared did not appear to matter. It is possible, the Court noted, that a person could be so far removed from a position of former authority that comment on his official conduct would no longer be covered by *Times*. But here public interest was still high and the comment referred to the duties of a county employee.

2. There is also the strong suggestion in Brennan's opinion that a plaintiff such as Baer will have to make a choice: Either he is not important enough as a public person to warrant large damages for injury to his reputation; or he is important and therefore subject to the limitations of the *New York Times* doctrine. For the newsman is the guideline this: the lower the person in the official hierarchy, the greater the risk of libel? Why?

3. Black and Douglas rejected all speculation about the proper definition of "public official" because such speculation admitted the possibility of a crime of seditious libel. Fortas dissented on a technicality. Whether intended or not, the Court in *Rosenblatt* extended to the ordinary citizen much the same privilege it had given executive officers in *Barr v. Matteo, 360 U.S. 564 (1959)*. Finally there is an intimation in Douglas' concurring opinion that the central issue in these cases should not be who is a public official but whether a public *issue* is being discussed. From a First Amendment point of view, isn't Douglas' analysis more helpful than endlessly attempting to define who is a "public official" or a "public figure"?

4. The short step between public official and public "figure" had been taken

by a federal court shortly after *New York Times* was decided. Dr. Linus Pauling, one of the fathers of the atomic bomb and an active pacifist, brought suit against the New York *Daily News* which had intimated that he was pro-Communist. An earlier $1 million suit against William Buckley and his *National Review,* which had characterized Dr. Pauling as a "megaphone for Soviet policy," and as "giving aid and comfort to the enemies of this country," had been dismissed by a New York Supreme Court judge on the strength of the *New York Times* decision. The judge held that Dr. Pauling as a "public figure" is open to the same comment that applies to public officials.

In the *Daily News* case the United States Court of Appeals for the Second Circuit carefully reviewed the evidence in support of defenses of truth, fair comment, and lack of malice, and the propriety of the trial judge's instructions to the jury. These were the major questions of law upon which the Appeals Court upheld the District Court's opinion. But, if the Appeals Court had disagreed with the lower court's ruling, it would have affirmed in any event on the basis of the *New York Times* decision. *Pauling v. News Syndicate Co. Inc., 335 F.2d 659 (2d Cir. 1964).* See also *Pauling v. Globe-Democrat Publishing Co., 362 F. 2d 188, 195 (8th Cir. 1966).*

5. The "public official" rule has been broadly interpreted by lower courts to include charges of Communist "tendencies" and absenteeism against Senator Clark of Pennsylvania, *Clark v. Allen, 415 Pa. 484, 204 A.2d 42 (1964);* similar charges against a former legislator and university professor, *Rose v. Koch, 154 N.W.2d 409 (Minn.1967);* and magazine articles attacking the late FBI Director Herbert Hoover, *Application of Levine, 97 Ariz. 88, 397 P.2d 205 (1964).*

In a Kentucky case, application of the rule was disallowed where it appeared the attack was not on the "official" conduct of a policeman, *Tucker v. Kilgore, 388 S.W.2d 112 (Ky.1964).* 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 because the plaintiffs were "public" people, *Lorillard v. Field Enterprises, Inc., 65 Ill.App.2d 65, 213 N.E.2d 1 (1965).*

6. A deputy sheriff, *Thompson v. St. Amant, 184 So.2d 314 (1966), aff'd, St. Amant v. Thompson, 390 U.S. 727, (1968);* an ex-Governor, *Powell v. Monitor Publishing Co., 217 A.2d 193 (N.H.1966);* and school boards, *Board of Education of Miami Trace Local School District, Fayette County, Ohio v. Marting, 7 Ohio Misc. 64, 217 N.E.2d 712 (1966); Pickering v. Board of Education, 391 U.S. 563* (1968) were also unable to collect damages under the rule.

In *Pickering* a school teacher who had criticized the school board's use of public funds was not sued for libel but dismissed from his teaching post. Such action, said the Supreme Court, was an inhibition of a citizen's First Amendment rights in the absence of a showing of actual malice, even though the teacher's statements in a letter to the local newspaper were partly erroneous.

A deputy chief of detectives was unable to collect from *Time* magazine for allegations of brutality where Negro suspects were concerned. *Pape v. Time, Inc., 354 F.2d 558 (7th Cir. 1965).*

A police captain called to quell a family fight shot the family's son. A newspaper report quoted the boy's father as saying that the shooting was "cold-blooded murder." The police officer sued the newspaper. A federal district court in Maryland, defining the police captain as a public figure, ruled that the newsman

had accurately reported, and had no reason not to believe, the opinions of family, friends and neighbors of the boy, that the shooting was unjustified. *Thuma v. Hearst Corp., 340 F.Supp. 867 (D.C. Md.1972).*

The public figure designation has been applied with the same result to policemen and firemen seeking election to a public safety council, *Tilton v. Cowles Publishing Co.,* 459 P.2d 8 (Wash.1969); to a head basketball coach, *Grayson v. Curtis Publishing Co.,* 436 P.2d 756 (Wash. 1967); to a well known trainer of standard bred horses, *Lloyds v. United Press Int'l, Inc.,* 311 N.Y.S.2d 373 (Sup.Ct. 1970); and to Republican Party workers and precinct delegates, *Arber v. Stahlin,* 159 N.W.2d 154 (Mich.1968), cert. den. 397 U.S. 924 (1970).

The *New York Times* rule has also been used successfully to protect newspaper publishers in libel suits brought by a county commissioner running for re-election, *Baldine v. Sharon Herald Co., 280 F.Supp. 440 (W.D.Pa.1966);* a highway department employee falsely reported to have retained department money, *News-Journal Co. v. Gallagher, 233 A.2d 166, (Del.1967);* editorials critical of the official conduct of a clerk of criminal and circuit courts of a county, running for re-election, *Beckley Newspaper Corp. v. Hanks, 389 U.S. 81 (1967);* and stories charging a mayor's law firm with conflicts of interest, *Gilberg v. Goffi, 15 N. Y.2d 1023, 207 N.E.2d 620, 260 N.Y. S.2d 29 (1965).* A New Jersey tax assessor was designated a public official in *Eadie v. Pole, 91 N.J.Super. 504, 221 A.2d 547 (1966);* a city patrolman in *Coursey v. Greater Niles Tp. Pub. Corp., 239 N.E.2d 837 (Ill.1968),* a city attorney in *Tunnell v. Edwardsville Intelligencer, Inc., 241 N.E.2d 28 (Ill.App. 1968),* a manager of a community center in *Brown v. Kitterman, 443 S.W.2d 146 (Mo.1969);* an army officer referred to in reports of the My Lai massacre, *Medina v. Time, Inc., 319 F.Supp. 398 (D.C.Mass.1970);* and an architect appointed by a city manager to supervise the construction of a city school. *Priestley v. Hastings & Sons Pub. Co. of Lynn, 271 N.E.2d 628 (Mass.1971).*

The Supreme Court of Pennsylvania, however, would not permit application of the *New York Times* rule when a defendant admitted that he knew his defamatory comments were false, *Fox v. Kahn, 421 Pa. 563, 221 A.2d 181 (1966).*

In 1965, the U. S. Supreme Court intervened to hold that charges of a "diabolical plot" against a county attorney and a city police chief fell under the rule, *Henry v. Collins, 380 U.S. 357 (1965).* In this case the Supreme Court ruled that spite or ill will was an insufficient standard.

Candidates for public office were specifically included in 1966 by the Louisiana Court of Appeals, *Dyer v. Davis, 189 So.2d 678 (La.1966).* And an Arizona court classified a college student senator as a public official, *Klahr v. Winterble, 4 Ariz.App. 158, 418 P.2d 404 (1966).*

7. But a New York court refused to extend the rule to the baseball pitcher, Warren Spahn, who successfully litigated his objections to the publication of a fictionalized biography without his consent, *Spahn v. Julian Messner, Inc., 18 N.Y.2d 324, 221 N.E.2d 543 (1966).* Jack Dempsey won a case against *Sports Illustrated* which had tried to apply the rule to an article suggesting that Dempsey had won the heavyweight title from Jess Willard in 1919 wearing weighted gloves, *Dempsey v. Time, Inc., 43 Misc.2d 754 (N.Y.1964).*

And three letter carriers who had refused to join a union and were called "scabs, traitors, and men of low character and rotten principles," were declared by a Virginia court to be neither "public offi-

cials," "public figures" nor persons involved in matters of "public interest." Whether or not the plaintiffs joined the union was nobody's business, said the court. The elaborated defamatory characterizations were carried in a monthly union newsletter. The action, brought under an insulting words statute, resulted in awards of $10,000 compensatory damages and $45,000 punitive damages to each letter carrier. [The court cited *Linn v. United Plant Guard Workers, 383 U. S. 53 (1966)* in which the United States Supreme Court said that state remedies could be applied to either party to a labor dispute engaging in malicious libels because such parties have no remedies under the National Labor Relations Board.] *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL–CIO v. Austin, 192 S.E.2d 737 (Va.1972).* On June 25, 1974 the U. S. Supreme Court reversed holding 6–3 that unions have a right to publish lists of "scabs" and to criticize vehemently non-complying members.

8. The *New York Times* rule was also applied to a local judge, *Driscoll v. Block, 3 Ohio App.2d 351 (1965),* and to the executive secretary of a temperance organization, which, the court said, was quasi-public in nature, *Edmonds v. Delta Democrat Pub. Co., 93 So.2d 171 (Miss. 1957).*

Members of grand juries fall under the "public official"—"public figure" rule, said a Minnesota court in 1971, as long as criticism of them is limited to their official activities. The Minnesota court would extend the "actual malice" test to all nongovernmental figures in whose activities there is a legitimate public interest. The publisher in this case had made a fairly extensive investigation, had withheld publication until final adjournment of the grand jury, had used qualified language in the offending editorial where he felt uncertain of his ground, and had published a partial retraction in a subsequent issue of his newspaper. In such circumstances there could be no showing of actual malice. *Standke v. B. E. Darby & Sons, Inc., 193 N.W.2d 139 (Minn. 1971).*

9. There remained only the question of what would constitute a public "issue" under the *New York Times* doctrine.

A business enterprise functioning within the context of a public issue has no immunity. H. O. Merren & Co., a British West Indies shipping firm, brought an action against the Dallas *Morning News* for a report that the British company, by means of a "legal loophole," had profitably transshipped goods from the United States through the West Indies to Cuba. The suit could not succeed, said a federal court, in the absence of a showing of actual malice. *H. O. Merren & Co. v. A. H. Belo Corp., 228 F.Supp. 515 (N.D.Tex.1964).*

10. Justice Douglas' notion that any matter of legitimate public interest, that is, any public issue, should be the standard for application of the *Times* doctrine, and the developing definitions of public official and public figure accepted by other members of the Court, were the beginning of a logical pattern of applications of the new public law of libel.

That pattern was strengthened late in 1968 when the U. S. Court of Appeals for the Ninth Circuit, noting the escalation from "public official" to "public figure" to "public issue" in applications of the *Times* doctrine, ruled against a medical laboratory which brought a trade libel suit against CBS for the network's program exposing faulty laboratory testing and the lack of federal control. The court said in part:

UNITED MEDICAL LABORATORIES, INC. v. COLUMBIA BROADCASTING SYSTEM, INC., 404 F.2d 706, 710, 711, 258 F.Supp. 735 (9th Cir. 1968), cert. den. 394 U.S. 921 (1969). Of the utmost relevance here * * * is the fact that the opinion (in

the district court) took occasion to reiterate, as the other cases had done (New York Times, Garrison, Rosenblatt, Walker, Butts, Hill and Pickering), the fundamental basis on which all of the court's First Amendment thrusts into the various fields thus far presented has rested—the right of the public to have an interest in the matter involved and its right therefore to know or be informed about it. * * *

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 of 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. * * *

The crucial question here then is whether First Amendment immunity can properly be regarded as extending to disclosure and discussion of professional practices and conditions in the health area involved. * * *

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. * * *

11. In 1972 a New York court would rule that a plaintiff restaurant, as a public facility, must show more than a published false statement to recover in a libel suit. A qualified privilege of fair comment protects criticism of institutions serving the public. Mere disparagement of the quality of a product or service sold to the public is not actionable in and of itself without a showing of malice and special damages. *Steak Bit of Westbury, Inc. v. Newsday, Inc., 334 N.Y.S. 2d 325 (N.Y.Supp.1972).*

12. Two cases decided together, one involving a football coach and the other a retired army general, answered an additional major question raised by the *New York Times* case. What would a news medium have to do to exhibit reckless disregard of the truth?

An answer came in the *Butts* case which 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, 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 George Burnett, 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 Burnett's 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 Burnett's note to Georgia head coach, Johnny Griffith, and Butts' 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 Burnett's notes, and 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 doctrine. 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 is a study in the problems presented by the forward thrust of *New York Times,* and it defines a separate test —highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers"—for public figures.

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## CURTIS PUBLISHING CO. v. BUTTS and ASSOCIATED PRESS v. WALKER

388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967).

Mr. 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. Cf. Sulzberger, Responsibility and Freedom, in Nelson, Freedom of the Press from Hamilton to the Warren Court 409, 412.

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,[20] was grossly

[20] Counsel for Butts continually pressed upon the jury in argument that the defendant had failed to exercise a minimum of care. He did not seriously contend that the Saturday Evening Post was actuated by pre-existing animosity toward Butts. Arguing that the misquotations which were shown to be present were proof of malice he stated: "I say that is not fair journalism; I say that is not true, careful reporting." After reviewing the failure of Curtis to * * * check the game films, he asked the jury: "Again, is that good reporting? Is that what the field or the profession of journalism owes you and owes me * * * when it is getting ready to write an article which it knows and which it states therein that it is going to

inadequate in the circumstances. The impact of a jury instruction "is not to be ascertained by merely considering isolated statements, but by taking into view all the instructions given and the tendencies of the proof in the case to which they could possibly be applied."

This jury finding was found to be supported by the evidence by the trial judge and the majority in the Fifth Circuit. Given the extended history of the case, the amount of the evidence pointing to serious deficiencies in investigatory procedure, and the severe harm inflicted on Butts, we would not feel justified in ordering a retrial of the compensatory damage issue, either on the theory that this aspect of the case was submitted to the jury only under the issue of "truth," or on the very slim possibility that the jury finding regarding punitive damages might have been based on Curtis' attitude toward Butts rather than on Curtis' conduct.

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 such 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 * * *

### NOTES

1. Chief Justice Warren concurred in the result, but he objected to what he saw in Harlan's opinion as the making of a distinction between "public official" and "public figure" and the forging of a separate standard for each.

2. Consistent with their absolutist rejection of all libel actions against the press in the *New York Times* case, Black and Douglas dissented in the *Butts* case. Brennan and White dissented because they could not accept the trial judge's charge to the jury.

3. Essentially what happened in the *Butts* case was that four members of the

ruin us * * *." The gist of Butts' contention on "actual malice" was that Curtis had been anxious to publish an exposé and had thus wantonly and recklessly seized on a questionable affidavit from Burnett. It is this theory which we feel that the jury must have accepted in awarding punitive damages.

Court—Harlan, Clark, Fortas and Stewart—introduced a different standard of malice, applicable only to libels of "public figures." "A 'public figure'," said the Court, "who is not a public official may * * * 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) Considering the Chief Justice's rejection of this variation on the theme of the *New York Times* rule, it is not clear whether a new standard emerged in the *Butts* case. But the enormous importance of the *Butts* case to journalism should be apparent. Butts finally settled for a total of $460,000 in damages. The *Butts* rule was followed in *Griffin v. Clemow, 251 A.2d 415 (Conn.Super. 1968).* See also *Johnston v. Time, Inc., 321 F.Supp. 837 (D.C.N.C.1970).*

4. 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 thrust 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.)

5. A Massachusetts court has since ruled that a plaintiff who was a suspect in a $1.5 million mail robbery and who chose to expose himself publicly by granting interviews and calling press con-

ferences was a "public figure" and could not recover in a libel action against a newspaper and a reporter for an investigatory article about him and other suspects in the absence of a showing of actual malice. *Tripoli v. Boston Herald-Traveler Corp., 268 N.E.2d 350 (Mass. 1971).*

A professional basketball player who had retired nine years before was declared by a federal court to be a "public figure" when he tried to sue *Sports Illustrated* for an article containing the statement that another player had "destroyed" him as a competitor. *Time, Inc. v. Johnston, 448 F.2d 378 (4th Cir. 1971).*

And the distinction between "hot" news and what a reporter might call "time copy" was drawn in a case involving an escapee from a federal jail. When an article is planned months in advance and time is not crucial, said the court, more extensive verification procedures may be required than when the newspaper is reporting "hot" news items of public interest for rapid dissemination. *McFarland v. Hearst Corp., 332 F.Supp. 746 (D.C.Md.1971).*

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## ST. AMANT v. THOMPSON

390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968).

**Editorial Note:**

Elaboration on the meaning of "reckless disregard" was provided by Justice White in a case involving "defamation by association" of a deputy sheriff in the heat of a political campaign. The Court reversed the Supreme Court of Louisiana.

Mr. Justice WHITE delivered the opinion of the Court: * * *

It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity. Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But *New York Times* and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones. We adhere to this view and to the line which our cases have drawn between false communications which are protected and those which are not.

The defendant in a defamation action brought by a public official cannot, however, 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.* (Emphasis added.) Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

* * * "Reckless disregard," it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out by case-to-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law. Our cases, however, have furnished meaningful guidance for the further definition of a reckless publication. In *New York Times,* the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In Garrison v. State of Louisiana, also decided before the decision of the Louisiana Supreme Court in this case, the opinion emphasized the necessity for a showing that a false publication was made with a "high degree of awareness of * * * probable falsity." Mr. Justice Harlan's opinion in Curtis Publishing Co. v. Butts stated that evidence of either deliberate falsification or reckless publication "despite the publisher's awareness of probable falsity" was essential to recovery by public officials in defamation actions. These cases are clear 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. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

* * *

### NOTES AND QUESTIONS

1. Justice Fortas, in a dissenting opinion, disagreed with the majority because the plaintiff Thompson had been caught in the crossfire between two political candidates.

"The First Amendment," said Fortas, "is not so fragile that it requires us to immunize this kind of reckless, destructive invasion of the life, even of public officials, heedless of their interests and sensitivities. The First Amendment is not a shelter for the character assassinator whether his action is heedless and reckless or deliberate. The First Amendment does not require that we license shotgun attacks on public officials in virtually unlimited open-season. The occupation of public officeholder does not forfeit one's membership in the human race. The public official should be subject to severe scrutiny and to free and open criticism. But if he is needlessly, heedlessly, falsely accused of crime, he should have a remedy in law. *New York Times* does not preclude this minimal standard of civilized living."

Had the defendant checked on the reliability of the libelous statement, Fortas would have voted with the majority, even if the charge of gross misconduct had later turned out to be false.

2. "The 'public interest' standard is intended to be wide-reaching," Note, *Privacy, Defamation and the First Amendment,* 67 Colum.L.Rev. 926 (1967) reflecting the central premise of philosopher Alexander Meiklejohn 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. Meiklejohn, *The First Amendment Is An Absolute,* 1961 Sup.Ct.Rev. 245 at 253–255. See also Meiklejohn, Political Freedom (1960). Speech having social importance, whether of a political nature or not, must be free, said Meiklejohn, not because persons "desire to speak," but because the people "need to hear." What are the strengths and weaknesses of the *New York Times* doctrine in terms of achieving these objectives of freedom of expression?

3. If actual malice as defined in *New York Times v. Sullivan* and applied in later cases has not been demonstrated by

a plaintiff who qualifies as a public official or a public figure, the defendant publisher is clearly not vulnerable to libel suits. The term "blackmail," for example, 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 "libel" when reported accurately in newspaper articles. The plaintiff had entered into agreements with the city for zoning exemptions in the past, and was again seeking such favors to permit 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.

The trial judge's instructions to the jury, reflecting confusion in the judge's 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" and a judgment against the *Greenbelt* (Md.) *New Review* was reversed. *Greenbelt Cooperative Publishing Ass'n v. Bresler,* 398 U.S. 6 (1970).

4. Similarly, when a primary election candidate was characterized by the *Concord* (N.H.) *Monitor* as a "former small-time bootlegger," he sued the newspaper and was awarded $10,000 by a jury and the New Hampshire Supreme Court affirmed the judgment. Again the Supreme Court reversed on the basis of faulty instructions to the jury as to the Court's meaning of "knowing falsehood or reckless disregard" as to the truth or falsity of a publication. *Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).*

5. The Ocala (Fla.) *Star Banner* came closer 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. An area editor who had been employed by the newspaper little more than a month and had never heard of the mayor's brother changed the first name when a local reporter phoned in the story. A jury awarded the plaintiff $22,000 in compensatory damages. Again 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 per Justice Stewart. *Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971).*

6. A hung jury twice denied Mayor Joseph Alioto of San Francisco the general and punitive damages he sought in a $12½ million suit against *Look* magazine for a Sept. 23, 1969 article entitled, "The Web That Links San Francisco's Mayor Alioto and the Mafia." Both verdicts turned on the question of actual malice. In the second trial the jurors agreed unanimously that the article was in part false and defamatory, but split 9–3 on the question of actual malice. The federal district court, admitting that it was a close question, ruled nevertheless that malice had not been demonstrated with convincing clarity. *Alioto v. Cowles Communications, Inc., C.A. 52150 (N.D.Cal.1969).*

In an appearance before Sen. Sam Ervin's Subcommittee on Constitutional Rights (March 3, 1971) Alioto protested the availability of government files and documents to "inexperienced" reporters and reiterated Fortas' plaint that the "occupation of public officeholder does not forfeit one's membership in the human race." The Mayor felt that he had been particularly damaged by the misinterpretation of material leaked from FBI files.

7. 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 magazine had confused a complainant's testimony with the independent findings of the Commission itself, the Supreme Court ruled

through Justice Stewart that in the circumstances of the case the magazine did not engage in a "falsification" sufficient in itself to sustain a jury finding of "actual malice."

"The author of the *Time* article," said Justice Stewart, "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." *Time Incorporated v. Pape, 401 U.S. 279 (1971). See also Time, Inc. v. McLaney, 406 F.2d 565 (C.A.Fla.1969).* Similarly in *Waskow v. Associated Press, 462 F.2d 1173 (D.C.Cir. 1972)* the court would not hold a newspaper liable for a good-faith misinterpretation of another newspaper's story on anti-war demonstrators and their draft statuses. See also *Casano v. WDSU–TV, Inc., 464 F.2d 3 (C.A.Miss.1972).*

8. Justice Douglas may have been prophetic when he suggested in *Rosenblatt v. Baer, 383 U.S. 75 (1966),* that the central issue in these cases should not be who is a public official or public figure but whether a public issue is being discussed. That notion may have come to fruition when a divided Court upheld a Court of Appeals reversal of a $275,000 District Court judgment in favor of a magazine distributor who had been called a "smut distributor" and "girlie-book peddler" by a radio station, but was subsequently acquitted of criminal obscenity charges. In a subsequent Supreme Court ruling Justice Douglas, ironically, took no part in the case and Justice Stewart, the author of a number of opinions for the Court in this area, joined Justices Marshall and Harlan in dissent. Justices Black and White concurred in the result, but White's opinion indicated that he does not accept the "public issue" standard as it is fashioned by Brennan.

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## ROSENBLOOM v. METROMEDIA

403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971).

Mr. Justice BRENNAN announced the judgment of the Court and an opinion in which The CHIEF JUSTICE and Mr. Justice BLACKMUN join.

In a series of cases beginning with New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Court has considered the limitations upon state libel laws imposed by the constitutional guarantees of freedom of speech and of the press. *New York Times* held that in a civil libel action by a public official against a newspaper those guarantees required clear and convincing proof that a defamatory falsehood alleged as libel was uttered with "knowledge that it was false or with reckless disregard of whether it was false or not." The same requirement was later held to apply to "public figures" who sued in libel on the basis of alleged defamatory falsehoods. The several cases considered since *New York Times* involved actions of "public officials" or "public figures," usually, but not always, against newspapers or magazines. Common to all the cases was a defamatory falsehood in the report of an event of

"public or general interest." 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. The District Court for the Eastern District of Pennsylvania held that the *New York Times* standard did not apply and that Pennsylvania law determined respondent's liability in this diversity case, 289 F.Supp. 737 (1968). The Court of Appeals for the Third Circuit held that the *New York Times* standard did apply and reversed the judgment for damages awarded to petitioner by the jury. 415 F.2d 892 (1969). We granted certiorari, 397 U.S. 904 (1970). We agree with the Court of Appeals and affirm that court's judgment.

In 1963, petitioner was a distributor of nudist magazines in the Philadelphia metropolitan area. During the fall of that year, in response to citizen complaints, the Special Investigations Squad of the Philadelphia Police Department initiated a series of enforcement actions under the city's obscenity laws. The police, under the command of Captain Ferguson, purchased various magazines from more than 20 newsstands throughout the city. Based upon Captain Ferguson's determination that the magazines were obscene, police on October 1, 1963, arrested most of the newsstand operators on charges of selling obscene material. While the police were making an arrest at one newsstand, petitioner arrived to deliver some of his nudist magazines and was immediately arrested along with the newsboy. Three days later, on October 4, the police obtained a warrant to search petitioner's home and the rented barn he used as a warehouse, and seized the inventory of magazines and books found at these locations. Upon learning of the seizures, petitioner, who had been released on bail after his first arrest, surrendered to the police and was arrested for a second time.

Following the second arrest, Captain Ferguson telephoned respondent's radio station *WIP* and another local radio station, a wire service, and a local newspaper to inform them of the raid on petitioner's home and of his arrest. *WIP* broadcast news reports every half hour to the Philadelphia metropolitan area. These news programs ran either five or ten minutes and generally contained from six to twenty different items that averaged about thirty seconds each. *WIP*'s 6 p. m. broadcast on October 4, 1963, included the following item:

"City Cracks Down on Smut Merchants

"The Special Investigations Squad raided the home of George Rosenbloom in the 1800 block of Vesta Street this afternoon. Police confiscated 1,000 allegedly obscene books at Rosenbloom's home and arrested him on charges of possession of obscene literature. The Special Investigations Squad also raided a barn in the 20 hundred block of Welsh Road near Bustleton Avenue and confiscated 3,000 obscene books. Capt. Ferguson says he believes they have hit the supply of a main distributor of obscene material in Philadelphia."

This report was re-broadcast in substantially the same form at 6:30 p. m., but at 8 p. m. when the item was broadcast for the third time, *WIP* corrected the third sentence to read "reportedly obscene." News of petitioner's arrest was broadcast five more times in the following twelve hours, but each report described the seized books as "allegedly" or "reportedly" obscene. From October 5 to October 21, *WIP* broadcast no further reports relating to petitioner.

On October 16 petitioner brought an action in Federal District Court against various city and police officials and against several local news media. The suit alleged that the magazines petitioner distributed were not obscene and sought injunctive relief prohibiting further police interference with his business as well as further publicity of the earlier arrests. The second series of allegedly defamatory broadcasts related to *WIP*'s news reports of the law suit. There were ten broadcasts on October 21, two on October 25, and one on November 1. None mentioned petitioner by name. The first at 6:30 a. m. on October 21 was pretty much like those that followed:

"Federal District Judge Lord, will hear arguments today from two publishers and a distributor all seeking an injunction against Philadelphia Police Commissioner Howard Leary * * * District Attorney James C. Crumlish * * * a local television station and a newspaper * * * ordering them to lay off the smut literature racket.

"The girlie-book peddlers say the police crackdown and continued reference to their borderline literature as smut or filth is hurting their business. Judge Lord refused to issue a temporary injunction when he was first approached. Today he'll decide the issue. It will set a precedent * * * and if the injunction is not granted * * * it could signal an even more intense effort to rid the city of pornography."

On October 27, petitioner went to *WIP*'s studios after hearing from a friend that the station had broadcast news about his lawsuit. Using a lobby telephone to talk with a part-time newscaster, petitioner inquired what stories *WIP* had broadcast about him. The newscaster asked him to be more specific about dates and times. Petitioner then asked for the noon news broadcast on October 21, 1963, which the newscaster read to him over the phone; it was similar to the above 6:30 a. m. broadcast. According to petitioner, the ensuing interchange was brief. Petitioner told the newscaster that his magazines were "found to be completely legal and legitimate by the United States Supreme Court." When the newscaster replied the district attorney had said the magazines were obscene, petitioner countered that he had a public statement of the district attorney declaring the magazines legal. At that point, petitioner testified, "the telephone conversation was terminated—he just hung up." Petitioner apparently made no request for a retraction or correction, and none was forthcoming. *WIP*'s final report on petitioner's lawsuit—the only one after petitioner's unsatisfactory conversation at the station—occurred on November 1 after the station had checked the story with the judge involved.

In May 1964 a jury acquitted petitioner in state court of the criminal obscenity charges under instructions of the trial judge that, as a matter of law, the nudist magazines distributed by petitioner were not obscene. Following his acquittal, petitioner filed this diversity action in District Court seeking damages under Pennsylvania's libel law. Petitioner alleged that *WIP*'s unqualified characterization of the books seized as "obscene" in the 6 and 6:30 p. m. broadcasts of October 4, describing his arrest, constituted libel *per se* and was proved false by petitioner's subsequent acquittal. In addition, he alleged that the broadcasts in the second series describing his court suit for injunctive relief were also false and defamatory in that *WIP* characterized petitioner and his business associates as "smut distributors" and "girlie book peddlers" and, further, falsely characterized the suit as an attempt to force the defendants "to lay off the smut literature racket." * * *

The jury returned a verdict for petitioner and awarded $25,000 in general damages, and $725,000 in punitive dam-

ages. The District Court reduced the punitive damages award to $250,000 on remittitur, but denied respondent's motion for judgment n. o. v. In reversing, the Court of Appeals emphasized that the broadcasts concerned matters of public interest and that they involved "hot news" prepared under deadline pressure. The Court of Appeals concluded that "the fact that plaintiff was not a public figure cannot be accorded decisive significance if the recognized important guarantees of the First Amendment are to be adequately implemented." 415 F.2d, at 896. For that reason, the court held that the *New York Times* standard applied and, further, directed that judgment be entered for respondent, holding that, as a matter of law, petitioner's evidence did not meet that standard.

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. Rosenblatt v. Baer, 383 U.S. 75, at 84–85, n. 10 (1966).

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. "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs." Time, Inc. v. Hill, 385 U.S., at 388. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." Thornhill v. Alabama, 310 U.S. 88, 102 (1941).

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." Curtis Publishing Co. v. Butts, 388 U.S. at 147 (opinion of HARLAN, J.). Comments in other cases reiterate this judgment that the First Amendment extends to myriad matters of public interest. In Time, Inc. v. Hill, supra, we had "no doubt that the * * * opening of a new play linked to an actual inci-

dent, is a matter of public interest," 385 U.S., at 388, which was entitled to constitutional protection. *Butts* held that an alleged "fix" of a college football game was a public issue. Associated Press v. Walker, a companion case to *Butts,* established that the public had a similar interest in the events and personalities involved in federal efforts to enforce a court decree ordering the enrollment of a Negro student in the University of Mississippi. * * *

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. 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.[12]

[12] We are not to be understood as implying that no area of a person's activities falls outside the area of public or general interest. We expressly leave open the question of what constitutional standard of proof, if any, controls the enforcement of state libel laws for defamatory falsehoods published or broadcast by news media about a person's activities not within the area of public or general interest. * * *

Our Brother WHITE agrees that the protection afforded by the First Amendment depends upon whether the issue involved in the publication is an issue of public or general concern. He would, however, confine our holding to the situation raised by the facts in this case, that is, limit it to issues involving "official actions of public servants." In our view that might be misleading. It is clear that there has emerged from our cases decided since *New York Times* the concept that the First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a "public official," "public figure," or "private individual," as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest. See T. Emerson, "The System of Freedom of Expression" 531–532, 540 (1970). *In that circumstance we think the time has come forthrightly to announce that the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases.* (Emphasis added.) As our Brother WHITE observes, that is not a problem in this case, since police arrest of a person for distributing allegedly obscene magazines clearly constitutes an issue of public or general interest.

We turn then to the question to be decided. Petitioner's argument that the Constitution should be held to require that the private individual prove only that the publisher failed to exercise "reasonable care" in publishing defamatory falsehoods proceeds along two lines.

First he argues that the private individual, unlike the public figure, does not have access to the media to counter the defamatory material and that the private individual, unlike the public figure, has not assumed the risk of defamation by thrusting himself into the public arena. Second, petitioner focuses on the important values served by the law of defamation in preventing and redressing attacks upon reputation.

We have recognized the force of petitioner's arguments, Time, Inc. v. Hill, and we adhere to the caution expressed in that case against "blind application" of the *New York Times* standard. Analysis of the particular factors involved, however, convinces us that petitioner's arguments cannot be reconciled with the purposes of the First Amendment, with our cases, and with the traditional doctrines of libel law itself. 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"

[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.

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 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.

General references to the values protected by the law of libel conceal important distinctions. Traditional arguments suggest that libel law protects two separate interests of the individual: first, his desire to preserve a certain privacy around his personality from unwarranted intrusion, and, second a desire to preserve his public good name and reputation. See Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (concurring opinion of STEWART, J.). The individual's interest in privacy—in preventing unwarranted intrusion upon the private aspects of his life—is not involved in this case, or even in the class of cases under consideration, since, by hypothesis, the individual is involved in matters of public or general concern.[17] In the present case, however, petitioner's business reputation is involved, and thus the relevant interests protected by state libel law are petitioner's public reputation and good name. * * *

Moreover, we ordinarily decide civil litigation by the preponderance of the evidence. Indeed, the judge instructed the jury to decide the present case on that standard. In the normal civil suit where this standard is employed, "we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor." In re Winship, 397 U.S. 358, 371 (1970) (concurring opinion of HARLAN, J.). In libel cases, however, we view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement—the three-quarter-million-dollar jury verdict in this case could rest on such an error—but the possibility of such error, even beyond the vagueness of the negligence standard itself, would create a strong impetus toward self-censorship, which the First Amendment cannot toler-

[17] Our Brothers Harlan and Marshall would not limit the application of the First Amendment to private libels involving issues of general or public interest. They would hold that the Amendment covers all private libels at least where state law permits the defense of truth. The Court has not yet had occasion to consider the impact of the First Amendment on the application of state libel laws to libels where no issue of general or public interest is involved. * * * However, Griswold v. Connecticut, 381 U.S. 479 (1965), recognized a constitutional right to privacy and at least one commentator has discussed the relation of that right to the First Amendment. T. Emerson, supra, 544–562. Since all agree that this case involves an issue of public or general interest, we have no occasion to discuss that relationship. See n. 12, supra. We do not, however, share the doubts of our Brothers Harlan and Marshall that courts would be unable to identify interests in privacy and dignity. The task may be difficult but not more so than other tasks in this field.

ate. These dangers for freedom of speech and press led us to reject the reasonable-man standard of liability as "simply inconsistent" with our national commitment under the First Amendment when sought to be applied to the conduct of a political campaign. * * * The same considerations lead us to reject that standard here.

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 as 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. Calculated falsehood, of course, falls outside "the fruitful exercise of the right of free speech." Garrison v. Louisiana, 379 U.S. 64, 75 (1964). * * *

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. [Mr. Justice Douglas took no part in the case.]

Mr. Justice BLACK, concurring in the judgment.

* * *

Mr. Justice WHITE, concurring in the judgment.

* * *

*I would accordingly hold that in defamation actions, absent actual malice as defined in New York Times Co. v. Sullivan, 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.* (Emphasis added.) Since respondent Metromedia did nothing more in the instant case, I join with the Court in holding its broadcasts privileged. I would not, however, adjudicate cases not now before the Court.

Mr. Justice HARLAN, dissenting.

* * *

I cannot agree that the First Amendment gives special protection to the press from "[t]he very possibility of having to engage in litigation," (opinion of BRENNAN, J.). Were this assertion tenable, I do not see why the States could ever en-

force their libel laws. * * * Further, it would certainly cast very grave doubts upon the constitutionality of so-called "right of reply statutes" advocated by the plurality, ante, at 17, n. 15, and ultimately treat the application of any general law to a publisher or broadcaster as an important First Amendment issue. The notion that such an interest, in the context of a purely private libel, is a significant independent constitutional value is an unfortunate consequence of the plurality's single-minded devotion to the task of preventing self-censorship, regardless of the purposes for which such restraint is induced or the evils its exercise tends to avoid.

It is, then, my judgment 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.

There remains the problem of punitive damages.[3] * * *

However, where the amount of punitive damages awarded bears a reasonable and purposeful relationship to the actual harm done, I cannot agree that the Constitution must be read to prohibit such an award. * * *

[3] The conclusions I reach in * * * this opinion are somewhat different than those I embraced four Terms ago in Curtis Publishing Co. * * *. Where matters are in flux, however, it is more important to re-think past conclusions than to adhere to them without question and the problem under consideration remains in a state of evolution, as is attested to by all the opinions filed today. Reflection has convinced me that my earlier opinion painted with somewhat too broad a brush and that a more precise balancing of the conflicting interests involved is called for in this delicate area.

**Editorial Note:**

Is the press now protected from the very possibility of having to engage in litigation? What human events fall outside the pale of the public or general concern? Are there any judicial guidelines to assist one in determining what is and what is not newsworthy? And who shall make this determination: the press or the courts? Some of these compelling questions are raised in Justice Marshall's dissent in which Justice Stewart joins.]

Mr. Justice MARSHALL, with whom Mr. Justice STEWART, joins, dissenting.

Here, unlike the other cases involving the *New York Times* doctrine, we are dealing with an individual who held no public office, who had not taken part in any public controversy, and who lived an obscure private life. George Rosenbloom, before the events and reports of the events involved here, was just one of the millions of Americans who live their lives in obscurity.

The protection of the reputation of such anonymous persons "from unjustified invasion and wrongful hurt 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." Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (STEWART, J., concurring). But the concept of a citizenry informed by a free and unfettered press is also basic to our system of ordered liberty. Here these two essential and fundamental values conflict.

The plurality has attempted to resolve the conflict by creating a conditional constitutional privilege for defamation published in connection with an event that is found to be of "public or general concern." The condition for the privilege is that the defamation must not be "published with knowledge that it was false or with reckless disregard of whether it was false or not." I believe that this ap-

proach offers inadequate protection for both of the basic values that are at stake.

In order for particular defamation to come within the privilege there must be a determination that the event was of legitimate public interest. That determination will have to be made by courts generally and, in the last analysis, by this Court in particular. Courts, including this one, are not anointed with any extraordinary prescience. But, assuming that under the rule announced by Mr. Justice BRENNAN for the plurality, courts are not simply to take a poll to determine whether a substantial portion of the population is interested or concerned in a subject, courts will be required to somehow pass on the legitimacy of interest in a particular event or subject; what information is relevant to self-government. * * * The danger such a doctrine portends for freedom of the press seems apparent.

The plurality's doctrine also threatens society's interest in protecting private individuals from being thrust into the public eye by the distorting light of defamation. This danger exists since all human events are arguably within the area of "public or general concern." My Brother BRENNAN does not try to provide guidelines or standards by which courts are to decide the scope of public concern. He does, however, indicate that areas exist that are not the proper focus of public concern, and cites Griswold v. Connecticut, 381 U.S. 479 (1965). But it is apparent that in an era of a dramatic threat of overpopulation and one in which previously accepted standards of conduct are widely heralded as outdated, even the intimate and personal concerns with which the Court dealt in that case cannot be said to be outside the area of "legitimate public concern."

The threats and inadequacies of using the plurality's conditional privilege to resolve the conflict between the two basic values involved here have been illustrated by the experience courts have had in trying to deal with the right of privacy. * * *

The unlimited discretion exercised by juries in awarding punitive and presumed damages compounds the problem of self-censorship that necessarily results from the awarding of huge judgments. This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others. Such free wheeling discretion presents obvious and basic threats to society's interest in freedom of the press. And the utility of the discretion in fostering society's interest in protecting individuals from defamation is at best vague and uncertain. These awards are not to compensate victims; they are only windfalls. Certainly, the large judgments that can be awarded admonish the particular defendant affected as well as other potential transgressors not to publish defamation. The degree of admonition—the amount of the judgment in relation to the defamor's means —is not, however, tied to any concept of what is necessary to deter future conduct nor is there even any way to determine that the jury has considered the culpability of the conduct involved in the particular case. Thus the essence of the discretion is unpredictability and uncertainty.

*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.* (Emphasis added.) And the self-censorship that results from the uncertainty created by the discretion as well as the self-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 victims of the defamation will be compensated for their real injuries. They will not be, however, assuaged far beyond their wounds. And, there will be a substantial although imprecise and imperfect admonition to avoid future defamation by imposing the requirement that there be compensation for actual damages.

* * *

### NOTES AND QUESTIONS

1. In *Rosenbloom*, Justice Marshall's opinion made an incursion into privacy law, a topic which is examined in chapter III. Protection of the rights of both reputation and privacy now revolves around the *New York Times* test of actual malice.

Recall Justice Fortas' vehement dissent in *St. Amant* in which he spoke for those who were still unable to appreciate fully the latitude given libelous publication by the *New York Times* standard.

"The First Amendment," he complained, "is not so fragile that it requires us to immunize this kind of reckless, destructive invasion of the life, even of public officials, heedless of their interests and sensitivities. The First Amendment is not a shelter for the character assassinator, whether his action is heedless and reckless or deliberate * * *" (see p. 259)

Assess Thomas Emerson's proposition that the *New York Times* principle compromises the system of freedom of expression by granting that at some point the system is to be disregarded in favor of the government's interest in not being attacked by the citizen-critic. Can the government safely probe into one's motives and intentions, one's state of mind; or determine what part of the public dialogue is true or false? Do you agree that even "calculated falsehood" ought to be protected because it forces one to defend, justify, and rethink one's position?

Although Emerson believes with Justice Black that libel laws are incompatible with the First Amendment, he would use them to protect purely personal feelings. What does he mean? See Emerson, The System of Freedom of Expression, pp. 543–562 (1969).

What do you think of Justice Marshall's recommendation in *Rosenbloom* that any private person be permitted to collect in a libel suit if he can show actual damages? Note Justice Harlan's repudiation in his footnote 3 of his own "prudent publisher" test announced in *Butts*. And evaluate Justice White's proposal that the proper standard would be to grant a privilege to report all matters, however private, related to the official actions of public servants. Do these recommendations create more problems than they solve? See Comment, *The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis*, 70 Michigan Law Review 1574–80 (1972).

But it is Justice Marshall's dissent which raises the abiding questions: What remains of the rights to reputation and privacy? Where is the line to be drawn between a person's innermost feelings of self-respect and the reporter's notion of newsworthiness or of the public's interest? Is this the distinction Emerson is making?

2. Is it possible that the Court need not have reached the "public interest" question in the *Rosenbloom* case? Could a major distributor of nudist magazines have been fairly characterized as a "public figure"? Did he not deal in a commodity for which he sought public approval and acceptance? Or did the "public interest" concept already have a firm grip on judicial thinking?

3. Of the four Supreme Court Justices who subscribed to the "public interest" standard of *Rosenbloom* in 1971,

only three, Burger, Brennan and Blackmun, are still on the Court. Adding Justice Douglas who took no part in the case and at best we have only four votes for the "public issue" test. Nevertheless, the test, with its own judicial momentum, has been used in a large number of subsequent cases.

That same year, for example, a federal district court in Illinois ruled that a plaintiff connected with an investigation into the presidential assassination was an "individual involved in an event of public or general interest," and thus could not prevail in a libel action unless he could show by clear and convincing proof that the alleged libel was published with actual malice, that is with knowledge that it was false or with reckless disregard as to its truth or falsity. The defamatory reference had been made in a *Playboy* interview with former New Orleans District Attorney Jim Garrison. *Novel v. Garrison, 338 F.Supp. 977 (D.C.Ill. 1971).*

So the *New York Times* rule seems to apply to a private person who becomes involved involuntarily in an event of public or general interest. *See also Casano v. WDSU-TV, Inc., 464 F.2d 3 (5th Cir. 1972).*

4. *Gordon v. Random House, Inc., 349 F.Supp. 919 (D.C.Pa.1972)* involved a book which, in attempting to describe racial tension between Jews and Negroes, quoted a fictionalized spokesman for the Black community as saying that the two groups might well "hasten the nation down the bloody road to racism and reaction." A Jewish merchant, who had experienced the North Philadelphia riots of 1964 which set the scene for the book, brought suit. The court said that his involvement in the riots made him either a public figure *or* a private person involved in a matter of public concern. And it added that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be evidence to permit the conclusion that the defendant author in fact entertained serious doubts as to the truth of his publication.

Does the "public issue" concept have any bounds? What is irrelevant to public decision-making if that notion is broadly defined?

5. The largest category of cases to apply a *Rosenbloom* test is that of organized crime. For example, in *Schwartz v. Time, Inc., 337 N.Y.2d 125 (N.Y.Sup. 1972)* the court said that the activities of organized crime are clearly matters of public interest and concern. See also *Nigro v. Miami Herald Pub. Co., 262 So.2d 698 (Fla.App.1972); La Bruzzo v. Associated Press, 353 F.Supp. 979 (D.C. Mo.1973).*

Some of the cases in this and other categories predate *Rosenbloom* suggesting that *Rosenbloom* was being anticipated or that the lower courts were following the "public issue" test suggested in Douglas' *Rosenblatt* concurrence and hinted at in Chief Justice Warren's concurring opinion in the *Butts* case.

Note, for example, *Miller v. News Syndicate Co., 445 F.2d 356 (2d Cir. 1971),* arrest of an alleged heroin smuggler; *Wasserman v. Time, Inc., 424 F.2d 920 (D.C.Cir.), cert. den. 398 U.S. 940 (1970),* photo of an alleged Mafia leader at a table in a restaurant; *Cervantes v. Time, Inc., 330 F.Supp. 936 (E.D.Mo. 1971),* a relationship of the mayor of St. Louis to organized crime; *Blanke v. Time, Inc., 308 F.Supp. 378 (E.D.La. 1970),* a conspiracy with Mafia to elect a friendly sheriff); *Arizona Biochemical Co. v. Hearst Corp., 302 F.Supp. 412 (S.D.N.Y.1969),* garbage collection franchise holder alleged to have Mafia associations; *Cerrito v. Time, Inc., 302 F.Supp. 1071 (D.C.Cal.1969),* plaintiff alleged to be the head of a Cosa Nostra family.

*Life* magazine, in the latter days of its existence, described a person as a killer associated with the Cosa Nostra and credited him with disposing of a body which had allegedly turned up in the basement of a Congressman's home. The subject sued but a federal court said he had no cause of action in the absence of demonstrated actual malice because he had become a public figure involved in a matter of public interest. *Konigsberg v. Time, Inc., 312 F.Supp. 848 (D.C.N.Y.1970).*

A New York court ruled in 1970 that a newspaper article about a gang-style murder witnessed by a person who later became the plaintiff in a libel suit and who had concealed the crime and lied to police dealt with a matter of public interest. In addition the court said that investigatory failures alone do not establish that a publication was deliberately falsified or recklessly published. *Cohen v. New York Herald Tribune, Inc., 310 N. Y.S.2d 709 (Sup.Ct.1970).*

6. Compare *Cohen,* however, with *Airlie Foundation, Inc. v. Evening Star Newspaper Co., 337 F.Supp. 421 (D.C. D.C.1972)* in which a federal district court declared that once a publisher has undertaken an investigation he should not be permitted to ignore with impunity the fruits of his own investigation. Here the newspaper had either ignored or overlooked information it had gathered which refuted earlier allegations that a Washington area conference center and its director were financed secretly by the CIA and Pentagon and were, in effect, operating as a spy center. In a telephone conversation with an editor the director of the CIA had emphatically denied any such connection, but the story was published anyway.

The case is important because it is a clear application of the *New York Times* standard with a *St.Amant* twist to it—evidence that the publisher entertained serious doubts as to the truth of his report and had engaged in the kind of selective reporting of facts reminiscent of the *Goldwater* libel case which is discussed in detail below.

Original awards of $419,800 to the Foundation and $100,000 to its director in compensatory damages were declared excessive and reduced to $50,000 and $10,000 respectively in light of the fact that the *Washington Star* had corrected and apologized for its error and had advised the major wire services and the White House press secretary of its retraction. The *Airlie Foundation* case illustrates that even in a public issue setting, publishers should not conclude that the *New York Times-Rosenbloom* doctrine provides an absolute immunity from libel.

7. Courts have employed the "public issue or interest" standard of *Butts* and *Rosenbloom* in many cases, most of them decided by summary judgment in favor of the defendant or by a motion on the pleadings. A sampling of these cases follows to illustrate the broad range of issues dealt with:

*Treutler v. Meredith Corp., 455 F.2d 255 (8th Cir. 1972),* announcement of mayoral candidacy; *Gospel Spreading Church v. Johnson Publishing Co., 454 F.2d 1050 (D.C.Cir. 1971),* size of estate left by church elder; *Bon Air Hotel Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970),* quality of hotel accommodations at Master's Golf tournament; *Credit Bureau of Dalton, Inc. v. CBS News, 332 F.Supp. 1291 (N.D.Ga.1971),* practices of credit bureaus; *Alexander v. Lancaster, 330 F.Supp. 341 (W.D.La. 1971),* awarding of a public contract and operations of a local police jury; *Spern v. Time, Inc., 324 F.Supp. 1201 (W.D. Pa.1971)* and *Hensley v. Life Magazine, Time, Inc., 336 F.Supp. 50 (D.C.Cal. 1971),* the instant minister racket; *Davis v. National Broadcasting Co., 320 F. Supp. 1070 (E.D.La.1970, aff'd 447 F. 2d 981 (5th Cir. 1971),* statement that plaintiff was the person who asked a lawyer to defend President Kennedy's assassin; *Sellers v. Time, Inc., 299 F.Supp.*

*582 (E.D.Pa.1969), aff'd 423 F.2d 887 (3d Cir. 1970), cert. den. 400 U.S. 830 (1970),* suit arising out of a stray golf shot; *West v. Northern Publishing Co., 487 P.2d 1304 (Alaska 1971),* illegal serving of intoxicating beverages to minors; *Time, Inc. v. Firestone, 254 So.2d 386 (Fla.App.1971), Firestone v. Time, Inc., 271 So.2d 745 (Fla.1972),* divorce decree involving socialite; *Farnsworth v. Tribune Co., 253 N.E.2d 408 (Ill.1969),* medical quackery; *Harnish v. Herald-Mail Co., 286 A.2d 146 (Md.1972),* public housing; *Priestley v. Hastings & Sons Publishing Co., 271 N.E.2d 628 (Mass.1971),* allegations of misconduct by junior high school architect; *Washington v. New York News, Inc., 322 N.Y.S.2d 896 (App.Div.1971),* attendance by bishop at a night club performance of singer in his church choir; *Twenty-Five East 40th St. Restaurant Corp. v. Forbes, Inc., 322 N.Y.S.2d 408 (App.Div. 1971),* quality of restaurant food; *Fotochrome, Inc. v. New York Herald Tribune Inc., 305 N.Y.S.2d 168 (Sup.1969),* financial status of corporation; *All Diet Foods Distribs., Inc. v. Time, Inc., 290 N.Y.S.2d 445 (Sup.1967),* health foods; *Miller v. Argus Publishing Co., 490 P.2d 101 (Wash.1971),* public relations firm working for political candidate; *Dacey v. Florida Bar, Inc., 427 F.2d 1292 (5th Cir. 1970),* legal controversy surrounding the book How to Avoid Probate; *Thompson v. Evening Star Newspaper Co., 394 F.2d 774 (D.C.Cir. 1968), cert. den. 393 U.S. 884 (1968),* fitness of candidate as delegate to national party convention; *Gertz v. Robert Welch, Inc., 322 F.Supp. 997 (N.D.Ill.1970),* policeman's killing of suspect and his subsequent indictment for murder; *Snead v. Forbes, Inc., 275 N.E.2d 746 (Ill.1971),* activities of president of large trucking firm in managing the firm; *A. S. Abell Co. v. Barnes, 265 A.2d 207 (Md. 1970), cert. den. 403 U.S. 921 (1971),* failure to file reports required of candidates for delegate to state constitutional convention; *Perkins v. Mississippi Publishers Corp., 241 So.2d 139 (Miss. 1970),* political campaign posters in midst of display of weapons belonging to accused bank robber.

ON JUNE 25, 1974 THE COURT ESSENTIALLY OVERTURNED *ROSENBLOOM* HOLDING 5–4 THAT *PRIVATE* CITIZENS BRINGING SUITS HAVE ONLY TO MEET A NEGLIGENCE TEST TO COLLECT DAMAGES. PUNITIVE DAMAGES, HOWEVER, WOULD DEPEND ON A SHOWING OF ACTUAL MALICE. *SEE GERTZ v. ROBERT WELCH, APPENDIX C.*

8. In *Goldman v. Time, Inc., 336 F. Supp. 133 (D.C.Cal.1971),* a case involving American youth living in Crete, the court said that newsworthiness would be established by considering (1) the social value of the facts published, (2) the depth of the article's intrusion into ostensibly private affairs, and (3) the extent to which the plaintiff sought public notoriety. The young Americans had permitted themselves to be interviewed at length and had posed for photographs. Actual malice on the part of *Life* magazine had not been demonstrated.

9. Justice Brennan noted in *Rosenbloom* that "Voluntarily or not, we are all 'public' men to some degree." He also observed that "Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern." A number of earlier lower court rulings besides the *Letter Carriers* and *Airlie Foundation* cases, ought to encourage continuing caution on the part of the reporter, even though the *New York Times* doctrine has been greatly expanded since 1964. The most notable of these is a decision of the United States Court of Appeals for the Second Circuit upholding a $75,000 libel judgment for presidential candidate Barry Goldwater against publisher Ralph Ginzburg.

The suit by Goldwater was based upon the publication of the September-October 1964 issue of *Fact* magazine, an issue which was trumpeted as "The Unconscious of a Conservative: A Special Issue on the Mind of Barry Goldwater." The magazine had sought to put together a psychobiography on Goldwater so as to alert the American people to what it perceived as the potential dangers of his Presidency. A selected bibliography was assembled but complimentary references to Goldwater in magazine articles, newspaper stories and books were carefully screened out. Examples of this warped editing are footnoted in the court's opinion.

On the basis of his preliminary research, Editor Ginzburg concluded that Senator Goldwater was suffering from paranoia and was therefore mentally ill. An early draft of the magazine article also suggested that the Senator was suffering from "repressed homosexuality." The editors then set out to conduct what was purported to be a survey of psychiatrists as to Goldwater's psychological fitness to serve as President of the United States. A sample of 12,356 psychiatrists was drawn from a rented mailing list. (2,417 responded and of these 1,189 agreed with some aspect of Ginzburg's thesis) A letter written by Ginzburg was attached to the questionnaire. It stated in part:

"A recent survey by Medical Tribune showed that psychiatrists—in sharp contrast to all other MDs—hold Goldwater in low esteem * * * We would appreciate, first, your indicating whether you think Goldwater is stable enough to serve as President * * * We would also appreciate any remarks you might care to make concerning Goldwater's general mental stability, insofar as you are able to draw inferences concerning it from his public utterances, his political viewpoints, and whatever knowledge you may have of his personality and background. Does he seem prone to aggressive behavior and destructiveness? Does he seem callous to the downtrodden and needy? Can you offer any explanation of his public temper-tantrums and his occasional outbursts of profanity? Finally, do you think that his having had two nervous breakdowns has any bearing on his fitness to govern this country?"

The poll was impugned at the trial by Burns W. Roper appearing as an expert witness. Returned questionnaires favorable to Goldwater were ignored. Many of those critical were anonymous. Responses were edited or rewritten to fit the magazine's editorial predispositions. The published article contained repeated references to Goldwater's supposed mental illness, 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. * * *" No medical experts were called upon to evaluate Ginzburg's thesis.

"Many people around Goldwater," Ginzburg wrote, "think he needs a psychiatrist—probably not because they realize how sick he is—but because of the daily symptoms of hostility he manifests. * * *" At trial Ginzburg was unable to identify a single source for his statement. Nor could he document in any medical sense his reports that Goldwater had suffered two nervous breakdowns.

The court's opinion is in large part an elaboration on the definition of actual malice presented in the *St. Amant* and *Butts* cases. Some students of communication law find it a perplexing opinion.

Is this not the very kind of politically relevant communication *New York Times* sought to protect? How can a candidate for the nation's highest office

argue that any part of his private life, particularly his psyche, be immune from public comment no matter how willfully distorted and inaccurate? And did not *Fact* magazine, though unprofessional in its efforts, at least attempt to gather data which would have a bearing on its presentation? How many newsmen engage in any kind of survey research when preparing articles for print? Did the circuit court subscribe to a standard of unprotected speech, the *Butts* standard, which Justice Harlan may be suggesting in his footnote 3 in *Rosenbloom* that he himself had abandoned? What effect do you think *Rosenbloom* would have on *Goldwater v. Ginzburg* if the latter case were to be argued today?

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## GOLDWATER v. GINZBURG

414 F.2d 324 (2d Cir. 1969).

WATERMAN, Circuit Judge. * * *

There are many parallels between the evidence tending to prove actual malice in this case and the proof in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), which the Supreme Court held was sufficient to establish actual malice. The Goldwater article did not contain "hot news"; the appellants were very much aware of the possible resulting harm; the seriousness of the charges called for a thorough investigation but the evidence reveals only the careless utilization of slipshod and sketchy investigative techniques; appellants were not psychiatric experts nor did they have any expert review "Goldwater: The Man and the Menace" or evaluate its conclusions; they persisted in their polling project despite warnings by reputable professional organizations that their techniques lacked validity; and, obviously there was evidence as to whether there was a possible preconceived plan to attack Senator Goldwater regardless of the facts. This evidence, together with the other facts brought out at trial established that the appellants not only knowingly published defamatory statements but also established with convincing clarity that the appellants were motivated by actual malice when they published these defamatory statements. Therefore, we hold that the trial judge properly denied appellants' motions for directed verdicts presented at the close of plaintiff's evidence and at the close of all the evidence and properly submitted the case to the jury. Needless to say, we also hold that the trial judge after the jury had returned its verdict, properly denied appellants' post-verdict motion for judgment notwithstanding the verdict and new trial, and their other post-verdict related motions, which similarly were based upon allegations that appellee had failed to prove his case.

* * *

The orders appealed from and the judgment are affirmed.

**Editorial Note:**

The U. S. Supreme Court denied certiorari over the strong objections of Justice Black joined by Justice Douglas.

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## GINZBURG v. GOLDWATER

Cert. denied 396 U.S. 1049, 90 S.Ct. 701, 24 L.Ed.2d 695 (1970).

Mr. Justice BLACK, with whom Mr. Justice DOUGLAS joins dissenting.

* * *

I cannot ascribe to the result the Court reaches today because I firmly believe that the First Amendment guarantees to each person in this country the unconditional right to print what he pleases about public affairs. * * * This case perhaps more than any I have seen in this area convinces me that the New York Times constitutional rule is wholly inadequate to assure the "uninhibited, robust, and wide-open" public debate

which the majority in that case thought it was guaranteeing. * * * What I wrote in my separate opinion in Rosenblatt v. Baer, 383 U.S. 75, 95 (1966), seems to me equally applicable here.

* * *

Moreover, there are two special factors in this case which make the holding of the Court of Appeals all the more repressive and ominous. This suit was brought by a man who was then the nominee of his party for the Presidency 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 Presidency 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 President. The decisions of the District Court and the Court of Appeals 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. Doubtless, the jury was justified in this case in finding that the Fact articles on Senator Goldwater were prepared with a reckless disregard of the truth, as many campaign articles unquestionably are. But, even if I believed in a balancing process to determine scope of the First Amendment, which I do not, the grave dangers of prohibiting or penalizing the publication of even the most inaccurate and misleading information seem to me to more than outweigh any gain, personal or social, that might result from permitting libel awards such as the one before the Court today. I firmly believe it is precisely because of these considerations that the First Amendment bars in absolute, unequivocal terms any abridgment by the Government of freedom of speech and press.

Another reason for the particular offensiveness of this case is that the damages awarded Senator Goldwater were, except for $1.00, wholly punitive. Senator Goldwater neither pleaded nor proved any special damages, and the jury's verdict of $1.00 nominal compensatory damages establishes that he suffered little if any actual harm. In spite of this, Ginzburg and his magazine are being punished to the extent of being forced to pay Senator Goldwater $75,000 punitive damages. 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 Court of Appeals summarily.

* * *

### NOTES AND QUESTIONS

1. There are additional cases which point to the need for journalistic care. In *Ragano v. Time, Inc., 302 F.Supp. 1005 (M.D.Fla.1969)*, for example, a U. S. District Court, in denying *Time* magazine's motion for a summary judgment, held that where everyone on the news staff connected with the preparation of an article, including a photograph, about a luncheon gathering of 13 Cosa Nostra bigwigs knew that the plaintiff was an attorney, but nowhere identified him as such, *Time* was not protected against a libel action by the *New York Times* doctrine. Moreover, the photograph was taken a week after the event under investigation had occurred. *Time's* contention that it honestly believed the plaintiff to be a hoodlum was said by the court to be incongruent with the presumption of in-

nocence and the rejection of guilt by association. The publisher took an interlocutory appeal of the court's denial of its motion for summary judgment. But the U. S. Court of Appeals affirmed the lower court and remanded the case for trial saying that there was a genuine issue of fact as to whether the publisher had acted in malice or in good faith. *Time Inc. v. Ragano, 427 F.2d 219 (5th Cir. 1970).*

Similarly, a cutline under a photograph in which the plaintiff was the central figure declared that "high-rollers at the Monte Carlo club have dropped as much as $20,000 in a single night. The United States Department of Justice estimates that the Casino grosses $20 million a year and that one-third is skimmed off for American Mafia 'families'." A federal court ruled that such a combination of words and pictures was reasonably capable of amounting to defamation, but would be measured against the *New York Times* standard of actual malice. *Holmes v. Curtis Pub. Co., 303 F.Supp. 522 (D.C.S.C.1969).*

2. However, when the host of a radio talk show on a morning following a snow storm declared that a man with a snow-plowing business had overcharged his wife and that "people like that shouldn't be in business," a Pennsylvania court reached a different conclusion. The plaintiff snow-plower, said the court, was not involved in an event of public or general concern. Therefore the privilege of the radio station and its employee could be defeated upon showing by a preponderance of evidence that the words were uttered with a lack of reasonable care and diligence, a standard far below that of *New York Times v. Sullivan. Matus v. Triangle Publications, Inc., 286 A.2d 357 (Pa.1971).* No rule of exception to the public interest standard seems to cover this case.

And *Esquire* magazine was denied summary judgment which it sought against the complaint of writer and television personality William F. Buckley, Jr. who said he was libeled in the magazine by Gore Vidal. A federal district court ruled that the doctrine of *New York Times* did not extend protection to exposures of every aspect of private life. Moreover, the record raised triable questions on the issue of malice. *Buckley v. Esquire, Inc., 344 F.Supp. 1133 (D.C. N.Y.1972).* See also *Vandenburg v. Newsweek, Inc., 441 F.2d 378 (5th Cir. 1971).*

In 1970 an equally divided Indiana Supreme Court affirmed a libel judgment for a former sheriff who had been falsely and, said the court, maliciously accused by a newspaper of intimidating a grand jury witness and of being an accessory after the fact of murder as a result of a beating in a jail cell. The newspaper, said the court, recklessly failed to check known sources of information and thereby gave evidence of its own doubts as to the truth of the libelous publication. *Indianapolis Newspapers, Inc. v. Fields, 259 N.E.2d 651 (Ind.1970).*

In *Speake v. Tofte, 327 F.Supp. 200 (D.C.D.C.1971)* a television station had broadcast a charge of jewel theft against a CIA security officer a month after the incident and a time when it knew the plaintiff had been cleared by a lie detector test. The court would not grant summary judgment because it believed a jury should settle the question of actual malice.

In *Snowden v. Pearl River Broadcasting Corp., 251 So.2d 405 (La.App. 1971)* a physician, a drugstore manager and a restaurant owner won judgments of $5,000, $4,000 and $2,500 respectively. 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 concerning the illicit sale and distribution of narcotics was liable, said the court, even though it had no actual knowledge of the falsity of the statements made by an unidentified caller.

The unsuspecting sponsor of the program was not liable said the court.

Another Louisiana case illustrates the perennial danger of simple inaccuracies. A reporter, reading a court document which he didn't understand, erroneously reported that Ernest Francis had been charged with the crime of window-peeping. What Francis had done was sign a surety bond for a friend, Gervey LaRue, who was charged with the crime, had failed to appear for trial, and was being sought under a bench warrant. The Supreme Court of Louisiana ruled that Francis himself was not involved in an event of general or public concern and so the constitutional principle which attaches when publication relates to private individuals involved in an event of public or general concern did not preclude Francis' recovery without proof of actual malice. Francis was awarded a final judgment of $8,000.

Francis ran a gas station and worked part-time for an insurance agency. There was evidence that he had lost insurance clients as a result of the story. A front-page retraction was pointed out by the court to be a mitigating factor only.

The new rule of *Rosenbloom* was pressed by the defendant on appeal, but there were technicalities in the case which may have clouded the central issue. *Rosenbloom* was decided after Francis had received a final judgment. "There is no retroactivity of *Rosenbloom*" said the court, "to these concluded procedural matters." The judgment against the newspaper was final.

On rehearing one justice objected strongly to this application of retroactivity, but he did not believe Francis had been involved in an event of public or general interest as *Rosenbloom* required. LaRue's failure to appear in court was a matter of public interest but Francis was not involved in LaRue's dereliction. Such was not actual involvement but unsupported association.

One justice dissented on the substantive interpretation of *Rosenbloom*. All court proceedings, said Justice McCaleb, involving the enforcement of our criminal laws are matters of public concern and interest. To become a bondsman for a person charged with a criminal offense is to perform a public act. Francis said, "I couldn't have been hurt worser than if I was shot with a shotgun." *Francis v. Lake Charles Am. Press, 265 So.2d 206 (La.1972).*

3. A California Court of Appeal affirmed a slander judgment against film actor Marlon Brando when he contended on the Joey Bishop show before a national audience that individual Oakland, Calif. police officers had willfully shot an alleged Black Panther as he came out of a house with his hands up—a charge implying execution. The court accepted the plaintiff's somewhat broad definition of actual malice: "the publication was made with evil motive and malice, willfully and wrongfully, and with intent to injure, disgrace and defame plaintiffs and with wanton and reckless disregard for the truth or falsity of the statements made." *Mullins v. Brando, 13 Cal. App.3d 409, 91 Cal.Rptr. 796 (1970).*

4. Writing for the New York Court of Appeals, Chief Judge Fuld clearly delineated an exception to the *New York Times* defense when he said:

> The reason underlying the privilege of a fair and true report of a judicial proceeding is * * * "the public interest in having proceedings of courts of justice public, not secret, for the greater security thus given for the proper administration of justice." * * * In most types of proceedings the advantage in having judicial proceedings made public "more than counterbalances the inconveniences to the private persons whose conduct may

be the subject of such proceedings. * * * On the other hand, however, the Legislature has, at least since 1847 * * * made it plain that in matrimonial actions the balance of convenience is in favor of the individual and that in the case of papers filed in such actions the public interest is not served by publicizing them but by sealing them and prohibiting their examination by the public * * *." This does not mean that a party may not publish details of a divorce or separation suit based on files obtained without a court order; or that the courts would interfere with the constitutional right of any one to publish such details, but it does mean that, if he does, he will be held accountable and liable if those details are not truthful. *Shiles v. News Syndicate Co., 27 N.Y.2d 9, 313 N.Y.S.2d 104 at 107–108 (1970) cert. den. 400 U.S. 999 (1971).*

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## SECTION 3. MITIGATING FACTORS

### A. MITIGATING FACTORS WHICH LOWER DAMAGES

All elements in these secondary lines of defense against libel are designed to demonstrate to a judge and jury lack of malice on the part of the publisher. Lawyers call these "mitigating factors" because they serve to mitigate or lessen damages. They will not throw a case out of court nor relieve a writer of responsibility for his libelous words. But they can make a substantial difference when the writer's responsibility, or irresponsibility, is translated into monetary terms.

The mitigating factors will be discussed under the following headings: (1) retraction and apology; (2) right of reply; (3) settlement; (4) proof of previous bad reputation; (5) reliance on a usually reliable source; and (6) miscellaneous appeals.

(1) RETRACTION AND APOLOGY: At least 26 states limit punitive and sometimes general damages when a retraction is requested and published. Some states allow only special damages when a proper retraction has been made. Minnesota's retraction statute is an example:

"In an action for damages for the publication of a libel in a newspaper, the plaintiff shall recover no more than special damages, unless a retraction be demanded and refused as hereinafter provided. He shall serve upon the publisher at the principal place of publication, a notice, specifying the statements claimed to be libelous, and requesting that the same be withdrawn. If a retraction thereof be not published on the same page and in the same type and the statement headed in 18 point type or larger 'RETRACTION,' as were the statements complained of, in a regular issue thereof published within one week after such service, he may allege such notice, demand, and failure to retract in his complaint and recover both special and general damages, if his cause of action be maintained. If such retraction be so published, he may still recover general damages, unless the defendant shall show that the libelous publication was made in good faith and under a mistake as to the facts. If the plaintiff was a candidate for office at the time of libelous publication, no retraction shall be available unless published on the same page and in the same type and the statement headed in 18 point type or larger 'RETRACTION', as were the statements complained of, in a regular issue thereof published within one week after such service and in a conspicuous place on the editorial page, nor if the libel was published

within one week next before the election. This section shall not apply to any libel imputing unchastity to a woman." See M.S.A. (Minn.) § 548.06.

Observe that under the statute a plaintiff is limited to the collection of special damages. Approximately 20 states have similar statutes. Some statutes also apply to broadcasters. See Hanson, Libel and Related Torts, Vol. 1, Case and Comment, 1969, § 195 for a chart of all retraction and correction statutes in the United States and Canada. Note also the stipulations as to form and timing, and the special requirement that a retraction referring to a political candidate also appear on the editorial page of the newspaper. Finally, note the quaint exemption for any libel imputing unchastity to a woman.

Retraction statutes may not protect the original source of the libel if he is also named in the complaint. The constitutionality of the Minnesota law has been sustained, *Allen v. Pioneer Press Co., 40 Minn. 117, 41 N.W. 936 (1889)*, while other state statutes have been declared unconstitutional. *Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041 (1904)*. Courts which have regarded retraction laws unfavorably have done so because they believe the general constitutional protections of life, liberty and property prohibit such laws, the defamed person is denied a speedy recovery for injury to his reputation, and, more important, retraction statutes represent class legislation favoring the press and denying the equal protection of the laws. Judges of such a mind find ways to circumvent the statutes.

Retraction statutes generally call for a specific retraction of the original article rather than a modified rewrite of it. It must be full, fair, unequivocal, without lurking insinuations or hesitant withdrawals; otherwise it will simply aggravate the original libel. The retraction should also be given the same emphasis and prominence of display as the original libel.

An apology, said a New Jersey court, to constitute a retraction of a defamatory article, must be frank and full, since a guarded and half-hearted apology will only injure the reporter's position. Mere publication of the defamed person's denial of the original story or a news story about the issues relative to the bringing of a libel action do not amount to a retraction. An apology, the court added, must unreservedly withdraw all imputations and express regret for the libel. *Brogan v. Passaic Daily News, 22 N.J. 139, 123 A.2d 473 (1956)*.

The California statute, a court said recently, is intended to afford publishers an opportunity to correct errors before being subjected to liability. It did not intend to build technical barricades to recovery by those who felt themselves defamed. *Kapellas v. Kofman, 459 P.2d 912, 81 Cal.Rptr. 360 (1969)*.

Acceptable procedure for the publisher to follow on both legal and ethical grounds is to call the injured party, express regret, and assure him that no malice was intended. Offer to retract and apologize, but point out to him the possibility of further publicity through the retraction itself. If it can be accomplished diplomatically and with finesse, the publisher might also offer a small sum for a legal release. A legal release bars future action for defamation in a civil case, although such a waiver is not intended as a license for libel. *Carlson v. Hillman Periodicals, Inc., 157 N.Y.S.2d 88 (1956)*.

Even an offer to retract, whether or not the state has a retraction statute, may serve to mitigate damages. So will refusal by a plaintiff of an offer to retract. In some jurisdictions (Indiana, Florida, Mississippi, Montana, North Carolina, North Dakota, South Dakota and Tennessee) a written notice to the publisher must precede an action against him, and

this may encourage a retraction. In Alabama, California, Georgia, Idaho, Minnesota, Nebraska, Oklahoma, Oregon and Wisconsin failure to give adequate notice may preclude recovery of general and/or punitive damages but does not affect special damages.

Either optional retraction statutes, as in Minnesota and California, or compulsory retraction laws, under which a defendant must print a revised version of the facts, have been suggested as steps toward reform of the libel laws. Emerson, Haber and Dorsen, Political and Civil Rights in the United States 731 (3rd ed. 1967).

(2) RIGHT OF REPLY: More a proposal for reform than a mitigating factor is the right of reply. Traditionally a publication intended to defend one's reputation has been privileged. Similarly, a newspaper, magazine or broadcasting station has a right to carry the reply to someone who has used a mass medium to attack another, provided there is no actual malice behind the reply. In both cases the qualification is that the reply be relevant to the original statement. John Henry Faulk's comments about the blacklisting practices of a right-wing organization did not warrant counter-charges of Communist and fellow traveler. *Faulk v. Aware, Inc., 169 N.Y.S.2d 363 (1957).*

The right of reply extends to legitimate spokesmen for one who has been attacked, such as a public relations man, an attorney, the secretary of an organization, or a family member. Of course, if the original statement is not libelous, there is no privilege in a libelous reply. Repeated refusal of a publisher to accord space to one whom he has attacked could be construed as evidence of malice.

Right to reply legislation was first introduced in France in 1822 and has influenced the legislation of most European and South American countries. Donnelly, *The Right of Reply: An Alternative to Action for Libel, 34 Va.L.Rev. 867 (1948).* It is a widely used remedy in Great Britain. *Adam v. Ward L.R. (1917) A.C. 309.* Mississippi and Florida provide for a rarely-invoked right of reply, allowing the wronged party to publish his own version of the facts in the publisher's medium. In Montana, Ohio and Wisconsin retraction statutes incorporate a provision for complaining parties to present their version of a story. Some right-of-reply statutes bar recovery of both general and punitive damages. And the reply itself, since it is required by law, is absolutely privileged. Some proponents of reply and access laws would deal harshly with the press for non-compliance. See Pedrick, *Freedom of the Press and the Law of Libel: the Modern Revised Translation* 49 Cornell L.Q. 581 (1964). Wilcox looks at the right of reply from a journalist's perspective and presents opinion data on its desirability in *Right of Reply in the United States* 14 Gazette 1 (1968).

Those who favor such laws envision a cacophony of divergent views substituting for lawsuits. "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." Barron, *Access to the Press—A New First Amendment Right* 80 Harv.L.Rev. 1657 (1967) See text, p. 553. See also Barron, Freedom of the Press For Whom? 1973; Emerson, The System of Freedom of Expression, 1969, p. 539; and *Tornillo v. The Miami Herald Publishing Company, 287 So.2d 78* (Fla.1973) in which the Florida Supreme Court upheld that state's right of reply law as it applied to a political candidate. See this text, p. 594.

(3) SETTLEMENT: Settlement—also referred to as accord and satisfaction—is

another post-publication defense. While a retraction is not ordinarily a bar to a libel action, the publication of a retraction or an apology as part of a written or verbal agreement with an injured person that the publication shall constitute a complete accord and satisfaction will bar the right of the plaintiff to an action for damages. *Tomol v. Shroyer Publications, Inc., 33 Northumb.L.J. 87 (Pa. Com.Pl.1961).*

A record should be kept when such settlements are made, and it is a good idea to have a witness on hand. Once an action has begun, a publisher should seek a settlement only through his attorney, so as not to cast aspersions on the righteousness of his own cause.

A libel case once decided by a competent tribunal cannot be revived after a decision on appeal has been made. In other words this doctrine, known as *res judicata,* applicable in civil litigation generally, embraces libel suits. *Res judicata* (things adjudged) establishes the principle of finality in litigation.

(4) PROOF OF PREVIOUS BAD REPUTATION: A showing that the character and reputation of the plaintiff is so bad that it cannot be further impaired by a fresh accusation will mitigate damages. In a case in which the plaintiff was a Methodist Bishop, a U. S. 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 such damages." The court added, however, that bad reputation may not be established by showing misconduct at a time and place far removed from the date and situation of the original injury. *Nichols v. Philadelphia Tribune Co., 22 F. R.D. 89 (E.D.Pa.1958).* See also *Bausewine v. Norristown Herald, 351 Pa. 634, 41 A.2d 736 (1945); Corabi v. Curtis Pub. Co., 441 Pa. 432, 273 A.2d 899 (1971).*

The relationship of the demonstrably bad reputation and the libel must be close. Reference to unrelated specific acts of misbehavior are no more sufficient in mitigating damages than are broad rumors and hearsay.

(5) RELIANCE ON A USUALLY RELIABLE SOURCE: A court may be impressed enough to reduce damages where a publisher can show that he accurately reprinted a report from a major news source such as the Associated Press or United Press International. But that there is no privilege for such communication is clearly stated in a 1937 case involv the Atlanta *Constitution.* The court said:

"The law does not recognize as privileged the repetition of an untruthful and libelous statement on the ground that it was communicated to the person making the statement by an authority having a reputation for truth and accuracy. While the Associated Press no doubt deserves all that is said for it as being a trustworthy, honest, and accurate newsgatherer, a newspaper, in publishing Associated Press news reports, cannot justify itself as publishing a privileged communication, or otherwise, on the ground that the Associated Press is a trustworthy, reliable and truthful organization for the gathering and dissemination of news." *Wood v. Constitution Publishing Co., 194 S.E. 760, 765 (Ga.1937).* For a contrary doctrine and one not widely accepted see *Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933).*

The reporter should try to confirm all potentially libelous information in wire service reports about persons in his own circulation area. At least these efforts may mitigate, and in some cases preclude, punitive damages. Compensatory or general damages may also be reduced, though some states permit no reduction in these on the assumption that no recompense can be made for the initial libel.

Wire services are not the only reliable sources. In an article by Robert Ruark

debunking psychiatry and psychoanalysis, reference was made to an unnamed psychiatrist who, Ruark charged, had lured away a patient's wife after many thousands of dollars worth of treatment and a disastrous series of business involvements. Although the case had been in the courts, Ruark's information came from the newspapers—notably the *New York Times* and other "reliable" sources which he had failed to identify.

A New York court, although sympathetic to arguments for mitigation of damages where the source is usually trustworthy, found no allegation of an absence of malice and ruled against Ruark and the newspaper which had carried his column. *Totero v. World Telegram Corp., 41 Misc.2d 33, 245 N.Y.S.2d 874 (1963).*

And a federal court ruled that evidence that a newspaper containing an allegedly defamatory editorial had relied on statements from federal executive departments and congressional committees about the plaintiff's activities would substantiate the newspaper's claim of mitigating circumstances. *Pauling v. News Syndicate Co., 335 F.2d 659 (2d Cir. 1964).*

(6) MISCELLANEOUS APPEALS: Anything a defendant can do to prove that the harm done was not as great as claimed, or to show a sincere regret or a lack of malice will help in reducing or blocking the award of punitive damages.

Statements uttered in the heat and passion of the moment or provoked by actions of the plaintiff may lend themselves to this kind of appeal.

When a nurse complained of a doctor's post-operative handling of a surgery patient and brought him before a medical grievance committee, he countered by declaring to the hospital administrator in a telephone conversation: "I wanted to ask you if you would stoop so low as to hire that creep, that malignant son of a bitch back to work for you in the hospital." The doctor's slanderous remarks were spread on the minutes of the hospital's board of directors where the nurse found them. She brought a slander suit.

Provocation, said the Supreme Judicial Court of Maine, though no excuse for slander, may be a mitigating factor when punitive damages are assessed. The court explained:

FARRELL v. KRAMER, 193 A.2d 560, 563 (Me.1963). "Implicit in her criticism was the thinly veiled suggestion that her judgment as to proper methods of post-operative treatment of a patient was better than his. Any professional nurse knows, or should know, that criticism of this sort will almost certainly induce irritation, annoyance and even anger on the part of any medical practitioner against whom it is directed. * * * Human frailties, emotions and passions being what they are, it should not surprise anyone that the defendant deemed himself tormented and persecuted by the plaintiff and thereupon abandoned that caution and restraint which is required by society. Although the slander is not thereby excused, such provocation will substantially diminish both the public interest in the punishment of the defendant and the plaintiff's right to have severe punishment inflicted." Judgment for the nurse was cut by more than two-thirds.

Although the publisher is wholly responsible for the republication of errors, efforts taken to correct them will serve to mitigate damages. Where there was evidence that a newspaper, which had erroneously quoted an auditor's report to the county commissioners as saying that the sheriff kept "incomplete" instead of "complete" records for booking prisoners, had stopped its press and made efforts to retrieve papers carrying the erroneous word "incomplete" and had published corrected articles, refusal to in-

struct the jury on mitigation of damages, said a Maryland court, was reversible error. *Brush-Moore Newspapers Inc. v. Pollitt, 151 A.2d 530 (Md.1959).*

Belief in the truth of the facts, even though the evidence has not convinced a jury, should be considered in mitigation. *Las Vegas Sun Inc. v. Franklin, 329 P.2d 867 (Nev.1958).* So should evidence that friendly items were published concerning the plaintiff before or with the libel, or evidence that other responsible publications had carried the same charge. It is no defense to qualify a rumor by the attributive device, "it is alleged;" but publication of a rumor which is widespread and on everyone's lips may be a mitigating factor. So might the plea that the libel is an unintended case of mistaken identity.

Evidence of the partial truth of a statement may also mitigate general and punitive damages.

Whatever the circumstances, evidence of journalistic care and competence in getting the plaintiff's side of the story and giving it adequate space will demonstrate good faith and a lack of malice, and that is the purpose of the mitigating factors.

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## B. THE AFTERMATH OF THE *NEW YORK TIMES* CASE: BETWEEN LAW AND ETHICS

Shortly after promulgation of the *New York Times* doctrine by the United States Supreme Court, two journalism professors writing in *Journalism Quarterly* observed: "It is immediately apparent now that the decision as to whether or not to publish questionable material might be based not on case studies in the law books, but on the theory of social responsibility * * *. * * * The emphasis has been shifted from legalistic to ethical grounds." Yoakam and Farrar, *The Times Libel Case and Communications Law* 42 Journalism Quarterly 661, 664 (1965).

Phelps and Hamilton, in their book on libel, offer the same thought: "It is also obvious that since this liberal rule gives the press the power to destroy a man, it requires that newsmen exert a degree of responsibility that some have not risen to in the past." See Phelps and Hamilton, Libel 188.

It is no longer simply a matter of estimating the risks of libel. The question is not only one of the probability of danger. It is also one of weighing the public interest against harm to the individual. In this context it should also be recognized that the very prominent among us will avoid lawsuits which merely give added circulation to libelous charges. One thinks of the epic patience of Eleanor Roosevelt in the wake of the bitter attacks upon her by Westbrook Pegler. The gossip magazines count on this noblesse oblige.

At the other end of the socio-economic scale, people have no resources, either financial or psychological, for court action, and their reputations bear small price tags in the marketplace. But if the law discriminates, the newsman need not.

The rules of liability are still important: names and addresses must be checked and rechecked for accuracy; verbs should be used discriminatingly—he jumped, he fell, he said, he admitted, all carry different connotations; "statement" is a more objective word than "confession"; and an indictment is a charge not a finding of guilt; unidentified sources ought to be avoided, especially those via telephone *(Tagawa v. Maui Pub. Co., 448 P.2d 337, Hawaii 1968),* and in letters to an editor; make time for proofreading in the production process because the typographical error is

no defense in libel; be reminded that pictures themselves, or through misplaced captions or cutlines, or through their contextual relationship to headlines and stories, can be libelous; look out for headlines that go beyond the story itself; and remember that libel can be contained in ads.

Where, in the public interest, a possible libel must be published, devices should be sought for muting the libelous imputations to private reputation. Quick responses to requests for corrections should be granted where it is known they are justified. On the other hand, certain kinds of information no matter how accurately reported cannot legally be made public. There is no privilege to report secret judicial or other governmental proceedings which may contain actionable libel.

The journalist should be prepared to investigate potential plaintiffs for the purpose of his own defense in a subsequent suit.

But more important, and complementary to the legal rules, are the ethical rules. The newsman's watchword is accuracy. And there are no degrees of accuracy. Accuracy, to exist, must be perfect, for example in names, addresses, photo identifications. A photograph taken in a public place to illustrate an article on prostitution, for example, must either be used with a subject's consent or with that subject's identification completely disguised if the photograph is to avoid litigation.

Moderation, judgment and sensitivity in weighing what the public must know against the sometimes unprotected rights of the individual represent the essence of a meaningful journalistic ethic. "Good" news for consumers may be "bad" news for producers. Presumably, journalistic ethics require high sensitivity where color and creed are concerned, and good taste in dealing with stories of sex, crime, horror, human pain and deformity. Similarly, cool judgment is required in reporting disasters or events which have a potential for panic. To what extent, in your judgment, does the *New York Times* doctrine stimulate and to what extent does it undermine these journalistic responsibilities?

# Chapter III

# PRIVACY AND THE PRESS

## SECTION 1. DEFINING THE GENERAL STANDARD

In his dissent in the libel case, *Rosenbloom v. Metromedia,* Justice Thurgood Marshall raised two nagging questions: What remains of the rights to reputation and privacy? Are there any judicial guidelines to assist one in determining what is and what is not newsworthy with respect to a genuine public interest? It is at this point that libel and privacy intersect and are being judged, however badly, against the same constitutional standard, *New York Times v. Sullivan.*

Part of an answer to the two questions may be that libel and privacy laws ought to protect deeply felt feelings growing out of purely personal matters in which society's interest is not engaged.

A privacy law was first proposed by Samuel Warren and Louis Brandeis (not then a Supreme Court Justice) in an 1890 *Harvard Law Review* article (Warren and Brandeis, *The Right to Privacy,* 4 Harv.L.Rev. 193 (1890). The article was a concrete reaction to what the two young lawyers considered prying and gossipy coverage by Boston newspapers of the social affairs of the Warren family. Although in retrospect their concern seems picayunish, Warren and Brandeis were prophetic in foreseeing that someday "mechanical devices [would] threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops'." And, of course, they made privacy part of the working legal lexicon that it had not been in the common law.

Much of the case law of privacy grew out of a 1903 New York statute which was a legislative response to the dilemma of a young girl who, discovering her portrait on posters advertising flour in stores, warehouse walls, and saloons, learned that she had no legal recourse. *Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).*

In subsequent cases based on the New York law, *expropriation of a name or a picture for commercial purposes without written consent,* the first form of invasion, would almost insure a judgment for the plaintiff. Taking a cue from Warren and Brandeis, New York courts began defining privacy as a property right, making its invasion analogous to a breach of contract or copyright.

But an invasion of privacy may take other forms. See Prosser, *Privacy,* 48 Calif.L.Rev. 383 (1960). A second form is *an intrusion upon one's solitude or seclusion, physically or by a wiretap or hidden camera.* In the introduction to *Environment for Man, the Next Fifty Years* (1967), William R. Ewald, Jr. defines privacy as "that condition in which the individual can control his response to signals from his environment and is not unknowingly observed."

A third form is *public disclosure of embarrassing private facts not necessarily defamatory.* A hospital patient who had been photographed against her will and presented to the world as the "starving glutton" by *Time* magazine brought a successful suit in Missouri. "If there is any right of privacy at all," said the court, "it should include the right to obtain medical treatment at home or in a hospital for an individual personal condi-

tion * * *" *Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942).*

Or, fourthly, privacy might be invaded by *placing a person in a false light through the coincidental use of names, fictionalization, or the misuse of names and pictures in otherwise legitimate news stories.* A news picture published 20 months after a child had been knocked down by a reckless driver was declared an invasion of privacy when reprinted in the *Saturday Evening Post* under the caption, "They Asked To Be Killed," which erroneously implied that the child pedestrian had been careless. *Leverton v. Curtis Pub. Co., 97 F.Supp. 181 (D.C.Pa. 1951), aff'd 192 F.2d 974 (3d Cir. 1951).* In an earlier action against the *Post* a federal district court granted relief to an honest taxi driver whose photograph had been used to illustrate a story about crooked cabbies. *Peay v. Curtis Pub. Co., 78 F.Supp. 305 (D.C.D.C.1948).* In 1955 an invasion of privacy was acknowledged by a New York court when a law-abiding slum child's photo was used in a story about juvenile delinquents. *Metzger v. Dell Publishing Company, 207 Misc. 182, 136 N.Y.S.2d 888 (1955).*

Note the closeness of privacy cases in the fourth or false light category to the tort of libel. If false light claims were covered by libel laws, the press would gain some advantage. Truth, for example, could be used as a defense and the mitigating factors or secondary defenses would also be available. If the torts were combined, however, and privacy were allowed to swallow up the field of defamation, the "numerous restrictions and limitations which had hedged defamation about for many years in the interest of freedom of the press and discouragement of trivial and extortionate claims," says Dean Prosser, would be "turned on the left flank."

If, on the other hand, libel were to swallow up the field of privacy, the defense of truth would be at best a modest gain to privacy since it is sometimes an onerous and uncertain defense.

These considerations are largely academic now and in many respects the defense of newsworthiness covers both libel and an invasion of privacy. Since the Supreme Court rulings in *New York Times* and *Time, Inc. v. Hill,* as we shall see, truth is no longer needed as a defense in either libel or privacy if a false but newsworthy report is made without actual malice. Technically a true but non-defamatory report may still lead to a successful privacy suit, but such opportunities for protecting privacy now appear remote.

Just as libel law has been recommended as a means of protecting false light invasions of privacy, it has also been proposed that trespass laws protect an invasion of one's solitude or seclusion and that property rights cover the expropriation of a name or photograph for commercial purposes. The law, however, has moved in a different direction.

The law of privacy has developed in its own right. Arrayed against all four forms of the tort are two basic defenses: (1) consent, and (2) newsworthiness.

*CONSENT* is the narrower defense, and in the four states which protect privacy by statute, New York, Virginia, Oklahoma and Utah, consent must be in written form. Consent in all jurisdictions which recognize a right of privacy may be a particular problem for the advertising man. It does not last forever and it is not a license to use a picture or a name in every imaginable way. A name or picture is meant to be used only for the specific purposes governed by the consent agreement whether it is written or verbal, explicit or implied. Major alterations in a photo, for example, are not permitted.

Yet publication in a magazine of a photograph which had been taken in a plaintiff's home without her consent was

not an invasion of privacy where the photograph had been altered prior to publication to make identification impossible. *Rawls v. Conde Nast Publications, Inc., 446 F.2d 313 (5th Cir. 1971).*

*NEWSWORTHINESS*, a much more complex defense, is based on the rationale that privacy may frequently have to be sacrificed to the broader right of the public to know. In 1940 the defense of newsworthiness was greatly reinforced by an important federal court decision which refused to protect the privacy of a former child prodigy whose life as a practically unknown recluse had been exposed, albeit sympathetically, by a writer for *New Yorker* magazine. See Jared Manley, *Where Are They Now?* New Yorker, August 14, 1937. The court decision is *Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940).*

A decade later a New York court held that "once an item has achieved the status of newsworthiness, it retains that status even when no longer current." *Gautier v. Pro-Football, Inc., 278 App.Div. 431, 106 N.Y.S.2d 553 (1951).* Two years earlier the same court had ruled that "the right of privacy does not prohibit the publication of matter which is of legitimate public or general interest, although no longer current." *Molony v. Boy Comics Publishers, 277 App.Div. 166, 98 N.Y.S.2d 119 (1950).*

If the passage of time—in the *Sidis* case 23 years—will not defeat a claim of newsworthiness, where does one's privacy begin and the public's interest end? Where can a line be drawn between legitimate news and maudlin curiosity? And who should draw the line: the professional journalist defining news or a judge applying what seems to him to be the ethical limits of community morality or sensibility? These delicate questions have not been satisfactorily resolved.

By 1940 15 states had recognized a right of privacy, some as a result of unusual court cases involving, for example, a reformed prostitute (*Melvin v. Reid, 112 Cal.App. 285, 297 P. 91 (1931)*); a woman incorrectly identified as an "exotic red-haired Venus" in a combination advertisement for a traveling burlesque show and rye and whole wheat bread (*Flake v. Greensboro News Co., 212 N. C. 780, 95 S.E. 55 (1938)*); a woman whose disfigured face was photographed without her consent while she was semiconscious (*Clayman v. Bernstein, 38 Pa. D. & C. 543 (1940)*); and an insurance salesman who lied to a young prospect when he told him that his mother had signed an insurance application—the mother brought suit (*Holloman v. Life Ins. Co. of Va., 192 S.C. 454, 7 S.E.2d 169 (1940)*).

In a 1937 New York privacy suit brought by a Hindu mystic who claimed that his picture had been used in a story exposing his "rope trick" for trade purposes and without his consent, the court in an influential decision attempted to define the competing value, the public interest:

"The public policy involved in leaving unhampered the channels for the circulation of news and information is considered of primary importance. * * * A free press is so intimately bound up with fundamental democratic institutions that, if the right of privacy is to be extended to cover news items and articles of general public interest, educational and informative in character, it should be the result of a clear expression of legislative policy." *Sarat Lahiri v. Daily Mirror, 295 N.Y.S. 382 (1937).*

Today courts in 35 states recognize a right of privacy, including the four states, New York, Virginia, Utah, Oklahoma, and the District of Columbia, in which privacy laws have been passed.

Not until 1967 did the United States Supreme Court invoke the First Amendment right of free press to defeat a priva-

cy suit. That 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 episode, but with the fictionalized addition of convict violence against the father and a son, and "a verbal sexual assault" against a daughter.

The novel led to a Broadway play and the play to a promotional picture-story in *Life* magazine. By this time the Hill family had fled to Connecticut at least partly to avoid the public spotlight. Hill's lawsuit was based on the *Life* promo which reviewed 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 Philadelphia; otherwise there was little resemblance between the docile captivity of the family and the sensationalized story line of the play. The incident eventually became a Hollywood film.

Both sides cited New York's privacy statute. The family had involuntarily become subjects of public interest and would not have had a case under the statute had the *Life* portrayal of their frightening experience been accurate. But it had been seriously deficient in that respect, even though the Hill captivity and a college of similar incidents had, not surprisingly, inspired the book and play.

Hill won a $75,000 judgment in a New York trial court which was reduced in a new trial to $30,000 in compensatory damages. The New York Court of Appeals subsequently affirmed the judgment and Time, Inc. appealed to the United States Supreme Court, arguing that the rules pertaining to the standards of newsworthiness had not been measured by guidelines which satisfy the First Amendment. A majority of the Court agreed and applied the *New York Times* definition of malice to the *Life* article: was the publication made with knowledge of its falsity or with reckless disregard as to whether it was false or not? The Court said no, and the judgment of the Court of Appeals was set aside.

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## TIME, INC. v. HILL

385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967).

Mr. 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.

The article appeared in Life in February 1955. It was entitled "True Crime Inspires Tense Play," with the subtitle, "The ordeal of a family trapped by convicts gives Broadway a new thriller, 'The Desperate Hours.'" The text of the article reads as follows:

"Three years ago Americans all over the country read about the desperate ordeal of the James Hill family who were held prisoners in their home outside Philadelphia by three escaped convicts. Later they read about it in Joseph Hayes' novel, *The Desperate Hours,* inspired by the family's experience. Now they can see the story re-enacted in Hayes' Broadway play based on the book, and next year will see it in his movie, which has been filmed but is being held up until the play has a chance to pay off.

"The play, directed by Robert Montgomery and expertly acted, is a heart-stopping account of how a family rose to heroism in a crisis. Life photographed the play during its Philadelphia tryout, transported some of the actors to the actual

house where the Hills were beseiged. On the next page scenes from the play are re-enacted on the site of the crime."

The pictures on the ensuing two pages included an enactment of the son being "roughed up" by one of the convicts, entitled "brutish convict," a picture of the daughter biting the hand of a convict to make him drop a gun, entitled "daring daughter," and one of the father throwing his gun through the door after a "brave try" to save his family is foiled.

The James Hill referred to in the article is the appellee. He and his wife and five children involuntarily became a front-page news story after being held hostage by three escaped convicts in their suburban, Whitemarsh, Pennsylvania, home for 19 hours on September 11–12, 1952. The family was released unharmed. In an interview with newsmen after the convicts departed, appellee stressed that the convicts had treated the family courteously, had not molested them, and had not been at all violent. The convicts were thereafter apprehended in a widely publicized encounter with the police which resulted in the killing of two of the convicts. Shortly thereafter the family moved to Connecticut. The appellee discouraged all efforts to keep them in the public spotlight through magazine articles or appearances on television.

* * *

The book was made into a play, also entitled "The Desperate Hours," and it is Life's article about the play which is the subject of appellee's action. The complaint sought damages on allegations that the Life article was intended to, and did, give the impression that the play mirrored the Hill family's experience, which, to the knowledge of defendant "* * * was false and untrue." Appellant's defense was that the subject of the article was "a subject of legitimate news interest," "a subject of general interest and of value and concern to the public" at the time of publication, and that it was "published in good faith without any malice whatsoever * * *." A motion to dismiss the complaint for substantially these reasons was made at the close of the case and was denied by the trial judge on the ground that the proofs presented a jury question as to the truth of the article.

The jury awarded appellee $50,000 compensatory and $25,000 punitive damages. On appeal the Appellate Division of the Supreme Court ordered a new trial as to damages but sustained the jury verdict of liability. * * * At the new trial on damages, a jury was waived and the court awarded $30,000 compensatory damages without punitive damages.

The New York Court of Appeals affirmed the Appellate Division "on the majority and concurring opinions at the Appellate Division," two judges dissenting. 15 N.Y.2d 986, 260 N.Y.S.2d 7, 207 N.E.2d 604. We noted probable jurisdiction of the appellant's appeal to consider the important constitutional questions of freedom of speech and press involved. After argument last Term, the case was restored to the docket for reargument. We reverse and remand the case to the Court of Appeals for further proceedings not inconsistent with this opinion.

Since the reargument, we have had the advantage of an opinion of the Court of Appeals of New York which has materially aided us in our understanding of that court's construction of the statute. It is the opinion of Judge Keating for the court in Spahn v. Julian Messner, Inc., 18 N.Y.2d 324, 274 N.Y.S.2d 877, 221 N.E.2d 543 (1966). * * *

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. "[E]ver mindful that the written word or picture is involved, courts have engrafted exceptions and restrictions onto the statute to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest."

In the light of questions that counsel were asked to argue on reargument, it is particularly relevant that the Court of Appeals made crystal clear in the *Spahn* opinion that truth is a complete defense in actions under the statute based upon reports of newsworthy people or events. * * *

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. *Spahn* points up the distinction. *Spahn* was an action under the statute brought by the well-known professional baseball pitcher, Warren Spahn. He sought an injunction and damages against the unauthorized publication of what purported to be a biography of his life. The trial judge had found that "[t]he record unequivocally establishes that the book publicizes areas of Warren Spahn's personal and private life, albeit inaccurate and distorted, and consists of a host, a preponderant percentage, of factual errors, distortions and fanciful passages. * * *" 43 Misc. 2d 219, 232, 250 N.Y.S.2d 529, 542. 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. The court, after distinguishing the cases on the ground that *Spahn* did not deal with public officials or official conduct, then says, "The free speech which is encouraged and essential to the operation of a healthy government is

something quite different from an individual's attempt to enjoin the publication of a fictitious biography of him. No public interest is served by protecting the dissemination of the latter. We perceive no constitutional infirmities in this respect." 18 N.Y.2d at 329, 274 N.Y.S. 2d at 880, 221 N.E.2d, at 546.

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. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. * * * 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' * * *." New York Times Co. v. Sullivan, supra, * * *. 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.

In this context, sanctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees. Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society. Fear of large verdicts in damage suits for innocent or mere negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to "steer far wider of the unlawful zone." New York Times Co. v. Sullivan, * * *.

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 appellant argues that the statute should be declared unconstitutional on its face if construed by the New York courts to impose liability without proof of knowing or reckless falsity. Such a declaration would not be warranted even if it were entirely clear that this is the view of the New York courts. The New York Court of Appeals, as the *Spahn* opinion demonstrates, has been assiduous

to construe the statute to avoid invasion of the constitutional protections for speech and press. We therefore confidently expect that the New York courts will apply the statute consistently with the constitutional command. Any possible difference with us as to the thrust of the constitutional command is narrowly limited in this case to the failure of the trial judge to instruct the jury that a verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article.

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.

Mr. Justice BLACK, with whom Mr. Justice DOUGLAS joins, concurring.

* * *

I acquiesce in the application here of the narrower constitutional view of *New York Times* with the belief that this doctrine too is bound to pass away as its application to new cases proves its inadequacy to protect freedom of the press from destruction in libel cases and other cases like this one. The words "malicious" and particularly "reckless disregard of the truth" can never serve as effective substitutes for the First Amendment words: "* * * make no law * * * abridging the freedom of speech, or of the press * * *."

* * *

* * * Life's conduct here was at most a mere understandable and incidental error of fact in reporting a newsworthy event. One does not have to be a prophet to foresee that judgments like the one we here reverse can frighten and punish the press so much that publishers will cease trying to report news in a lively and readable fashion as long as there is —and there always will be—doubt as to the complete accuracy of the newsworthy facts. Such a consummation hardly seems consistent with the clearly expressed purpose of the Founders to guarantee the press a favored spot in our free society.

Mr. Justice DOUGLAS, concurring.

* * * The episode around which this book was written had been news of the day for some time. The most that can be said is that the novel, the play, and the magazine article revived that interest. A fictionalized treatment of the event is, in my view, as much in the public domain as would be a water color of the assassination of a public official. It seems to me irrelevant to talk of any right of privacy in this context. Here a private person is catapulted into the news by events over which he had no control. He and his activities are then in the public domain as fully as the matters at issue in New York Times Co. v. Sullivan, 376 U.S. 254. Such privacy as a person normally has ceases when his life has ceased to be private.

Once we narrow the ambit of the First Amendment, creative writing is imperiled and the "chilling effect" on free expression which we feared in Dombrowski v. Pfister, 380 U.S. 479, is almost sure to take place. That is, I fear, the result once we allow an exception for "knowing or reckless falsity." Such an elusive exception gives the jury, the finder of the facts, broad scope and almost unfettered discretion. A trial is a chancy thing, no matter what safeguards are provided. To let a jury on this record return a verdict or not as it chooses is to let First Amendment rights ride on capricious or whimsical circumstances, for emotions and prejudices often do carry the day. The exception for "knowing and reckless falsity" is therefore, in my view, an abridgment of speech that is barred by the First and Fourteenth Amendments. But as indicated in my Brother BLACK'S opinion I have joined the Court's opinion in order to make possible an adjudication that controls this litigation.

Mr. Justice HARLAN, concurring in part and dissenting in part.

* * *

Like the Court, I consider that only a narrow problem is presented by these facts. To me this is not "privacy" litigation in its truest sense. See Prosser, Torts § 112; Silver, Privacy and the First Amendment, 34 Ford.L.Rev. 553; but see Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U.L.Rev. 962. No claim is made that there was any intrusion upon the Hills' solitude or private affairs in order to obtain information for publication. The power of a State to control and remedy such intrusion for news-gathering purposes cannot be denied, cf. Mapp v. Ohio, 367 U.S. 643, but is not here asserted. Similarly it may be strongly contended that certain facts are of such limited public interest and so intimate and potentially embarrassing to an individual that the State may exercise its power to deter publication. But the instructions to the jury, the opinions in the New York appellate courts, and indeed the arguments advanced by both sides before this Court all recognize that the theme of the article in question was a perfectly proper one and that an article of this type could have been prepared without liability. The record is replete with articles commenting on the genesis of The Desperate Hours, one of which was prepared by the author himself and used by appellee to demonstrate the supposed falsity of the Life piece. Finally no claim is made that appellant published the article to advance a commercial interest in the play. There is no evidence to show that Time, Inc., had any financial interest in the production or even that the article was published as an advertisement. Thus the question whether a State may apply more stringent limitations to the use of the personality in "purely commercial advertising" is not before the Court.

Having come this far in step with the Court's opinion, I must part company with its sweeping extension of the principles of New York Times Co. v. Sullivan, 376 U.S. 254. It was established in *Times* that mere falsity will not suffice to remove constitutional protection from published matter relating to the conduct of a public official that is of public concern. But that decision and those in which the Court has developed its doctrine, Rosenblatt v. Baer, 383 U.S. 75; Garrison v. State of Louisiana, 379 U.S. 64, have never found independent value in false publications nor any reason for their protection except to add to the protection of truthful communication. And the Court has been quick to note that where private actions are involved the social interest in individual protection from falsity may be substantial. Thus I believe that rigorous scrutiny of the principles underlying the rejection of the mere falsity criterion and the imposition of ancillary safeguards, as well as the interest which the State seeks to protect, is necessary to reach a proper resolution of this case.

Two essential principles seem to underlie the Court's rejection of the mere falsity criterion in *Times*. The first is the inevitability of some error in the situation presented in free debate especially when abstract matters are under consideration. Certainly that is illustrated here in the difficulty to be encountered in making a precise description of the relationship between the Hill incident and The Desperate Hours. The second is the Court's recognition that in many areas which are at the center of public debate "truth" is not a readily identifiable concept, and putting to the preexisting prejudices of a jury the determination of what is "true" may effectively institute a system of censorship. Any nation which counts the *Scopes* trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity.

"The marketplace of ideas" where it functions still remains the best testing ground for truth.

But these arguments against suppressing what is found to be "false" on that ground alone do not negative a State's interest in encouraging the publication of well researched materials more likely to be true. Certainly it is within the power of the State to use positive means—the provision of facilities and training of students—to further this end. The issue presented in this case is the constitutionality of a State's employment of sanctions to accomplish that same goal. The Court acknowledges that sanctions may be employed against knowing or reckless falsehoods but would seem to grant a "talismanic immunity" to all unintentional errors. However, the distinction between the facts presented to us here and the situation at issue in the *Times* case and its progeny casts serious doubt on that grant of immunity and calls for a more limited "breathing space" than that granted in criticism of public officials.

First, we cannot avoid recognizing that we have entered an area where the "marketplace of ideas" does not function and where conclusions premised on the existence of that exchange are apt to be suspect. In Rosenblatt v. Baer, supra, the Court made the *Times* rationale operative where "the public has an independent interest in the qualifications and performance of the person who holds it [government position], beyond the general public interest in the qualifications and performance of all government employees * * *." In elaboration the Court said: "The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." To me this seems a clear recognition of the fact that falsehood is more easily tolerated where public attention creates the strong likelihood of a competition among ideas. Here such competition is extremely unlikely for the scrutiny and discussion of the relationship of the Hill incident and the play is "occasioned by the particular charges in controversy" and the matter is not one in which the public has an "independent interest." It would be unreasonable to assume that Mr. Hill could find a forum for making a successful refutation of the Life material or that the public's interest in it would be sufficient for the truth to win out by comparison as it might in that area of discussion central to a free society. Thus the state interest in encouraging careful checking and preparation of published material is far stronger than in *Times*. The dangers of unchallengeable untruth are far too well documented to be summarily dismissed.

Second, there is a vast difference in the state interest in protecting individuals like Mr. Hill from irresponsibly prepared publicity and the state interest in similar protection for a public official. In *Times* we acknowledged public officials to be a breed from whom hardiness to exposure to charges, innuendos, and criticisms might be demanded and who voluntarily assumed the risk of such things by entry into the public arena. But Mr. Hill came to public attention through an unfortunate circumstance not of his making rather than his voluntary actions and he can in no sense be considered to have "waived" any protection the State might justifiably afford him from irresponsible publicity. Not being inured to the vicissitudes of journalistic scrutiny such an individual is more easily injured and his means of self-defense are more limited. The public is less likely to view with normal skepticism what is written about him because it is not accustomed to seeing his name in the press and expects only a disinterested report.

The coincidence of these factors in this situation leads me to the view that a State should be free to hold the press to a duty

of making a reasonable investigation of the underlying facts and limiting itself to "fair comment" on the materials so gathered. Theoretically, of course, such a rule might slightly limit press discussion of matters touching individuals like Mr. Hill. But, from a pragmatic standpoint, until now the press, at least in New York, labored under the more exacting handicap of the existing New York privacy law and has certainly remained robust. Other professional activity of great social value is carried on under a duty of reasonable care and there is no reason to suspect the press would be less hardy than medical practitioners or attorneys for example. The "freedom of the press" guaranteed by the First Amendment, and as reflected in the Fourteenth, cannot be thought to insulate all press conduct from review and responsibility for harm inflicted. The majority would allow sanctions against such conduct only when it is morally culpable. I insist that it can also be reached when it creates a severe risk of irremediable harm to individuals involuntarily exposed to it and powerless to protect themselves against it. I would remand the case to the New York courts for possible retrial under that principle.

A constitutional doctrine which relieves the press of even this minimal responsibility in cases of this sort seems to me unnecessary and ultimately harmful to the permanent good health of the press itself. If the *New York Times* case has ushered in such a trend it will prove in its long-range impact to have done a disservice to the true values encompassed in the freedoms of speech and press.

Mr. Justice FORTAS, with whom THE CHIEF JUSTICE and Mr. Justice CLARK join, dissenting.

The Court's holding here is exceedingly narrow. It declines to hold that the New York "Right of Privacy" statute is unconstitutional. I agree. The Court concludes, however, that the instructions to the jury in this case were fatally defective because they failed to advise the jury that a verdict for the plaintiff could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article. Presumably, the plaintiff is entitled to a new trial. If he can stand the emotional and financial burden, there is reason to hope that he will recover damages for the reckless and irresponsible assault upon himself and his family which this article represents. But he has litigated this case for 11 years. He should not be subjected to the burden of a new trial without significant cause. This does not exist. Perhaps the purpose of the decision here is to indicate that this Court will place insuperable obstacles in the way of recovery by persons who are injured by reckless and heedless assaults provided they are in print, and even though they are totally divorced from fact. If so, I should think that the Court would cast its decision in constitutional terms. Short of that purpose, with which I would strongly disagree, there is no reason here to order a new trial. The instructions in this case are acceptable even within the principles today announced by the Court.

* * * *But I do not believe that whatever is in words, however much of an aggression it may be upon individual rights, is beyond the reach of the law, no matter how heedless of others' rights—how remote from public purpose, how reckless, irresponsible, and untrue it may be.* (Emphasis added.) I do not believe that the First Amendment precludes effective protection of the right of privacy—or, for that matter, an effective law of libel. I do not believe that we must or should, in deference to those whose views are absolute as to the scope of the First Amendment, be ingenious to strike down all state action, however circumspect, which penalizes the use of words as instruments of aggression and personal

assault. There are great and important values in our society, none of which is greater than those reflected in the First Amendment, but which are also fundamental and entitled to this Court's careful respect and protection. Among these is the right to privacy, which has been eloquently extolled by scholars and members of this Court. Judge Cooley long ago referred to this right as "the right to be let alone." In 1890, Warren and Brandeis published their famous article "The Right to Privacy," in which they eloquently argued that the "excesses" of the press in "overstepping in every direction the obvious bounds of propriety and decency" made it essential that the law recognize a right to privacy, distinct from traditional remedies for defamation, to protect private individuals against the unjustifiable infliction of mental pain and distress. A distinct right of privacy is now recognized, either as a "common-law" right or by statute, in at least 35 States. Its exact scope varies in the respective jurisdictions. It is, simply stated, the right to be let alone; to live one's life as one chooses, free from assault, intrusion or invasion except as they can be justified by the clear needs of community living under a government of law. As Brandeis said in his famous dissent in Olmsted v. United States, 277 U.S. 438, 478 (1928), the right of privacy is "the most comprehensive of rights and the right most valued by civilized men."

* * *

Privacy, then, is a basic right. The States may, by appropriate legislation and within proper bounds, enact laws to vindicate that right. * * * Difficulty presents itself because the application of such state legislation may impinge upon conflicting rights of those accused of invading the privacy of others. But this is not automatically a fatal objection. Particularly where the right of privacy is invaded by words—by the press or in a book or pamphlet—the most careful and sensitive appraisal of the total impact of the claimed tort upon the congeries of rights is required. I have no hesitancy to say, for example, that where political personalities or issues are involved or where the event as to which the alleged invasion of privacy occurred is in itself a matter of current public interest, First Amendment values are supreme and are entitled to at least the types of protection that this Court extended in New York Times Co. v. Sullivan. But I certainly concur with the Court that the greatest solicitude for the First Amendment does not compel us to deny to a State the right to provide a remedy for reckless falsity in writing and publishing an article which irresponsibly and injuriously invades the privacy of a quiet family for no purpose except dramatic interest and commercial appeal. My difficulty is that while the Court gives lip-service to this principle, its decision, which it claims to be based on erroneous instructions, discloses hesitancy to go beyond the verbal acknowledgment.

* * *

The courts may not and must not permit either public or private action that censors or inhibits the press. But part of this responsibility is to preserve values and procedures which assure the ordinary citizen that the press is not above the reach of the law—that its special prerogatives, granted because of its special and vital functions, are reasonably equated with its needs in the performance of these functions. For this Court totally to immunize the press—whether forthrightly or by subtle indirection—in areas far beyond the needs of news, comment on public persons and events, discussion of public issues and the like would be no service to freedom of the press, but an invitation to public hostility to that freedom. This Court cannot and should not refuse to permit under state law the private citizen who is aggrieved by the type of assault which we have here and which is not within the specially protected core

of the First Amendment to recover compensatory damages for recklessly inflicted invasion of his rights.

Accordingly, I would affirm.

### NOTES AND QUESTIONS

1. Professor Edward Bloustein in *Privacy As An Aspect of Human Dignity,* 39 N.Y.U.Law Rev. 962 at 963 (1964), referred to in Harlan's opinion, has objected to the judicial practice of evaluating whether the right of privacy has been invaded by whether or not the alleged invasion can be measured in terms of dollars and cents injury. Bloustein states: "(w)hat provoked Warren and Brandeis to write their article was a fear that a rampant press feeding on the stuff of private life would destroy individual integrity and emasculate individual freedom and independence." Id. at 971.

To support this position, Bloustein points to the statement in the Warren and Brandeis article itself where the authors assert that "the principle which protects personal writings and all other personal productions * * * against publication in any form is in reality not the principle of private property, but that of inviolate personality." 4 Harv.L.Rev. 193 at 205 (1890).

In Bloustein's view a common principle unites (1) the criminal cases involving the rule of excluding evidence which is the product of a violation of a Fourth Amendment, (2) the cases involving invasions of privacy by administrative officials. (Cf. *Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946),* text, p. 681) and (3) tort cases involving invasion of privacy by privately owned mass media:

"The injury is to our individuality, to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered." See Bloustein, supra, at 1003.

Professor Bloustein says that identifying the social value behind the right of privacy as individual dignity rather than emotional tranquility, reputation, or pecuniary harm is important because the courts at least will be engaged in adjusting the values that are actually at stake. Presumably this will mean that the future development of the right of privacy will have more resilience in terms of dealing with new assaults on individual dignity produced by advancing technology. See Note, *Privacy and Efficient Government: Proposals for a National Data Center,* 82 Harv.L.Rev. 400 (1968); Westin, Privacy and Freedom, 1968; and Miller, The Assault on Privacy, 1971.

2. Writing, as he concedes, against the tide in 1966, Professor Harry Kalven, in taking a counter position, says that in his view the effort of tort law "to protect the right of privacy seems to me a mistake." Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?* 31 Law & Contemp.Prob. 326 (1966). The reason Kalven gives for his view: "the pettiness of the tort." Is similar disdain expressed for the right of privacy in the opinions of some of the justices in *Hill?* What are the sources of this disdain? Does this attitude indicate why a contest between the individual's right to privacy and a First Amendment-based concern for the public's right to be informed about newsworthy events leave the right of privacy the loser? Would looking at privacy as Bloustein does make the interest it protests less trivial when compared to First Amendment interests?

3. Is the *Hill* test basically that the publisher will be liable for what he prints on a right of privacy theory only if the publication at issue does not affect a matter of public interest? Or is it that the publisher will escape liability if the publication is newsworthy? What test gives the broader protection to the publisher? To the individual?

4. In another article Professor Kalven observed that "the logic of *New York Times* and *Hill* taken together grants the press some measure of constitutional protection for anything the press thinks is a matter of public interest." *The Reasonable Man and the First Amendment* 1967 Supreme Court Review 284.

The two cases do indeed provide the press with unusual immunity where the law of privacy is asserted. Newspapers cannot be sued for libel unless what they print with regard to public persons is published with reckless disregard of the truth or falsity of the charges. A similar demanding standard must be met by those suing news media under New York's right of privacy statute. But on the basis of the Court's reasoning doesn't the public person analogue break down in a privacy context? Perhaps *Rosenbloom v. Metromedia* is in point here. But was Rosenbloom a "private" person?

Shouldn't the crucial factor in a right of privacy case be whether or not the claimant in the invasion of privacy action was in the public limelight in any sense *before* the alleged invasion of privacy. Rosenbloom was a distributor of magazines and thereby a kind of communicator seeking public approval of his form of message. True, he was thrust suddenly into the public spotlight in a way which offended him; but Hill tempted no such public notoreity. His experience was newsworthy and immune to a privacy suit in its original form. Should it have been so immune in its later fictionalized form?

These are the kinds of distinctions the Court did not make in the *Hill* case. Without such distinctions is it meaningful any longer to talk of privacy as an actionable tort?

There is little doubt that making it more difficult for public persons to discourage press criticism by bringing libel suits may embolden the press to report vigorously and fearlessly on public matters. But what societal interests are served by making it just as difficult for individuals who are the hapless victims of tragedy to secure recompense from a press which exploits or falsifies their tragedy?

Do public officials specifically and public persons generally have a capacity for counteracting barrages of media criticism or falsification that private persons lack? Recall the distinction Justice Harlan made in his opinion for the Court in the *Walker* case between public officials and public figures. Public officials, he contended, would have a greater opportunity to reply than public figures. Would not heretofore non-public persons who find themselves unexpectedly on the front page or in the evening newscast possess a still lesser capacity for reply?

Justice Harlan concurred in part and dissented in part in *Time v. Hill*. Harlan minimized the First Amendment dimension of the *Hill* case arguing that the matter was not one in which the public had an interest. He also pointed out that the decisive factor in determining newspaper liability ought to be whether the aggrieved person has any means of counter-attack.

"It would be unreasonable to assume," said Harlan, "that Mr. Hill could find a forum for making a successful refutation of the Life material or that the public's interest in it would be sufficient for the truth to win out by comparison as it might in that area of discussion central to a free society. Thus the state interest in encouraging careful checking and preparation of published material is far stronger than in Times (*New York Times v. Sullivan*). The dangers of unchallengeable untruth are far too well documented to be summarily dismissed."

5. Is it a deficiency of even Justice Harlan's great sensitivity to the right of

privacy that he is concerned primarily with publicity that is untrue? Suppose the publicity is true. What then are the rights of an individual to his privacy? Just as in the common law there was a time when the greater the truth the greater the libel, it may be in our own time, at least on occasion, that the greater the newsworthiness (frequently translated truth) the greater the invasion of privacy. Truth is still a primary defense in a non-public person libel suit; it is not generally a defense in a privacy suit, except in those states which have privacy laws.

A plaintiff in a privacy suit may use breach of truth as an argument when he pleads that a publication has placed him in a false light and that a publisher has done so deliberately. The problem may be that Mr. Hill's public refutation of the *Life* article would tend to generate still more publicity which in turn would add to the destruction of his privacy. If so, then the opportunity for reply may not protect one's solitude or save him from embarrassment, although it might put distorted facts straight.

In any case the person whose privacy has been invaded faces a dilemma, and, if you accept Professor Bloustein's definition of privacy, then a monetary award can hardly be a recompense for a loss of human dignity. Yet a court action may be the only option open to an aggrieved party. Justice Fortas addresses this point when he says in a spirited dissent in which he was joined by Chief Justice Warren and Justice Clark:

"I do not believe that whatever is in words, however much of an aggression it may be upon individual rights, is beyond the reach of the law, no matter how heedless of other's rights—how remote from public purpose, how reckless, irresponsible, and untrue it may be. * * * The greatest solicitude for the First Amendment does not compel us to deny to a State the right to provide a remedy for reckless falsity in writing and publishing an article which irresponsibly and injuriously invades the privacy of a quiet family for no purpose except dramatic interest and commercial appeal."

6. To be sure the *Hill* case may not have presented the free press-privacy issue squarely; and though Justice Brennan's rationale in the case may be debatable, damage to Hill's privacy may not have been sufficient to overcome the public's right to know. Nor was the line between fact and fictionalization as clear as it might have been. But the central question remains: where does privacy stand in our hierarchy of values?

Although *Butts* and *Walker* are libel cases, they may have a bearing on future collisions between freedom and the press and the right of privacy. If *Time, Inc. v. Hill* is the consequence of the application of *New York Times v. Sullivan* to the right of privacy, then later developments in the *New York Times* doctrine, as represented by *Butts* and *Walker*, should be important to the future of privacy.

Butts was allowed to recover his judgment; General Walker was not. Can it be inferred, then, that the less public a person the greater the likelihood that he will prevail in a right of privacy case? Certainly the public interest was more directly involved in *Walker* than in *Butts*. Perhaps a question of football ethics went less directly to the *raison d'etre* of the First Amendment than did an issue of racial discrimination in a state university.

But this does not solve the problem. In the absence of any theory of the public interest, how does one measure newsworthiness? Are "public interest" and "newsworthiness" synonymous? And who should make the judgment as to when the line separating news of legitimate public interest from the purely personal realm has been crossed? The judge or the news editor?

7. In his book, *Privacy and the Press* (1972), Don R. Pember, approving the general thrust of the *Hill* case, notes that "throughout the years a distinct First Amendment philosophy or flavor developed in the great mass of case law on privacy. Schooled in a tradition which predates our nationhood, judges and justices generally placed freedom of the press above the individual right to privacy."

Pember is undoubtedly correct when he observes that truth and the concept of a public interest have become such overriding social values that privacy laws are an impotent remedy. "What is more important," Pember asks, "the protection of society by a free and unfettered press, or the individual's claim to personal solitude?"

Mark well the way the question is put. One is reminded of how badly free expression fared in the early post-World War II Communist conspiracy cases when, in a similar equation, speech was designated an individual right and set against society's interest in self-preservation. Who could prefer speech given such a choice? Roscoe Pound had a word of caution for those who would balance rights in this manner. "When it comes to weighing or valuing claims or demands with respect to other claims or demands," he said, "we must be careful to compare them on the same plane. If we put one as an individual interest and the other as a social interest we may decide the question in advance in our way of putting it." Pound, *A Survey of Social Interests*, 56 Harvard Law Review 2 (1943).

Balancing rights is hazardous at best and in the case of free press and privacy it may be unnecessary. "The possibility that the right of privacy will overwhelm the rights of society is so remote that it is hardly cause for alarm," Professor Thomas Emerson has observed. "Most of the forces at work press the other way." Emerson, The System of Freedom of Expression (1970).

It is these forces which Alan Westin and Arthur Miller examine in their separate works on privacy. They are concerned with physical and psychological surveillance, computer and microfilm technology, data banks and other dossier systems. Professor Pember would agree that electronic snooping by both government and private corporations poses a greater threat to a free society than vigorous reporting, and that where the press is concerned courts will continue to be generous in applying the defense of "newsworthiness" against privacy claims. Prying journalism will nevertheless continue to be one of the pressures which wear against privacy. Newsworthiness will require more careful definition and its relationship to the idea of a public interest will have to be examined. A British Parliamentary committee recently took a short step toward definition—although it came out against a law of privacy—when it suggested that a distinction might be made between published material which is *in* the public interest, that is a concomitant of informed citizenship, and that which is merely *of* public interest, that is an appeal to a general desire for vicarious experience or entertainment. Report of the Committee on *Privacy*, Kenneth Younger, Chairman, London, July, 1972, p. 47.

8. In the meantime, if privacy claims cannot be sustained against absolutist interpretations of free speech and press, then privacy may require a countervailing legal status and a definition which concretely demarcates an inner and inviolate core of personality. The right of privacy, preceding any law of privacy, is a venerable concept in American jurisprudence, especially where the infringement is by government.

Decrying the British policy of issuing general search warrants against American colonists, John Adams maintained that

from this invasion of individual privacy "the child of Independence was born." *Boyd v. United States, 116 U.S. 616 (1886).* In pre-Civil War America Justice Story and Thomas Cooley recognized the fundamental nature of the right and its implications for freedom. Since then, privacy has found protection in the First, Third, Fourth and Ninth Amendments and in the penumbras of the Bill of Rights generally. The scope of the right was elaborated in *Griswold v. Connecticut, 381 U.S. 479 (1965)* when the Supreme Court struck down a state law making it a crime for even married couples to use contraceptives or in this case for the Planned Parenthood League to give advice on such use.

Citing the First and Fourteenth Amendments in his opinion for the Court, Justice Douglas said that "the State may not, consistently 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—indeed the freedom of the entire university community. * * * Without these peripheral rights the specific rights would be less secure."

He added that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help 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, as we have seen. 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."

In a concurring opinion Justice Goldberg strongly endorsed Douglas' interpretation of the Ninth Amendment. Justices Black and Stewart dissented, Black because here and in earlier cases he could find no language in the Constitution specifically protecting a "broad, abstract and ambiguous" right of privacy.

Justice Harlan's opinion in *Time, Inc. v. Hill*, vaguely reminiscent of Douglas' *Griswold* holding, argues that unless it is circumscribed the *New York Times* doctrine will have ushered in (both for its impact on the law of defamation and the right of privacy) "such a trend" that "it will prove in its long-range impact to have done a disservice to the true values encompassed in the freedoms of speech and press."

In spite of *Griswold*, which gave to the right of privacy a new constitutional status, an operational definition of the concept remains elusive. The result in *Time, Inc. v. Hill* testifies to this.

Should we then conclude that in terms of an effective role for the right of privacy as a mass media tort, the elevation of privacy to constitutional status is not very meaningful? In other words, could it be said that in terms of legal recognition for a right of privacy *Time, Inc. v. Hill* marks a retreat from the broad language of the *Griswold* case? Perhaps all that

the elevation of the right of privacy to constitutional status in *Griswold* accomplishes is to focus attention on the confrontation of the competing constitutional values of privacy and freedom of the press, and we are back where we began. The two cases taken together do suggest that the Court will be more assiduous in protecting privacy from governmental intrusions than from invasions by the press or other non-governmental entities.

9. We are left with the unenviable task of defining privacy. Douglas' penumbras may yet provide a conceptual framework for further constitutional analysis. Certainly it is a right which has implications for personal dignity, individuality, and a sense of the inner man, all purposes for which a free society exists. Brandeis saw privacy as the "most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States, 277 U.S. 438 (1928).* Milton Konvitz describes it as "a kind of space that a man may carry with him, into his bedroom or into the street." Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 Law and Contemporary Problems, 272, 279–280 (1966). Alan Westin defines 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, considering his own social context, Westin adds, must find an acceptable balance between solitude and companionship, intimacy and broader social participation, anonymity and visibility, reserve and disclosure. And a free society, he says, will leave these choices to the individual, with only extraordinary exceptions allowed in the general interests of society. Westin, Privacy and Freedom (1968), pp. 7, 42. Paul Freund talks about the "reality of human personality in an age increasingly defaced by anonymity and mass media, mass politics and mass information. * * *" Freund, The Supreme Court of the United States (1961), p. 182.

But Freund, like Bloustein, also sees a social value in privacy. "It is at least a hypothesis worth testing," says Freund, "that privacy, though in its immediate aspect an individual interest, serves an important socializing function. An unwillingness to suffer disclosure of what has been discreditable in one's life, or of one's most intimate thoughts and feelings, reflects an intuitive sense that to share everything would jeopardize the sharing of anything. Complete openness in social life would encounter misunderstandings, inability to forgive, unlimited tolerance for differences. The inner sense of privacy, and mutual respect for it, may be a mechanism that helps to secure the condition for living fraternally in a world where men are not gods, where to know all is not to understand and forgive all." Freund, Privacy: *One Concept Or Many*, in Pennock and Chapman (eds.), Privacy (1971), p. 188.

Freund may be suggesting that in situations where privacy must compete with other constitutional claims it can be defined as either a social or a personal right depending upon the circumstances. For those who would prefer to avoid the risks of balancing, privacy may be more resolutely defined as a set of rules which cut across any opposing rules of the collectivity and which constitute in Thomas Emerson's words "a sphere of space that has not been dedicated to public use or control." Emerson, The System of Freedom of Expression (1970), p. 562.

Emerson would include in this space at least the privacy of one's bodily functions, for example procreation, marriage, contraception and the rearing of children, the rights of privacy protected by the Supreme Court in its historic abortion ruling. *Jane Roe v. Wade, 410 U.S. 113 (1973).*

Privacy under this rule would also protect the woman in childbirth, the couple privately engaged in sexual intercourse, and the sleeper from raucous sound trucks in residential neighborhoods in the middle of the night. It would certainly protect the woman in *York v. Story, 324 F.2d 450 (9th Cir. 1963)* who, when she came to a police station complaining of an assault, was asked to undress and was photographed in the nude. Her pictures were then circulated among policemen for their amusement. It would also protect the woman who was photographed in the rest room of Sad Sam's tavern in Delafield, Wisconsin by Sad Sam himself. *Yoeckel v. Samonig, 272 Wis. 430, 75 N.W.2d 925 (1956)*; and the parents whose deformed newborn child was photographed in a hospital and the picture published without their consent, *Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930)*.

10. Attempts to recover damages for an invasion of privacy by a publication referring not to the plaintiff but to another person have met with little success whether the person publicized is living or dead. See Privacy, 18 A.L.R.3d 873. The *Bazemore* case was partially overruled by a later Georgia court decision which denied relief to parents whose privacy was violated by newspaper photos of their murdered child whose decomposed body, in chains, was pulled from a lake. Additional prints showing the gruesome effects of the atrocious crime were made, commercially available to the public. The court rejected the privacy claim because the crime, at least until its perpetrator was apprehended, was a matter of public interest. *Waters v. Fleetwood, 91 S.E.2d 344 (Ga.1956)*.

However, a surviving husband 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 "happiest" mother in reality had been extremely depressed and unstable, and only fictitious dialogue in the story made her appear otherwise.

In this case the defendant had met the *New York Times* and *Time, Inc. v. Hill* standard for an invasion of privacy—knowledge of falsity or reckless disregard for the truth. *Varnish v. Best Medium Publishing Co., 405 F.2d 608 (2d Cir. 1968)*.

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## A. THE DEFENSE OF CONSENT

Whatever damage *Time, Inc. v. Hill* might have done to the right of privacy's capacity for doctrinal growth, let us assume that the concept still has some legal vitality and that some forms of invasion of privacy may yet remain which cannot be defended on the basis of "newsworthiness." From the point of view of preventing litigation in these circumstances, care by the media occasionally provides the publisher with the defense of consent.

*Miller v. Madison Square Garden, 28 N.Y.S.2d 811 (1941)*, is illustrative. The defendant had sold a booklet to patrons attending a six day bicycle race. The defendant reprinted in the booklet a picture of the plaintiff as reprinted from an English magazine, *The Penny Illustrated Paper*, where the plaintiff was shown mounted on a high-wheeled bicycle. The same illustration of the plaintiff had been used in a 1934 biography of the plaintiff published under the title of *Bronco Charlie*. At trial in the *Mill-*

*er* case, a representative of the defendant testified that the plaintiff requested that the defendant Madison Square Garden give him publicity. But the court pointed out that if the defendant wanted to plead consent as a defense he had to meet the technical requirements of the New York statute; N.Y. Civil Rights Law, McKinney's Consol.Laws, c. 6, §§ 50 and 51. The court ruled in *Miller* at 812 as follows:

"Defendant has pleaded, as an affirmative and partial defense, that it published plaintiff's name and picture in response to plaintiff's request to give him publicity, and with his consent. Unless the plaintiff's consent were in writing, that defense would not be available as a complete defense to the cause of action. The statute referred to (§§ 50 and 51, Civil Rights Law) specifically grants a right of action to a living person whose name or picture is used by another 'without having first obtained the written consent of such person.' The use of a person's name or picture by another, with the oral consent of such person, may, however, be asserted as a partial defense in mitigation of damages."

In the *Miller* case since the plaintiff not only orally consented to have his picture taken but testified that the use of his name and picture by defendant had failed to subject him to ridicule or to cause him humiliation, the court only assessed nominal damages against the defendant: to-wit, six cents.

In a more recent decision, *Sperry Rand Corp. v. Hill, 356 F.2d 181 (1st Cir. 1966)*, a defendant in a suit under the New York right of privacy statute was permitted to assert estoppel as a defense where a "defendant justifiably relied on plaintiff's unjustifiable silence." Id. at 187. In *Sperry Rand*, the *Miller* holding that oral consent can be considered in mitigation of damages, was relied on to permit the assertion of another non-statutory defense—estoppel. In other words, a course of conduct as well as written consent may prevent plaintiffs from recovery under the New York right of privacy statute.

Assume that the *Miller* case were to be litigated today, is it really clear that newsworthiness would not be a defense?

The state of Massachusetts was able to get an injunction to block the general distribution of Frederick Wiseman's well reviewed film *Titicut Follies* because, contrary to an agreement between Wiseman and state authorities, many persons identified in the film either had not signed releases or were not competent to do so. The trial court found that many of the scenes showed inmates nude and in degrading situations. In spite of the fact that Massachusetts has not recognized a legally protected right of privacy, the Supreme Judicial Court of the state upheld the trial court on privacy grounds. Valid releases from all who were photographed might have made a difference. The film was permitted to be shown only to specialized audiences. *Commonwealth v. Wiseman, 249 N.E.2d 610 (Mass.1969).*

A federal district court held in *Washington Post Co. v. Kleindienst, 357 F. Supp. 770 (D.C.D.C.1972)*, however, that under the First Amendment the press has a right of access to interview confidentially and without censorship any inmate of a federal correctional institution who *consents* to be interviewed. Reporters, of course, would be subject to reasonable exceptions as to time and place; and they might be denied access where it could be determined that serious administrative or disciplinary problems might result from an interview. The *Washington Post* was in the process of presenting a comprehensive series of articles on prison conditions when it ran into a flat prohibition by the Attorney-General and the Director of the Bureau of Prisons of interviews with prisoners. The district court's premise was a public interest in public institutions.

In denying summary judgment to a pharmaceutical firm which had used a 40-year-old photo of actress Pola Negri in a drug ad without her consent, a federal appeals court held that, although her appearance had changed since 1922, the New York statute was designed to protect "any living person" against the unauthorized use of his name or picture for commercial exploitation.

The picture, which appeared in seven medical journals, depicted the actress in a state of psychological trauma. Since her friends, fans and her physician recognized her, the court had no difficulty in rejecting the defendant's claim that the photo was not a recognizable likeness; nor was it persuaded by the baseless claim that the photo was not being used for purposes of trade.

Negri claimed severe emotional and mental distress and humiliation, harm to her reputation, unjust appropriation of her *rights of publicity* and defendant's unjust enrichment as a result, loss of income from other legitimate promotional opportunities, and punitive damages. Defendant, said the court, had plainly violated the statute and was liable to the actress for any injuries a trial court might decide she had suffered. *Negri v. Schering Corp., 333 F.Supp. 101 (D.C.N.Y. 1971).*

Summary judgment was also denied *Newsweek* magazine in a privacy suit brought by a man whose photo had been taken to illustrate what he was told was to be a "patriotic article." Instead he had become part of an October 6, 1969 cover story, "The Troubled American—A Special Report on the White Majority" in which he was pictured as a typical "troubled American"—"angry, uncultured, crude, violence prone, hostile to both rich and poor, and racially prejudiced." Only his address was used and none of these views was attributed directly to him. But the court felt his friends and neighbors would generally recognize him and presume him to fit the stereotype.

There could be no libel action, said the court, since it is not libelous to call a person a "bigot" or other appropriate name descriptive of political, religious, economic or sociological philosophies under Pennsylvania law; and such charges would fit half the population of the United States. There was a privacy issue, however, and it would turn on whether the defendant could show that the plaintiff had consented, and in what sense he had consented, to have the picture taken. And that would be a question for a jury. *Raible v. Newsweek, Inc., 341 F.Supp. 804 (D.C.Pa.1972).*

### B. THE DEFENSE OF NEWSWORTHINESS

Where newsworthiness is the defense the *Time, Inc. v. Hill* standard has been applied to block complaints by the Howard Hughes interests about an unauthorized biography of the billionaire recluse, *Rosemount Enterprises, Inc. v. Random House, Inc., 294 N.Y.S.2d 122 (1968)*; and a suit by a casino customer who got caught in a photograph which was later used to dress up an article on gambling and the crime syndicates in the *Saturday Evening Post. Holmes v. The Curtis Pub. Co., 303 F.Supp. 522 (D.S.C. 1969).*

*Time* magazine was upheld in a privacy suit brought by a number of young Americans who had been photographed during their wanderings in Europe. Their activities were newsworthy, said a federal district court, and the magazine had not dug deeply into their private affairs. Moreover, they had made themselves readily available for both the pictures and story. *Goldman v. Time, Inc., 336 F.Supp. 133 (D.C.Cal.1971).*

Television news film of a holdup suspect being searched by police did not support a claim for an invasion of privacy, even though the plaintiff had not

participated in any crime and was later released without any charges being filed. *Williams v. KCMO Broadcasting Division Meredith Corp., 472 S.W.2d 1 (Mo.App.1971).*

A public figure has no exclusive right to his own biography and cannot claim an invasion of privacy when his life story is published. *Corabi v. Curtis Pub. Co., 273 A.2d 899 (Pa.1971).*

A convicted truck hijacker who claimed he was now living an exemplary, rehabilitated life complained that *Reader's Digest* had artfully and maliciously invaded his privacy in an article which disclosed truthful but embarrassing facts about his past life. The crux of the plaintiff's argument was that the magazine need not have used his name; it wasn't newsworthy and its use resulted in his being abandoned by his 11-year-old daughter and his friends.

A California court agreed that the use of the plaintiff's name might not have been newsworthy and that its publication might be found by a jury to be grossly offensive to most reasonable people, counter to the interests of our correctional system, and without the consent of the plaintiff. Since a jury would have to make these determinations, the cause was remanded to the trial court.

In spite of the court's gratuitous addition of such criteria as offensiveness and damage to the correctional system, the case would still turn on the question of newsworthiness, and that question alone, since clearly no consent had been given to the publication. Briscoe in his specialty had been a notorious and newsworthy criminal.

Citing *Kapellas v. Kofman, 1 Cal.3d 20, 81 Cal.Rptr. 360, 459 P.2d 912 (1969)*, the court observed that in determining whether an incident is newsworthy it must consider the social value of the facts published, the depth of the article's intrusion into ostensibly private affairs, and the extent to which the plaintiff voluntarily acceded to his status of public notoriety. And, of course, the actual malice standard of *New York Times* and *Hill* would apply. *Briscoe v. Reader's Digest Ass'n, 4 Cal.3d 529, 93 Cal. Rptr. 866, 483 P.2d 34 (1971).* Surprisingly, *Briscoe* was later reversed by a federal judge in an anomalous unreported case.

Nathan Leopold was unable to protect his privacy from invasion by a book and a motion picture the fictionalized aspects of which were reasonably comparable to the record in the celebrated Leopold and Loeb murder case many years before. Leopold had pleaded guilty and his participation in the crime was a matter of public and historical interest, said the court, even though the plaintiff had since become a useful citizen. *Leopold v. Levin, 259 N.E.2d 250 (Ill.1970).*

In some circumstances, indeed in most circumstances, an innocent bystander loses his right to privacy if the incident is in any sense newsworthy. *Cordell v. Detective Publications, Inc., 307 F.Supp. 1212 (D.C.Tenn.), aff'd 419 F.2d 989 (6th Cir. 1968).* Where a not-so-innocent party is involved the public-interest rule applies with even greater force. The "Boston Strangler's" notoriety and the additional fact that he had consented to a film portrayal of his life left him with no privacy claim in the absence of a knowingly false or reckless result. *DeSalvo v. Twentieth Century-Fox Film Corp., 300 F.Supp. 742 (D.C.Mass.1969).*

### C. PHYSICAL INTRUSION

A newsman seems to reach the outer limits of protection faster when he involves himself in a physical intrusion. In gathering information for a *Life* magazine article, "Crackdown on Quackery" which dealt in part with a person who attempted to heal using clay, minerals and herbs, *Life* staffers entered the "healer's"

home to make surreptitious photographs and recordings of his activities.

A district court awarded damages on privacy grounds and the court of appeals affirmed holding that the First Amendment does not include the right to invade an individual's privacy by gaining access to his home by subterfuge and taking pictures without his consent. The court was unwilling to extend the *New York Times* and *Hill* standard to a physical trespass on an individual's private domain and it seemed to be differentiating between dissemination of information, that is an invasion by publication, and an invasion by the reporter himself in the course of gathering information. *Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971).*

That there are indeed limits to the defense of newsworthiness is demonstrated in an incredible case involving a peripatetic photographer said to be America's only *paparazzo* and Jacqueline Onassis, the widow of President John F. Kennedy. Ronald Galella, a freelance, made a modest living photographing celebrities, mostly Mrs. Onassis. His strategy was aggressive pursuit described by Jackie as a continual stalking of her, popping up everywhere while emiting a curious "grunting" sound which, she said, terrified her.

Galella argued that his subject was simply a camera-shy and uncooperative public person and when she asked the Secret Service and other police officers to intervene in her behalf the photographer, complaining 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 activities were not protected by the First Amendment but constituted actionable assault, battery, and harassment, violation of the common law and constitutional right of privacy, violation of the civil rights statute, and tortious infliction of emotional distress. Both Jackie and the government were granted injunctive relief in a ruling in which the court expressed enormous distaste for the plaintiff Galella, whose claim was rejected, along with his perjured testimony. That portion of the ruling which deals with the privacy issues 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.

*Restricted areas.* Several decisions have established that news gathering in certain places, especially by photography, may be absolutely barred, no matter how circumspect the deportment of the reporter or photographer may be. In Tribune Review Publishing Co. v. Thomas, 254 F.2d 883 (3rd Cir. 1958), the plaintiff newspaper sought to enjoin enforcement of a court rule proscribing photography in particular areas of a courthouse. In

affirming the district court's denial of an injunction, the court said:

> Realizing that we are not dealing with freedom of expression at all but with rules having to do with gaining access to information on matters of public interest, can it be argued that here there is some constitutional right for everybody not to be interfered with in finding out things about everybody else? We suppose it would not be contended that a newspaper reporter or any other citizen could insist upon entering another's land without permission to find out something he wanted to know. In the same way, merely because someone's private letters might be interesting as gossip or as models of English composition it would hardly be argued that one could open another's desk and read through what he finds there. * * * We think that this question of getting at what one wants to know, either to inform the public or to satisfy one's individual curiosity is a far cry from the type of freedom of expression, comment, criticism so fully protected by the first and fourteenth amendments to the Constitution. 254 F.2d at 885.

* * *

In Dietemann v. Time, Inc., 284 F. Supp. 925 (C.D.Cal.1968), aff'd, 449 F.2d 245 (9th Cir. 1971), the court was faced with a case indistinguishable in principle from that at bar. The plaintiff there was a quack healer. *Life Magazine* sent investigative reporters to his house equipped with a hidden camera and radio transmitter. They gained entrance by deceit and surreptitiously took photographs and recorded their conversation with the plaintiff. The district court held that this conduct was an actionable invasion of privacy under California law and entered judgment for plaintiff, rejecting *Life's* claim that it had a First Amendment right to engage in such conduct. 284 F.Supp. at 931–932.

The Ninth Circuit affirmed and expressly rejected the proposition that freedom of the press is a license to commit torts with impunity. Judge Hufstedler, speaking for a unanimous court on this point, said:

> The defendant claims that the First Amendment immunizes it from liability * * * because its employees were gathering news and its instrumentalities are indispensable tools of investigative reporting. We agree that newsgathering is an integral part of news dissemination * * * 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. 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.* * * * Defendant relies upon the line of cases commencing with New York Times Co. v. Sullivan (1964) 376 U.S. 254 and extending through Rosenbloom v. Metromedia, Inc. (1971) 403 U.S. 29 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.
>
> As we previously observed, publication is not an essential element of plaintiff's cause of action. Moreover, it is not the foundation for the invocation of a privilege. Privilege concepts developed in defamation cases and to some extent in privacy actions in which publication is an essential component are not relevent 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 *supra*, 385 U.S. 374, 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. 449 F.2d at 249–250.

This position is fully supported by the commentators who agree that the First Amendment affords no privilege for intrusion. Dean Prosser, in discussing the Supreme Court's decision in Time, Inc. v. Hill, 385 U.S. 374 (1967), stated:

> On Certiorari, the analogy of defamation was manifest and persuasive; and the Supreme Court applied the rule of the Sullivan case, holding the misstatements of fact to be privileged unless it was found that they were made with knowledge of falsity or in reckless disregard of the truth. By this decision, and others which followed it, the two branches of invasion of privacy *which turn on publicity* were taken over under the Constitutional privilege. *The other two, however, are pretty clearly not.* As at common law, the celebrity can still undoubtedly complain of the appropriation of his name or likeness for purposes of advertising or the sale of a product, and so can the man in the news. And the Supreme Court decisions on intrusion have made it clear that either has as much right as anyone else to be free from intrusion into his home or his bank account. W. Prosser, Law of Torts, § 118, at 826–827 (4th ed. 1971) (emphasis supplied).

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.

* * *

We do not agree with plaintiff's trial attorney who contended at trial that whenever defendant is on public property, she regards it as her private domain; in support he points to her testimony:

> I consider it private when I am walking on a public street * * * I consider private errands private * * *
>
> Q * * * your errand is your own private business, is that what you mean?
>
> A Yes.

In any event, we said at trial, and now repeat, that she is a public figure. Nevertheless, the First Amendment does not immunize all conduct designed to gather information about or photographs of a public figure. There is no general constitutional right to assault, harass, or unceasingly shadow or distress public figures.

*Balancing the right of privacy against the impingement on "speech".* The foregoing authorities have dealt with "speech" of substantial or even great public interest and concern. The trial record before us, however, warrants the inquiry: Should the unremitting tortious and criminal behavior of plaintiff towards defendant over the past few years, with a very strong likelihood of its continuance, be a mandatory sacrifice she is compelled to make in order that some portion of the public may learn what she wore while walking on the public streets, or her appearance at the theater and public functions, or her department store purchases, or what she ate in restaurants? Does the Constitution insist on that too? Surely, such a contention belittles the great wisdom that is the hallmark of the Constitution.

In this case, photographs of defendant walking in Central Park, riding in automobiles, eating in restaurants, picknicking with her children, and the like, and his photograph captions indicating what magazines she has bought and what she has put in her coffee are of miniscule importance to the public. The torment inflicted upon her in the course of Galella's obtaining these photographs and bits of information clearly outweighs any interest in his obtaining such information.

Most of the courts which have considered this problem have concluded that just such a balancing test must be applied. * * *

The balancing test is responsive both to the protection of the individual's right to privacy and to the purposes of the First Amendment. Clearly, the First Amendment protects freedom of expression with respect to public affairs—matters relevant to the self-government of the nation. *E. g.*, Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv.L.Rev. 1, 12 (1965). It extends to "all issues about which information is needed or appropriate to enable members of the society to cope with the exigencies of their period." Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). Doubtless, Mrs. Onassis is a public figure, whose life has included events of great public concern. But it cannot be said that information about her comings and goings, her tastes in ballet, the food that she eats, and other minutiae which are the sole product of Galella's three years of pursuit, bear significantly upon public questions or otherwise "enable the members of society to cope with the exigencies of their period." It merely satisfies curiosity.

* * *

*Invasion of privacy.* Plaintiff's endless snooping constitutes tortious invasion of privacy.

We venture to suggest that faced with a factual situation comparable to the distressing one before us, with a torrent of almost unrelieved abuse into the privacy of every day activity, the New York Court of Appeals would complete the mission it has already begun of determining what should be actionable under the developing common law right of privacy. Nader v. General Motors Corp., 25 N.Y.2d 560, 307 N.Y.S.2d 647, 255 N.E. 2d 765 (1970), in which the Court applied District of Columbia law.

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. He follows her about irrespective of what she is doing: trailing her up and down the streets of New York, chasing her out of the city to neighboring places and foreign countries when she leaves for recreation or vacation, haunting her at restaurants (recording what she eats), theatres, the opera and other places of entertainment, and pursuing her when she goes shopping, getting close to her at the counter and in-

quiring of personnel as to her clothing purchases. 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 studies her habits, the operations of her household and the procedures of the Secret Service in guarding her children. He has kept her under such close observation for so long a period of time that he has commented at considerable length on her personality, her shopping tastes and habits, and her preferences for entertainment. With evident satisfaction, he referred, while testifying, to his "usual habitual observation." 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.

We return now to *Nader*. The Court there sustained the sufficiency of allegations to the effect that plaintiff's "right of privacy" under District of Columbia law had been violated by defendant's activities which consisted of surveillance, shadowing, eavesdropping, and others not here relevant.

Chief Judge Fuld, for the Court, wrote:

> There are * * * allegations that the appellant hired people to shadow the plaintiff and keep him under surveillance. In particular, he claims that, on one occasion, one of its agents followed him into a bank, getting sufficiently close to him to see the denomination of the bills he was withdrawing from his account. From what we have already said, it is manifest that the mere observation of the plaintiff in a public place does not amount to an invasion of his privacy. But, under certain circumstances, surveillance may be so 'overzealous' as to render it actionable. (See Pearson v. Dodd, 133 U.S.App.D.C. 279, 410 F.2d 701, 704; Pinkerton Nat. Detective Agency, Inc. v. Stevens, 108 Ga.App. 159, 132 S.E.2d 119) * * * A person does not automatically make public everything he does merely by being in a public place, and the mere fact that Nader was in a bank did not give anyone the right to try to discover the amount of money he was withdrawing. 25 N.Y.2d at 570, 307 N.Y.S.2d at 655, 255 N.E.2d at 771.
>
> * * *

As we see it, Galella's conduct falls within the formulation of the right of privacy as expressed in the opinion. 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" which Judge Fuld found to be actionable. (*Nader*, 25 N.Y.2d at 569, 307 N.Y.S. 2d at 654, 255 N.E.2d at 770.)

Does the law of New York differ from the law of the District of Columbia as declared by New York's highest court? The dictum in Roberson v. Rochester Folding-Box Co., 171 N.Y. 538, 64 N.E. 442 (1902), does not support the conclusion that invasion of privacy is not actionable under New York law. As Dean Prosser has pointed out, "The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common * * *": (i)

commercial appropriation of one's name or likeness, (ii) intrusion, (iii) public disclosure of private facts and (iv) publicity which places the plaintiff in a false light in the public eye. W. Prosser, Law of Torts § 117 at 804–12 (4th ed. 1971); *accord,* Restatement (Second) Torts, § 652A (tent.draft 1967). Note, Torts: Unnecessary Analysis of Elements of Right of Privacy by Court of Appeals: A Possible Basis for Extension of the Tort in New York? 36 Bklyn.L.Rev. 507, 513 (1970). *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 rejection of the old thinking that supported the *Roberson* dictum, in such cases as Battalla v. State, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961); Tobin v. Grossman, 24 N.Y.2d 609, 301 N.Y.S.2d 554, 249 N.E.2d 419 (1969) (recognizing cause of action despite anticipated proliferation of claims); and Ferrara v. Galluchio, 5 N.Y.2d 16, 176 N.Y.S.2d 996, 152 N.E.2d 249 (1958) (protecting freedom from mental disturbance), is the final factor which persuades us that *Nader* foreshadows the course which the Court of Appeals of the State of New York would follow today in dealing with intrusions upon the right of privacy.

* * *

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, Note, 83 Harv.L.Rev. 1923 (1970), and includes, but is not limited to, such disparate abuses of privacy as the unreasonable seeking, gathering, storing, sharing and disseminating of information by humans and machines.

It has been cogently suggested that the right to privacy proscribes dehumanizing conduct which assaults "liberty, personality and self-respect." Fried, Privacy, 77 Yale L.J. 475, 485 (1968).

* * *

**NOTES**

1. 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.

2. The Court of Appeals for the Second Circuit essentially upheld the lower court decision, noting that the First Amendment does not set up a wall of immunity to protect newsmen from any liability for their conduct while gathering news. Crimes and torts committed in news gathering, said the court, are not protected, and it cited *Branzburg v. Hayes, Rosenbloom v. Metromedia,* and *Dietmann v. Time, Inc.,* suggesting once again that *Dietmann* may be a ruling of significance to the future law of privacy.

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' Fifth Avenue home. *Galella v. Onassis, 487 F.2d 986 (C.A.N.Y.1973).*

It is rumored that the Appeals Court ruling has put Galella back in business and that he has again become the nemesis of Jacqueline Onassis.

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## SECTION 2. THE CONFLICT BETWEEN PRIVACY AND ACCESS TO INFORMATION

What is the newsman's liability when he steals or receives stolen information from the private files of a news source? Is receiving information taken without authorization from government files the equivalent of receiving stolen goods? In a contest between press freedom and property rights which should yield? How far can the right to gather news be extended?

Recall in the *Pentagon Papers* case that 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 documents. Chief Justice Burger and Justice Blackmun agreed with White that penal sanctions were an appropriate way of protecting government secrets.

In the past only copyright law has been concerned with how information is acquired; and the law has created only a modest number of problems for journalism, notably the copyrighting of government information so as to make it unavailable for publication. See M. B. Schnapper, Constraint By Copyright (1960).

Recently statutes and legal precedents designed to protect property have been used against journalists in their news gathering activities. In two important cases government information was stolen by third parties and passed on to reporters. The first case involved documents removed from the office of Senator Thomas Dodd by four former employees. The papers were photostated and returned, the copies going to Washington columnist Drew Pearson and his associate Jack Anderson. Stories appeared based on information contained in the purloined papers and Dodd initiated a libel suit. Invoking the *New York Times* rule a United States district court disallowed the libel action. But 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." Corpus Juris Secundum, Trover and Conversion, § 1, p. 531.

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. A portion of the district court opinion follows:

### DODD v. PEARSON

279 F.Supp. 101 (D.D.C.1968) aff'd in part rev'd in part 410 F.2d 701.

HOLTZOFF, District Judge. * * *

On the uncontroverted facts, the individuals who without authority entered the plaintiff's office, rifled his files, removed documents and made copies of them, which they turned over to the defendants, would be liable for damages in trespass and conversion. They are not being

sued. 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 would be a work of supererogation to multiply authorities for this proposition of law, which is almost elementary. It is clear, therefore, that on the undisputed facts, the defendants are liable to the plaintiff for damages on the theory of conversion. The mere fact that the defendants received copies of the documents from the trespassers who purloined the originals, instead of the originals themselves, is, of course, immaterial. What the measure of damages should be and whether substantial damages may be recovered under the circumstances, is a matter to be determined at a later stage of this litigation.

Plaintiff's counsel advance an additional alternative theory on which they seek to predicate the plaintiff's right to recover, namely, violation of the right of privacy. The right of privacy has been developed and has gradually gained recognition in the law of torts since the turn of the century. This Court in Peay v. Curtis Pub. Co., D.C., 78 F.Supp. 305, held that it formed a part of the law of the District of Columbia. As this Court stated in the Peay case, the right of privacy has been broadly described as "the right to be let alone". The publication of a photograph of a private individual without his sanction, or depicting events in his personal life that are of no public interest, are illustrative violations of the right of privacy. It is a right to keep the noiseless tenor of one's way along the cool sequestered vale of life without intrusion on the part of the public. There are those who shun publicity and who deplore and even resent any attempt to cast a public gaze on any aspect of their personal life. The law respects this attitude and lends sanction to it by way of an action for damages for its infringement. There are, however, important limitations on the right of privacy. It does not extend to matters of public interest, or to persons properly in the public eye, at least as to matters other than features of their intimate life, Bernstein v. National Broadcasting Co., 129 F.Supp. 817, 828, affirmed 98 U.S.App.D.C. 112, 232 F. 2d 369.

The Restatement of the Law of Torts recognizes the right of privacy. It defines it as follows (§ 867):

"A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."

The Restatement likewise formulates the exception to this right, which has already been discussed. It states (§ 867):

"*Conflict of interests.* The rule stated in this Section gives protection to the interest which a person has in living with some privacy, but this protection is relative to the customs of the time and place and to the habits and occupation of the plaintiff. * * * if he submits himself or his work for public approval, as does a candidate for public office, a public official, an actor, an author or a stunt aviator he must necessarily pay the price of even unwelcome publicity through reports upon his private life and photographic reproductions of himself and his family, unless these are defamatory or exceed the bounds of fair comment."

* * *

The Court concludes that the publication of the material of which the plaintiff complains is not protected by the cloak of the right of privacy, because the publications relate to his activities as a high-ranking public officer, namely, Senator of the United States, in which the public has an interest.

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. * * * In this instance, apparently the plaintiff seeks to recover damages for injury to reputation, personal embarrassment and mental anguish. Whether recovery of such damages may be had in an action for conversion and, in fact, whether on the facts of this case the plaintiff may recover substantial damages at all, must be left for determination at the trial. * * *

### NOTES AND QUESTIONS

1. Shouldn't the same First Amendment considerations which make it almost impossible for Dodd to recover from Pearson on either the tort of libel or the tort of invasion of right of privacy make it equally difficult for Dodd to recover from Pearson on a theory of conversion? What, if anything, is there about a conversion theory which makes the First Amendment less compelling?

2. The editors of the Georgetown Law Journal have pointed out that allowing an action in conversion to substitute for a libel or right of privacy suit runs counter to the underlying premises of *New York Times v. Sullivan* and *Time Inc. v. Hill*. The *Dodd* case extended the tort of conversion ("any distinct act of dominion wrongfully exercised over another's property, in denial of or inconsistent with his right") to the delivery by former employees of Senator Dodd of copies of purloined documents to Jack Anderson, Drew Pearson's colleague. See Note, *Conversion As a Remedy for Injurious Publication—New Challenge to the New York Times Doctrine?*, 56 Geo.L.J. 1223 at 1224 (1968). The editors note that Judge Holtzoff observed that " 'Anderson was aware of the manner in which the copies had been obtained.' " Id. at 1224.

The extension by the court of the tort of conversion to information or ideas is criticized on the ground that the court makes the liability of the publisher hinge on whether the information in question was known by the publisher to have been wrongfully obtained.

The editors further point out that knowledge is not usually a critical factor in imposing liability for conversion and that, unlike *New York Times* and *Hill*, the definition of knowledge revolved around the "source of the speech rather than its content." Note, supra, 56 Geo. L.J. 1223 at 1229 (1968). Thus liability is imposed in *Dodd* because of the manner in which the information is obtained rather than because the information is not "newsworthy" or because it was published in "reckless disregard of its truth or falsity."

Is the extension of a conversion theory to these circumstances a completely inconsistent defiance of that vigorous and intense criticism of government which the *New York Times* case was designed to assure?

Should conversion theory never be used in situations like *Dodd v. Pearson*?

The editors of the Georgetown Law Journal made the following compromise suggestion for cases dealing with public officials or public figures for accommodating the three competing elements of tort law (libel, right of privacy and conversion) with First Amendment interests. See Note, supra, 56 Geo.L.J. 1223 at 1230 (1968):

"If a columnist actively participates in the commission of a tort, he would obviously be held to have exceeded the bounds of constitutionally protected activity. When the tort directly relates to the publication of information concerning official misconduct, however, the *sine qua non* for liability should be active partici-

pation by the publisher in the commission of the tortious act. Such a rule would comport with the policy and spirit underlying similar privileges to other areas, and allow the protection of a well-informed public to outweigh considerations of individual interests."

Does this suggested approach focus on the *content* rather than the *source* of the speech?

From a First Amendment point of view, i. e., vigorous and robust criticism of government, what are the advantages of the suggested approach over that actually used by Judge Holtzoff in *Dodd v. Pearson*?

3. Judge Holtzoff's decision in the district court granting partial summary judgment to Senator Dodd on a theory of conversion and denying partial summary judgment to Senator Dodd on a right of privacy theory were brought by interlocutory appeal to the United States Court of Appeals for the District of Columbia. The Court of Appeals affirmed the district court's ruling on the privacy issue but reversed the same court on its grant of summary judgment for conversion. *Pearson v. Dodd,* 410 F.2d 701 (D.C. Cir. 1969), cert. den. 395 U.S. 947 (1969).

With respect to the privacy point, Dodd's counsel argued that the district court had misunderstood his claim and that his privacy objection was based not on the content of the columns published by Pearson but on the manner in which he obtained the information published. In the appellate court, Senator Dodd used an offshoot of the right of privacy doctrine styled "intrusion." "Intrusion into an individual's seclusion, solitude, or private affairs" is listed by Dean Prosser as one of the four separate wrongs covered by the right of privacy. Judge Wright distinguished intrusion from other invasions of privacy on the ground that intrusion does not require the publication of the information obtained. For the tort of intrusion to be accomplished it is only necessary that the information be obtained "by improperly intrusive means."

Judge Wright concluded that Pearson received the documents from Senator Dodd's files with knowledge that they had been removed from the files without authorization. Should the court hold that Pearson is liable for invasion of privacy since he had received information from an intruder? Judge Wright answered the question in the negative:

"In an untried and developing area of tort law, we are not prepared to go so far. A person approached by an eavesdropper with an offer to share in the information gathered through the eavesdropping would perhaps play the nobler part should he spurn the offer and shut his ears. However, it seems to us that at this point it would place too great a strain on human weakness to hold one liable in damages who merely succumbs to temptation and listens.

"Of course, appellants did more than receive and peruse the copies of the documents taken from appellee's (Dodd's) files: they published excerpts from them in the national press. But in analyzing a claimed breach of privacy, injuries from intrusion and injuries from publication should be kept clearly separate. Where there is intrusion, the intruder should generally be liable whatever the content of what he learns. An eavesdropper to the marital bedroom may hear marital intimacies, or he may hear statements of fact or opinion of legitimate interest to the public; for purposes of liability that should make no difference. On the other hand, where the claim is that private information concerning plaintiff has been published, the question of whether that information is genuinely private or is of public interest should not turn on the manner in which it has been obtained. Of course, both forms of invasion may be combined in the same case.

"Here we have separately considered the nature of appellant's (Pearson and Anderson) publications concerning appellee, and have found that the matter published was of obvious public interest. The publication was not itself an invasion of privacy. Since we have also concluded that appellant's role in obtaining the information did not make them liable for intrusion to appellee, their subsequent publication, itself no invasion of privacy, cannot reach back to render that role tortious."

4. The Court of Appeals also concluded that Drew Pearson and his colleague Jack Anderson were not guilty of conversion. 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."

The court noted that it had previously held in the opinion that Dodd was not entitled to summary judgment for invasion of privacy and that although Dodd has originally sued Pearson and Anderson for libel, that claim had since been dropped.

Judge Wright's opinion clearly closes the opening wedge in breaking down media immunity in a Dodd-type fact situation which Judge Holtzoff's opinion in the district court had created. Holtzoff had sketched the outlines of a theory of media liability on a conversion theory even though *Times v. Hill* and the *New York Times* doctrines precluded such liability on a right of privacy or libel theory.

5. Do the classifications between injuries from publication and injuries from intrusion separate quite as tidily as Judge Wright suggests? When did the most serious consequence of the intrusion into Dodd's files occur: When the confidential files were removed by the "intruder" or when Pearson published them? What is the real basis for refusal to hold that Pearson's role in *l'affaire* Dodd is not passive (merely reading and receiving the documents) but active, (publishing them)? Is the basic problem that without injury from intrusion there would be no publication and therefore no injury from such publication? But the court wishes to separate the intrusion from publication apparently because candid recognition of their interconnection cannot be accomplished without returning to the basic issue of whether an elected public official as Dodd has any basis for a right of privacy claim against Pearson. In the light of this analysis, cf. Judge Wright's remark in the Court of Appeals, fn. 6: "Since under common law principles appellants' publication does

not amount to an invasion of privacy, we need not reach the serious constitutional questions suggested by Time, Inc. v. Hill, 385 U.S. 374 (1967)."

6. Judge Wright points out that files in Dodd's senate office are maintained in an office owned by the United States. Wright noted that this question was not briefed by the parties but he speculated that it is not entirely clear as to whether the Senator had title to the contents of his files. Assume that Dodd has no "title" to the content of the files. Whose legal position would such an assumption strengthen?

7. Judge Edward Tamm concurred in the result reached by Judge Wright but he filed a separate concurring opinion:

"Some legal scholars will see in the majority opinion—as distinguished from its actual holding—an ironic aspect. Conduct for which a law enforcement officer would be soundly castigated is, by the phraseology of the majority opinion, found tolerable; conduct which, if engaged in by government agents would lead to the suppression of evidence obtained by these means, is approved when used for the profit of the press. There is an anomaly lurking in this situation: the news media regard themselves as quasi-public institutions yet they demand immunity from the restraints which they vigorously demand be placed on government. That which is regarded as a mortal taint on information secured by any illegal conduct of government would appear from the majority opinion to be permissible as a technique or modus operandi for the journalist. Some will find this confusing, but I am not free to act on my own views under the doctrine of stare decisis which I consider binding upon me."

8. Is it really inconsistent, however, to permit the use of information as evidence (which presumably would be inadmissible in a criminal prosecution) for "profit by the press" in view of the fact that such information as used by the press is also quite damaging to the party against whom it is used? Does Judge Tamm take too great a legal leap when he styles the news media as "quasi-public institutions." On the other hand, Judge Wright in the majority opinion appears to take an even greater leap when he suggests that the requirements of the Fourth Amendment should extend to private as well as to governmental conduct: "Just as the Fourth Amendment has expanded to protect citizens from government intrusions where the intrusion is not reasonably expected, so should tort law protect citizens from other citizens."

The Fourth Amendment states as follows: "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."

But how helpful and how basic are Fourth Amendment references in a case such as the principal one which, however suppressed, is permeated with First Amendment considerations? In the light of this conflict between competing constitutional values, reflect on which appears to be the approach which identifies most clearly the fundamental issues involved? Is it the approach of Judge Wright for the majority in the Court of Appeals or the approach suggested by the editors of the Georgetown Law Journal? Why?

9. 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 claim to possession." *Liberty Lobby, Inc. v. Pearson, 390 F.2d 489 (D.C.Cir. 1968).*

Of no advantage to plaintiffs was the fact they were engaged in political lobbying of a highly controversial nature, rendering their affairs a matter of public interest.

What is important about the *Pearson* cases is that they do not preclude the application of conversion theory to First Amendment questions.

10. The second major case involving stolen property arose in California when a reporter for the *Los Angeles Free Press* received and paid for a list of names (with addresses and telephone numbers) of undercover narcotics agents from a young man identifying himself as an employee of the California Attorney General's office.

Two months later in August 1969, to the horror of state officials, the complete list was published under headlines such as "Know Your Local Narc." Publisher Arthur Kunkin and the reporter who had bought the list were indicted by a Los Angeles grand jury on a charge of violating the California Penal Code which places criminal liability on "Every person who buys or receives any property that has been stolen or which has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals withholds or aids in concealing or withholding any such property from the owner. * * *" Unlike conversion, which Prosser has called the "forgotten tort," receiving stolen property is an active concept in American law.

Convicted in a jury trial, the two newspapermen were fined and placed on probation. The California Court of Appeals affirmed the convictions in a detailed March 1972 ruling. *People v. Kunkin, 24 Cal.App.3d 447, 100 Cal.Rptr. 845 (1972)* citing the United States Supreme Court in *Zemel v. Rusk, 381 U.S. 1, (1965),* a freedom of travel case, Associate Justice Fleming noted for the California court that "the right to speak and publish does not carry with it the unrestrained right to gather information." Moreover, he was not willing to condone what he called a "Constitutional thieves market;" and he distinguished *Dodd* which, he emphasized, had not held that documents were not property.

"We think a restriction on traffic in stolen documents," said Justice Fleming, "is a valid restriction, even though it may have some impact on news gathering. We think a state is constitutionally warranted in adopting laws against receipt of stolen documents and uniformly enforcing those laws against all persons, including newsmen and publishers, who knowingly receive stolen documents."

The case strengthens the idea of a property right restriction on freedom of the press and reinforces Chief Justice Burger's belief, expressed in his *Pentagon Papers* dissent, that the press has an obligation to report the theft of government papers to the proper authorities, once having verified their origin. The press thus becomes handmaiden to the police. Does such an alliance exclude the public interest?

"The press as a watchdog of government," says Everette Dennis, "has always

depended on disgruntled public officials for leaks and internal memoranda. Such sources of information have always led to the exposure of government corruption and wrongdoing. A mandatory legal verification of all information would quickly close information sources." Dennis, *The Case of the Purloined Papers,* Rights (June/July 1973), p. 11. *Purloined Information as Property: A New First Amendment Challenge,* 50 Journalism Quarterly 456 (Autumn 1973).

In the *Kunkin* case the Supreme Court of California came to the rescue on a technicality. Since the newspaper's informant had not indicated that he was no longer employed by the Attorney General, had insisted that the roster of agents be returned, and had asked to remain anonymous in order to avoid trouble, there was no substantial evidence, said the court, from which the jury could reasonably have inferred that the list was stolen and that the newspapermen therefore had a guilty knowledge. The more substantive question of whether the newspaper has a constitutional right to publish information reaching it through diverse and unorthodox channels was never reached. *People v. Kunkin, 107 Cal. Rptr. 184 (1973).*

11. Just as a reasonable qualification to a reporter's privilege to protect his sources would be his actual involvement in a crime either as a participant or an observer and thereby an accessory before the fact, a reasonable qualification to permitting the publication of purloined papers might be whether the reporter himself had broken in and rifled personal files. This makes a distinction between intrusion and publication and in doing so honors both freedom of press and the right of privacy. The distinction is implied in *Pearson v. Dodd* and it appears to be the theory of *Dietemann v. Time, Inc.,* 449 F.2d 245 (9th Cir. 1971) in which the court would not countenance a physical invasion of privacy by a news reporter whether it be by breaking and entering, theft of personal or professional documents, or surreptitious photography or recording. Intrusion may be the one form of invasion of privacy which the press in the future may clearly not engage in with any sense of constitutional security.

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## SECTION 3. PRIVACY AND THE REPORTER'S TAPE-RECORDED TELEPHONE MESSAGES

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Sam Riley and Joel Wiessler raise a fascinating question in a recent conference paper *(Privacy: The Reporter, The Telephone, and the Tape Recorder,* AEJ, Fort Collins, Col. (1973)): Is a reporter liable to wiretap charges when he records telephone conversations with his sources without their permission? A Pennsylvania court recently answered this question in the affirmative in upholding the wiretap conviction of an investigative reporter for the Philadelphia *Bulletin* under a state statute which provides in part that "no person shall intercept a communication by telephone or telegraph without permission of the parties to such communication." *Commonwealth v. Gregory P. Walter, May Session 1972, No. 2816, Viol.P.S. 18–3742.*

The Walter case is unusual, Riley and Wiessler point out, because "there was no question of a 'third party' tapping into a telephone line to listen clandestinely to the conversation of others. Rather, Walter was charged with recording ('intercepting') his own conversations with others. This raises the question of consent, and forces scrutiny of the concept of interception."

Pennsylvania courts are in conflict on the point. In 1967 a federal district held

that "* * * neither law (Federal or Pennsylvania) was intended to prohibit one *party* to a telephone conversation from recording that conversation for his own purposes. The 'dirty business' sought to be terminated by the Pennsylvania statute was the *interception* and recording by third parties of communications without the consent of *all the parties* thereto. When the recording by one of his conversation with another shall have become an 'interception' of their conversation, the word 'intercept' shall have taken on a new and different meaning indeed." *Parkhurst v. Kling, 266 F.Supp. 780 (E.D.Pa.1967).* Ten years before the United States Supreme Court said, "It is settled that no interception occurs when one party to a telephone conversation simply records it for his own use." *Rathbun v. United States, 355 U. S. 107 (1957).*

The Supreme Court of Pennsylvania has held otherwise. In *Commonwealth v. McCoy, 275 A.2d 28 (Pa.1971)* that court ruled that "Pennsylvania's anti-wiretapping statute clearly demands that the consent of all parties be given before any device for overhearing or recording is installed or utilized. The statute contains no exceptions even for interceptions by governmental authorities engaged in an attempt to apprehend a criminal."

Riley and Wiessler have determined that seven states follow the federal lead and require only one-party consent. They are Alaska, Florida, Louisiana, Massachusetts, New York, North Carolina and Tennessee. Seven states require the consent of *all* parties to a recorded telephone conversation. They are California, Hawaii, Illinois, Maryland, Nevada, Oregon, and Pennsylvania. Eleven states have no wiretapping statute, and the remaining 25 states follow no specific rule of consent.

Since the recording of telephone conversations for the sake of accuracy is not an unusual journalistic practice, it is important for the reporter to know how the courts of his state have construed the concept of "implied consent" or "fair use" with respect to recording devices. Walters was fined $350. He could have been fined $5,000 and sentenced to a jail term of from 15 days to a year.

# Chapter IV

# THE PUZZLE OF PORNOGRAPHY

## SECTION 1. THE URGE TO CENSOR

"Civilized" society has always taken upon itself the grievous burden of delivering its members from their own impure and improper thoughts about morality and politics.

All ages have suffered the book burner. The Analects of Confucius were destroyed by his Emperor; and in 213 B.C. Ch'in Shih Huang Ti, builder of the Great Wall, further confined himself by confiscating, except for technical books, the literature of his people and burying alive or banishing 500 of his scholars and librarians. Plato advocated expurgation of the Odyssey to make it more suitable for young readers—although the Greeks were remarkably "modern" in their attitudes toward sex.

St. Paul was a renowned book burner. St. Augustine approved; and from the 4th century to modern times Church councils have promulgated lists of forbidden authors: Arius, Nestorius, Abelard, Wyclif, Hus, Luther, Balzac, Dumas, Anatole France, J. S. Mill, Pascal, Richardson, Moravia, to select a random few.

The medieval universities of Europe contributed to taste and right-thinking through their Colleges of Censors and Commissioners on Heresy, although the age of the Wife of Bath and Boccaccio was relatively uninhibited in matters of sex. When The Decameron finally came under Papal ban in 1559 it was not for its obscenity but for its spoofing of the clergy.

Tudor and Stuart monarchs used licensing systems and barbaric punishments to curtail heretical, seditious and offensive books and pamphlets, and to protect pontifical and political establishments from verbal assault. The Stationers' Company, a licensing bureau, and the Star Chamber, a secret court, were their effective agents.

The sovereign Parliament also used the Stationers' Company to enforce bans against the written word; and Presbyterians and Independents were no more open-minded than Papists, Royalists and Anglicans in permitting their opponents to be heard. Although John Milton's *Areopagitica* was an impassioned protest against parliamentary censorship, it was hardly a monument to libertarianism for the Puritan poet exempted opinions "impious or evil"—that is Roman Catholic or Kingly—from the marketplace of ideas. And Milton, as we have noted, was quite willing to serve as an official censor for Cromwell.

Until the 18th century, spiritual offenses were thought to be the concern of ecclesiastical courts. By 1725, however, the publication of obscenity (or pornography: we shall use the terms synonymously) had become more crime than sin and pornographers were being convicted under the common law. And since the American Constitution had not discarded the common law as it applied to obscenity and blasphemy, Abner Kneeland could be tried for a libel against God in the theocratic Boston of the early 1800s.

Increasingly, morality came to have a sexual aura and sexual indecencies were interpreted as outrages against religion. In our own day, religious motivations may promote much activity in the realm of sex censorship. Louis Henkin believes

that obscenity is forbidden not because it incites sexual misconduct but because it offends notions of holiness and propriety. Henkin, *Morals and the Constitution: the Sin of Obscenity,* 63 Colum.L. Rev. 402–12 (March 1963); Fleishman, *Witchcraft and Obscenity: Twin Superstitions,* 39 Wilson Library Bulletin 640–44 (April 1965). Obscenity may not then be a crime as much as it is a manifestation of what Harold Gardiner, a respected Catholic editor, calls the "serious sin" of blasphemy and sacrilege. Craig, *Censorship and Obscenity: A Panel Discussion,* 66 Dick.L.Rev. 432 (Summer 1962).

Can the state legislate merely to preserve a traditional or transitory view of private morality based upon untested hypotheses about character and its corruption, asks Henkin? Is not morals legislation an establishment of religion in violation of the First and Fourteenth Amendments? The Englishman Thomas Bowdler, for example, expurgated Shakespeare and Gibbon's History of the Decline and Fall of the Roman Empire to conform to his peculiar religious convictions.

Organizations with religious sponsorship have often been in the vanguard of censorship. The National Office for Decent Literature, for example, secure in its self-defined role as a guardian of community morals, includes in its arsenal of repression boycott, intimidation, and the constant threat of police power. Whatever its purity of purpose and its right as a pressure group to pursue particular objectives, NODL's irregular and erratic censorship activities have led to the blacklisting and removal from circulation of great works of literature including those of Hemingway, Faulkner, Dos Passos, Orwell, O'Hara, Zola, Koestler, Mailer, Farrell, Edmund Wilson, and scores of others. Furthermore, NODL's criteria for objectionable literature are so expansive—including crime, violence, sex, disrespect for authority, suggestive illustration, blasphemy, and ridicule of racial or religious groups—that they constitute a means for the prevention of literature rather than any discriminating evaluation of it.

NODL advocates local ordinances and censorship boards and has even considered the benefits of a national "literature czar." At the same time, it does not recognize the rulings of courts, and cleared books remain on its lists.

Churches have many allies in the field of censorship, and their motivations may or may not be religious. America has a long tradition of Watch and Ward societies for the suppression of vice, obscenity laws, and postal and customs censorship regulations which first of all suggests a veritable obsession with sex, and secondly an assumption that virtue and ignorance are synonymous.

This spirit of mind is reflected in the story Bertrand Russell tells of the Anglican Bishop who said of Russell that every word in every book he had written was inspired by sexual lust. Lord Russell's 60 books were mostly about philosophy and mathematics, but he did write a book on sexual ethics titled Marriage and Morals and this apparently was the only one of his works that the Bishop had read—because, said Russell, "Sex was the only thing that interested him." See Chandos, (ed.) To Deprave and Corrupt (1962) p. 29.

At one time the chief censor of Memphis outlawed movies starring Charles Chaplin and Ingrid Bergman because he disapproved of their personal morality: he also refused to pass any films depicting train robberies because in his youth he had been robbed on a train. Leary and Noall, *Entertainment: Public Pleasures and the Law,* 71 Harv.L.Rev. 338 fn. 87 (December 1957). A former chairman of the state literature commission of Georgia revealed something about

himself when he declared, "I don't discriminate between nude women, whether or not they are art. It's all lustful to me." Gellhorn in Downs (ed.), The First Freedom (1960), p. 28.

Above all a publication should not prove alluring and thereby pleasurable; but it may be emetic, that is, so disgusting as to induce vomiting. In his impressive 1933 decision legitimizing James Joyce's *Ulysses,* Judge John Woolsey found, and probably to his relief, that "in many places the effect of *Ulysses* upon the reader undoubtedly is somewhat emetic, (but) nowhere does it tend to be aphrodisiac." 5 F.Supp. 182 (S.D.N.Y. 1933). So schizoid have we become in matters of sex that we reject the honest portrayal of love and the simple realism of sex but invite the portrayal of the slaying of a love partner and remain unmoved by the open expression of sadistic violence. Craig, *Censorship and Obscenity: A Panel Discussion,* 66 Dick.L.Rev. 429 (1962).

Non-governmental groups involved at least to a degree in the censorship of motion pictures include the National Catholic Office for Motion Pictures (formerly the National Legion of Decency) which, by its own admission, can wreak economic havoc on particular films, the General Federation of Women's Clubs, the National Congress of Parents and Teachers, the Daughters of the American Revolution, the Protestant Motion Picture Council, the American Association of University Women, the American Jewish Committee, and the National Federation of Music Clubs. Municipal organizations concerned with separating the "bad" from the "good" in film and literature are legion.

This is not to say that private groups have no right to judge the moral and aesthetic quality of a publication and to make recommendations regarding it, especially to parents who at least theoretically exert ultimate control over the family's receiving system. Indeed they do. But too often their purpose is a blind censorship, reflecting the morality of the pack, the zeal of the fanatic, and the narrowness of mind of the ignorant.

Led by a clergyman, the Illinois Vigilance Association discovered in 1922 that jazz had "caused the downfall" of one thousand girls in Chicago alone; and Dr. Florence Richards, medical director of a Philadelphia high school for girls, warned that "jazz may tear to pieces our whole social fabric." So laws were passed to prohibit the playing of jazz in public places in Cleveland, Detroit, Kansas City, Omaha, and 50 other cities, and jazz retreated to the bars and bordellos.

Aldous Huxley's Brave New World and Steinbeck's East of Eden were removed from a Pendleton, Oregon, high school reading list because a religious group objected. A Wrenshall, Minnesota, high school English teacher was fired for asking his class to read Orwell's 1984. Salinger's The Catcher in the Rye has been a target of censorship all across the country. A father's objection to it in Virginia led to a state investigation of the 20,000-title book list from which purchases could be made with state funds. In early 1974 the school board of Drake, N. D. ordered the burning 32 copies of Kurt Vonnegut's Slaughterhouse-Five. Also consigned to the flames were James Dickey's Deliverance and an anthology of short stories containing the works of Hemingway, Steinbeck and Faulkner. The teacher who assigned them was fired from his high school post. A high school teacher in McBee, S. C. was arrested on a charge of distributing obscene materials to minors for assigning Vonnegut's fiction to a class. Authorities at church-sponsored Fairfield University declared the works of Spinoza, Leibnitz and Sartre to be harmful. Marshall, *The 'Right-to-Read' Controversy,* Freedom of Information Center Report No. 199 (May 1968).

In 1972 the president of the Roselle, N. J. Board of Education, removed four books from a list to be added to the high school library through a federally funded program because they were "too liberal and I disagree with their points of view." The books were Galbraith's The Affluent Society, Lekachman's The Age of Keynes, Beaton's The Struggle for Peace, and Ebenstein's Today's Isms: Communism, Fascism, Socialism and Capitalism. *New York Times,* June 18, 1972.

Arguments supporting the censorship of obscenity can be found in Devlin, The Enforcement of Morals (1959); Van Den Haag, "Quia Ineptum" in Chandos (ed.) To Deprave and Corrupt (1962); and Clor, Obscenity and Public Morality (1969).

The amenability of obscenity to governmental control—our primary concern in this chapter—depends upon whether the idea of obscenity can be discussed at all in utilitarian terms. What resource has government for determining what is impure? And is what is impure also that which is enjoyed, that which tends toward joy, love, liveliness, including the stirring of lustful thoughts and impulses? Must sexual desire inevitably result in personal shame? Are libidinous thoughts destructive of the social order?

Social reality just might be incomplete without its erotic components, for, as Havelock Ellis observed, to outlaw obscenity is to falsify life. Ellis, On Life and Sex: Essays of Love and Virtue, 1937. And, as a matter of fact, if sex, one of the most emotive words in our language, is the bane of the good society, then Madison Avenue is culpable for it saturates our culture with a neurotic babble of sexual suggestions, symbols, and exhortations. This use of love magic (ritual activities designed to attract to the user a desired sexual object without use of any known physical or psychological mechanism which could produce this result) may be directly proportionate to the level of sexual socialization anxiety in a society. Shirley and Romney, *Love Magic and Socialization Anxiety: A Cross-Cultural Study,* 64 American Anthropologist 1028 (October, 1962). Sex censorship may indeed be a quixotic exercise amid such cacophony because it seeks to control an irrepressible force by the futile expedient of eliminating stimuli that are infinitely replaceable.

"All those ghastly novels—sex is an obsession with the Americans," declared Malcolm Muggeridge after a visit to the United States. "If the purpose of pornography is to excite sexual desire, it is unnecessary for the young, inconvenient for the middle-aged, and unseemly for the old."

So, on the one hand, the exploitation of sexuality has become a precept of our economic system, while on the other the censorship of sex provides government and private groups with a traditional weapon of social control. The contradiction is seldom noted. In The Other Victorians (1966) Steven Marcus traces the complex interrelationships in Victorian society among the economic system, the social structure, and prevailing norms and behavior. What are attempts to repress Kazantzakis' The Last Temptation of Christ and Baldwin's Another Country but efforts to preserve the status quo ante of church and state? Yet the advertising industry exploits our sexual insecurities with a devilish cleverness. Simpler by far is the new Puritanism of the post-revolutionary Soviet society which forthrightly censors sex without concomitant exploitation.

There are other contradictions. In an era of relative permissiveness the novelist, poet, television writer, art gallery director, concert manager, and librarian must still defend against the guerrilla fighter for community purity or his uniformed agent of sexual order. And, typically, the censor, propelled by his own neuroses, never sees himself in danger of

corruption from obscene communication: only his peers. And in spite of him, the obscenities of today have a perverse tendency to become the classics of tomorrow. Time has always made a fool of the censor.

Regrettable is the equivocation of the newspaper press in the realm of sex censorship. Capable of whiplash reaction to other kinds of censorship—particularly those which interfere with its own routines—the press is frequently an unconcerned bystander when the sex censor is on the rampage. Or, worse, the press becomes an active partner of the censor. The astounding conservatism of the daily press in matters of sex is reflected in the thousands of dollars the *Chicago Tribune* and *Washington Post* spent to get the word "penis" out of a book review after distribution had begun; and most have experienced the annoying hypocrisy of television's "bleeps." Hutchison, Tropic of Cancer On Trial (1968), Ch. 8, "The National Press and Cancer." Smith, *Is Anything Unprintable?* 7 Columbia Journalism Review 22 (1968).

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## SECTION 2. THE DEVELOPMENT OF OBSCENITY LAW IN AMERICA

1. Obscenity and pornography came into the common law in *Curl's case, 2 Strange 788, 93 Eng.Rep. 849 (K.B. 1727)*, when a tasteless tract titled, "Venus in the Cloister or the Nun in Her Smock," was held to jeopardize the general morality. This period saw the dawn in England of vice societies bent on banning obscene books. And as they flourished obscenity flourished so that by the beginning of the 19th century England was entering what might be called its pornographic period.

In a vain attempt to suppress sex communication, Lord Campbell's Act of 1857 made the sale and distribution of obscene libel a crime. Ten years 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 ruled, in deference to the most feebleminded and susceptible in the community, that the test of obscenity was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall." The book was held obscene on the basis of the effect isolated passages would have on the most susceptible readers.

*Hicklin* became the standard in England and America. In the meantime, the first federal obscenity law, the Tariff Act of 1842, had been passed to prohibit importation into the United States of obscene literature; obscenity laws were popping up all over, and freedom of speech had come to mean freedom for "clean" speech only.

The first reported American case involved *Fanny Hill* or *Memoirs of a Woman of Pleasure* in 1821. She was to become a constitutional celebrity in 1966.

2. In 1873, Anthony Comstock, a sex-obsessed grocer's clerk, managed an omnibus anti-obscenity bill through Congress which, although it brought together and reinforced earlier laws, did not even trouble to define obscenity. Comstock's lobby was the Committee (later Society) for the Suppression of Vice, and it was the YMCA that launched it for him. State laws followed.

In 1876 Congress revised the Comstock Act to make obscene publications non-mailable. The Post Office, with Comstock serving as a special agent, gradually developed a system of adminis-

trative censorship and confiscation which the courts seemed reluctant to override.

Using the *Hicklin* test, the federal obscenity statute was upheld in *Ex parte Jackson, 96 U.S. 727 (1878),* in *United States v. Bennett, 24 Fed.Cas. 1093 (N. Y.S.D.1879),* in *United States v. Harmon, 45 F. 414 (D.C.Kan.1891) rev'd 50 F. 921 (C.C.)*; and *Hicklin* was still being applied in 1929 when a New York City court declared Radclyffe Hall's sophisticated story of lesbian love, The Well of Loneliness, obscene in *People v. Friede, 133 Misc. 611, 233 N.Y.S. 565 (1929).* Theodore Dreiser's An American Tragedy was banned in Boston in 1930 under a *Hicklin* test. *Commonwealth v. Friede, 271 Mass. 318, 171 N. E. 472 (1930).*

3. Light was let in when Judge Learned Hand in 1913 first questioned the validity of the *Hicklin* test in the trial of a publisher charged with selling Daniel Goodman's novel of economic blight and degradation, Hagar Revelly. *United States v. Kennerley, 209 F. 119 (S.D.N. Y.1913).* 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 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. *Halsey v. New York Society for the Suppression of Vice, 191 App.Div. 245, 180 N.Y.S. 836 (1920).*

In 1930 Federal Judge Augustus Hand wrote an opinion reversing the conviction of Mary Ware Dennett for her pamphlet, "The Sex Side of Life," a sensitive piece written primarily for her own children. It was not obscene, said the judge, but a serious presentation of an important subject. *United States v. Dennett, 39 F.2d 564 (2d Cir. 1930).*

4. The *Hicklin* rule 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 (S.D.N.Y.1933).* A better test, 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 the Judge had taken intellectual pains to determine. Woolsey's opinion, quite 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, Learned Hand could say bluntly in *United States v. Levine, 83 F.2d 156 (2d Cir. 1936)* that the *Hicklin* rule 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 opinion of competent critics. What counts, he said, is its effects upon all whom it is likely to reach.

5. The Post Office and Customs Bureau, federal censors since 1842, then began applying a *Ulysses* test, or what came to be known as the "community standard" test, to a wide range of books, pamphlets and photographs. In *Parmelee v. United States, 113 F.2d 729 (D.C.Cir. 1940)* a federal court applied a "contemporary standards" test drawn from *Kennerley* to Customs Bureau censorship of nudism in art. Because they could effectively block the movement of such materials, these government officials became the nation's chief censors, the arbiters of community tastes. The expense and time requirements of litigation meant that the courts were generally circumvented.

In 1943, the Postmaster General sought to revoke *Esquire's* second-class mailing privilege because the magazine did not appear to be making "the special contribution to the public welfare" which the Postmaster presumed the Congress intended. The Court of Appeals reversed his holding in *Esquire, Inc. v. Walker,*

*151 F.2d 49 (D.C.Cir. 1945)* with the subsequent unanimous approval of the Supreme Court. Reviewing the legislative history of the Classification Act of 1879, especially its Fourth condition admitting a publication to second-class rates, Justice DOUGLAS concluded for the Court:

HANNEGAN v. ESQUIRE, INC., *327 U.S. 146, 66 S.Ct. 456, 90 L.Ed. 586 (1946).* * * * It is plain, as we have said, 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. * * *

Since *Esquire,* the revocation power has been almost abandoned as an anti-obscenity sanction. The *Esquire* case is reported and discussed in this text, p. 148.

6. The entire Post Office procedure was branded illegal in 1945 by the U. S. Court of Appeals in the District of Columbia in a ruling that Dr. Paul Popenoe's booklet, "Preparing for Marriage," was not non-mailable obscenity. Judge Thurman Arnold condemned summary seizure of mail as an interference with both liberty and property without due process as required by the Fifth Amendment. *Walker v. Popenoe, 149 F.2d 511 (D.C.Cir. 1945).* The Post Office ignored the decision, but a year later, in the Administrative Procedures Act, Congress moved to require a hearing and the use of established legal procedures in all such cases, and the courts subsequently ruled that interim mail blocks prior to a hearing were illegal. The Act also prohibited the government from judging the very cases which it had investigated and prosecuted.

In spite of procedural improvements, the Postmaster General still enjoys capricious and arbitrary powers, and there are ambiguities as to what court procedures are to be followed in particular cases.

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## MANUAL ENTERPRISES, INC. v. DAY

370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639 (1962).

**Editorial Note:**

The power of the Post Office to censor the mails and its particular definitions of obscenity have been challenged numerous times, but no more forthrightly than by the Supreme Court in a 1962 case involving the sale of magazines containing near-nude male models. In his judgment for the court, Justice Harlan * * * 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.

Justice Brennan's concurring opinion dealt specifically with the discretionary power of the Post Office and included a detailed review (omitted here) of the ambiguous legislative history of Section 1461 of the Comstock Act.

Mr. Justice BRENNAN, with whom THE CHIEF JUSTICE and Mr. Justice

DOUGLAS join, concurring in the reversal.

I agree that the judgment below must be reversed, though for a reason different from my Brother HARLAN'S. This is the first occasion on which the Court has given plenary review to a Post Office Department order holding matter "nonmailable" because obscene.

Petitioners, publishers of certain magazines, employ the mails in the distribution of about half of their claimed circulation of 25,000. On March 25, 1960, petitioners deposited 405 copies of their publications for transmission as second class mail from Alexandria, Virginia, to Chicago. However, the Alexandria postmaster, acting, apparently without notice to petitioners, on his belief that the magazines might be obscene and therefore "nonmailable" under 18 U.S.C. § 1461, 18 U.S.C.A. § 1461, withheld delivery and forwarded samples to the General Counsel of the Post Office Department.

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In addition to the question whether the particular matter is obscene, the Post Office order raises insistent questions about the validity of the whole procedure which gave rise to it, vital to the orderly development of this body of law and its administration. We risk erosion of First Amendment liberties unless we train our vigilance upon the methods whereby obscenity is condemned no less than upon the standards whereby it is judged. * * * Questions of procedural safeguards loom large in the wake of an order such as the one before us. Among them are: (a) whether Congress can close the mails to obscenity by any means other than prosecution of its sender; (b) whether Congress, if it can authorize exclusion of mail, can provide that obscenity be determined in the first instance in any forum except a court, and (c) whether, even if Congress could so authorize administrative censorship, it has in fact conferred upon postal authorities any power to exclude matter from the mails upon their determination of its obscene character.

Lower courts and judges have been troubled by these questions, but this Court has not had occasion to decide them. At least question (c) is before us now. It surpasses in general significance even the important issue of the standards for judging this material's "mailability." Moreover, dealing with the case on this ground involves less constitutional difficulty than inheres in others. The conclusion that the Postmaster General is acting *ultra vires* because Congress has not granted the power which he here asserts, while greatly influenced by constitutional doubts, does not require a decision as to whether any establishment of administrative censorship could be constitutional.

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Whether Congress, by its enactment or amendment of 18 U.S.C. § 1461, 18 U.S.C.A. § 1461 (a part of the Criminal Code), has authorized the Postmaster General to censor obscenity, is our precise question. The Government relies upon no other provision to support the constitutionally questionable power of administrative censorship of this material. That power is inferred from the declaration that every item proscribed in § 1461 is "nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier." Even granting that these words on their face permit a construction allowing the Post Office the power it asserts, their use in a criminal statute, their legislative history, and the contrast with the words and history of other provisions dealing with similar problems, raise the most serious doubt that so important and sensitive a power was granted by so perfunctory a provision. The area of obscenity is honeycombed with hazards for First Amendment guaranties, and the grave constitutional questions which would be

raised by the grant of such a power should not be decided when the relevant materials are so ambiguous as to whether any such grant exists.

(There follows an historical review of Section 1461) * * *

We have sustained the criminal sanctions of § 1461 against a challenge of unconstitutionality under the First Amendment. Roth v. United States, 354 U.S. 476. We have emphasized, however, that the necessity for safeguarding First Amendment protections for nonobscene materials means that Government "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. I imply no doubt that Congress could constitutionally authorize a noncriminal process in the nature of a judicial proceeding under closely defined procedural safeguards. But the suggestion that Congress may constitutionally authorize any process other than a fully judicial one immediately raises the gravest doubts. However, it is enough to dispose of this case that Congress has not, in § 1461, authorized the Postmaster General to employ any process of his own to close the mails to matter which, in his view, falls within the ban of that section. * * * I, therefore, concur in the judgment of reversal.

Justice CLARK dissented. Justice BLACK concurred in the result. Justices FRANKFURTER and WHITE took no part in the decision.

### NOTES

1. The Customs Bureau has been more permissive than the Post Office, and, in once using Huntington Cairns of the National Gallery of Art to make its final decisions concerning the importation of "art," more sensitive to the delicate aesthetic questions foreign materials might raise. But, in theory, the Bureau exercises a plenary power over the right of adult Americans to have access to foreign publications and films.

2. A Federal District Court in 1964 took a close look at the Customs procedure and declared it unconstitutional. Part of that decision follows:

UNITED STATES v. 18 PACKAGES OF MAGAZINES, *238 F.Supp. 846, 847–848 (N.D.Cal.1964).* "The Government attempts to avoid the case [*A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964)*] by arguing that the First Amendment has no inhibitory effect on Congress's 'complete' control of foreign commerce. This novel theory is not buttressed by citation to a single court opinion which has ever intimated such a possibility. The only rationale offered in support of the theory is to the effect that unless it be accepted, there will be practical limitations on the ability of Congress to restrict the importation of 'obscene' books or other material. This may well be. However, Constitutional guarantees may not be subverted to expediency. The Constitution, as it is written and construed by the United States Supreme Court, must be strictly respected.

"The Government goes on to argue that even if the First Amendment does apply to Congressional powers over foreign commerce, it would not prohibit a law authorizing summary seizure of foreign magazines. It is 'manifest' 'without argument,' the Government contends, that the language of the First Amendment could not refer to the 'foreign press.' Even if it be conceded, arguendo, that the 'foreign press' is not a direct beneficiary of the Amendment, the concession gains nought for the Government in this case. The First Amendment does protect the public of this country. As Mr. Justice Brennan pointed out in A Quantity of Copies of Books v. State of Kansas, supra, there is a 'right of the public in a free society to unobstructed

circulation of non-obscene books.' The First Amendment surely was designed to protect the rights of readers and distributors of publications no less than those of writers or printers. Indeed, the essence of the First Amendment right to freedom of the press is not so much the right to print as it is the right to read. The rights of readers are not to be curtailed because of the geographical origin of printed materials."

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3. Since constitutional considerations are interwoven in every obscenity case, the least that can be hoped for is that federal judges will review the procedures and judgments of postal and customs officials, whose literary and artistic values may be underdeveloped, and allow critical, scientific and psychiatric evidence, where relevant, to be presented in behalf of challenged publications.

The best argument for this is that these federal agencies are not regulatory. The legislative history of obscenity statutes suggests that censorship has evolved as a result of departmental assertions of power confirmed far more by Congressional silence than by any express consent. Paul and Schwartz, Federal Censorship 317 (1962).

4. Changes in the composition of the Court have generated new federal laws designed to limit the distribution and promotion of obscene materials. Under the Pandering Advertisement Act of 1968, for example, the individual householder defines obscenity for himself. If he swears that he has been sexually aroused by unsolicited mail, the Post Office orders the senders to strike his name from their mailing lists. The Post Office has issued well over 300,000 such orders in the past few years, some of them based on complaints about the sexually stimulating effects of advertisements for such materials as the *Christian Herald,* automobile seat covers, and an electronics magazine.

The constitutionality of this statute was upheld in *Rowan v. United States Post Office Department.*

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## ROWAN v. UNITED STATES POST OFFICE DEPARTMENT

397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970).

Mr. Chief Justice BURGER delivered the opinion of the Court.

Appellants challenge the constitutionality of Title III of the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 645, 39 U.S.C.A. § 4009 (1964 ed., Supp. IV), under which a person may require that a mailer remove his name from its mailing lists and stop all future mailings to the householder. The appellants are publishers, distributors, owners, and operators of mail order houses, mailing list brokers, and owners and operators of mail service organizations whose business activities are affected by the challenged statute.

* * *

Appellants initiated an action in the United States District Court for the Central District of California upon a complaint and petition for declaratory relief on the ground that 39 U.S.C. § 4009 (1964 ed., Supp. IV) is unconstitutional. They alleged that they had received numerous prohibitory orders pursuant to the provisions of the statute. Appellants contended that the section violates their rights of free speech and due process guaranteed by the First and Fifth Amendments to the United States Constitution. Additionally, appellants argued that the section is unconstitutionally vague, without standards, and ambiguous.

A three-judge court was convened * * * and it determined that the section was constitutional when interpreted

to prohibit advertisements similar to those initially mailed to the addressee. 300 F.Supp. 1036. * * * Section 4009 was a response to public and congressional concern with use of mail facilities to distribute unsolicited advertisements that recipients found to be offensive because of their lewd and salacious character. Such mail was found to be pressed upon minors as well as adults who did not seek and did not want it. Use of mailing lists of youth organizations was part of the mode of doing business. At the congressional hearings it developed that complaints to the Postmaster General had increased from 50,000 to 250,000 annually. The legislative history, including testimony of child psychology specialists and psychiatrists before the House Committee on the Post Office and the Civil Service, reflected concern over the impact of the materials on the development of children. A declared objective of Congress was to protect minors and the privacy of homes from such material and to place the judgment of what constitutes an offensive invasion of those interests in the hands of the addressee.

* * *

The essence of appellants' argument is that the statute violates their constitutional right to communicate. One sentence in appellants' brief perhaps characterizes their entire position:

"The freedom to communicate orally and by the written word and, indeed, in every manner whatsoever is imperative to a free and sane society."

Without doubt the public postal system is an indispensable adjunct of every civilized society and communication is imperative to a healthy social order. But the right of every person "to be let alone" must be placed in the scales with the right of others to communicate.

In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail. To make the householder the exclusive and final judge of what will cross his threshold undoubtedly has the effect of impeding the flow of ideas, information, and arguments that, ideally, he should receive and consider. Today's merchandising methods, the plethora of mass mailings subsidized by low postal rates, and the growth of the sale of large mailing lists as an industry in itself have changed the mailman from a carrier of primarily private communications, as he was in a more leisurely day, and have made him an adjunct of the mass mailer who sends unsolicited and often unwanted mail into every home. It places no strain on the doctrine of judicial notice to observe that whether measured by pieces or pounds, Everyman's mail today is made up overwhelmingly of material he did not seek from persons he does not know. And all too often it is matter he finds offensive.

* * *

Weighing the highly important right to communicate, but without trying to determine where it fits into constitutional imperatives, against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee.

The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property. In this case the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer.

To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial

to cut off an offensive or boring communication and thus bar its entering his home. Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.

Both the absoluteness of the citizen's right under § 4009 and its finality are essential; what may not be provocative to one person may well be to another. In operative effect the power of the householder under the statute is unlimited; he may prohibit the mailing of a dry goods catalog because he objects to the contents —or indeed the text of the language touting the merchandise. 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.

In effect, Congress has erected a wall —or more accurately permits a citizen to erect a wall—that no advertiser may penetrate without his acquiescence. The continuing operative effect of a mailing ban once imposed presents no constitutional obstacles; the citizen cannot be put to the burden of determining on repeated occasions whether the offending mailer has altered its material so as to make it acceptable. Nor should the householder have to risk that offensive material come into the hands of his children before it can be stopped.

We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even "good" ideas on an unwilling recipient. That we are often "captives" outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain.

* * *

The appellants also contend that the requirement that the sender remove the addressee's name from all mailing lists in his possession violates the Fifth Amendment because it constitutes a taking without due process of law. The appellants are not prohibited from using, selling, or exchanging their mailing lists; they are simply required to delete the names of the complaining addressees from the lists and cease all mailings to those persons.

Appellants next contend that compliance with the statute is confiscatory because the costs attending removal of the names are prohibitive. We agree with the conclusion of the District Court that the "burden does not amount to a violation of due process guaranteed by the Fifth Amendment of the Constitution. Particularly when in the context presently before this Court it is being applied to commercial enterprises."

There is no merit to the appellants' allegations that the statute is unconstitutionally vague. A statute is fatally vague only when it exposes a potential actor to some risk or detriment without giving him fair warning of the nature of the proscribed conduct. Here the appellants know precisely what they must do on receipt of a prohibitory order. The complainants' names must be removed from the sender's mailing lists and he must refrain from future mailings to the named addressees. The sender is exposed to a contempt sanction only if he continues to mail to a particular addressee after ad-

ministrative and judicial proceedings. Appellants run no substantial risk of miscalculation.

Judgment affirmed.

There were no dissenting opinions.

### NOTES

1. The Postal regulations considered in *Rowan* were rewritten partly, using the *Rowan* case dicta as Sec. 3008(a–b) of the Postal Reorganization Act of 1970, P.L. 91–375 (Aug. 12, 1970) which converted the Post Office from a government department to a quasi-public corporation. The Post Office has enforced Sec. 3008 since Feb. 1, 1971.

2. Not all federal laws designed to inhibit the distribution of obscene materials have fared so well with the Supreme Court as did the Pandering Advertisement Act of 1968. Lower federal courts in California and Georgia ruled in 1970 that sections of the Postal Reorganization Act authorizing the Postmaster General to halt use of the mails for commerce in allegedly obscene materials and permitting detention of incoming mail were unconstitutional. The Supreme Court agreed, holding that the administrative censorship scheme created by the Act, under which the Postmaster General, following administrative hearings, may halt use of the mails and postal money orders for distribution of allegedly obscene materials, and under which he may obtain a court order permitting him to detain a defendant's mail pending the outcome of the proceedings against him, violated the First Amendment since it lacked adequate safeguards against undue inhibition of protected expression. Moreover, the scheme failed to require governmentally initiated judicial participation in the procedure barring materials from the mails, failed to assure prompt judicial review, and failed to provide that any restraint preceding final judicial determination should be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. *Blount v. Rizzi, 400 U.S. 410 (1970).*



## SECTION 3. ROTH: A LANDMARK CASE

## ROTH v. UNITED STATES

## ALBERTS v. STATE OF CALIFORNIA

354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957).

**Editorial Note:**

The landmark 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. Judge Jerome Frank concurred 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).* Judge Frank also attempted a summary of relevant socio-psychological data bearing on the relationship between obscenity and anti-social behavior. *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 addressed itself to the first three questions, and in a 5–4 decision upheld the conviction of Roth, but reached

a more liberal and rational plateau in doing so. Writing for the majority, Justice Brennan, in upholding the constitutionality of the Comstock Acts, enunciated a revised legal test of obscenity based on the American Law Institute's model statute:

*"Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."* (Emphasis added.)

At least sex and obscenity were no longer to be synonymous.

Decided with *Roth* was the case of David Alberts who had been convicted by a judge of the municipal court of Beverly Hills under a misdemeanor complaint which charged him with the sale and promotion of obscene and indecent books in violation of the California Penal Code.

Mr. 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.*" (Emphasis added.) In Alberts, the trial judge applied the test * * * whether the material has "a substantial tendency to deprave or corrupt its readers by inciting lascivious *thoughts* or arousing lustful desires." (Emphasis added.) It is insisted that the constitutional guaranties are violated because convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of antiso-

cial conduct, or will probably induce its recipients to such conduct. But, in light of our holding that obscenity is not protected speech, the complete answer to this argument is in the holding of this Court in Beauharnais v. People of State of Illinois, 343 U.S. at page 266:

"Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class."

However, sex and obscenity are not synonymous. 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 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.

Mr. Chief Justice WARREN, concurring in the result. * * * The line dividing the salacious or pornographic from literature or science is not straight and unwavering. Present laws depend largely upon the effect that the materials may have upon those who receive them. It is manifest that the same object may have a different impact, varying according to the part of the community it reached. But there is more to these cases. *It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture.* (Emphasis added.) The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting.

The personal element in these cases is seen most strongly in the requirement of *scienter*. Under the California law, the prohibited activity must be done "wilfully and lewdly." The federal statute limits the crime to acts done "knowingly." In his charge to the jury, the district judge stated that the matter must be "calculated" to corrupt or debauch. 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. I believe that the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all we need to decide.

I agree with the Court's decision in its rejection of the other contentions raised by these defendants.

Mr. Justice HARLAN, concurring in the result in (*Alberts*) and dissenting in (*Roth*). * * * In short, I do not understand how the Court can resolve the constitutional problems now before it without making its own independent judgment upon the character of the material upon which these convictions were based. I am very much afraid that the broad manner in which the Court has decided these cases will tend to obscure the peculiar responsibilities resting on state and federal courts in this field and encourage them to rely on easy labeling and jury verdicts as a substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.

My second reason for dissatisfaction with the Court's opinion is that the broad strides with which the Court has proceeded has led it to brush aside with perfunctory ease the vital constitutional considerations which, in my opinion, differentiate these two cases. It does not seem to matter to the Court that in one case we balance the power of a State in this field against the restrictions of the Fourteenth Amendment, and in the other the power of the Federal Government against the limitations of the First Amendment.

* * *

I dissent in * * * Roth v. United States.

We are faced here with the question whether the federal obscenity statute, as construed and applied in this case, violates the First Amendment to the Constitution. To me, this question is of quite a different order than one where we are dealing with state legislation under the

Fourteenth Amendment. *I do not think it follows 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.* (Emphasis added.) * * *

The Constitution differentiates between those areas of human conduct subject to the regulation of the States and those subject to the powers of the Federal Government. The substantive powers of the two governments, in many instances, are distinct. And in every case where we are called upon to balance the interest in free expression against other interests, it seems to me important that we should keep in the forefront the question of whether those other interests are state or federal. Since under our constitutional scheme the two are not necessarily equivalent, the balancing process must needs often produce different results. Whether a particular limitation on speech or press is to be upheld because it subserves a paramount governmental interest must, to a large extent, I think, depend on whether that government has, under the Constitution, a direct substantive interest, that is, the power to act, in the particular area involved.

The Federal Government has, for example, power to restrict seditious speech directed against it, because that Government certainly has the substantive authority to protect itself against revolution. * * * But in dealing with obscenity we are faced with the converse situation, for the interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric. * * *

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK concurs, dissenting.

When we sustain these convictions, we make the legality of a publication turn on the purity of thought which a book or tract instills in the mind of the reader. I do not think we can approve that standard and be faithful to the command of the First Amendment, which by its terms is a restraint on Congress and which by the Fourteenth is a restraint on the States.

* * *

By these standards punishment is inflicted for thoughts provoked, not for overt acts nor antisocial conduct. This test cannot be squared with our decisions under the First Amendment. * * * This issue cannot be avoided by saying that obscenity is not protected by the First Amendment. The question remains, what is the constitutional test of obscenity?

The tests by which these convictions were obtained require only the arousing of sexual thoughts. Yet the arousing of sexual thoughts and desires happens every day in normal life in dozens of ways. Nearly 30 years ago a questionnaire sent to college and normal school women graduates asked what things were most stimulating sexually. Of 409 replies, 9 said "music"; 18 said "pictures"; 29 said "dancing"; 40 said "drama"; 95 said "books"; and 218 said "man." Alpert, Judicial Censorship of Obscene Literature, 52 Harv.L.Rev. 40, 73.

The test of obscenity the Court endorses today gives the censor free range over a vast domain. To allow the State to step in and punish mere speech or publication that the judge or the jury thinks has an *undesirable* impact on thoughts but that is not shown to be a part of unlawful action is drastically to curtail the First Amendment. As recently stated by two

of our outstanding authorities on obscenity, "The danger of influencing a change in the current moral standards of the community, or of shocking or offending readers, or of stimulating sex thoughts or desires apart from objective conduct, can never justify the losses to society that result from interference with literary freedom." Lockhart & McClure, Literature, The Law of Obscenity and the Constitution, 38 Minn.L.Rev. 295, 387.

If we were certain that impurity of sexual thoughts impelled to action, we would be on less dangerous ground in punishing the distributors of this sex literature. But it is by no means clear that obscene literature, as so defined, is a significant factor in influencing substantial deviations from the community standards. * * * The absence of dependable information on the effect of obscene literature on human conduct should make us wary. It should put us on the side of protecting society's interest in literature, except and unless it can be said that the particular publication has an impact on action that the government can control.

As noted, the trial judge in the Roth case charged the jury in the alternative that the federal obscenity statute outlaws literature dealing with sex which offends "the common conscience of the community." That standard is, in my view, more inimical still to freedom of expression.

*The standard of what offends "the common conscience of the community" conflicts, in my judgment, with the command of the First Amendment that "Congress shall make no law * * * abridging the freedom of speech, or of the press." Certainly that standard would not be an acceptable one if religion, economics, politics or philosophy were involved. How does it become a constitutional standard when literature treating with sex is concerned?* (Emphasis added)

**NOTES AND QUESTIONS**

1. Is *Roth* an unsatisfactory decision? Although it did generate a more liberal and careful handling of obscenity cases, its indefinable "prurient interest" test does little to dissipate the considerable confusion that has beset all legal tests for obscenity. How would prurient interest be measured? Who could testify to its arousal? Who would be candid enough to do so? But it was an important decision because it dug the philosophic fox holes from which the individual Justices would do battle with obscenity. Take note of the prophetic quality of Justice Harlan's appeal for local community standards.

2. Justice Brennan had articulated a five-fold test intended to identify obscenity, and once identified, this kind of expression, he said, was outside the pale of constitutional protection. What were these five criteria? But Brennan's mood was not suppressive. Chief Justice Warren, in another prophetic opinion which publisher Ralph Ginzburg, as we shall see, might have read with greater care, directed attention to the conduct of the purveyor. It is not the book that is on trial, he observed, but rather the person who engages in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. Justice Harlan suggested that only hard-core pornography should be punished (later Justice Potter Stewart was to join him in this position noting that he could not define hard-core pornography but could nevertheless recognize it). More significantly, Harlan concluded that legal action in this realm is primarily the responsibility of state legislatures rather than federal government. Consistent in their doctrine of preferred freedoms, Black and Douglas would brook no censorship of expression, whatever its form.

Brennan's exemption of obscenity from the protection of the First Amendment, sometimes called the two-level

theory, is considered by Professor Thomas Emerson to have been a mistaken approach. Emerson writes:

"Thus the Court uses the two-level approach to cut off consideration of what interests society is attempting to protect by obscenity laws, what the actual effects of obscenity may be, * * * Furthermore, the two-level theory abandons all First Amendment doctrine in an important area of expression and leaves that expression with only due process protection. It gives the impression that 'obscenity' is beyond the pale of constitutional protection * * *. The two-level theory of libel was abandoned in *New York Times v. Sullivan*. The theory should also be given up in the field of obscenity." Emerson, The System of Freedom of Expression, p. 487 (1970).

3. On the same day, in *Kingsley Books, Inc. v. Brown, 345 U.S. 436 (1957)*, Justice Frankfurter, consistent in his application of the doctrine of judicial restraint, upheld for the Court a New York obscenity statute authorizing police officers to enjoin the sale and distribution of indecent expression with the provision that the seller was entitled to a judicial determination within three days. Chief Justice Warren and Justices Douglas, Black and Brennan dissented, although Brennan later referred to *Kingsley* as a model of judicial procedure.

4. Also in 1957, all nine Justices agreed that adults are not to be deprived of books in order to shield juvenile innocence. A Michigan statute 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, manifestly tending to the corruption of the morals of youth. * * *" Again Justice Frankfurter spoke for the Court. A fragment of his opinion follows:

BUTLER v. MICHIGAN, *352 U.S. 380 (1957)*. "The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig. Indeed, the Solicitor General of Michigan has, with characteristic candor, advised the Court that Michigan has a statute specifically designed to protect its children against obscene matter 'tending to the corruption of the morals of youth.' But the appellant was not convicted for violating this statute.

"We have before us legislation not reasonably restricted to the evil which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society. We are constrained to reverse this conviction."

The Court's renewed interest in protecting the morals of youth, as we shall note, gives this case high relevance.

5. In this same 1957 term, and under the influence of *Roth*, the Supreme Court in *per curiam* decisions overruled four U. S. Courts of Appeals decisions that had upheld obscenity convictions of a French motion picture, *Times Films Corp. v. City of Chicago, 355 U.S. 35 (1957)*, imported collections of nudist and student art publications, *Mounce v. United States, 355 U.S. 180 (1957)*, a homosexual magazine, *One, Inc. v. Olesen, 355 U.S. 371 (1958)*, and two nudist magazines, *Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958)*.

6. 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. A conviction of the film's 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 such as adultery, hateful and immoral to some.

7. In the significant 1962 case *Manual Enterprises, Inc. v. Day,* discussed in another connection earlier, Justice John Harlan, joined by Justice Stewart, held in his judgment for the Court that nude-male magazines did not possess that quality of "patent offensiveness" or "indecency" which would make them legally obscene. Harlan seemed to be reaching for a definition of "hard-core" pornography, a much sharper test than that of "prurient interest." A portion of his opinion follows:

## MANUAL ENTERPRISES, INC. v. DAY

370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639 (1962).

[W]e find lacking in these magazines an element which, no less than "prurient interest," is essential to a valid determination of obscenity * * * and to which neither the Post Office Department nor the Court of Appeals addressed itself at all: These magazines cannot be deemed so offensive on their face as to affront current community standards of decency—a quality that we shall hereafter refer to as "patent offensiveness" or "indecency." Lacking that quality, the magazines cannot be deemed legally "obscene," and we need not consider the question of the proper "audience" by which their "prurient interest" appeal should be judged.

The words of § 1461, "obscene, lewd, lascivious, indecent, filthy or vile," connote something that is portrayed in a manner so offensive as to make it unacceptable under current community *mores.* While in common usage the words have different shades of meaning, the statute since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex. * * *

Obscenity under the federal statute thus requires proof of two distinct elements: (1) patent offensiveness; and (2) "prurient interest" appeal. Both must conjoin before challenged material can be found "obscene" under § 1461. In most obscenity cases, to be sure, the two elements tend to coalesce, for that which is patently offensive will also usually carry the requisite "prurient interest" appeal. It is only in the unusual instance where, as here, the "prurient interest" appeal of the material is found limited to a particular class of persons that occasion arises for a truly independent inquiry into the question whether or not the material is patently offensive. * * *

To consider that the "obscenity" exception in "the area of constitutionally protected speech or press," does not require any determination as to the patent offensiveness *vel non* of the material itself might well put the American public in jeopardy of being denied access to many worthwhile works in literature, science, or art. For one would not have to travel far even among the acknowledged masterpieces in any of these fields to find works whose "dominant theme" might, not beyond reason, be claimed to appeal to the "prurient interest" of the reader or observer. We decline to attribute to Congress any such quixotic and deadening purpose as would bar from the mails all material, not patently offensive, which stimulates impure desires relating to sex. Indeed such a construction of § 1461 would doubtless encounter constitutional barriers. Consequently we consider the power exercised by Congress in enacting § 1461 as no more embracing than the interdiction of "obscenity" as it had theretofore been understood. It is only material whose indecency is self-demon-

strating *and* which, from the standpoint of its effect, may be said predominantly to appeal to the prurient interest that Congress has chosen to bar from the mails by the force of § 1461. * * *

Our own independent examination of the magazines leads us to conclude that the most that can be said of them is that they are dismally unpleasant, uncouth, and tawdry. But this is not enough to make them "obscene." Divorced from their "prurient interest" appeal to the unfortunate persons whose patronage they were aimed at capturing (a separate issue), these portrayals of the male nude cannot fairly be regarded as more objectionable than many portrayals of the female nude that society tolerates. Of course not every portrayal of male or female nudity is obscene. Were we to hold that these magazines, although they do not transcend the prevailing bounds of decency, may be denied access to the mails by such undifferentiated legislation as that before us, we would be ignoring the admonition that "the door * * * into this area [the First Amendment] cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests" * * *

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8. Guilty knowledge was made a prerequisite to punishment for the crime of selling obscene books in another 1959 case, *Smith v. California, 361 U.S. 147 (1959)*. The Court 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 be the loser.

9. Sporadic fighting, as well as some major engagements, were to continue on the obscenity front for the next decade.

10. The Rhode Island General Assembly created by resolution a Commission to Encourage Morality in Youth for the purpose of educating the public on literature tending to corrupt the young. Without public hearings, lists of objectionable books were prepared and distributors were threatened with prosecution.

In *Bantam Books v. Sullivan, 372 U.S. 58 (1963)*, referred to in earlier cases, the United States Supreme Court overruled the state supreme court on grounds that the Commission's actions abridged First Amendment liberties and that "under the Fourteenth Amendment 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 extralegal sanctions.

11. Laws having substantially the same effects in Kansas, *A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964)*, and Missouri, *Marcus v. Search Warrant, 367 U.S. 717 (1961)* were struck down for blocking distribution prior to an adversary proceeding on the issue of obscenity. It was in this period that Henry Miller's Tropic of Cancer, beset by more than 60 criminal actions in at least nine states, was to become the most litigated book in the history of literature. Some courts found it obscene; others did not. Hutchison, Tropic of Cancer on Trial (1968). *Tropic* was finally given constitutional approval in 1964 when five members of the United States Supreme Court voted to reverse a Florida court's conviction of the book, but did so without writing an opinion. *Grove Press v. Gerstein, 378 U.S. 577 (1964)*. Instead they indicated that their reversal was based on their arguments in another case decided on the same day and involving a motion picture rather than a book.

That case is important for other reasons as well, and a portion of it follows:

## JACOBELLIS v. STATE OF OHIO

378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964).

Mr. Justice BRENNAN announced the judgment of the Court and delivered an opinion in which Mr. Justice GOLDBERG joins.

Appellant, Nico Jacobellis, manager of a motion picture theater in Cleveland Heights, Ohio, was convicted on two counts of possessing and exhibiting an obscene film. * * * The dispositive question is whether the state courts properly found that the motion picture involved, a French film called *"Les Amants"* ("The Lovers"), was obscene and hence not entitled to the protection for free expression that is guaranteed by the First and Fourteenth Amendments. We conclude that the film is not obscene and that the judgment must accordingly be reversed. * * *

The question of the proper standard for making this determination has been the subject of much discussion and controversy since our decision in Roth seven years ago. Recognizing that the test for obscenity enunciated there—"whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest," is not perfect, we think any substitute would raise equally difficult problems, and we therefore adhere to that standard. We would reiterate, however, our recognition in Roth that obscenity is excluded from the constitutional protection only because it is *"utterly without redeeming social importance,"* and that "[t]he 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." (Emphasis added.) It follows that material dealing with sex in a manner that advocates ideas, Kingsley Int'l Pictures Corp. v. Regents, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. Nor may the constitutional status of the material be made to turn on a "weighing" of its social importance against its prurient appeal, for a work cannot be proscribed unless it is "utterly" without social importance. It should also be recognized that the Roth standard requires in the first instance a finding that the material *"goes substantially beyond customary limits of candor in description or representation of such matters."* (Emphasis added.) * * * In the absence of such a deviation from society's standards of decency, we do not see how any official inquiry into the allegedly prurient appeal of a work of expression can be squared with the guarantees of the First and Fourteenth Amendments.

It has been suggested that the "contemporary community standards" aspect of the Roth test implies a determination of the constitutional question of obscenity in each case by the standards of the particular local community from which the case arises. This is an incorrect reading of Roth. The concept of "contemporary community standards" was first expressed by Judge Learned Hand in United States v. Kennerley, 209 F. 119, 121 (D.C.S.D.N.Y.1913), where he said: "* * * If there be no abstract definition, such as I have suggested, should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which *the community may have arrived here and now?* * * * To put thought in leash to the *average conscience of the time* is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy.

"Nor is it an objection, I think, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of general notions about what is decent. * * *" (Italics added.)

It seems clear that in this passage Judge Hand was referring not to state and local "communities," but rather to "the community" in the sense of "society at large; * * * the public, or people in general." Thus, he recognized that under his standard the concept of obscenity would have "a varying meaning from time to time"—not from county to county, or town to town.

We do not see how any "local" definition of the "community" could properly be employed in delineating the area of expression that is protected by the Federal Constitution. * * * It is true that Manual Enterprises dealt with the federal statute banning obscenity from the mails. But the mails are not the only means by which works of expression cross local-community lines in this country. It can hardly be assumed that all the patrons of a particular library, bookstand, or motion picture theater are residents of the smallest local "community" that can be drawn around that establishment. Furthermore, to sustain the suppression of a particular book or film in one locality would deter its dissemination in other localities where it might be held not obscene, since sellers and exhibitors would be reluctant to risk criminal conviction in testing the variation between the two places. It would be a hardy person 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. The result would thus be "to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly."

It is true that local communities throughout the land are in fact diverse, and that in cases such as this one the Court is confronted with the task of reconciling the rights of such communities with the rights of individuals. Communities vary, however, in many respects other than their toleration of alleged obscenity, and such variances have never been considered to require or justify a varying standard for application of the Federal Constitution. The Court has regularly been compelled, in reviewing criminal convictions challenged under the Due Process Clause of the Fourteenth Amendment, to reconcile the conflicting rights of the local community which brought the prosecution and of the individual defendant. Such a task is admittedly difficult and delicate, but it is inherent in the Court's duty of determining whether a particular conviction worked a deprivation of rights guaranteed by the Federal Constitution. * * * *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.)

* * *

Reversed.

Mr. Justice WHITE concurs in the judgment.

THE CHIEF JUSTICE, with whom Mr. Justice CLARK joins, dissenting.

* * * 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 Nation 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.

* * *

**NOTES**

1. It was in a concurring opinion in *Jacobellis* that Justice Stewart indulged in an exercise in pragmatic logic when he declared that, though he couldn't define obscenity, "I know it when I see it."

2. Note the relevance of *Jacobellis* to the arguments of the Court in the landmark 1973 case, *Miller v. State of California, 413 U.S. 15.* See text p. 375. The Court obviously has had great difficulty in deciding whether the standards used to define obscenity should be local or national.

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## SECTION 4. FILM CENSORSHIP

Self-censorship can be a particularly subtle and insidious form of censorship. Fear of official regulation brought about by pressure groups has until recently discouraged the motion picture industry from dealing explicitly and honestly with topics like abortion and prostitution. Motion picture and television industry codes soothe producers by promulgating unenforceable sanctions which frequently reinforce the particular prejudices of advertisers and advertising agencies, and the stronger, more vocal segments of the public.

Of course, it was not until 1952 that film communication was brought under the protective custody of the First Amendment—and then equivocally. In the *Miracle* case a sensitive and respectful Italian film was banned as sacrilegious by the New York Board of Regents, the state's censorship agency. A unanimous United States Supreme Court held that the New York law, under which the ban had been made, was an unconstitutional abridgement of free speech and press, of which film communication was a legitimate part—but only because it permitted a standard for prohibition as vague as "sacrilegious." The implication was clearly that prohibition for other reasons might be allowable. *Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).*

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### TIMES FILM CORP. v. CITY OF CHICAGO

365 U.S. 43, 81 S.Ct. 391, 5 L.Ed.2d 403 (1961).

**Editorial Note:**

Only in 1961 did the Supreme Court squarely face the question of whether the precensorship of motion pictures was constitutional. A narrowly drawn Chicago ordinance requiring prior approval of the censor was upheld in a narrow 5–4 decision. Justice Clark, writing for the majority, implied a distinction between film and other media of mass communication and ruled that the precensorship of motion pictures was not in itself unconstitutional. He was also implying that obscenity could be an exception to the general rule that prior restraints on expression are unconstitutional.

The dissenting opinions of Chief Justice Warren and Justices Black, Douglas and Brennan have been described as vehement. WARREN'S opinion *is* vehement, lengthy and supportive of the gen-

eral thrust of this section. Compare the community standards of 1961 with those of the present. A portion of Warren's dissent follows:

I cannot agree either with the conclusion reached by the Court or with the reasons advanced for its support. To me, this case clearly presents the question of our approval of unlimited censorship of motion pictures before exhibition through a system of administrative licensing. Moreover, the decision presents a real danger of eventual censorship for every form of communication, be it newspapers, journals, books, magazines, television, radio or public speeches. The Court purports to leave these questions for another day, but I am aware of no constitutional principle which permits us to hold that the communication of ideas through one medium may be censored while other media are immune. Of course each medium presents its own peculiar problems, but they are not of the kind which authorize the censorship of one form of communication and not others. I submit that in arriving at its decision the Court has interpreted our cases contrary to the intention at the time of their rendition and, in exalting the censor of motion pictures, has endangered the First and Fourteenth Amendment rights of all others engaged in the dissemination of ideas. * * *

A revelation of the extent to which censorship has recently been used in this country is indeed astonishing. The Chicago licensors have banned newsreel films of Chicago policemen shooting at labor pickets and have ordered the deletion of a scene depicting the birth of a buffalo in Walt Disney's *Vanishing Prairie*. * * * Before World War II, the Chicago censor denied licenses to a number of films portraying and criticizing life in Nazi Germany including the March of Time's *Inside Nazi Germany*. * * * Recently, Chicago refused to issue a permit for the exhibition of the motion picture *Anatomy of a Murder* based upon the best-selling novel of the same title, because it found the use of the words "rape" and "contraceptive" to be objectionable. * * * The Chicago censor bureau excised a scene in *Street With No Name* in which a girl was slapped because this was thought to be a "too violent" episode. * * * A member of the Chicago censor board explained that she rejected a film because "it was immoral, corrupt, indecent, against my * * * religious principles." * * * A police sergeant attached to the censor board explained, "Coarse language or anything that would be derogatory to the government—propaganda" is ruled out of foreign films. "Nothing pink or red is allowed," he added. * * * The police sergeant in charge of the censor unit has said: "Children should be allowed to see any movie that plays in Chicago. If a picture is objectionable for a child, it is objectionable period." * * * And this is but a smattering produced from limited research. Perhaps the most powerful indictment of Chicago's licensing device is found in the fact that between the Court's decision in 1952 in Joseph Burstyn, Inc., v. Wilson, and the filing of the petition for certiorari in 1960 in the present case, not once have the state courts upheld the censor when the exhibitor elected to appeal. * * *

This is the regimen to which the Court holds that all films must be submitted. It officially unleashes the censor and permits him to roam at will, limited only by an ordinance which contains some standards that, although concededly not before us in this case, are patently imprecise. The Chicago ordinance commands the censor to reject films that are "immoral," * * * or those that portray "depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and [expose] them to contempt, derision or obloquy, or [tend] to produce

a breach of the peace or riots, or [purport] to represent any hanging, lynching, or burning of a human being." May it not be said that almost every censored motion picture that was cited above could also be rejected, under the ordinance, by the Chicago censors? It does not require an active imagination to conceive of the quantum of ideas that will surely be suppressed. * * *

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Prior censorship in the form of classification statutes are systematically applied in New York, Maryland, Virginia and Kansas; two dozen communities, notably Chicago, Dallas, Detroit, Memphis, and Atlanta, still require movies to be submitted to pre-distribution examination.

The Supreme Court's 1965 decision in *Freedman v. Maryland,* which follows, may have hastened the demise of some state and local film censorship. Nevertheless, there is evidence that censorship boards and committees find myriad opportunities to ignore and circumvent Supreme Court procedural guidelines, with no one the wiser. Carmen, Movies Censorship, and the Law (1966), (See particularly Chs. 3, 4 and 5.)

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## FREEDMAN v. STATE OF MARYLAND

380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).

Mr. Justice BRENNAN delivered the opinion of the Court.

Appellant sought to challenge the constitutionality of the Maryland motion picture censorship statute, Md.Ann.Code, 1957, Art. 66A, 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, 233 Md. 498, 197 A.2d 232. * * * We reverse.

* * *

Unlike the petitioner in Times Film, appellant does not argue that [the Maryland law] is unconstitutional simply because it may prevent even the first showing of a film whose exhibition may legitimately be the subject of an obscenity prosecution. He presents a question quite distinct from that passed on in Times Film; accepting the rule in Times Film, he 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 or view for examination will receive immediate notice of such elimination or disapproval, and if appealed from, such film or view 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. 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.

### NOTES

1. The Court in *Freedman,* except for a brief concurring opinion by Douglas and Black rejecting any form of censorship, made no move toward declaring the Maryland statute unconstitutional. But it did reject the lack of procedural safeguards in the Maryland system: specifically the long period of time it would take to get a judicial determination as to whether the film is protected or unprotected expression. The censor has at least lost some of his teeth.

In *Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968)* the Court noted that the state ordinance at issue required the Motion Picture Appeals Board to seek a court injunction against a disapproved film, this after seven administrative steps that could require 50–57 days.

2. Senator Margaret Chase Smith's proposal for a federal classification system has heightened the interest of the movie industry in self-regulation. On October 7, 1968, the Motion Picture Association of America announced a new system of voluntary classification designed to shield persons under 17 (now 18) from the psychological ravages of foreign and domestic films. The classification is now as follows: G—Suitable for all general audiences; GP—All ages admitted. Parental guidance suggested; R—Adults and 17-year-olds and under accompanied by a parent or adult guardian; X—Actually ex-certificated, without a code seal and forbidden for anyone under 18. Individual states and cities and individual theaters may set the age limits higher.

Joseph Strick, producer of the film "Tropic of Cancer," unsuccessfully sought an injunction against MPAA's rating system (his film had received an X rating) on the grounds of monopoly and restraint of trade. Strick was also concerned that an X rating would mislead viewers to believe that his film was not a work of art. *Tropic Film Corp. v. Paramount Pictures Corp., 319 F.Supp. 1247 (S.D.N.Y.1970).*

3. This concern for the young is consistent with Supreme Court dicta in more recent obscenity cases and specifically in a case throwing out Dallas' municipal licensing ordinance for classification of motion pictures because of its vagueness.

The Dallas ordinance provided in part that "A film shall be considered 'likely to incite or encourage' crime, delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable,

praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons if, in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire."

Delivering the opinion of the Court in INTERSTATE CIRCUIT, INC. v. CITY OF DALLAS, 390 U.S. 676 (1968), Mr. Justice MARSHALL said in part:

* * * The vice of vagueness is particularly pronounced where expression is sought to be subjected to licensing. It may be unlikely that what Dallas does in respect to the licensing of motion pictures would have a significant effect upon film makers in Hollywood or Europe. But what Dallas may constitutionally do, so may other cities and States. Indeed, we are told that this ordinance is being used as a model for legislation in other localities. Thus, one who wishes to convey his ideas through that medium, which of course includes one who is interested not so much in expression as in making money, must consider whether what he proposes to film, and how he proposes to film it, is within the terms of classification schemes such as this. If he is unable to determine what the ordinance means, he runs the risk of being foreclosed, in practical effect, from a significant portion of the movie-going public. Rather than running that risk, he might choose nothing but the innocuous, perhaps save for the so-called "adult" picture. Moreover, a local exhibitor who cannot afford to risk losing the youthful audience when a film may be of marginal interest to adults—perhaps a "Viva Maria"—may contract to show only the totally inane. The vast wasteland that some have described in reference to another medium might be a verdant paradise in comparison. The First Amendment interests here are, therefore, broader than merely those of the film maker, distributor, and exhibitor, and certainly broader than those of youth's under 16. * * *

The dangers inherent in vagueness are strikingly illustrated in this case. Five members of the Board viewed. "Viva Maria." Eight members voted to classify it as "not suitable for young persons," the ninth member not voting. The Board gave no reasons for its determination. The Board alleged in its petition for an injunction that the classification was warranted because the film portrayed "sexual promiscuity in such a manner as to be in the judgment of the Board likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interests." Two Board members, a clergyman and a lawyer, testified at the hearing. Each adverted to several scenes in the film, which, in their opinion, portrayed male-female relationships in a way contrary to "acceptable and approved behavior." Each acknowledged, in reference to scenes in which clergymen were involved in violence, most of which was farcical, that "sacrilege" might have entered into the Board's determination. And both conceded that the asserted portrayal of "sexual promiscuity" was implicit rather than explicit, i. e., that it was a product of inference by, and imagination of, the viewer. * * *

Vagueness and the attendant evils we have earlier described are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression. Cf. Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963). Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children. * * *

In *Rabeck v. New York, 391 U.S. 462 (1968)* the Court struck down a New York law for vagueness after it had been used against a magazine because it was alleged, the magazine "would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes."

### NOTES AND QUESTIONS

1. Is the Court saying here that this one medium of expression, the film, may be censored if the censors work quickly and apply clearly defined standards of judgment? However distasteful this may be, the stringent due process requirements imposed by the Court may discourage those censors accustomed to making slow and arbitrary rulings.

2. While ratings may assist parents in selecting movies for their children, the X designation is free advertising for the shabby producer of which there is now an epidemic.

As tastelessness escalates, every sexual act imaginable has shown up on the screen. And why not! "The Immoral Mr. Teas," a vintage skin flick, cost $24,000 and grossed over a million. From "nudie-cuties" the industry regressed to the "peeping Toms," improved considerably with the avant-garde "undergrounds" of Warhol, Anger and Mekas, then slumped again with "how-to-do-it" specials like "Anomalies" which was advertised as "a story of heterosexual, homosexual perversions, lesbianism, orgy, transvestism, fetishism, narcissism, masochism, sadism, and sensualism." To such a "purple" challenge there had to be a grassroots response. Botto, "They Shoot Dirty Movies Don't They?" *Look,* Nov. 3, 1970.

The grand climax has been the incredible "Deep Throat," which Vincent Canby of the *New York Times* admits to having seen twice (he wasn't bored the first time). Although the film provoked a great deal of sophisticated legal, scientific and artistic debate—and a great deal of revenue for its producers—a New York City Criminal Court judge may have had the last critical word. Judge Joel Tyler describes the film rather well:

"The camera angle, emphasis and closeup zooms were directed * * * toward a maximum exposure in detail of the genitalia during the gymnastics, gyrations, bobbing, trundling, surging, ebb and flowing, eddying, moaning, groaning and sighing, all with ebullience and gusto. * * * Such concentration upon the acts of fellatio and cunnilingus overlooked the numerous clear, clinical acts of sexual intercourse, anal sodomy, female masturbation, clear depiction of seminal fluid ejaculation and an orgy scene—a Sodom and Gomorrah gone wild before the fire—all of which is enlivened with the now famous 'four letter words' and finally with bells ringing and rockets bursting in climactic ecstasy."

Anthony Burgess suggests that the ebullience and gusto lie in the judge and not in the film. "If only 'Deep Throat' were as Rabelaisian as he makes it seem to be," Burgess laments. "Our aesthetic condemnation of pornography rests on the fact that is *not* Rabelaisian—that there is no wit, no belly-humor, no learning, no Holy Bottle and no Abbey of Thelema. In other words, no life and no art. The moral question is, of course, a lot of nonsense." Burgess, *For Permissiveness, With Misgivings,* The New York Times Magazine, July 1, 1973.

But for Tyler "Deep Throat" was "unmistakably hard-core pornography," "a nadir of decadence," "indisputably obscene by any legal measurement," "hard-core pornography with a vengeance." *People v. Mature Enterprises, Inc., 41 LW 2499, March 1, 1973.* The film's promoters were convicted of a misdemeanor and fined $100,000 according to

a formula not to exceed double the corporation's gain from the offense.

All that remains to be said is that other critics, some of them quite sophisticated, found in "Deep Throat" for the first time the filmic liberation of female sexuality.

3. The Court has recently shown a determination to protect children from what it defines as obscenity, consistent with an earlier view that "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare." *Prince v. Massachusetts, 321 U.S. 158 (1944)* dealt with a child selling religious pamphlets on a street corner contrary to the state's child labor law. Dibble, *A State Quarantine to Protect Children,* 39 So. Cal.L.Rev. 345 (1966). That determination is reflected in a 1968 decision upholding the constitutionality of a New York statute prohibiting the sale of "girlie" magazines, or anything else alleged to be harmful obscenity, to anyone under 17. *Ginsberg v. State of New York, 390 U.S. 629 (1968),* discussed below.

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## SECTION 5. SOCIAL VALUE TEST: WHAT IS "REDEEMING SOCIAL IMPORTANCE"?

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**Editorial Note:**

*Jacobellis v. State of Ohio,* supra, p. 346 was a significant case because a new post-*Roth* standard began to emerge from it. In *Jacobellis,* Justice Brennan made the social importance test quite explicit as the primary test against which to measure protected sexual expression; and he said *Roth* required a finding that the material goes substantially beyond the customary limits of candor. He also defined the community standard as a national one, the standard of society at large, and one which makes no allowances for regional prejudices and local idiosyncracies—a revision first recommended by Justice Harlan in *Manual Enterprises, Inc. v. Day.* "There must first be decided the relevant 'community' in terms of whose standards of decency the issue must be judged. We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency." 370 U.S. 478 (1962). Harlan would have permitted state censorship so the national community test really had meaningful application only to Justices Brennan and Stewart. Chief Justice Warren dissented from the latter view. And Brennan reiterated the Court's concern for the protection of children; and Warren his contempt for the profiteers of pornography.

The emergence of the social importance test—and its reformulation into a broader test of social value—is intricately traced in a brilliant book by Charles Rembar, the delightfully literate attorney who directed "Fanny Hill" on her long and perilous journey to the United States Supreme Court. Rembar, The End of Obscenity (1968). That journey began in 1821 when "Fanny's" conviction in a Massachusetts court recorded the first American obscenity case. There were many subsequent court appearances. Rembar defended "Fanny" (the popular title of John Cleland's Memoirs of a Woman of Pleasure, written in England about 1750) in actions in New York, New Jersey, and again in Massachusetts on behalf of G. P. Putnam's Sons.

In Massachusetts, the book itself, not its publisher or distributor, was put on trial in an equity suit brought by the state Attorney General. Significant in Rembar's handling of the case was his demon-

stration of the social value of the work by means of expert witnesses. An interesting parallel is Gerald Gardiner's earlier defense of "Lady Chatterley" in an English courtroom for which he provided a retinue of defense witnesses, including Dame Rebecca West, The Bishop of Woolwich, Lord Francis Williams, E. M. Forster, Cecil Day Lewis, Miss Dilys Powell, and Norman St. John-Stevas, literary authorities all. Lady Chatterley was acquitted. Rolph (ed.), The Trial of Lady Chatterley: Regina v. Penguin Books Limited (1961). Note, *The Use of Expert Testimony in Obscenity Litigation,* 1965 Wis.L.Rev. 113.

It is clear from Rembar's account that it was his intention, his legal strategy, to get the Court to substitute the notion of *social value* for the *social importance* test of *Roth*. This may seem like hair splitting, but social value is a broader, more general test, suggesting value of any degree, important or unimportant. "Importance," Rembar observes, has other meanings—not synonymous with value—that would impose a higher standard. "Some value" might not be too hard to show; "some importance" could be something else again. Secondly, Rembar hoped that the Court would, in following his reasoning, replace the prurient interest standard of *Roth* with his social value standard, as the salient test of pornography. As he explains in his brief to the Court: "Social value * * * 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." Rembar, The End of Obscenity 440 (1968).

The measure of Rembar's success is found in Justice BRENNAN's opinion for the Court in which the Chief Justice and Justice Fortas join:

## A BOOK NAMED "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE" v. ATTORNEY GENERAL of the COMMONWEALTH OF MASSACHUSETTS

383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966).

* * * As authorized by § 28D, G. P. Putnam's Sons intervened in the proceedings in behalf of the book, but it did not claim the right provided by that section to have the issue of obscenity tried by a jury. At the hearing before a justice of the Superior Court, which was conducted, under § 28F, "in accordance with the usual course of proceedings in equity," the court received the book in evidence and also, as allowed by the section, heard the testimony of experts [2] and

[2] In dissenting from the Supreme Judicial Court's disposition in this case, 349 Mass. 69, 74–75, 206 N.E.2d 403, 406–407 (1965), Justice Whittemore summarized this testimony:

"In the view of one or another or all of the following viz., the chairman of the English department at Williams College, a professor of English at Harvard College, an associate professor of English literature at Boston University, an associate professor of English at Massachusetts Institute of Technology, and an assistant professor of English and American literature at Brandeis University, the book is a minor 'work of art' having 'literary merit' and 'historical value' and containing a good deal of 'deliberate, calculated comedy.' It is a piece of 'social history of interest to anyone who is interested in fiction as a way of understanding society in the past.' [1] A saving grace is that although

" 1. One of the witnesses testified in part as follows: 'Cleland is part of what I should call this cultural battle that is going on in the 18th century, a battle between a restricted Puritan, moralistic ethic that attempts to suppress freedom of the spirit, freedom of the flesh, and this element is competing with a freer attitude towards life, a more generous attitude towards life, a more wholesome attitude towards life, and this very attitude that is manifested in Fielding's great novel "Tom Jones" is also evident in Cleland's novel. * * * [Richardson's] "Pamela" is the story of a young country girl; [his] "Clarissa" is the story of a woman trapped in a house of prostitution. Obviously, then Cleland takes both

accepted other evidence, such as book reviews, in order to assess the literary, cultural, or educational character of the book. This constituted the entire evidence, as neither side availed itself of the opportunity provided by the section to introduce evidence "as to the manner and form of its publication, advertisement, and distribution." The trial justice * * * adjudged *Memoirs* obscene and declared that the book "is not entitled to the protection of the First and Fourteenth Amendments. * * *" The Massachusetts Supreme Judicial Court affirmed the decree. * * * We reverse. * * * [T]he sole question before the state courts was whether *Memoirs* satisfies the test of obscenity established in Roth v. United States.

We define obscenity in *Roth* in the following terms: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Under this definition, as elaborated in subsequent cases, 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.* (Emphasis added.)

The Supreme Judicial Court purported to apply the *Roth* definition of obscenity and held all three criteria satisfied. We need not consider the claim that the court erred in concluding that *Memoirs* satisfied the prurient appeal and patent offensiveness criteria; for reversal is required because the court misinterpreted the social value criterion. * * *

The Supreme Judicial Court erred in holding that a book need not be "unqualifiedly worthless before it can be deemed obscene." A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness. Hence, even on the view of the court below that *Memoirs* possessed only a modicum of social value, its judgment must be reversed as being founded on an erroneous interpretation of a federal constitutional standard.

It does not necessarily follow from this reversal that a determination that *Memoirs* is obscene in the constitutional sense would be improper under all circumstances. On the premise, which we have no occasion to assess, that *Memoirs* has the requisite prurient appeal and is patently offensive, but has only a minimum of social value, the circumstances of production, sale, and publicity are relevant

> these themes, the country girl, her initiation into life and into experience, and the story of a woman in a house of prostitution, and what he simply does is to take the situation and reverse the moral standards. Ricardson believed that chastity was the most important thing in the world; Cleland and Fielding obviously did not and thought there were more important significant moral values.'

many scenes, if translated into the present day language of 'the realistic, naturalistic novel, could be quite offensive' these scenes are not described in such language. The book contains no dirty words and its language 'functions * * * to create a distance, even when the sexual experiences are portrayed.' The response, therefore, is a literary response. The descriptions of depravity are not obscene because 'they are subordinate to an interest which is primarily literary'; Fanny's reaction to the scenes of depravity was 'anger,' 'disgust, horror, [and] indignation.' The book 'belongs to the history of English literature rather than the history of smut.'[2]

> "2. In the opinion of the other academic witness, the headmaster of a private school, whose field is English literature, the book is without literary merit and is obscene, impure, hard core pornography, and is patently offensive."

in determining whether or not the publication or distribution of the book is constitutionally protected. Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance. It is not that in such a setting the social value test is relaxed so as to dispense with the requirement that a book be *utterly* devoid of social value, but rather that, as we elaborate in Ginzburg v. United States, where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, a court could accept his evaluation at its face value. In this proceeding, however, the courts were asked to judge the obscenity of *Memoirs* in the abstract, and the declaration of obscenity was neither aided nor limited by a specific set of circumstances of production, sale, and publicity. All possible uses of the book must therefore be considered, and the mere risk that the book might be exploited by panderers because it so pervasively treats sexual matters cannot alter the fact—given the view of the Massachusetts court attributing to *Memoirs* a modicum of literary and historical value —that the book will have redeeming social importance in the hands of those who publish or distribute it on the basis of that value.

Reversed.

Mr. Justice BLACK and Mr. Justice STEWART concur in the reversal for the reasons stated in their respective dissenting opinions in Ginzburg v. United States and Mishkin v. State of New York, * * *

Mr. Justice DOUGLAS, concurring * * *. I base my vote to reverse on my view that the First Amendment does not permit the censorship of expression not brigaded with illegal action. But even applying the prevailing view of the *Roth* test, reversal is compelled by this record which makes clear that *Fanny Hill* is not "obscene." The prosecution made virtually no effort to prove that this book is "utterly without redeeming social importance." The defense, on the other hand, introduced considerable and impressive testimony to the effect that this was a work of literary, historical, and social importance.

We are judges, not literary experts or historians or philosophers. We are not competent to render an independent judgment as to the worth of this or any other book, except in our capacity as private citizens. * * * If there is to be censorship, the wisdom of experts on such matters as literary merit and historical significance must be evaluated. On this record, the Court has no choice but to reverse the judgment of the Massachusetts Supreme Judicial Court, irrespective of whether we would include *Fanny Hill* in our own libraries. * * *

It is to me inexplicable how a book that concededly has social worth can nonetheless be banned because of the manner in which it is advertised and sold. However florid its cover, whatever the pitch of its advertisements, the contents remain the same. * * *

### NOTES

1. Justices Clark and White, dissenting separately, objected to the Court's deviation from the *Roth* standard to protect what Clark defined as a "patently offensive" book; Harlan dissented because the Court had interferred with a state obscenity law. But the social value theory, nevertheless, now seemed to have five adherents on the Court.

2. The signal importance of *Fanny Hill*, however, is that it presented a new three-element test, a variation on *Roth*. To be obscene, said Brennan, material must appeal to a prurient interest in sex, be patently offensive, and utterly without redeeming social value. Note that in his

*Ginzburg* dissent below Mr. Justice Black repudiated each of the three elements.

A second major deviation from the *Roth* standard—but a test suggested in the Chief Justice's concurring opinion in that case—became part of the Court's judgmental equipment on the same day.

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## SECTION 6. CONDUCT: THE GINZBURG ABERRATION

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Coming down with "Fanny Hill" was a decision upholding a five-year sentence and a $28,000 fine against Ralph Ginzburg, publisher of *Eros*, a glossy, overpriced magazine devoted to more sophisticated sexual themes. Ginzburg either hadn't taken Chief Justice Warren's cue in *Roth* concerning the conduct of the purveyor or he was bent on a daring test of the Court's sensitivity to challenge. Whether Ginzburg's publications were obscene or not—and they did not appear to be by then current constitutional standards—he promoted them as if they were; he defined their "social value." And if books cannot be punished, booksellers can, especially if they display what the Court referred to as the "leer of the sensualist."

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## GINZBURG v. UNITED STATES

383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966).

Mr. Justice BRENNAN delivered the opinion of the Court. * * * In the cases in which this Court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question. In the present case, however, the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene. We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise. * * * [W]e view the publications against a background of commercial exploitation of erotica solely for the sake of their prurient appeal. The record in that regard amply supports the decision of the trial judge that the mailing of all three publications offended the statute.

The three publications were EROS, a hard-cover magazine of expensive format; Liaison, a bi-weekly newsletter; and *The Housewife's Handbook on Selective Promiscuity* (hereinafter the *Handbook*), a short book. The issue of EROS specified in the indictment, * * * contains 15 articles and photo-essays on the subject of love, sex, and sexual relations. The specified issue of Liaison, * * *, contains a prefatory "Letter from the Editors" announcing its dedication to "keeping sex an art and preventing it from becoming a science." The remainder of the issue consists of digests of two articles concerning sex and sexual relations which had earlier appeared in professional journals and a report of an interview with a psychotherapist who favors the broadest license in sexual relationships. * * * The *Handbook* purports to be a sexual autobiography detailing with complete candor the author's sexual experiences from age 3 to age 36. The text includes, and prefatory and concluding sections of the book elaborate, her views on such subjects as sex education of children, laws regulating private consensual adult sexual practices, and the equality of women in sexual relationships. It was claimed at trial that women would find the book valuable, for ex-

ample as a marriage manual or as an aid to the sex education of their children.

Besides testimony as to the merit of the material, there was abundant evidence to show that each of the accused publications was originated or sold as stock in trade of the sordid business of pandering —"the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." EROS early sought mailing privileges from the postmasters of Intercourse and Blue Ball, Pennsylvania. The trial court found the obvious, that these hamlets were chosen only for the value their names would have in furthering petitioners' efforts to sell their publications on the basis of salacious appeal; the facilities of the post offices were inadequate to handle the anticipated volume of mail, and the privileges were denied. Mailing privileges were then obtained from the postmaster of Middlesex, New Jersey. EROS and Liaison thereafter mailed several million circulars soliciting subscriptions from that post office; over 5,500 copies of the *Handbook* were mailed.

The "leer of the sensualist" also permeates the advertising for the three publications. The circulars sent for EROS and Liaison stressed the sexual candor of the respective publications, and openly boasted that the publishers would take full advantage of what they regarded an unrestricted license allowed by law in the expression of sex and sexual matters. The advertising for the *Handbook*, apparently mailed from New York, consisted almost entirely of a reproduction of the introduction of the book, written by one Dr. Albert Ellis. [The American Sexual Tragedy, 1962] Although he alludes to the book's informational value and its putative therapeutic usefulness, his remarks are preoccupied with the book's sexual imagery. The solicitation was indiscriminate, not limited to those, such as physicians or psychiatrists, who might independently discern the book's therapeutic worth. * * *

This evidence, in our view, was relevant in determining the ultimate question of obscenity and, in the context of this record, serves to resolve all ambiguity and doubt. The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material. And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the market place or a spurious claim for litigation purposes. Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the *Roth* test. * * *

We perceive no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test. No weight is ascribed to the fact that petitioners have profited from the sale of publications which we have assumed but do not hold cannot themselves be adjudged obscene in the abstract; to sanction consideration of this fact might indeed induce self-censorship,

and offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment. Rather, 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. A conviction for mailing obscene publications, but explained in part by the presence of this element, does not necessarily suppress the materials in question, nor chill their proper distribution for a proper use. Nor should it inhibit the enterprise of others seeking through serious endeavor to advance human knowledge or understanding in science, literature, or art. All that will have been determined is that questionable publications are obscene in a context which brands them as obscene as that term is defined in *Roth*—a use inconsistent with any claim to the shelter of the First Amendment. * * *

Affirmed.

Mr. Justice BLACK, dissenting. * * * Since, as I have said many times, I believe the Federal Government is without any power whatever under the Constitution to put any type of burden on speech and expression of ideas of any kind (as distinguished from conduct), * * * I would reverse Ginzburg's conviction on this ground alone. * * * I agree with my Brother HARLAN that the Court has in effect rewritten the federal obscenity statute and thereby imposed on Ginzburg standards and criteria that Congress never thought about; or if it did think about them, certainly it did not adopt them. Consequently, Ginzburg is, as I see it, having his conviction and sentence affirmed upon the basis of a statute amended by this Court for violation of which amended statute he was not charged in the courts below. * * * Quite apart from this vice in the affirmance, however, I think that the criteria declared by a majority of the Court today as guidelines for a court or jury to determine whether Ginzburg or anyone else can be punished as a common criminal for publishing or circulating obscene material are so vague and meaningless that they practically leave the fate of a person charged with violating censorship statutes to the unbridled discretion, whim and caprice of the judge or jury which tries him. * * *

* * *

Mr. Justice HARLAN, dissenting.

I would reverse the convictions of Ginzburg and his three corporate codefendants. * * * I believe that under this statute the Federal Government is constitutionally restricted to banning from the mails only "hardcore pornography," * * * Because I do not think it can be maintained that the material in question here falls within that narrow class, I do not believe it can be excluded from the mails. * * * While the precise holding of the Court is obscure, I take it that the objective test of *Roth*, which ultimately focuses on the material in question, is to be supplemented by another test that goes to the question whether the mailer's aim is to "pander" to or "titillate" those to whom he mails questionable matter.

Although it is not clear whether the majority views the panderer test as a statutory gloss or as constitutional doctrine, I read the opinion to be in the latter category. The First Amendment, in the obscenity area, no longer fully protects material on its face nonobscene, for such material must now also be examined in the light of the defendant's conduct, attitude, motives. This seems to me a mere euphemism for allowing punishment of a person who mails otherwise constitutionally protected material just because a jury

or a judge may not find him or his business agreeable. Were a State to enact a "panderer" statute under its police power, I have little doubt that—subject to clear drafting to avoid attacks on vagueness and equal protection grounds—such a statute would be constitutional. Possibly the same might be true of the Federal Government acting under its postal or commerce powers. What I fear the Court has done today is in effect to write a new statute, but without the sharply focused definitions and standards necessary in such a sensitive area. Casting such a dubious gloss over a straightforward 101-year-old statute is for me an astonishing piece of judicial improvisation.

I would reverse the judgment below.

Mr. Justice STEWART, dissenting.

Ralph Ginzburg has been sentenced to five years in prison for sending through the mail copies of a magazine, a pamphlet, and a book. There was testimony at his trial that these publications possess artistic and social merit. Personally, I have a hard time discerning any. Most of the material strikes me as both vulgar and unedifying. But if the First Amendment means anything, 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. * * *

* * *

There does exist a distinct and easily identifiable class of material in which all of these elements coalesce. It is that, and that alone, which I think government may constitutionally suppress, whether by criminal or civil sanctions. I have referred to such material before as hardcore pornography, without trying further to define it. Jacobellis v. State of Ohio. In order to prevent any possible misunderstanding, I have set out in the margin a description, borrowed from the Solicitor General's brief, of the kind of thing to which I have reference.[3] * * * But material of this sort is wholly different from the publications mailed by Ginzburg in the present case, and different not in degree but in kind.

The Court today appears to concede that the materials Ginzburg mailed were themselves protected by the First Amendment. But, the Court says, Ginzburg can still be sentenced to five years in prison for mailing them. Why? Because, says the Court, he was guilty of "commercial exploitation," of "pandering," and of "titillation." But Ginzburg was not charged with "commercial exploitation"; he was not charged with "pandering"; he was not charged with "titillation." Therefore, to affirm his conviction now on any of those grounds, even if otherwise valid, is to deny him due process of law. * * * But those grounds are *not*, of course, otherwise valid. Neither the statute under which Ginzburg was convicted nor any other federal statute I know of makes "commercial exploitation" or "pandering" or "titillation" a criminal offense. And any criminal law that sought to do so in the terms so elusively defined by the Court would, of course, be unconstitutionally vague and therefore void. * * *

3 "* * * Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material * * * cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment. * * *"

### NOTES AND QUESTIONS

1. The Court's affirmation of Ginzburg's five-year sentence (later reduced to three) sent shock waves through the publishing world. Epstein, *The Obscenity Business* 218 Atlantic 56 (August 1966); and Rembar, The End of Obscenity 484–90. In evaluating the conduct of the purveyor, Justice Brennan had clearly legitimized a new and independent test for censurable obscenity. Rembar compares it with the ancient legal notion of estoppel, the notion that you ought to be held to what you say. If a publisher says his book is obscene, the Supreme Court is willing to take him at his word. Rembar, supra, 485. Is social value, then, insufficient if the advertising claims of the publisher guarantee that his material will catalyze certain glandular juices? Do you think the Court in *Ginzburg* may have been trying to avoid the First Amendment issue?

2. It is clear from *Ginzburg* that the Court had superimposed a fourth test of purveyor conduct or pandering upon the three-element test of *Fanny Hill*. And that test has weathered the uncertainties of time, as we shall see.

As Harlan and Stewart suggest in their dissenting opinions, the Court seems to have written a new statute, or at least fashioned a new rule, just for Ginzburg and without notice in advance to Ginzburg or anyone else. Ironically the eroticism for which he was convicted in the mid-sixties was soon overtaken by a new genre of explicitness.

After 10 years of legal maneuvering Ginzburg was committed to a federal prison where he served eight months of a three-year sentence. Through it all, most of his fellow publishers were strangely silent. Since his release in October, 1972 Ginzburg has vowed to gain vindication in the Supreme Court, a Court which he now holds in contempt. Ginzburg, *Castrated: My Eight Months in Prison*, The New York Times Magazine, Dec. 3, 1972.

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## SECTION 7. JUDICIAL DISCORD

The issue became dazzling in its complexity. A third decision was delivered on that momentous day in the legal history of sexual expression—March 21, 1966. In the case of Edward Mishkin against the state of New York, the Court, again speaking through Justice Brennan, was able to combine its earlier concept of patent offensiveness with evidence of offensive conduct on the part of the publisher. Mishkin traded in sadism, masochism, fetishism, and homosexuality. He instructed his authors and artists to be sure that his books were "full of sex scenes and lesbian scenes, strong, rough and blunt, and dealing graphically with the darkening of flesh under flagellation." The Court upheld his three-year sentence and fine of $12,000.

Justice BRENNAN went back to the *Roth-Jacobellis* test and noted in MISHKIN v. STATE OF NEW YORK, *383 U.S. 502 (1966)*:

"Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. The reference to the 'average' or 'normal' person in *Roth* does not foreclose this holding. In regard to the prurient-appeal requirement, the concept of the 'average' or 'normal' person was employed in *Roth* to serve the essentially negative purpose of expressing our rejection of that aspect of the *Hicklin* test

* * * that made the impact on the most susceptible person determinative. We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group; and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons, it also avoids the inadequacy of the most-susceptible-person facet of the *Hicklin* test. * * * This evidence amply shows that appellant was 'aware of the character of the material' and that his activity was 'not innocent but calculated purveyance of filth.' "

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Justice Harlan concurred. Justices Black, Douglas and Stewart dissented, the latter surprisingly since Stewart had advocated a hard-core pornography test.

**NOTES**

1. Unlike obscenity which has always been defined in terms of itself—lewd, lascivious, prurient, licentious, indecent —hard-core pornography has at least been distinguished tentatively as day-dream material calculated to feed the auto-erotic desires of the immature, the perverted and the senile. It is erotic fantasy without nonerotic relief. It encourages luxuriation in morbid, regressive, sexual-sadistic fantasy, almost totally divorced from reality. See Kronhausen and Kronhausen, Pornography and the Law (1959), p. 178. The Court indicated in its per curiam opinion in *Redrup v. New York, 386 U.S. 767 (1967)* that the traditional "girlie" magazines do not fit the hard-core category. Mishkin's books which, by his own testimony were too sickening to be prurient, may have constituted hard-core pornography.

Under this test, mature audiences, it would seem, were to be denied hard-core pornography as Justices Brennan, Harlan, Clark, White, and Chief Justice Warren would define it; although a federal court reversed a verdict against the importation of pornography for scientific purposes.

*United States v. Thirty-One Photographs, etc., 156 F.Supp. 350 (S.D.N.Y. 1957).*

2. D. H. Lawrence's observation that what to one man is pornography might be the laughter of genius to another underlines the futility of the search for an objective test of obscenity. Obscenity is as variable and as personal in its meanings as the human psyche itself. Lawrence himself characterized pornography as an attempt to insult sex, to make it ugly, cheap and degraded, trivial and nasty. Lawrence, Sex, Literature and Censorship, (Harry T. Moore, ed.) 1959.

"The evil of arousing revulsion in adults who are a non-captive audience (may be) simply too trivial a predicate for constitutional regulation." Kalven, *The Metaphysics of the Law of Obscenity*, 1960 Sup.Ct.Rev. 40. Perhaps judicial process does not lend itself to making literary and psychiatric judgments. Former Federal Judge Thurman Arnold reflects the judicial dilemma in a 1959 brief to a Vermont court:

"The spectacle of a judge poring over the picture of some nude, trying to ascertain the extent to which she arouses prurient interest, and then attempting to write an opinion which explains the difference between that nude and some other nude has elements of low comedy. * * * The task of explaining why the words 'sexual relations' are decent and some other word with the same meaning is indecent is not one for which judicial techniques are adapted." See Kalven, supra, p. 40.

Nevertheless, the Justices have struggled valiantly with the vexing question of censorship and obscenity. If they have not found an answer, at least they have applied their intellectual resources

to the task. Congressional committees, on the other hand, have issued pro-censorship reports which are anti-intellectual in tone and which attack "modern" literature and "liberal" interpretations of the law as if both had purposively sought to undermine the moral survival of the Republic. Larrabee, *The Cultural Context of Sex Censorship* 20 Law & Contemp. Prob. 672–88 (1955). In 1962 Congress passed an obscenity law for the District of Columbia so sweeping that it received a Presidential veto. Since 1910 as many as 50 nations have signed conventions making trade in obscene publications a punishable offense.

3. Justice Brennan has become the Court's "expert" on obscenity. On the premise that some forms of expression are beyond the pale of constitutional protection, he would punish hard-core pornography, that is patently offensive material well beyond the bounds of contemporary community standards, lacking social value, and pandered to the prurient interests of an innocent or at least sexually immature audience for commercial gain. Chief Justice Warren and Justice Fortas generally adhered to that formula.

Justice White accepts pandering as a measure of obscenity, but he will not use the social value test independently as does Brennan, because he agrees with former Justice Clark that appeal to prurient interest should be the salient test for obscenity, a category of speech that can be socially harmful. Justices Black, Douglas, Harlan and Stewart reject pandering as evidence of guilt.

Justice Harlan called the Ginzburg decision "an astonishing piece of judicial improvisation" for it sustained a conviction for obscenity on the basis of material it did not consider obscene. And since no federal statute makes commercial exploitation, pandering or titillation a criminal offense, Harlan and Stewart believed Ginzburg had been denied due process.

Justice Harlan would permit the states, but not the federal government, to punish hard-core pornography, as he attempted to define it in the *Manual Enterprises* case. The States would be permitted wider authority in dealing with obnoxious matter than might be justifiable under a strict application of the *Roth-Memoirs* rule. The influence of this view will become apparent when the Burger Court rulings are analyzed.

Justice Stewart would permit both State and Federal governments to suppress hard-core pornography, which he will not attempt to define.

Perhaps the reader begins to feel what Justice Harlan described in a 1968 case as a sense of "utter bewilderment."

Brennan and Harlan insisted that contemporary community standards meant a national standard; Clark and Warren argued for a local community standard.

The elderly modernists, Black and Douglas, would allow no suppression of any kind of expression unless there is a clear and present danger that anti-social or criminal behavior will result—a position well beyond where society appears willing to go and one which has little support in lower federal and state courts. Any test of obscenity like the "common conscience of the community" was repellent to Black and Douglas because it could not be applied to religion, economics or politics. Judge Curtis Bok of Pennsylvania, *Commonwealth v. Gordon, 66 Pa. D. & C. 101 (1949)*, the late Judge Jerome Frank of New York, and the American Civil Liberties Union also adhered to this view.

Chief Justice Warren was generally credited with the pandering or contextual yardstick, also known as the conduct approach, obscenity per quod, and variable obscenity.

The Burger Court standards, as we shall see, evolve from the complex groundwork laid by the Warren Court.

## SECTION 8. DEFINITIONAL DILEMMA

A welter of standards and tests grew out of the 14 separate opinions of the 1966 cases! * The New York City Police Department reported that arrests for the sale and distribution of allegedly obscene literature increased 300 per cent within a week of the Court's decisions. Semonche, *Definitional and Contextual Obscenity*, 13 U.C.L.A.L.Rev. 1173 (1966). Between *Roth* and *Ginzburg* the Court had not upheld a single finding of obscenity. *Ginzburg* opened the gates to a torrent of confusion. One writer refers to the case as a "frantic effort to re-balance the scales in favor of the censors after a decade of tipping them in favor of free expression." Note, *The Substantive Law of Obscenity: An Adventure in Quicksand*, 13 N.Y.L.F. 124 (1967).

What did it leave of the *Roth* test? What did it leave of the tripartite standard of *Fanny Hill* combining prurient interest, patent offensiveness, and lack of social value? If the conduct of the purveyor was to be considered only in close cases, how does one recognize a close case? If Ginzburg was punished for intending to sell pornography, is it then possible to be punished for bad intentions in the absence of sales or distribution? What is the difference between pandering and honest labeling? Certainly there was no fraud in Ginzburg's promotion. He did his utmost to serve notice on sensitive members of the mass audience as to what he was about. How does pandering affect the intrinsic merits of a book, a magazine, or a photograph? Would the pandering of "Fanny Hill" be socially beneficial since the novel has been declared innocent of obscenity and to possess social value? Perhaps the Court has confused pandering with legitimate advertising. In any case the Ginzburg test permits the prosecution of an "unpopular" business and it denies a reader his own judgment about artistic or scientific value simply because the distributor's assessment is vulgar.

This attempt to make obscenity variable in terms of the communicator cultivated a forest of new problems. There were too many variables in the variable obscenity approach. Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 Sup.Ct.Rev. 67.

Prurient interest is no less confounding a concept, and the Court has made it applicable to the average homosexual, the average masochist, the average fetishist in the interests of variability. Do the "sexually mature" have no prurient interests? Kinsey data suggest that better educated persons are more responsive to pornography because they are more imaginative and better able to conceptualize. Furthermore, "the impulse to seek pleasurable sexual visual stimuli is statistically, biologically, and psychologically normal." Kinsey Institute for Sex Research, Sex Offenders, 403, 671, 678 (1965).

The impossibility of defining or isolating the concept of prurient interest is reflected in this commentary by the framers of the Model Penal Code:

"We reject the prevailing test of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising, and art, and because regulation of thought or desire, unconnected with overt

* In the approximately 10-year period between *Roth* (1957) and *Ginsberg* (1968) the Court had generated 55 separate opinions in 13 obscenity cases. For a summary of the philosophical divisions of the Court in 1968 see Justice Harlan's concurring opinion in *Ginsberg v. State of New York, 390 U.S. 676 (1968).*

For a survey of lower court development in obscenity law for the same period see *Luros v. United States, 389 F.2d 200 (8th Cir. 1968).*

misbehavior, raises the most acute constitutional as well as practical difficulties." Model Penal Code § 207.10 Comment 10 (Tent.Draft No. 6, 1957).

We can be sure that, just as the stately Victorian homes sometimes housed great collections of pornography, whoever makes the rules regarding the stimulation of prurient interest will reserve a goodly quantity of stimuli for himself, as has been the tradition of all censors. This results in what Eliot Fremont-Smith of the *New York Times* calls "privileged prurience;" and it requires, of course, a most arrogant and perhaps blindly naive view of those below one in social status. It may also require what Paul Freund refers to as a certain remnant of irrational Puritanism which "led those worthies to object to bear-baiting not because it gave pain to the bear, but because it gave pleasure to the spectators." See 42 F.R. D. 499 (1967).

Hard-core pornography, that which is patently offensive, is another problematic notion primarily because it is somehow related to prurient interest and national standards and conventions. Moreover, those who would make it the standard of suppression define it in terms of aphrodisiac, stimulant, daydream and fantasy, words of warm tone for many persons.

Few of those who would apply the hard-core standard are as candid as Justice Stewart who admits he cannot define it. Margaret Mead and the Kronhausens define hard-core pornography as daydream material calculated to feed the auto-erotic desires of the immature, perverted, and senile. For Justice Harlan it was that which is patently offensive, for others that which is grossly shocking. See Lockhart and McClure, *Obscenity Censorship: the Core Constitutional Issue—What Is Obscene?* 7 Utah L.Rev. 289 (1961), and for still others that which offends the sense of separateness and privacy. Elliot, *Against Pornography* 230 Harper's 51 (March 1965).

There is no hard-core to which everyone responds uniformly. Half of the authors, critics and university dons who engaged in debate in *The Times* literary supplement over the merits of William Burroughs' Naked Lunch thought it a masterpiece; the other half considered it arcane trash.

Thomas Emerson says that, since it depends upon majority taste, patent offensiveness is a test diametrically opposed to all concepts of freedom of expression.

The Court has never dared a definition of contemporary community standards; and in *Ginzburg* it violated its own dominant theme theory by focusing on four objectionable articles out of fifteen in the magazine *Eros*.

All that remained until recently was the social value test against which the testimony of reputable experts could be measured. Although no single person has the omniscience to say what is socially, culturally, or aesthetically valuable, works of at least arguable merit would be protected. The contention that under such a standard practically nothing could be censored should not be at all disturbing.

The substantial evidence approach is reflected in this fragment of a Massachusetts court opinion in a case involving Naked Lunch:

"As to whether the book has any redeeming social value, * * * 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 opinions of others concerning the book, we cannot ignore the serious acceptance of it by so many persons in the literary community." *Attorney-General v. A Book Named "Naked Lunch," 218 N.E.2d 571–72 (Mass.1966)*, cited in Monaghan, *Obscenity 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 Yale L.J. 127 (1966).

Should the government be making decisions at all as to what forms of expression possess social value?

Although we are no longer dependent upon the sexual sensibilities of the average man, perhaps Charles Rembar's social value test has too soon reached its zenith. And questions of social value inevitably encourage questions of social harm.

Adequate empirical tests have not been applied to the assumptions underlying the censorship of obscenity, assumptions which former Justice Clark, Justice White, and now the Nixon appointees, seldom questioned. It has not been demonstrated that obscene or pornographic books, films and photographs lead to anti-social conduct. To many, such evidence is irrelevant anyway. How much more comfortable the opinion of a law school dean who, citing J. Edgar Hoover as authority, declared that it is the universal judgment of ordinary men and women that there is a direct causal relationship between the dissemination of obscene publications and criminal conduct. Hayes, *The Offense of Obscenity: A Symposium of Views,* 51 Ky.L.J. 641–48 (1963).

If artistic or socio-psychological judgments of this kind are to be made in the courtroom, valid and reliable scientific evidence must be considered relevant and admissible—even though no one expects the law to be based upon the absolute predictability of human behavior.

General propositions drawn from existing research might include the following: (1) There are wide individual variations in response to psychosexual cues; (2) an interest in pornography may be as much the reflection of a personality as a molder of it; (3) some persons, both male and female, do become aroused by sex stimuli in pictures and books; (4) users of pornographic language and literature are not necessarily sex offenders, and they frequently tend to be shy and sexually frustrated or impotent; on the positive side, explicit sexual materials are sought as a source of entertainment and information by substantial numbers of American adults. The most frequent purchaser is a college-educated, married male, in his thirties or forties, who is above average in socio-economic status; (5) where there is a personal element of sexual guilt, pornographic materials may be found particularly repugnant by the viewer; (6) it is not known how long the influence of erotic material is felt, nor how it affects overt behavior, attitudes and mental health; (7) factual data tend to contradict the hypothesis that the observation of illicit sex practices normally leads to criminal sexual behavior; (8) communication of a sexual nature is more likely to reinforce already existing attitudes than to create new ones; and (9) direct experience appears to have a much greater influence on human relations than vicarious experience such as reading.

The single most comprehensive and systematic study of obscenity and its effects is the 1970 Report of the Presidential Commission on Obscenity and Pornography (New York: Bantam Books, 1970) which was 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 the President and has been given only passing attention by the Supreme Court.

Although the Commission reflects scientific caution in its conclusions, some of the facts it developed are contrary to widely held assumptions. For example, the Commission could find little evidence that obscene books or motion pictures incite youth or adults to criminal conduct, sexual deviancy or emotional disturbances. It trusts that its modest pioneering work in empirical research will help

to open the way for more extensive and long-term research based on more refined methods directed to answering more refined questions.

The recommendations of the Commission are dealt with in the remaining sections of this chapter.

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## SECTION 9. ADDITIONAL TESTS: JUVENILES AND PRIVACY

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By 1969 there appeared to be a momentary stability in the tests the Supreme Court had developed to define and deal with obscenity.

It did not seem possible that the Court could ignore parents who are outraged by commercial efforts to exploit the wider circulation of pornography. And there is some evidence that children functioning at a borderline intellectual level, and those who exhibit signs of behavioral maladjustment, show adverse effects after repeated exposure to escapist communication whether it be violence, sex or that popular hybrid, *porno-violence.* An inference might be ventured that some kinds of pornographic stimuli strengthen a socially undesirable or even destructive orientation toward sex and sexual relationships. Maccoby, *Why Do Children Watch Television?* 18 Public Opinion Quarterly 239 (1954). See also Larsen (ed.) Violence and Mass Media (1968).

In recent years much legislative attention in the states has been focused on Section 484–h of the New York Penal Code which seeks to protect persons under 17 from sexual communication "when it predominantly appeals to the prurient, shameful or morbid interest of minors and is patently offensive to prevailing standards and is utterly without redeeming social importance," the foregoing essentially the *Roth-Memoirs* test.

Sensing society's interest in protecting children, and to a minimal extent unwilling adults, the Court in 1968 upheld the constitutionality of Section 484–h in *Ginsberg v. State of New York, 390 U.S. 629 (1968),* a case which must not be confused with the earlier *Ginzburg* ruling.

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## GINSBERG v. STATE OF NEW YORK

390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968).

**Editorial Note:**

Ginsberg was prosecuted for selling a 16-year-old boy two "girlie" magazines in violation of 484–h. He was convicted under that part of the law which prohibits the sale to a minor of any picture depicting nudity, that is, "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 * * *" The magazines were not obscene for persons over 17 years of age and so the Court had adopted a concept of variable obscenity.

Speaking for the Court and citing *Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944)* Justice BRENNAN said: That the State has power to make that adjustment seems clear, for we have recognized that 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 * * *." In Prince we sustained the conviction of the guardian of a nine-year-old girl, both members of the sect of Jehovah's Witnesses, for vio-

lating the Massachusetts Child Labor Law by permitting the girl to sell the sect's religious tracts on the streets of Boston.

The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in § 484–h upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful. First of all, constitutional interpretation has consistently recognized that parents' claims to authority in their own households to direct the rearing of their children is basic in the structure of our society. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. * * *

Justice Douglas, joined by Justice Black, dissented because he objected to the Court sitting as the Nation's board of censors. Justice Fortas dissented because the Court sustained Ginsberg's conviction without deciding whether the magazines in question were obscene.

"The State's police power," he added, "may, within very broad limits, protect the parents and their children from public aggression of panderers and pushers. This is defensible on the theory that they cannot protect themselves from such assaults. But it does not follow that the State may convict a passive luncheonette operator of a crime because a 16-year-old boy maliciously and designedly picks up and pays for two girlie magazines which are presumably *not* obscene."

## STANLEY v. GEORGIA

394 U.S. 557, 89 S.Ct. 1243,
22 L.Ed.2d 542 (1969).

**Editorial Note:**

The matter of a public aggression by pushers and panderers brings us to the last piece in the puzzle designed by the Warren Court. You will recall in *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970) that the Court upheld a federal law designed to protect the homeowner from unwanted mail. A year earlier in *Stanley v. Georgia, 394 U.S. 557 (1969)* the Court had gone even farther in connecting the concepts of obscenity and privacy. But *Stanley* is a freedom "for" rather than a freedom "from" obscenity case and is therefore out of the mainstream of this line of rulings.

The Court held in *Stanley* that, although it may be a crime to sell obscene materials and therefore a crime to buy them, it is not a crime to have them in your possession, especially if they are in a desk drawer in your bedroom. The facts of the case are distressing. 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 and using Stanley's screen and projector they viewed them. Stanley was arrested, charged with the possession of obscene matter and convicted.

Delivering the opinion of a unanimous Court, Justice Marshall held that the mere private possession of obscene matter cannot constitutionally be made a crime. "If the First Amendment means anything," he said, "it means that a State 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." Of course, Justice Marshall did not explain how one might legally procure obscene films.

**NOTES**

1. The Court backed off from *Stanley,* or at least distinguished it, in two 1971 cases which vaguely suggested that a new majority might be forming in the obscenity area. 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 materials to even willing adults and denied that there was any right to receive such materials, as *Stanley* might have implied.

2. 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 ruling in *Freedman v. Maryland* (14 days), a majority of the Court 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.

Justice Douglas, dissenting in both cases, caught the essential absurdity of the situation when he observed:

"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. * * * Furthermore, any argument that all importation may be banned to stop possible commercial distribution simply ignores numerous holdings of this Court that legislation touching on First Amendment freedoms must be precisely and narrowly drawn to avoid stifling the expression the Amendment was designed to protect." Douglas, of course, assumes obscenity to be within the orb of protected expression. Only Justice Black agreed with him.

Douglas now thought that *Stanley* could apply only to a man who writes salacious books in his attic, prints them in his basement, and reads them in his living room.

3. 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 and to willing adults, provides a useful review of the long and tortuous path trod by the Warren Court. To be sure the Court conceded its confusion and the Babel of opinions it had generated. Nevertheless, broadly interpreted, obscenity rulings from 1957 to 1972 did repay the efforts of the agonizing Justices and culminated in the relatively liberal three-element test of *Fanny Hill (A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Com. of Massachusetts, 383 U.S. 413 (1966)),* with minor modifications:

(1) the dominant theme of the material taken as a whole must appeal to a prurient interest in sex;

(2) the material must be patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters, and the community standards were national rather than local;

(3) the material must be utterly without redeeming social value.

In spite of the definitional problems some of these terms have created, the test has had permissive consequences. All three elements were meant to coalesce, that is, absent any one and there would probably be no finding of punishable obscenity.

In addition there came to be three qualifications and the presence of any one would make the primary test unnecessary:

(a) the Court would countenance no appeals to juveniles or strike down laws meant to protect them (*Ginsberg*);

(b) there would be no pandering or commercial exploitation of the natural interest in sex (*Ginzburg*);

(c) and there could be no assault upon personal privacy through the mail or by other public means (*Rowan*).

Any one of these activities would make materials not obscene by the primary three-element test nevertheless punishable as if they were obscene. *Redrup* led to 31 *per curiam* reversals of obscenity convictions and it tidied up some of the mess left by earlier cases. For example see *Keney v. New York, 388 U.S. 440 (1967).*

## THE LOCKHART COMMISSION

4. It should be noted that the Commission on Obscenity and Pornography essentially rejected the Court's primary tests but subscribed to the qualifications. The Commission concluded that the vague and highly subjective aesthetic, psychological and moral elements of the primary test did not provide meaningful guidance for law enforcement officials, juries or courts. The law was so inconsistent that it interfered with constitutionally protected expression. In addition, said the Commission, public opinion does not support legal prohibition of adult use of obscene materials, a law enforcement effort society is not equipped to support.

"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 therefore recommended the repeal of all existing federal, state and local legislation which prohibits or interferes with consensual distribution of obscene materials to adults.

Statutes protecting the young, however, were proposed by the Commission on the grounds that insufficient research had been done on the effects of exposure of children to sexually explicit materials. The Commission noted that there were strong ethical feelings against experimentally exposing children to materials of this type. And it respected the stated opinions of parents on the question.

The Commission would also respect the right of parents to consent to having their children exposed to sexual materials. In any case, the Commission's statutory recommendations would cover only pictorial material since it could think of no constitutionally safe way to control the distribution of books and other textual materials. They would also exempt broadcast material because of adequate self-regulation and FCC supervision.

Additional support for the Court's qualifications is found in the Commission's endorsement of state and local laws prohibiting public displays of sexually explicit materials and of the 1970 Postal Reorganization Act dealing with the mailing of unsolicited advertisements of a sexually explicit nature. The Commission was sensitive to unwanted intrusions

upon individual privacy. Here also it would exempt verbal materials and the content of broadcasting.

Prophetically the Commission recommended against the elimination by Congress of federal judicial jurisdiction in the obscenity area as a response to vocal citizen disagreement with the results of the exercise 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."

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5. Prof. Emerson basically agreed with *Redrup* that restrictions upon alleged obscenity are permissible only if a communication having a shock effect is forced upon a person against his will, or if the restriction operates only to limit the dissemination of erotic material to children. Emerson, The System of Freedom of Expression, p. 497 (1970).

Richard Kuh in Foolish Figleaves? (1967) makes a similar legislative recommendation. He would place no limitations on the discreet circulation of pornography to willing adults.

6. The fragility of the Warren Court formulations goes back to Justice Harlan's dissent in *Roth* in which he advocated a very limited role for federal judicial review in favor of state autonomy.* In 1969 Justice Harry Blackmun in a dissent joined by Chief Justice Warren Burger clearly reflected the growing influence of Harlan's commitment to the notion that the States have greater latitude in proscribing obscenity than the Federal government which is strictly limited by the First Amendment. Blackmun wrote:

> I am not persuaded that the First and Fourteenth Amendments necessarily prescribe a national and uniform measure—rather than one capable of some flexibility and resting on concepts of reasonableness—of what each of our several States constitutionally may do to regulate obscene products within its borders. Here a Minnesota trial court * * * endeavored to apply standards articulated by this Court in prior cases and embodied in a precisely worded Minnesota statute, and reached the conclusion that the materials in question were obscene within the meaning of that statutory definition. Six of the seven Justices of the Supreme Court of that State, citing Redrup v. New York, and other decisions of this Court, have identified the offending material "for what it is," have described it as dealing "with filth for the sake of filth," and have held it obscene as a matter of law. * * * I cannot agree that the Minnesota trial court and those six justices are so obviously misguided in their holding that they are to be summarily reversed on the authority of *Redrup*. At this still, for me, unsettled state in the development of state law of obscenity in the federal constitutional context I find myself generally in accord with the views expressed by Mr. Justice Harlan. * * * *Hoyt v. Minnesota, 339 U.S. 524 (1969).*

7. *Reidel* and *Thirty-Seven Photographs* represent a sharp deviation from the proposition that there should be no interference with the unobtrusive circulation of obscenity to willing adults.

8. Bottomless dancing brought the Burger Court majority together in *California v. LaRue, 409 U.S. 109 (1972)*, the celebrated "bottomless" case. Here Jus-

* Suggestions of a return to state standards are also to be found in *Perez v. Ledesma, 401 U.S. 82 (1971)*; *Dyson v. Stein, 401 U.S. 200 (1971)*; and *Byrne v. Karalexis, 401 U.S. 216 (1971)*, the "I Am Curious (Yellow)" case. See also *U. S. v. A Motion Picture Entitled, "I Am Curious (Yellow)," 404 F.2d 196 (1968).* See Teeter and Pember, *Obscenity 1971: The Rejuvenation of State Power and the Return to Roth*, 17 Villanova L.Rev. 211 (1971).

tice William Rehnquist deftly used the Twenty-First Amendment's mandate to the states to set liquor regulations to interrupt the "Bacchanalian revelries" that were taking place in some California bars. His opinion for the Court depended upon the speech-action dichotomy which Thomas Emerson has made central to his theory of the First Amendment, and upon Chief Justice Warren's majority opinion in the draft card burning case (*United States v. O'Brien, 391 U.S. 367 (1968)*).

"We cannot accept the view," Warren had said, "that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

Oregon and Hawaii have used the conduct approach in writing state obscenity statutes.

Prof. Emerson has criticized the manner in which the Court distinguished between speech and action in *O'Brien*. Significantly Justice Douglas dissented in *O'Brien*. Douglas also dissented in *LaRue*, joined by Justices Brennan and Marshall. Marshall analyzed the sexual activities of *LaRue* in terms of the *Roth* line of cases. The Court had not.

*LaRue* was seen as a stopgap decision designed to postpone the fundamental issue then dividing the Court: Does the First Amendment protect all material of a sexually oriented nature so long as it is displayed only to consenting adults? The Court would soon answer that question.

9. The *Roth-Memoirs* standard got a brief reprieve in a case involving two small newspaper pictures in *Kaleidoscope*, a Wisconsin counter-culture newspaper, of a nude man and a nude woman embracing in a sitting position. The pictures appeared in a poetry section containing one poem entitled "Sex Poem" which was an undisguisedly frank play-by-play account of the author's recollection of sexual intercourse. Using only the prurient interest element of *Roth* and reiterating that sex and obscenity were not synonymous, the Court in a *per curiam* opinion considered the poem and pictures an attempt at serious art and would not prohibit circulation of the entire newspaper because of them. No mention was made of "patent offensiveness" or "redeeming social value." *Kois v. Wisconsin, 408 U.S. 229 (1972)*.

10. In a 1973 case, *Papish v. Board of Curators of the University of Missouri, 410 U.S. 667*, the newly appointed Justices again came together, this time in dissent. In a second *per curiam* opinion the Court ruled that a political cartoon in a campus newspaper of irregular publication depicting policemen raping the Statue of Liberty and the Goddess of Justice and a story headlined "Motherfuckers Acquitted" were not constitutionally obscene or unprotected. The mere dissemination of ideas—no matter how offensive to good taste—on a university campus may not be shut off in the name alone of "conventions of decency," said the Court. See also *Cohen v. California,* 403 U.S. 15 (1971), reported and discussed in this text, p. 96.

## SECTION 10. BURGER COURT REVISIONISM

The Warren Court obscenity edifice came crashing down on June 21, 1973 when the 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 are *Miller v. State of California, 413 U.S. 15* (1973) (mass mailing campaign to advertise illustrated "adult" books), *Paris Adult Theatre I et*

*al. v. Slaton, 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 8 mm. Film et al., 413 U.S. 123* (1973) (importation 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 has 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 masterful review of 16 years of judicial efforts in this puzzling area in his *Paris Adult Theatre* dissent.

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## MILLER v. STATE OF CALIFORNIA

413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

Mr. 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 the California Penal Code § 311 approximately incorporates the three-stage *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 Amendments 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. *As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.* (Emphasis added.)

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. 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 con-

[4] See the dissenting opinion of Mr. Justice Brennan in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

tinue 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. "Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees." 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. "Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.'"

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 Amend-

* 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 of-

ment 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 requirement 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.

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## 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 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 Irving Kristol, finds 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 adds, 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

fenses. He had conducted an extensive statewide survey—the Chief Justice says nothing more specific about the survey—and had given expert evidence on 26 occasions in the year prior to the Miller trial.

places of public accommodation. The Chief Justice concludes:

"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 *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, is joined in his dissent by Justices Stewart and Marshall. His opinion provides an excellent review of the Court's work in this troubling area since 1957, 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.

Mr. 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 ab-

stract and without reference to the particular material before the Court,—was, to say the least, short lived. By 1967 the following views had emerged: Mr. Justice Black and Mr. Justice Douglas consistently maintained that government is wholly powerless to regulate any sexually oriented matter on the ground of its obscenity. Mr. 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." Mr. 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 Mr. Chief Justice Warren, Mr. 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 if 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.

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 toler-

able 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. Although we have assumed that obscenity does exist and that we "know it when [we] see it," * * *

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. * * *" Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 707 (1968) (Harlan, J., dissenting). 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. Cf. Mishkin v. New York, 383 U.S. 502, 516–517 (1966) (Black, J., dissenting).

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 draw-

ing 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 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* ap-

proach, 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 assumes 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 grow 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, *supra,* 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.)



**NOTES**

1. In his opinion for the Court in *Orito*, Chief Justice Burger reiterated the view that *Stanley* did not protect obscene materials outside of the home or in interstate commerce. And words alone may constitute obscenity, said the Chief Justice, in finding against the proprietor of the Peek-a-Boo Bookstore in *Kaplan*.

"For good or ill, a book has a continuing life. It is passed hand to hand, and we can take note of the tendency of widely circulated books of this category to reach the impressionable young and have a continuing impact. A State could reasonably regard the 'hard core' conduct described by *Suite 69* as capable of encouraging or causing antisocial behavior, especially in its impact on young people. States need not wait until behavioral experts or educators can provide empirical data before enacting controls of commerce in obscene materials unprotected by the First Amendment or by a constitutional right to privacy."

Finally in *12 200-Ft. Reels of Super 88mm. Film,* Burger closed the Customs Bureau door to the importation of obscene matter.

2. Justice Douglas dissented separately and predictably in all five cases. He seems to take a quiet satisfaction in noting that the Court had worked hard to define obscenity but concededly had failed. The criminal law had become a trap. "To send men to jail," said Douglas, "for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process." "The Court's test," he added, "would make it possible to ban any paper or any journal or magazine in some benighted place. * * * To give the power to the cen-

sor, as we do today, is to make a sharp and radical break with the traditions of a free society." For Douglas obscenity is no more than a classification of offensive ideas and to make that classification unprotected expression would require a constitutional amendment and the public debate that would entail.

Douglas' dissent in *Kaplan* offers some interesting historical vignettes including the fact that Julius Goebel, a leading expert on colonial law, does not so much as allude to punishment of obscenity. J. Goebel, Development of Legal Institutions (7th rev. 1946 ed.).

## SECTION 11. THE FUTURE OF OBSCENITY—WHATEVER IT IS

There was a sharp increase in obscenity prosecutions for a time after the *Ginzburg* decision. A rash of local and state prosecutions have also followed the recent Burger Court decisions. In late October, 1973 the Supreme Court, affirming its new position on obscenity, upheld one lower court conviction, dismissed appeals in two convictions, and sent eight other obscenity cases back to lower courts for review under the June guidelines. The Court again split 5–4.

The remanded cases were *Carlson v. Minnesota, Trinkler v. Alabama, West v. Texas, Cinema Classics Ltd., Inc. v. Busch, Roth v. New Jersey, Harding v. United States, McCrary v. Oklahoma, Cherokee News & Arcade, Inc. v. Oklahoma,* and *Groner v. United States, 94 S.Ct. 263–278 (1973).* Appeals were dismissed in *Kirkpatrick v. New York, 94 S.Ct. 283 (1973)* and *Procaccini v. Jones, 94 S.Ct. 287 (1973).*

Justice Douglas in dissent complained that every author, every bookseller, every movie exhibitor, and perhaps every librarian would now be at the mercy of the local police chief's conception of what appeals to "prurient interest" and is "patently offensive." The standard will vary from town to town and day to day in no predictable fashion. The meaning of the standards will vary according to each person's idiosyncracies; and the standards themselves fail to give adequate notice and invite the arbitrary exercise of police power. "Bookselling should not be a hazardous profession," said Douglas.

In July 1973 the Georgia Supreme Court declared Mike Nichols' film adaptation of Jules Feiffer's "Carnal Knowledge" to be obscene, in spite of the fact that the film received much critical acclaim and an Oscar nomination for the female lead. On June 24, 1974 the U. S. Supreme Court reversed unanimously, a majority of five holding that the film did not meet the potent offensiveness, hard core, or explicit depiction tests of the Court. Jenkins v. Georgia, —— U.S. ——. The same majority, led by Justice Rehnquist, found that an illustrated brochure advertising the Lockhart Commission report did meet the tests. Hamling v. U. S., —— U.S. —— (1974).

Do you agree with Justice Brennan, who essentially adopts the view of the Commission on Obscenity and Pornography, that the Burger formula is every bit as difficult to apply rationally to consenting adults as the *Roth-Memoirs* test?

In doing away with the broader "redeeming social value" test, which had been so painstakingly developed, do you think the Court was reacting to those who found social value in a pornographic film because the soundtrack used "Tales from the Vienna Woods," or in a grossly tasteless book because the flyleaf contained a quotation from Voltaire?

Will the "serious literary, artistic, political or scientific value" test lead to a confused deluge of legislation and litigation? Or will state and local laws written under the influence of the older test still prevail? Would you expect new

legislation to be more permissive or more repressive?

Justice Brennan in his *Paris Adult Theatre* dissent conveys an air of resignation. He can no longer define obscenity. Can you? Does the concept have any objective meaning? Or does its meaning depend upon the subjective psychological and physiological responses of an individual? What ought to be the position of the law in the puzzle? The protection of children? Of unwilling adults? Of personal privacy? Or are we wrong to define obscenity in terms of sex at all?

Has the dirty picture or the Anglo-Saxon pejorative been rendered innocuous when measured against assassination and napalm? If our society falls, says Howard Moody, the reason will not be "salacious literature, erotic art or obscene films but * * * the 'soul-rot' that comes from the moral hypocrisy of straining at the gnat of sexuality and swallowing the camel of human deterioration and destruction." Moody, *Toward a New Definition of Obscenity,* 24 Christianity and Crisis, 284, 288 (1965). Or perhaps future Commissions ought to invest their efforts in studying what Tom Wolfe calls the mass perversion of porno-violence, an ethic combining sadomasochism and the fantasy of easy triumph —"Let him do anything he pleases, as long as he doesn't get in my way. And if he does get in my way, or even if he doesn't * * * well * * * we have *new* fantasies for that. Put hair on the walls." Wolfe, *Pause, Now, and Consider Some Tentative Conclusions About the Meaning of this Mass Perversion Called Porno-Violence: What Is It and Where It Comes From and Who Put the Hair on the Walls*, 110 Esquire (July 1967).

Is the real hard-core of pornography the degradation and dehumanization of individual human beings—the pornography of an Auschwitz? Twenty years ago the United States Supreme Court made a clear distinction between obscenity and stories of deeds of bloodshed, and chose not to become exercised over the latter. *Winters v. New York, 333 U.S. 507 (1948).* In Sweden violence is censored on television; sex is relatively free from censorship. Is there a better constitutional case for enactment of laws prohibiting senseless depictions of fictional brutality for the entertainment of children rather than laws prohibiting the showing of buttocks or breasts with less than a full opaque covering?

Vincent Canby reports that "A Clockwork Orange" received an X rating as a motion picture, ostensibly because of the violence; yet when the producers sought an R-rating, they were asked only to delete a funny, fast-motion sex scene. The film's violence went untouched. *New York Times,* July 1, 1973. Have we become impervious to massacre?

Sexual pornography is an immensely profitable business which thrives on the social and religious strictures of neo-puritanism. So profitable is it that the Mafia is reported to be taking it over in New York City. *New York Times,* Dec. 10, 1972. Do the hypocritical taboos which for generations have sought to repress overt pornography add to its pleasurable qualities? West Coast pornographers show the same staying power as the bootleggers of an earlier era, and as long as there is a market they will somehow stay in business. Without moral proscriptions would pornography run its course and disappear? When laws making the flow of obscenity to willing adults illegal were repealed in Denmark, interest rapidly diminished. *Time,* June 6, 1969.

Perhaps we should conclude that pornography is simply an artistic failure which cannot be rectified by moral indignation and legal penalties.

Perhaps someday self-censorship, the censorship of the super-ego, will replace

the clumsy and ineffective external controls. What is the nature of the public urge to censor? If legal means could be developed to apply obscenity laws only to the protection of children, would that quiet the urge? Or is there a better way? Is the best remedy for pornographic speech simply more speech like the teaching of moral philosophy and aesthetics?

Certainly the most promising recommendation of the Commission on Obscenity and Pornography was that of a massive sex education program aimed at adults as well as children and adolescents. The Commission believed that accurate and appropriate sex information provided openly and directly through legitimate channels and from reliable sources in healthy contexts would compete successfully with potentially distorted, warped, inaccurate, and unreliable information from clandestine, illegitimate sources, and provide a solid foundation for the basic institutions of society.

Or does pornography meet a need for which no substitutes can be found, making all proposals for its extinction naive and futile? Alain Robbe-Grillet, a French playwright and novelist, says an adult needs pornography as a child needs fairy tales.

"More generally," he adds "we might say that man at every age is a consumer and a producer of myths, whether they be images or narratives. As for our fellow spectator, so deliberately observing this life-sized reproduction of the exposed vulva, we understand now that this man is the most fully developed man of all, the one who has explored possibilities to their ultimate consequences: an intellectual. * * *

"We are invariably mistaken if we fail to consider, with open eyes, the society we live in as well as what we ourselves have in our heads." Robbe-Grillet, *For a Voluptuous Tomorrow*, Saturday Review, May 20, 1972.

Finally, since obscenity lends itself to an infinite range of definition, is government control really feasible? Would a better approach to protecting the essential intimacies and physiological privacies of life be the development of privacy laws since privacy seems somewhat more capable of definition? Moreover, private matters might be protected from reporting before that reporting is transformed into protected speech. There is still, after all, the First Amendment to consider.

# Chapter V

# FREE PRESS AND FAIR TRIAL

## SECTION 1. THE LAW AND LITERATURE OF FREE PRESS AND FAIR TRIAL

### A. PSYCHOLOGICAL VARIABLES

"I remember one of those sorrowful farces, in Virginia," Mark Twain recounts in *Roughing It*, "which we call a jury trial. A noted desperado killed Mr. B., a good citizen, in the most wanton and cold-blooded 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. Why could not the

jury law be so altered as to give men of brains and honesty an *equal chance* with fools and miscreants? Is it right to show the present favoritism to one class of men and inflict a disability on another, in a land whose boast is that all its citizens are free and equal? I am a candidate for the legislature. I desire to tamper with the jury law. I wish to so alter it as to put a premium on intelligence and character, and close the jury-box against idiots, blacklegs, and people who do not read newspapers. But no doubt I shall be defeated—every effort I make to save the country 'misses fire.' "

Twain's seriocomic reference is not intended to foreclose debate on the ripe conflict between the constitutional values of free press and fair trial, but rather to focus attention on what is still the central question of a contentious dialogue: what *is* the effect of trial and pre-trial information on jury verdicts?

Jeremy Bentham, early in the 19th century, expressed similar concerns about the relationship between free press and fair trial. Bentham, Rationale of Judicial Evidence, 604 (1827). And his observations affirm the durability of the debate:

"In England, publications of the cases of litigant parties are altogether unusual, and if distributed for any such purposes as that of influencing the decision of the jury, would be liable to be treated on the footing of an offence against justice. * * * In England, the ground for the prohibition put upon these *ex parte* publications, is the danger of their exercising an undue influence on the minds of the jury. * * * Even in England, the reason on which the prohibition relies for its support has more of surface than of substance in it. The representations given by publications of this sort will of course be partial ones: the color given to them will be apt to be deceived, and their affections engaged on the wrong side. Partial? Yes: but can anything in these printed arguments be more partial than the *viva voce* oratory of the advocates on the same side will be sure to be? The dead letter cannot avoid allowing full time for reflection: the *viva voce* declamation allows of none. The written arguments may contain allegations without proofs, true: but is not the spoken argument just as apt to do the same? When, of the previous statement given by the leading advocate, any part remains unsupported by evidence, the judge of course points out the failure: whatever effect this indication has on the jury, in the way of guarding them against that source of delusion in spoken arguments, would it have less efficacy in the case of written ones?"

Jurists are still arguing the efficacy of a judge's instructions to a jury. In a 1951 federal appeals case, *Leviton v. United States, 193 F.2d 848 (2d Cir. 1951), cert. den. 343 U.S. 946 (1952),* a copy of the *New York Times,* containing an inaccurate report, found its way into the jury room. The trial court reasoned that where the judge had given explicit instructions that the contents of the article were to be disregarded and went on to point out how the offenses set forth in the indictment differed from those described in the article, there was no error in having allowed the trial to proceed. The United States Court of Appeals agreed.

"Trial by newspaper," said Judge Clark for the court, "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."

Judge Jerome Frank, incensed by the majority opinion, said in a frequently quoted dissent: "My colleagues admit that 'trial by newspaper' is unfortunate. But they dismiss it is an unavoidable curse of metropolitan living (like, I sup-

pose, 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."

"The naive assumption," said Justice Robert Jackson of the United States Supreme Court, *Krulevitch v. United States, 336 U.S. 440 (1949),* "that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction."

Few attorneys would claim the clairvoyance Jackson attributed to them. What do the foregoing commentaries imply? Is the unresolved problem of jury prejudice inherently psychological in nature? The few preliminary behavioral studies of the relationship between publicity and jury verdicts which have been reported suggest a high probability that news of a confession does influence jurors against a defendant. See McCombs, *Experimental Analysis of "Trial By Newspaper"* (paper presented at the Association for Education in Journalism Convention, Aug. 29, 1966) and "Behavioral Research On Pre-Trial Publicity," School of Journalism, University of North Carolina, 1969 (mimeographed). Wilcox and McCombs, *Confession Induces Belief in Guilt: Criminal Record and Evidence Do Not,* A.N.P.A. News Research Bulletin 15, July 7, 1966. Tans and Chaffee, *Pretrial Publicity and Juror Prejudice,* 43 Journalism Quarterly 647 (1966). See generally Bush (ed.) Free Press and Fair Trial, 1970.

On the other hand, these same reports indicate that there is as yet little evidence that other forms of pre-trial information —criminal records, descriptions of evidence, and opinions of court officers as to guilt or innocence—have any significant effects. But see Kline and Jess, *Prejudicial Publicity: Its Effect on Law School Mock Juries,* 43 Journalism Quarterly 113 (1966), where this potentially prejudicial material persisted in the minds of jurors.

One researcher concluded that in experimental settings jurors take judicial admonitions very seriously and are able to put out of their minds inflammatory extrinsic information and reach a verdict solely on the evidence presented at the trial. Simon, *Murders, Juries, and the Press,* Trans/action 40 (May-June, 1966), and in Simon (ed.) The Sociology of Law, 1968.

The University of Chicago Law School's Jury Project reached the same conclusion in experiments involving auto negligence suits. Kalven and Zeisel, The American Jury 92–99 (1960).

"It has yet to be shown," yet other researchers report, "that there is any correlation between the amount of publicity given a case and the probability that the defendant will be found guilty or given a severe sentence. At another level, there is no evidence that a 'prejudiced' juror is more likely to judge a defendant guilty or to hold out more strongly for such a judgment, plausible as that possibility may seem." Tans and Chaffee, *Pretrial Publicity and Juror Prejudice,* supra 654. Ironically, the same two investigators note that news of an arrest—seldom an issue between press and bar—may be the single most prejudicial fact of a crime story. Id. at 647. See also Riley, *Pre-Trial Publicity: A Field Study,* 50 Journalism Quarterly 17 (Spring 1973).

In late 1973 two social scientists at Columbia University's Bureau of Applied Social Research, Allen H. Barton and Alice Padawer-Singer, reported that a three-year study had produced evidence that jurors exposed to prejudicial news stories were as much as 66 per cent more likely to find defendants guilty than jurors who read objective news reports.

In experiments recreating an actual case and courtroom conditions, the researchers also found that jurors who were not screened for impartiality by customary "voir dire" examinations were more likely to return guilty verdicts.

As important as these investigations are, they merely probe the complex of variables yet to be examined in the free press-fair trial dialogue. However, in the light of recent opinions of the United States Supreme Court and the bold initiative of the American Bar Association in issuing its Reardon Report, the question of actual effects may now be academic.

Bench and bar come by their concern about the possibly prejudicial nature of press reports honestly, for the problem is an old one. Chief Justice Marshall took note of the extra-legal newspaper comment in the treason trial of Aaron Burr in 1807, *United States v. Aaron Burr,* 25 *Fed.Cas. 49 (No. 14692g) (1807)*, and, in a reference to the Alexandria (Va.) *Expositor*, he wrote:

"Light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions, which will close the mind against testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection." Id. at 51.

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## B. THE CASE AGAINST THE PRESS

There is an unbroken line of *causes célèbre* from 1807 to the present in which the spectre of prejudicial publicity has appeared. See Lofton, Justice and the Press (1966) Ch. 3. Among the more notorious of 20th century cases were the Thaw-White-Nesbit case, the Leo Frank case, in which the young Jewish defendant was dragged out of jail and lynched by a Georgia mob, the cases of Mooney-Billings, Sacco-Vanzetti, Leopold and Loeb, Hall-Mills, Gray-Snyder, and Carl Wanderer.

Few cases in the annals of American crime received wider attention or gave greater impetus to criticism of the press than the Lindbergh kidnaping trial which may have been a watershed for court reporting in America. Never again would the press descend like vultures upon a defendant without risking the wrath of peers, readers and the court system itself.

As many as 800 newsmen and photographers, among them Edna Ferber, Fannie Hurst, Kathleen Norris, Adela Rogers St. John, Walter Winchell, Runyon and Woolcott, helped turn the tiny town of Flemington, N. J. into a midsummer Mardi Gras. They were joined by the great figures of stage and screen, United States senators, crooners and social celebrities, and as many as 20,000 curious nobodies on a single day. One report had it that the jury was seriously considering an offer to go into vaudeville.

The small courtroom became a 24-hour news and propaganda bureau spawning headlines such as "Bruno Guilty, But Has Aids, Verdict of Man in Street," and news story references to Bruno Hauptmann as "a thing lacking human characteristics." Robert Benchley's famous February 23, 1935, *New Yorker* report, "Apres la Guerre Finie," best caught the magic of the scene:

"They are the correspondents who supplied us with the news that Mr. Wilentz was rivalling Mr. Reilly for the title of 'best-dressed lawyer,' that Flemington stores were having a run on cameras, that local bars had fixed up a drink of applejack known as The Hauptmann, that a

dog named Nellie had become the mascot of the trial, and that the sale of 'kidnap ladders' and miniature sleeping suits was progressing nicely. The world is always full of a number of things for these light-hearted reporters, and the metropolitan district is their oyster."

Legal attitudes toward press coverage and publicity-seeking lawyers were forever hardened by the Lindbergh case, and an era of free-wheeling court coverage may have ended in 1937.

It is apparent that a single case as bizarre as that of a Charles Manson, an assassination, or a case with the vast implications of Watergate can demand the front pages of every newspaper in America.

And the constancy of human behavior probably accounts for the fact that the free press-fair trial conflict will not go away. Celebrated cases of the 50's, 60's and 70's reinforce this impression. It is estimated that between 1951 and 1969 at least 421 appeals on grounds of prejudicial publicity were carried to state and federal appeals courts. American Bar Association Legal Advisory Committee on Fair Trial and Free Press, The Rights of Fair Trial and Free Press, p. 7 (1969).

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SHEPHERD v. FLORIDA 341 U.S. 50, 71 S.Ct. 549, 95 L.Ed. 740 (1951).

**Editorial Note:**

In 1950 a white girl in Florida was allegedly raped by three Negroes. Within hours three suspects were in custody. A local newspaper, reporting that the three had confessed, did much to transform an already furious public into a mob, which stormed the jail in a lynch attempt, burned the home of one suspect, and forced another's relatives to flee the community for fear of their lives. Inflammatory newspaper coverage included a cartoon which appeared while the grand jury was deliberating, picturing three electric chairs and captioned, "No Compromise—Supreme Penalty."

The state militia finally had to be called out to maintain order, and judicial rules had to be strictly enforced to keep weapons out of the courtroom. On trial, the defendants were sentenced to death, although their purported confessions were never offered in evidence. At the same time, the defense presented, and the court rejected as irrelevant, evidence of brutal beatings of the three defendants while in custody.

On appeal to the United States Supreme Court, the convictions were reversed *per curiam* on the ground that Negroes had been purposefully excluded from the grand jury. Justice JACKSON noted for the Court, however, that prejudicial news coverage had been a more significant obstruction to justice:

"But prejudicial influences outside the courtroom, becoming all too typical of a highly publicized trial, were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated. * * * Newspapers published as a fact, and attributed the information to the sheriff, that these defendants had confessed. No one, including the sheriff, repudiated the story. Witnesses and persons called as jurors said they had read or heard of this statement. However, no confession was offered at the trial. The only rational explanations for nonproduction in court are that the story was false or that the confession was obtained under circumstances which made it inadmissible or its use inexpedient."

The Court underlined the haphazardness of authority for the confession story by the editor's own admission: "The information is based on articles in the vari-

ous daily papers and personal conversations I had with people generally. * * * If articles appear in those papers that have stood the test two or three days without denial or corrections, based on my previous experience as an editor, I assume them to be true. * * *"

Justice Jackson was appalled; he found it "hard to imagine a more prejudicial influence than a press release by the officer of the court charged with defendants' custody stating that they had confessed, and here just such a statement, unsworn to, unseen, uncross-examined, and uncontradicted, was conveyed by the press to the jury." Newspapers, Jackson asserted, in the enjoyment of their constitutional rights may not deprive accused persons of their right to a fair trial.

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**Editorial Note:**

In the case of STROBLE v. CALIFORNIA, 343 U.S. 181 (1952)—involving the ice-pick slaying of a six-year-old girl by an elderly man—newspaper reports, relying on a confession released by the district attorney on the day of the crime and later accepted as evidence at the preliminary hearing, referred to the accused as a "were-wolf," "fiend" and a "sex-mad killer." And at a conference called by the governor of California and a legislative committee to consider the problem of sex crimes, the district attorney was quoted on front pages as not knowing why sex offenders "shouldn't be disposed of the same way" as mad dogs.

Convicted of first degree murder, the defendant eventually brought an appeal to the United States Supreme Court. Although the Court chastised the district attorney and the press, it affirmed the conviction. Justice FRANKFURTER, as was his custom in such cases, registered a strong dissent which focused on the prosecutor's antics:

"To have the prosecutor himself feed the press with evidence that no self-restrained press ought to publish in anticipation of a trial is to make the State itself, through the prosecutor who wields the power, a conscious participant in trial by newspaper, instead of by those methods which centuries of experience have shown to be indispensable to the fair administration of justice. * * * I cannot agree to uphold a conviction which affirmatively treats newspaper participation instigated by the prosecutor as part of the traditional concept of the 'American way of the conduct of a trial.' Such passion as the newspapers stirred in this case can be explained (apart from mere commercial exploitation of revolting crime) only as want of confidence in the orderly course of justice. * * * The moral health of the community is strengthened by according even the most miserable and pathetic criminal those rights which the Constitution has designed for all."

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In a landmark departure from prior rulings, the Supreme Court granted a new trial in MARSHALL v. UNITED STATES, 360 U.S. 310 (1959), despite the statements of jurors that they would not be influenced by news articles, that they could decide the case only on the evidence offered, and that they felt no prejudice against the defendant as a result of the articles. The case, decided on supervisory rather than constitutional grounds, also suggested that publicity need not be massive or prolonged to constitute grounds for a new trial. Two newspaper stories containing information of prior convictions of the accused and his wife had appeared during the trial. *Marshall* relied in part on an earlier Supreme Court ruling, *Holt v. United States, 218 U.S. 245 (1910).*

### THE PROBLEM OF OFFICIALLY INSPIRED PUBLICITY

1. Too often pre-trial publicity has an official ring to it. In 1807, President Thomas Jefferson sent a special message to Congress in which he announced that Aaron Burr was guilty of high treason. Burr had planned to seize New Orleans, Jefferson said, and then detach the west from the eastern United States, and attempt to conquer Mexico. Burr might have been guilty, John Adams retorted, "but if his guilt is as clear as the Noon day Sun, the first Magistrate ought not to have pronounced it so before a Jury had tryed him." Levy, Jefferson and Civil Liberties: The Darker Side 70–77 (1963).

2. In March, 1965, President Lyndon Johnson announced to a nationwide television audience the arrest of four men in connection with the murder of Mrs. Viola Liuzzo, the Detroit housewife who was shot to death in Alabama while engaged in civil rights activities. Mr. Johnson identified the suspects and castigated the Ku Klux Klan to which they belonged. The Chicago *Tribune* wondered in its March 30 issue, "How can such men expect to receive a just trial when they have been condemned in advance on the highest authority?" And on April 14, the Los Angeles *Times* observed: "Mr. Johnson's comments, addressed to the nation over radio and television, were hardly in keeping with the American legal concept that an individual is innocent until proved guilty."

President Richard Nixon in a like vein volunteered conclusive sentiments on the guilt of Charles Manson in the Sharon Tate case. And former Mayor Sam Yorty of Los Angeles revealed part of the contents of a notebook found in the home of Sirhan Sirhan, Robert Kennedy's convicted assassin.

3. Much of the problem of governmental publicity originates, however, not with the President but with the departments and agencies under his authority. Congressional investigations may be another major source of prejudice. The McCarthy scourge, the television quiz scandals, investigations into organized crime and union activities, the Watergate affair and the grand jury investigation into the affairs of Vice President Spiro Agnew are examples. Administrative agencies have sometimes used publicity as a substitute for litigation, and it has been suggested that the press release is as important a weapon in adversary proceedings before regulatory agencies as the legal brief, and that newspaper publicity will come to occupy more of an attorney's attention than trial strategy. Rourke, Secrecy and Publicity 136 (1961). In legislative and executive investigations a witness, of course, sometimes needs publicity in his own defense. An essential characteristic of an open society is that there are means by which publicity can be organized to rebut a government charge. Witnesses and defendants need this protection because many of them cannot command the public platform available to a government official.

It was the late J. Edgar Hoover who announced that three men arrested in connection with the kidnaping of Frank Sinatra, Jr., had previous criminal records. Actually, their records contained only arrests, not convictions, and even that fact would not have been admissible in court if the defendants had elected not to take the witness stand.

4. In the Alger Hiss case, HUAC released to the press all but four of the 200 "pumpkin papers" while the grand jury was considering an indictment. After Hiss' first trial, which ended in a hung jury, then Congressman Richard M. Nixon, a committee member, attacked the presiding judge for being prejudiced against the prosecution.

While appearing before the House Legislative Oversight Subcommittee as a witness, Bernard Goldfine was referred

to by the Subcommittee chairman as "an individual who obviously has been getting by with illegal acts. * * *" Congressional Record—House, 17365, August 13, 1958.

5. Dave Beck, former president of the International Brotherhood of Teamsters, faced a plethora of prejudicial comment in his struggle to keep out of prison. Early in its investigation of Beck, the McClellan Committee announced that it had "produced 'rather conclusive' evidence of a tie-up between West Coast Teamsters and underworld bosses to monopolize vice in Portland, Oregon," and "to control Oregon's law enforcement machinery from a local level on up to the governor's chair." On March 22, 1957, newspapers quoted the Committee's statement that "$250,000 had been taken from Teamster funds * * * and used for Beck's personal benefit." Four days later Beck appeared before the Senate Committee to the accompaniment of such newspaper headlines as, "Beck Takes 5th Amendment, President of Teamsters 'Very Definitely' Thinks Records Might Incriminate Him." At his second appearance before the Committee, the chairman announced that "the committee has not convicted Mr. Beck of any crime, although it is my belief that he has committed many criminal offenses." For the problems presented by the free press-fair trial issue when the publicity arises from press coverage of a witness before a legislative committee, see *Beck v. Washington, 369 U.S. 541 (1962).*

6. Beck's successor, James Hoffa, provided the classic example of trial by official publicity. Hoffa was called before the McClellan Committee 48 times while indictments were being considered against him by one or more of 27 grand juries investigating his activities. "The victims were accused often by rumor and hearsay," said Edward Bennett Williams, Hoffa's attorney, of those who appeared before the Committee. "If they admitted the accusation, they faced conviction. If they denied it, they faced perjury. And if they stood silent, they faced contempt." Williams believes such extra-legal methods may undermine our traditional legal procedure, for, if a man cannot be convicted in court by due process of law, he can be convicted in the public mind through legislative investigation and the attendant publicity. Williams, One Man's Freedom (1962).

Robert F. Kennedy resigned as counsel for the McClellan Committee to conduct his brother's campaign for the Presidency. During the televised debates, candidate John F. Kennedy said, "I'm not satisfied when I see men like Jimmy Hoffa in charge of the largest union in the United States still free." On another occasion during the campaign, the future President declared, "In my judgment, an effective Attorney General with the present laws we now have on the books can remove Mr. Hoffa from office. And I assure you that both my brother and myself have a very deep conviction on the subject of Mr. Hoffa." Lens, *The Pursuit of Jimmy Hoffa,* Progressive (February, 1963) p. 35.

Then, while a grand jury was considering charges against Hoffa, Robert Kennedy on network television said, commenting on his brother's campaign statements, "I think it is an extremely dangerous situation at the present time; this man who has a background of corruption and dishonesty, has misused hundreds of thousands of dollars of union funds, betrayed the union membership, sold out the membership, put gangsters and racketeers in positions of power, and still heads the Teamsters Union."

Robert Kennedy became attorney general and the campaign—it has been called a vendetta—against Hoffa continued. After four unsuccessful attempts, Hoffa was finally convicted of jury tampering, a charge growing out of a 1962 Nashville

trial on conspiracy charges. The merits of the government's case are not our concern. Its tactics are.

Under the headline, "Government's Plan to Oust Hoffa by '64," the *Wall Street Journal* of June 11, 1962, reported: "Though their best-laid plans have gone awry in the past, Government investigators are confident they've devised a strategy grand enough in concept to insure the ouster of James R. Hoffa as Teamster president—not this year, but maybe next year, or the year after."

The Department of Justice issued deleterious press releases concerning Hoffa, and there was evidence of the attorney general giving assistance and encouragement to writers attacking Hoffa in *Life* and *Look* magazines while he was awaiting trial. The *Nation,* in its Sept. 7, 1964, issue, summarized the situation as "not whether Hoffa is saint or sinner, a good or an evil influence, guilty or innocent, but rather whether he is entitled to a fair trial." It is only fair, of course, to ask how much publicity in cases such as these was actually fomented by prominent figures like Hoffa and Beck in the belief that it might help rather than hinder their causes?

Assistant Attorney General Henry Peterson's role in pre-trial comments in the Agnew case will be debated for a long time to come.

These cases and other cases of prejudicial news coverage are discussed and documented in Gillmor, Free Press and Fair Trial 44–61, 62–78 (1966).

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## C. A LANDMARK CASE

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### IRVIN v. DOWD

366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

**Editorial Note:**

It was not until 1961 that the United States Supreme Court reversed a state criminal conviction solely on the grounds that prejudicial pre-trial publicity had made a fair trial before an impartial jury impossible. On April 8, 1955, parolee Leslie Irvin was arrested by Indiana State Police on suspicion of burglary and bad check writing. A few days later, the Vanderburgh county prosecutor and Evansville, Indiana, police issued press releases announcing that "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 examined under *voir dire,* 370 had said they believed Irvin guilty. His attorney had exhausted all of his peremptory challenges. [Note: After veniremen are sworn, a defendant is allowed an unlimited number of challenges for cause during the voir dire (literally "to speak the truth") examination in which prospective jurors are questioned to ascertain whether they are incompetent to serve by reason of having an interest in the cause or of having prejudice which might affect their impartiality with respect to the case. When a jury has been sworn, the defendant still has a stipulated number of peremptory challenges—usually from 15 to 20 in a criminal case.] When 12 jurors were finally accepted by the court, the defense attorney challenged all of them for bias, complaining particularly that four, in their *voir dire* examinations, had professed a belief in Irvin's guilt.

After six years of complex legal maneuvering and a successful prison break by Irvin, the case reached the United States Supreme Court for a second time. This time, in a unanimous decision, the Court considered Irvin's constitutional claims in terms of prejudicial news reporting and concluded that Irvin had not been accorded a fair and impartial trial, that he should have been granted a second change of venue, an Indiana statute

notwithstanding, and that, in the circumstances of the case, it was the duty of the United States Court of Appeals to evaluate independently the *voir dire* testimony of the jurors.

"It is not required," said Justice Tom CLARK, speaking for the Court, "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. * * * To hold that the mere existence of any preconceived notions as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

Of pre-trial prejudice in the case, Justice Clark observed for the 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 line-up 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 (the *modus operandi* of these robberies was compared to that of the murders and the similarity noted) * * * 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 Fri-

day when 27 of the 35 prospective jurors questioned were excused for holding biased pretrial opinions * * *." A few days later the feeling was described as "a pattern of deep and bitter prejudice against the former pipe-fitter." Spectator comments, as printed by the newspapers, were "my mind is made up"; "I think he is guilty"; and "he should be hanged."

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. A number admitted that, if they were in the accused's place in the dock and he in theirs on the jury with their opinions, they would not want him on a jury.

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. 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. Two-thirds of the jurors had an opinion that petitioner was guilty and were familiar with the material facts and circumstances involved, including the fact that other murders were attributed to him, some going so far as to say that it would take evidence to overcome their belief. One said that he "could not * * * give the defendant the benefit of the doubt that he is innocent." Another stated that he had a "somewhat" certain fixed opinion as to petitioner's guilt. No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. 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.

Hypersensitive to the possible effects of pretrial publicity Justice FRANKFURTER observed in a frequently referred to concurring opinion:

"Not a term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts—too often, as in this case, with the prosecutor's collaboration—exerting pressure upon potential jurors before trial and even during the course of the trial, thereby making it extremely difficult if not impossible to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court. Indeed 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."

Irvin's case was remanded to the District Court and he was retried by Indiana in a less emotional atmosphere. He was found guilty and sentenced to life imprisonment—a sentence for which, he confided to his attorney, he was grateful. See McDowell, *Mad Dog Killer: A Case Study of Pretrial Publicity* (M.A. Thesis, American University), 1968.

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## SOME DEVELOPMENTS AFTER IRVIN

### NOTES AND QUESTIONS

1. A week earlier, in a *per curiam* decision, *Janko v. United States, 366 U.S. 716 (1960),* [the case below is found at *281 F.2d 156, 8th Cir. 1960*], the Supreme Court, exercising its supervisory power to formulate and apply proper standards of enforcement of the criminal law in the federal courts, reversed a conviction, at least in part, because a single newspaper article in the St. Louis *Post-Dispatch* linked the defendant in an income tax evasion trial to a local "rackets boss" and described him as a "former convict."

Justice Frankfurter, in one of his many pointed warnings to the press, said in his concurring opinion in the *Irvin* case that *Janko* had been reversed because prejudicial publicity had poisoned the outcome, and, he added, "The Court has not yet decided 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."

2. In *People v. Van Duyne, 43 N.J. 369, 204 A.2d 841 (1964),* a Paterson, New Jersey, construction worker, Louis Van Duyne, was arrested in April, 1963, on a charge of beating his young wife to death. The story was not an unusual one. After visiting a number of taverns, the 27-year-old husband came to an apartment where his estranged wife was living, chased her out into an alley, and beat her to death. He was tried, convicted, and sentenced to life imprisonment.

Van Duyne appealed his conviction partly on the grounds of improper and prejudicial news stories having appeared in local newspapers while his jury was being drawn. One story in the October 7 issue of the Paterson *Evening News* duly noted that "the state is seeking the death sentence for the construction worker accused of brutally beating to death his estranged wife," but then added, "Van Duyne was nabbed in a phone booth a short time later. Police quoted him as saying, 'You've got me for murder. I don't desire to tell you anything'." Copies of the paper containing these potentially damaging statements were found in the jurors' assembly room.

Next morning, defense counsel brought to the attention of the court the fact that copies of the Paterson *Morning Call* were circulating among the jury panel. Included in the morning story was the following paragraph: "According to police, Van Duyne had been arrested at least 10 times and had once threatened to 'kill a cop.' Authorities reported that after his arrest Van Duyne beat up a man during the summer of 1962 and then threatened Detective William Toomen with a gun." The trial judge ordered the jurors to be locked up "to eliminate any further contact with the press."

On appeal, the New Jersey Supreme Court could not find in the record sufficient evidence to indicate that newspaper articles had in themselves prevented a fair trial or that they had so infected the minds of some of the jurors as to leave them biased against the defendant. Van Duyne's conviction was affirmed. See *People v. Van Duyne, 43 N.J. 368, 204 A.2d 841 (1964).*

## D. OSWALD AND THE WARREN REPORT

Interest in accommodating the two basic constitutional rights, so often in conflict, was heightened by the tragic death of President John F. Kennedy and the events which followed. Two weeks after the President's death, the American Civil Liberties Union concluded in a formal statement that had Lee Harvey Oswald lived, he would have been deprived of all opportunity for a fair trial due to the conduct of police and prosecution officials in Dallas, under pressure from the public and news media.

From the moment of his arrest until his murder two days later, the ACLU noted, Oswald was repeatedly tried and convicted in the news media through the public statements of Dallas law enforcement officials. Oswald's guilt was stated without qualification. The cumulative effect of these public pronouncements was to imprint indelibly on the public mind the conclusion that Oswald was indeed the slayer. The police had erred, the ACLU continued, in capitulating to the glare of publicity and public clamor, and in arranging Oswald's transfer from the city to the county jail to suit the convenience of the media. The media had erred in not curbing their pressing demands upon the police to publicize the case. Statement of the American Civil Liberties Union, *Civil Liberties Aspects of the Lee Harvey Oswald Case, and Developments Arising Out of the Assassination of President Kennedy,* December 6, 1963.

On December 1, 1963, seven Harvard Law School professors, in a letter to the *New York Times,* added the authority of their criticism of the public spectacle that had been permitted in the Dallas police station, "with its halls and corridors jammed with a noisy, milling throng of reporters and cameramen." "Precisely because the President's assassination was the ultimate in defiance of law it called for the ultimate in vindication of law. * * * It is ironic that the very publicity which had already made it virtually impossible for Oswald to be tried and convicted by a jury meeting constitutional standards of impartiality should, in the end, have made such trial unnecessary. * * * It is too frequently a feature of our process of criminal justice that it is regarded as a public carnival. And this reflects our general obsession that everybody has a right immediately to know and see everything, that reporters and TV cameras must be omnipresent, that justice must take a second place behind the public's immediate 'right to be informed' about every detail of a crime. * * *"

The *Times* itself expressed its regret in having initially referred to Oswald as the "murderer" without the attendant adjective "alleged."

The first Kennedy assassination was followed by the Warren Commission and its controversial Report, which reiterated the criticism. The *Report of the President's Commission on the Assassination of President John F. Kennedy* 201–242 and *passim* (1964) reprimanded the Dallas police department for its frantic press conferences conveying misinformation, hearsay evidence, and conjecture to the voracious news media. By divulging specific items of evidence linking Oswald to the killing of the President and Officer Tippit, the prospective jury, said the Commission, was given the opportunity of prejudging the very questions that would be raised at the trial. The police chief published the inadmissible fact that Oswald had refused to take a lie detector test, and he reported that "we are sure of our case." A police captain said that the case against Oswald was "cinched."

The Warren Commission also complained of the pandemonium of cameras, floodlights, microphones and cables

which choked the Dallas police station. Although the Dallas press normally did not take pictures of a prisoner without police permission, the rules were suspended for Oswald. When he appeared, newsmen turned their cameras on him, held microphones close to his face, and shouted questions at him.

Undoubtedly the public was interested in the investigation and the apprehension of a suspect, who appeared to have been acting alone, the Commission noted; but did the Commission appreciate the depth of public interest? Was there time to wait for sifting and winnowing of fact and error? It is terrifying to contemplate what forms fanatical segments of public opinion might have taken had there been a news blackout, or had only disconnected bits of information been released before the conclusion of Oswald's trial. Oswald's may indeed have been a special case, one of those infrequent, almost unique, but justifiable exceptions to the normal rules of procedure.

Bradley S. Greenberg and Edwin B. Parker, in their collection of essays and research reports on the assassination, [Greenberg and Parker (eds.), The Kennedy Assassination and the American Public: Social Communication (1965); see also Friendly and Goldfarb, Crime and Publicity 315–25 (1967)], find cumulative evidence to support the hypothesis that public fear during the dreadful hours following the President's death was minimized by quick, reassuring mass media reports. They conclude that "fear and anxiety might have been magnified to the point of hysteria" if news reports following the assassination had not been so reassuring and had not quickly informed people "that the functions of government were being carried out smoothly, that there was no conspiracy, and that there was no further threat."

After a year-long study, the Press-Bar Committee of the American Society of Newspaper Editors concluded in a spring, 1965 report that it could not accept the major assertions of the Warren Report concerning press performance. Whatever might be said about the propriety of police and prosecutors in Dallas in publicizing facts and falsehoods about the assassination and the suspect, the editors contended, the press performed as reporter, not instigator. To the extent that information purveyed by these officials was accurate, press reports were accurate. The press originated no false reports; what rumors there were stemmed logically—not illogically—from information made public by law enforcement officials. They were not originated by the press.

It would seem that the news media did a remarkably skillful and comprehensive job in providing the world with almost instant information on the events which were unfolding in Dallas, the basic outlines of which agreed with the Warren Report, which was 10 months in the making. Is it naive to overlook the high probability that rumor and dangerous word-of-mouth speculation would have rushed in to fill the vacuum left by incomplete news reporting? And did not this news reporting include the qualification, examination and squelching of rumors which might have contributed to wild public confusion?

Nevertheless, their badgering of the police, their aggressiveness in demanding information, and their ignoring of instructions designed to insure orderly procedures, require the news media to share in the responsibility for the failure in law enforcement which resulted in Oswald's death.

Oblivious to broader considerations of the role of the press in critical social situations, the Warren Report concluded:

"The promulgation of a code of professional conduct governing representatives of all news media would be welcome evidence that the press had profited

by the lesson of Dallas. The burden of insuring that appropriate action is taken to establish ethical standards of conduct for the news media must also be borne, however, by State and local governments, by the bar, and ultimately by the public. The experience in Dallas during November 22–24 is a dramatic affirmation of the need for steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial."

In immediate response to the Report, newspaper and broadcasting organizations, through a Joint Media Committee on News Coverage Problems, agreed to a voluntary pooling policy for the "orderly efficient and unobtrusive coverage" of those momentous events in which newsmen unintentionally become the main characters in the drama. James Reston believes, for example, that there were so many newsmen covering Khrushchev's visit to the United States in 1959 that they changed the course of events.

Another response to the Warren Report was the formation by the American Bar Association of the Advisory Committee on Fair Trial and Free Press under the chairmanship of Paul C. Reardon, associate justice of the Supreme Judicial Court of Massachusetts.

The trial of Jack Ruby was anticlimax. If the news media were sometimes flamboyant, so were Melvin Belli, Ruby's chief counsel for a time, and Judge Joe B. Brown, who presided over the trial. Belli initiated a propaganda campaign focusing on a series of autobiographical magazine articles about his client, and while appeals were pending he wrote a book about the trial. Judge Brown was working under contract on a Ruby book manuscript during the trial. And there were individual instances of press depredations. A book on the trial, Kaplan and Waltz, The Trial of Jack Ruby 291 (1965), tells a story of Alice Nichols, Ruby's desolate ex-girl friend who had testified in his behalf in Dallas:

"Just as she left the courtroom, the flashbulbs began exploding in her face, and this additional stress was enough to destroy her brittle composure. She broke into tears and struggled to get away from the pursuing photographers. She ran out of the courthouse and down the steps, followed by a shouting mob of some twenty photographers snapping pictures all the way. They had been told to get a picture of Ruby's girl friend and this they intended to do. Finally, about a half block from the courthouse, the strange procession ended when Miss Nichols, out of breath, permitted herself to be surrounded by her pursuers, who snapped picture after picture as she sobbed and shouted incoherently."

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## E. THE "CLASSIC" SHEPPARD CASE: THE BACKGROUND

In the wake of the Ruby case, Dr. Sam Sheppard brought a second petition to the United States Supreme Court claiming that the press had violated his constitutional right to a fair trial, and on November 15, 1965 the Court agreed to review his conviction.

1. Sheppard had been convicted of murder in the second degree for the bludgeon slaying of his wife and had been sentenced to life imprisonment. The conviction was affirmed by the Supreme Court of Ohio, *Sheppard v. Ohio, 165 Ohio St. 293, 135 N.E.2d 342 (1956)* and Sheppard appealed to the United States Supreme Court, which denied him certiorari on November 13, 1956.

In his first petition, Sheppard complained that on the evening before the trial began radio station WHK broadcast

a debate between Forrest Allen of the Cleveland *Press* and James Collins, city editor of the *Plain Dealer*, on the question of which paper deserved more credit for the indictment. He also complained about television interviews on the courthouse steps, as jurors were arriving, with Inspector Emeritus Robert Fabian of Scotland Yard—Fabian was stringing for the Scripps-Howard newspapers—and the judge, prosecutor, and a city detective. Bay Village, a Cleveland suburb, was overrun with reporters, photographers and television newsmen. Every move of the Sheppard family and of officers participating in the investigation was covered. Interviews with anyone who would talk about the case were widely disseminated.

"During the days before the trial," Sheppard's brief continued, "the court had erected inside the bar a long table for the use of reporters; one end of that table was within six inches of the last chair in the jury box; a microphone was installed in front of the witness chair connected to three loud speakers in the courtroom. * * * Assigned to newspaper, radio and television personnel were all the available rooms on the courthouse floor, including the assignment room, where cases are assigned to other courtrooms for trial. In these rooms the radio and television stations and newspapers had private telephone lines installed and all other necessary equipment to carry on their work. Rooms were also assigned to radio commentators on the third floor of the Courthouse. This is the floor on which the jury deliberating rooms are located. One such room located next to the room occupied by the jury that tried this case was used by Radio Station WSRS, and broadcasting continued from that room throughout the trial, and during the time the jury was in that room during recess, and during deliberations of the jury."

"Assembled in the hall outside the courtroom were photographers from the newspapers and television lights were stationed there during the entire trial." Sheppard's objections to being photographed were ignored. The jury was televised, one juror and her family in their home.

2. When all possible remedies in the state courts had been exhausted, Sheppard's attorneys were able to bring a *habeas corpus* proceeding in a federal court, based essentially on the argument that Sheppard's constitutional right to a fair trial had been violated by a hostile and irresponsible press.

In this petition it was charged that the trial judge had been prejudiced against Sheppard, and that his refusal to disqualify himself and to order a change of venue in the face of "massive prejudicial publicity" deprived the accused of a fair trial. An affidavit purported to show that the judge had told Dorothy Kilgallen of the New York *Journal-American*, shortly before the trial began, that Sam Sheppard "is guilty as hell."

3. This time United States District Court Judge Carl Weinman of Dayton agreed that Sheppard had not been accorded a fair trial, and in a stinging 86-page rebuke to the trial judge and Cleveland newspapers, he characterized the trial as a "mockery of justice." *Sheppard v. Maxwell, 231 F.Supp. 37 (S.D. Ohio, 1964).* Upon reviewing five columns of clippings submitted in evidence of Sheppard's appeal, the federal judge contended that inflammatory and prejudicial reporting by all Cleveland newspapers continually implied Sheppard's guilt. One "cheap sob-sister editorial" in the *Press,* he said, "literally screamed" for conviction.

Prejudice may also have been shown, Judge Weinman added, by the fact that the newspaper kept running pictures of trial Judge Edward Blythin, who was up

for reelection, and gave him pointed advice on how to conduct the trial. In Weinman's opinion, the judge should have ordered a change of venue; instead he handed over most of the courtroom space to a hostile press. And, contrary to settled law, he allowed Cleveland police to testify that Sheppard had refused to take a lie detector test, then failed to instruct the jury to disregard that testimony. Judge Blythin also failed to question the jury about a radio broadcast by Bob Considine which compared Sheppard—irrelevantly—with Alger Hiss. There was also evidence, overlooked by the trial judge, that two jurors had heard a broadcast by Walter Winchell in which a woman was quoted as declaring she was Sheppard's mistress.

"If ever there was a trial by newspapers," said Judge Weinman, "this was a perfect example."

4. Ten months later, the United States Court of Appeals, over a vigorous dissent, reversed the District Court and ordered Sheppard to resume serving his life sentence. *Sheppard v. Maxwell, 346 F.2d 707 (6th Cir. 1965).*

Appellate courts traditionally deal with questions of law, not fact; but in this case the appeals court took issue with the factual content of Judge Weinman's decision and his presumption that the jurors had ignored the trial judge's instructions not to read the newspapers.

In the meantime, Sheppard had married the svelte German divorcee who had corresponded with him while he was in prison, and who would divorce him a few years later.

Dr. Sheppard died on April 6, 1970 of undetermined causes after a brief third marriage to the 20-year-old daughter of a wrestler who had become Sheppard's manager as the former osteopath sought to shape a new career.

## SHEPPARD v. MAXWELL

384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

**Editorial Note:**

In his second appeal to the United States Supreme Court, Sheppard reiterated his contention that the press had so violated his constitutional right to a fair trial that no impartial jury could have been impaneled to try him. He claimed also that the trial judge had failed to protect jurors from outside influences and had assigned nearly all the seats in the courtroom to newspaper reporters.

The American and Ohio Civil Liberties Unions filed "friend of the court" briefs urging the constitutional invalidation of the conviction because the trial court had failed to protect the accused from the "inherently prejudicial publicity which saturated the community."

In their arguments before the Supreme Court on February 28, 1966, Sheppard's attorney, F. Lee Bailey, and Ohio's Attorney General (later U.S. Attorney-General) William B. Saxbe, differed in their views of the effects of press coverage on the trial, but they did agree that the responsibility for preventing "trial by newspaper" from contaminating juries should be borne by judges, prosecutors and policemen and not by the press. Bailey conceded that a decision in favor of Sheppard would mean that for the first time the Court had struck down a conviction for prejudicial newspaper publicity without proof that any juror had been affected by it. Saxbe countered that to allow Sheppard to attack his conviction with an emotional issue that obscured the overwhelming proof of guilt would be to subvert the jury system.

The managing editor of the *Chicago Daily News* at that time, Everett Norlander, was prophetic when he warned that "the press will be answering its critics for years to come on what it has done with this story."

Mr. Justice CLARK delivered the Opinion of the Court:

* * * Marilyn Sheppard, petitioner's pregnant wife, was bludgeoned to death in the upstairs bedroom of their lakeshore home in Bay Village, Ohio, a suburb of Cleveland. On the day of the tragedy, July 4, 1954, Sheppard pieced together for several local officials the following story: He and his wife had entertained neighborhood friends, the Aherns, on the previous evening at their home. After dinner they watched television in the living room. Sheppard became drowsy and dozed off to sleep on a couch. Later, Marilyn partially awoke him saying that she was going to bed. The next thing he remembered was hearing his wife cry out in the early morning hours. He hurried upstairs and in the dim light from the hall saw a "form" standing next to his wife's bed. As he struggled with the "form" he was struck on the back of the neck and rendered unconscious. On regaining his senses he found himself on the floor next to his wife's bed. He raised up, looked at her, took her pulse and "felt that she was gone." He then went to his son's room and found him unmolested. Hearing a noise he hurried downstairs. He saw a "form" running out the door and pursued it to the lake shore. He grappled with it on the beach and again lost consciousness. Upon his recovery he was laying face down with the lower portion of his body in the water. He returned to his home, checked the pulse on his wife's neck, and "determined or thought that she was gone." He then went downstairs and called a neighbor, Mayor Houk of Bay Village. The Mayor and his wife came over at once, found Sheppard slumped in an easy chair downstairs and asked, "What happened?" Sheppard replied: "I don't know but somebody ought to try to do something for Marilyn." Mrs. Houk immediately went up to the bedroom. The Mayor told Sheppard, "Get hold of yourself. Can you tell me what happened?" Sheppard then related the above-outlined events. After Mrs. Houk discovered the body, the Mayor called the local police, Dr. Richard Sheppard, petitioner's brother, and Aherns. The local police were the first to arrive. They in turn notified the Coroner and Cleveland police. Richard Sheppard then arrived, determined that Marilyn was dead, examined his brother's injuries, and removed him to the nearby clinic operated by the Sheppard family. When the Coroner, the Cleveland police and other officials arrived, the house and surrounding area were thoroughly searched, the rooms of the house were photographed, and many persons, including the Houks and the Aherns, were interrogated. The Sheppard home and premises were taken into "protective custody" and remained so until after the trial.

From the outset officials focused suspicion on Sheppard. After a search of the house and premises on the morning of the tragedy, Dr. Gerber, the Coroner, is reported—and it is undenied—to have told his men, "Well, it is evident the doctor did this, so let's go get the confession out of him." * * * The newspapers played up Sheppard's refusal to take a lie detector test and "the protective ring" thrown up by his family. Front-page newspaper headlines announced on the same day that "Doctor Balks At Lie Test; Retells Story." A column opposite that story contained an "exclusive" interview with Sheppard headlined: " 'Loved My Wife, She Loved Me,' Sheppard Tells News Reporters." The next day, another headline store disclosed that Sheppard had "again late yesterday refused to take a lie detector test" and quoted an Assistant County Attorney as saying that "at the end of a nine-hour questioning of Dr. Sheppard, I felt he was now ruling [a test] out completely." But subsequent newspaper articles report-

ed that the Coroner was still pushing Sheppard for a lie detector test. More stories appeared when Sheppard would not allow authorities to inject him with "truth serum."

On the 20th, the "editorial artillery" opened fire with a front-page charge that somebody is "getting away with murder." The editorial attributed the ineptness of the investigation to "friendships, relationships, hired lawyers, a husband who ought to have been subjected instantly to the same third degree to which any person under similar circumstances is subjected * * *." The following day, July 21, another page-one editorial was headed: "Why No Inquest? Do It Now, Dr. Gerber." The Coroner called an inquest the same day and subpoenaed Sheppard. It was staged the next day in a school gymnasium; the Coroner presided with the County Prosecutor as his advisor and two detectives as bailiffs. In the front of the room was a long table occupied by reporters, television and radio personnel, and broadcasting equipment. The hearing was broadcast with live microphones placed at the Coroner's seat and the witness stand. A swarm of reporters and photographers attended. Sheppard was brought into the room by police who searched him in full view of several hundred spectators. Sheppard's counsel were present during the three-day inquest but were not permitted to participate. When Sheppard's chief counsel attempted to place some documents in the record, he was forcibly ejected from the room by the Coroner, who received cheers, hugs, and kisses from ladies in the audience. Sheppard was questioned for five and one-half hours about his actions on the night of the murder, his married life, and a love affair with Susan Hayes. At the end of the hearing the Coroner announced that he "could" order Sheppard held for the grand jury, but did not do so.

Throughout this period the newspapers emphasized evidence that tended to incriminate Sheppard and pointed out discrepancies in his statements to authorities. At the same time, Sheppard made many public statements to the press and wrote feature articles asserting his innocence. During the inquest on July 26, a headline in large type stated: "Kerr [Captain of the Cleveland Police] Urges Sheppard's Arrest." In the story, Detective McArthur "disclosed that scientific tests at the Sheppard home have definitely established that the killer washed off a trail of blood from the murder bedroom to the downstairs section," a circumstance casting doubt on Sheppard's accounts of the murder. No such evidence was produced at trial. The newspapers also delved into Sheppard's personal life. Articles stressed his extra-marital love affairs as a motive for the crime. The newspapers portrayed Sheppard as a Lothario, fully explored his relationship with Susan Hayes, and named a number of other women who were allegedly involved with him. The testimony at trial never showed that Sheppard had any illicit relationships besides the one with Susan Hayes.

On July 28, an editorial entitled "Why Don't Police Quiz Top Suspect" demanded that Sheppard be taken to police headquarters. It described him in the following language:

"Now proved under oath to be a liar, still free to go about his business, shielded by his family, protected by a smart lawyer who has made monkeys of the police and authorities, carrying a gun part of the time, left free to do whatever he pleases * * *."

A front-page editorial on July 30 asked: "Why Isn't Sam Sheppard in Jail?" It was later titled "Quit Stalling—Bring Him In." After calling Sheppard "the most unusual murder suspect ever seen around these parts" the article said that "[e]xcept for some superficial question-

ing during Coroner Sam Gerber's inquest he has been scot-free of any official grilling * * *." It asserted that he was "surrounded by an iron curtain of protection [and] concealment."

That night at 10 o'clock Sheppard was arrested at his father's home on a charge of murder. He was taken to the Bay Village City Hall where hundreds of people, newscasters, photographers and reporters were awaiting his arrival. He was immediately arraigned—having been denied a temporary delay to secure the presence of counsel—and bound over to the grand jury.

The publicity then grew in intensity until his indictment on August 17. Typical of the coverage during this period is a front-page interview entitled: "DR. SAM: 'I Wish There Was Something I Could Get Off My Chest—but There Isn't.'" Unfavorable publicity included items such as a cartoon of the body of a sphinx with Sheppard's head and the legend below: "'I Will Do Everything In My Power to Help Solve This Terrible Murder.'—Dr. Sam Sheppard." Headlines announced, *inter alia,* that: "Doctor Evidence is Ready for Jury," "Corrigan Tactics Stall Quizzing." "Sheppard 'Gay Set' Is Revealed By Houk," "Blood Is Found In Garage," "New Murder Evidence Is Found, Police Claim," "Dr. Sam Faces Quiz At Jail On Marilyn's Fear Of Him." * * *

With this background the case came on for trial two weeks before the November general election at which the chief prosecutor was a candidate for municipal judge and the presiding judge, Judge Blythin, was a candidate to succeed himself. Twenty-five days before the case was set, a list of 75 veniremen were called as prospective jurors. This list, including the addresses of each venireman, was published in all three Cleveland newspapers. As a consequence, anonymous letters and telephone calls, as well as calls from friends, regarding the impending prosecution were received by all of the prospective jurors. The selection of the jury began on October 18, 1954.

The courtroom in which the trial was held measured 26 by 48 feet. A long temporary table was set up inside the bar, in back of the single counsel table. It ran the width of the courtroom, parallel to the bar railing, with one end less than three feet from the jury box. Approximately 20 representatives of newspapers and wire services were assigned seats at this table by the court. Behind the bar railing there were four rows of benches. These seats were likewise assigned by the court for the entire trial. The first row was occupied by representatives of television and radio stations, and the second and third rows by reporters from out-of-town newspapers and magazines. One side of the last row, which accommodated 14 people, was assigned to Sheppard's family and the other to Marilyn's. The public was permitted to fill vacancies in this row on special passes only. Representatives of the news media also used all the rooms on the courtroom floor, including the room where cases were ordinarily called and assigned for trial. Private telephone lines and telegraphic equipment were installed in these rooms so that reports from the trial could be speeded to the papers. Station WSRS was permitted to set up broadcasting facilities on the third floor of the courthouse next door to the jury room, where the jury rested during recesses in the trial and deliberated. Newscasts were made from this room throughout the trial, and while the jury reached its verdict.

On the sidewalk and steps in front of the courthouse, television and newsreel cameras were occasionally used to take motion pictures of the participants in the trial, including the jury and the judge. Indeed, one television broadcast carried a staged interview of the judge as he entered the courthouse. In the corridors outside the courtroom there was a host of

photographers and television personnel with flash cameras, portable lights and motion picture cameras. This group photographed the prospective jurors during selection of the jury. After the trial opened, the witnesses, counsel, and jurors were photographed and televised whenever they entered or left the courtroom. Sheppard was brought to the courtroom about 10 minutes before each session began; he was surrounded by reporters and extensively photographed for the newspapers and television. A rule of court prohibited picture-taking in the courtroom during the actual sessions of the court, but no restraints were put on photographers during recesses, which were taken once each morning and afternoon, with a longer period for lunch. * * *

The jurors themselves were constantly exposed to the news media. Every juror, except one, testified at *voir dire* to reading about the case in the Cleveland papers or to having heard broadcasts about it. Seven of the 12 jurors who rendered the verdict had one or more Cleveland papers delivered in their home; the remaining jurors were not interrogated on the point. Nor were there questions as to radios or television sets in the talesmen's homes, but we must assume that most of them owned such conveniences. As the selection of the jury progressed, individual pictures of prospective members appeared daily. During the trial, pictures of the jury appeared over 40 times in the Cleveland papers alone. The court permitted photographers to take pictures of the jury in the box, and individual pictures of the members in the jury room. One newspaper ran pictures of the jurors at the Sheppard home when they went there to view the scene of the murder. Another paper featured the home life of an alternate juror. The day before the verdict was rendered—while the jurors were at lunch and sequestered by two bailiffs—the jury was separated into two groups to pose for photographs which appeared in the newspapers.

We now reach the conduct of the trial. While the intense publicity continued unabated, it is sufficient to relate only the more flagrant episodes:

1. On October 9, 1954, nine days before the case went to trial, an editorial in one of the newspapers criticized defense counsel's random poll of people on the streets as to their opinion of Sheppard's guilt or innocence in an effort to use the resulting statistics to show the necessity for change of venue. The article said the survey "smacks of mass jury tampering," called on defense counsel to drop it, and stated that the bar association should do something about it. It characterized the poll as "non-judicial, non-legal, and nonsense." The article was called to the attention of the court but no action was taken.

2. On the second day of *voir dire* examination a debate was staged and broadcast live over WHK radio. The participants, newspaper reporters, accused Sheppard's counsel of throwing roadblocks in the way of the prosecution and asserted that Sheppard conceded his guilt by hiring a prominent criminal lawyer. Sheppard's counsel objected to this broadcast and requested a continuance, but the judge denied the motion. When counsel asked the court to give some protection from such events, the judge replied that "WHK doesn't have much coverage," and that "[a]fter all, we are not trying this case by radio or in newspapers or any other means. We confine ourselves seriously to it in this courtroom and do the very best we can."

3. While the jury was being selected, a two-inch headline asked: "But Who Will Speak for Marilyn?" The front-page story spoke of the "perfect face" of the accused. "Study that face as long as you want. Never will you get from it a hint of what might be the answer

* * *." The two brothers of the accused were described as "Prosperous, poised. His two sisters-in-law. Smart, chic, well-groomed. His elderly father. Courtly, reserved. A perfect type for the patriarch of a staunch clan." The author then noted Marilyn Sheppard was "still off stage," and that she was an only child whose mother died when she was very young and whose father had no interest in the case. But the author—through quotes from Detective Chief James McArthur—assured readers that the prosecution's exhibits would speak for Marilyn. "Her story," McArthur stated, "will come into this courtroom through our witnesses." * * *

4. As has been mentioned, the jury viewed the scene of the murder on the first day of the trial. Hundreds of reporters, cameramen and onlookers were there, and one representative of the news media was permitted to accompany the jury while they inspected the Sheppard home. The time of the jury's visit was revealed so far in advance that one of the newspapers was able to rent a helicopter and fly over the house taking pictures of the jurors on their tour.

* * *

6. On November 24, a story appeared under an eight-column headline: "Sam Called A 'Jekyll-Hyde' By Marilyn, Cousin To Testify." It related that Marilyn had recently told friends that Sheppard was a "Dr. Jekyll and Mr. Hyde" character. No such testimony was ever produced at the trial. The story went on to announce: "The prosecution has a 'bombshell witness' on tap who will testify to Dr. Sam's display of fiery temper —countering the defense claim that the defendant is a gentle physician with an even disposition." Defense counsel made motions for change of venue, continuance and mistrial, but they were denied. No action was taken by the court.

7. When the trial was in its seventh week, Walter Winchell broadcasted over WXEL television and WJW radio that Carole Beasley, who was under arrest in New York City for robbery, had stated that, as Sheppard's mistress, she had borne him a child. The defense asked that the jury be queried on the broadcast. Two jurors admitted in open court that they had heard it. The judge asked each: "Would that have any effect upon your judgment?" Both replied, "No." This was accepted by the judge as sufficient; he merely asked the jury to "pay no attention whatever to that type of scavenging * * * Let's confine ourselves to this courtroom, if you please." * * *

8. On December 9, while Sheppard was on the witness stand he testified that he had been mistreated by Cleveland detectives after his arrest. Although he was not at the trial, Captain Kerr of the Homicide Bureau issued a press statement denying Sheppard's allegations which appeared under the headline: " 'Bare-faced Liar,' Kerr Says of Sam." Captain Kerr never appeared as a witness at the trial.

9. After the case was submitted to the jury, it was sequestered for its deliberations, which took five days and four nights. After the verdict, defense counsel ascertained that the jurors had been allowed to make telephone calls to their homes every day while they were sequestered at the hotel. Although the telephones had been removed from the jurors' rooms, the jurors were permitted to use the phones in the bailiff's rooms. The calls were placed by the jurors themselves; no record was kept of the jurors who made calls, the telephone numbers or the parties called. The bailiffs sat in the room where they could hear only the jurors' end of the conversation. The court had not instructed the bailiffs to prevent such calls. By a subsequent motion, defense counsel urged that this ground alone warranted a new trial, but the motion was overruled and no evidence was taken on the question.

The principle that justice cannot survive behind walls of silence has long been reflected in the "Anglo-American distrust for secret trials." In re Oliver, 333 U.S. 257, 268 (1948). 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 Mr. 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. * * * [T]he Sheppard jurors were subjected to newspaper, radio and television coverage of the trial while not taking part in the proceedings. They were allowed to go their separate ways outside of the courtroom, without adequate directions not to read or listen to anything concerning the case. * * * 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. * * * Sheppard stood indicted for the murder of his wife; the State was demanding the death penalty. For months the virulent publicity about Sheppard and the murder had made the case notorious. Charges and countercharges were aired in the news media besides those for which Sheppard was called to trial. In addition, only three months before trial, Sheppard was examined for more than five hours without counsel during a three-day inquest which ended in a public brawl. The inquest was televised live from a high school gymnasium seating hundreds of people. Furthermore, the trial began two weeks before a hotly contested election at which both Chief Prosecutor Mahon and Judge Blythin were candidates for judgeships.

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.

At a temporary table within a few feet of the jury box and counsel table sat some 20 reporters staring at Sheppard and taking notes. The erection of a press table for reporters inside the bar is unprecedented. 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. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial. And the record reveals constant commotion within the bar. Moreover, the judge gave the throng of newsmen gathered in the corridors of the courthouse absolute free rein. Participants in the trial, including the jury, were forced to run a gantlet of reporters and photographers each time they entered or left the courtroom. The total lack of consideration for the privacy of the jury was demonstrated by the assignment to a broadcasting station of space next to the jury room on the floor above the courtroom, as well as the fact that jurors were allowed to make telephone calls during their five-day deliberation.

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.

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. For instance, the judge belatedly asked them not to handle and photograph trial exhibits laying on the counsel table during recesses.

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. Although the witnesses were barred from the courtroom during the trial the full *verbatim* testimony was available to them in the press. This completely nullified the judge's imposition of the rule.

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. That the judge was aware of his responsibility in this respect may be seen from his warning to Steve Sheppard, the accused's brother, who had apparently made public statements in an attempt to discredit testimony for the prosecution.
* * *

Defense counsel immediately brought to the court's attention the tremendous amount of publicity in the Cleveland press that "misrepresented entirely the testimony" in the case. 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. The exclusion of such evidence in court is rendered meaningless when a news media (sic) makes it available to the public.
* * *

The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge's failure to take any action. Effective control of these sources—concededly within the court's power—might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity, at least after Sheppard's indictment.

More specifically, the trial court might well have proscribed extra-judicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. See State v. Van Duyne, 43 N.J. 369, 389, 204 A.2d 841, 850 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements. Being advised of the great public interest in the case, the mass coverage of the press, and the potential prejudicial impact of publicity, 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 broadcasted prejudicial stories, could have been warned as to the impropriety of publishing material not introduced in the proceedings. The judge was put on notice of such events by defense counsel's complaint about the WHK broadcast on the second day of

trial. 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. Had the judge, the other officers of the court, and the police placed the interest of justice first, the news media would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom—not pieced together from extra-judicial statements.

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. 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.

Since the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom, we must reverse the denial of the habeas petition. 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.

Mr. Justice BLACK dissents.

### NOTES AND QUESTIONS

1. At his second trial, Samuel Sheppard was acquitted. And strict rules set down by the trial judge surrounded that trial. See *Editor & Publisher* (Oct. 15, 1966) p. 10. A damage suit which he later filed against Louis B. Seltzer, retired editor of the Cleveland *Press,* the E. W. Scripps Co., publisher of the newspaper, and Cuyahoga County Coroner Samuel Gerber, alleging that they had conspired to accuse him of his first wife's murder, was thrown out of court.

2. There has been much puzzling conjecture on what Justice Clark intended his *Sheppard* opinion to mean. Some jurists interpreted it as a green light for use of the contempt power against offending news media, Cipes, *Controlling Crime News, Sense or Censorship?* Atlantic (August, 1967) p. 49, while others used it as an excuse to deny all court and crime news to reporters. On balance, which interpretation seems more persuasive? Some newsmen, on the other hand,

took comfort in the view that the Warren Commission meant only to castigate the police, and Justice Clark in *Sheppard* only the trial court judge. Fichenberg, *The Price of Liberty,* 32 Albany L.Rev. 317 (1968).

Justice Clark, in rather unsuccessful attempts at clarification, has emphatically denied any intention of reviving the contempt power, *Fair Trial & Free Press,* a dialogue sponsored by the Kansas Bar Association, (May 3, 1967) and published by the Freedom of Information Center, University of Missouri, 49 (June, 1967); or of approving secret court hearings, silencing lawyers, or bringing other sanctions against the press, Denver *Post,* October 26, 1966, p. 1. He has been quoted as saying that the *Sheppard* guidelines need not even be followed by the courts, Cipes, *Controlling Crime News, Sense or Censorship?* supra 49. And he has declared that the "fair trial-free press issue is one that has been magnified way out of proportion. I see no collision, no collision whatsoever, between a fair trial and a free press." *Fair Trial & Free Press,* supra at 49.

While Clark's cryptograms might not be very helpful, his *Sheppard* opinion stands. It would require more self-delusion than one generally finds in newsmen to interpret that opinion as not being critical of the press.

What the Court does say in *Sheppard* is that it will judge, using its own non-empirical standards, the point beyond which prejudice must not go in a criminal trial if a conviction is to remain valid. "Our system of law," the Court had already said in *In re Murchison, 349 U.S. 133, 136 (1955),* and reiterated in *Sheppard,* "has always endeavored to prevent even the probability of unfairness." So it is a question of probability in the Court's own subjective measure of that concept. See Herndon, *Sheppard v. Maxwell: the Sufficiency of Probability,* N.D.L.Rev. (Fall, 1966), p. 1.

3. *Sheppard* also delivers a broad mandate to trial judges to be masters of their own courtrooms. Do you think Judge Blythin had met this obligation? Trial courts, Clark directed, must take strong measures to ensure that the balance is never weighed against the accused. As a set of guidelines to the courts and a remonstration to the press, the importance of the *Sheppard* case cannot be over-emphasized.

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## F. THE KATZENBACH RULES

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**Editorial Note:**

A development which might have settled the conflict between press and bar had it received continued attention was the promulgation by the Attorney General of the United States of the Katzenbach rules in an April 16, 1965, address to the American Society of Newspaper Editors. Because of the neat balance they strike between permissible publication and restraint, the federal guidelines have evoked none of the discord associated with the Reardon Report and other proposals. Moreover they have become the basis of bilateral press-bar codes and other articles of agreement in a number of localities. For example, the Recommended Guidelines of the Fair Trial-Free Press Council of Minnesota Relating to Adult Criminal Proceedings are almost a duplicate of the Katzenbach rules. They have been reprinted on a wallet-sized card and distributed by the Council to hundreds of police officers, attorneys, and newsmen in the state. Since press and bar representatives could not agree on criminal records, no recommendations are made concerning them in the Minnesota Guidelines.

**OFFICE OF THE ATTORNEY GENERAL**

Washington, D. C.

Statement of Policy Concerning the Release of Information by Personnel of the Department of Justice Relating to Criminal Proceedings (28 CFR § 50.2)

The availability to news media of information in criminal cases is a matter which has become increasingly a subject of concern in the administration of criminal justice. The purpose of this statement is to formulate specific guidelines for the release of such information by personnel of the Department of Justice.

While the release of information for the purpose of influencing a trial is, of course, always improper, there are valid reasons for making available to the public information about the administration of the criminal laws. The task of striking a fair balance between the protection of individuals accused of crime and public understanding of the problems of controlling crime depends largely on the exercise of sound judgment by those responsible for administering the criminal laws and by representatives of the press and other media.

Inasmuch as the Department of Justice has generally fulfilled its responsibilities with awareness and understanding of the competing needs in this area, this statement, to a considerable extent, reflects and formalizes the standards to which representatives of the Department have adhered in the past. Nonetheless, it will be helpful in ensuring uniformity of practice to set forth the following guidelines for all personnel of the Department of Justice.

Because of the difficulty and importance of the questions they raise, it is felt that some portions of the matters covered by this statement, such as the authorization to make available federal conviction records and a description of items seized at the time of arrest, should be the subject of continuing review and consideration by the Department on the basis of experience and suggestions from those within and outside the Department.

1. These guidelines shall apply to the release of information to news media from the time a person is arrested or is charged with a criminal offense until the proceeding has been terminated by trial or otherwise.

2. At no time shall personnel of the Department of Justice furnish any statement or information for the purpose of influencing the outcome of a defendant's trial.

3. Personnel of the Department of Justice, subject to specific limitations imposed by law or court rule or order, may make public the following information:

(A) The defendant's name, age, residence, employment, marital status, and similar background information.

(B) The substance or text of the charge, such as a complaint, indictment, or information.

(C) The identity of the investigating and arresting agency and the length of the investigation.

(D) The circumstances immediately surrounding an arrest, including the time and place of arrest, resistance, pursuit, possession and use of weapons, and a description of items seized at the time of arrest.

Disclosures should include only incontrovertible, factual matters, and should not include subjective observations. In addition, where background information or information relating to the circumstances of an arrest would be highly prejudicial and where the release thereof would serve no law enforcement function, such information should not be made public.

4. Personnel of the Department shall not volunteer for publication any infor-

mation concerning a defendant's prior criminal record. However, this is not intended to alter the Department's present policy that, since federal criminal conviction records are matters of public record permanently maintained in the Department, this information may be made available upon specific inquiry.

5. Because of the particular danger of prejudice resulting from statements in the period approaching and during trial, they ought strenuously to be avoided during that period. Any such statement or release shall be made only on the infrequent occasion when circumstances absolutely demand a disclosure of information and shall include only information which is clearly not prejudicial.

6. The release of certain types of information generally tends to create dangers of prejudice without serving a significant law enforcement function. Therefore, personnel of the Department should refrain from making available the following:

(A) Observations about a defendant's character.

(B) Statements, admissions, confessions, or alibis attributable to a defendant.

(C) References to investigative procedures, such as fingerprints, polygraph examinations, ballistic tests, or laboratory tests.

(D) Statements concerning the identity, credibility, or testimony of prospective witnesses.

(E) Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial.

7. Personnel of the Department of Justice should take no action to encourage or assist news media in photographing or televising a defendant or accused person being held or transported in federal custody. Departmental representatives should not make available photographs of a defendant unless a law enforcement function is served thereby.

8. This statement of policy is not intended to restrict the release of information concerning a defendant who is a fugitive from justice.

9. Since the purpose of this statement is to set forth generally applicable guidelines, there will, of course, be situations in which it will limit release of information which would not be prejudicial under the particular circumstances. If a representative of the Department believes that in the interest of the fair administration of justice and the law enforcement process information beyond these guidelines should be released in a particular case, he shall request the permission of the Attorney General or the Deputy Attorney General to do so.

Nicholas deB. Katzenbach
ATTORNEY GENERAL

### NOTES AND QUESTIONS

1. The special appeal of the Katzenbach rules is their flexibility, the door left open for information, such as evidence seized at the time of arrest, which, though prejudicial, may reflect important aspects of the public interest. For example, the circumstances of a person's arrest may involve information vital to the public. An announcement that a man has been arrested on a forged securities charge tells little. But the public interest is served by disclosing as well that millions of dollars in worthless securities were seized at the time of arrest, that others were sold to unknown victims, and that still others are loose somewhere in the marketplace.

2. Prior criminal records are problematic, but Katzenbach noted that public scrutiny requires information about what kinds of people are becoming involved in the criminal process. Is the problem one of first offenders or repeaters? Does the

arrest of a repeated offender result in a speedy trial—or are there needless delays? Was there undue leniency in prior treatment? Is the arrest a mere harassment of a prior offender? "These are social questions," said Katzenbach, "which the public has a right, and even a duty, to consider."

The former Attorney General said his department would not volunteer criminal conviction records, but would respond to a legitimate inquiry having to do with convictions on federal offenses.

The Katzenbach rules were received favorably by important segments of the press, and they have been adopted by other federal departments and bureaus.

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## G. THE REARDON REPORT

**Editorial Note:**

Hard on the heels of *Sheppard* came the report of the American Bar Association's Advisory Committee on Fair Trial and Free Press, the much discussed Reardon Report. The Committee began its work in 1965 as part of a larger bar association project on minimum standards for criminal justice. Like *Sheppard*, the Committee was given its forward thrust by the recommendation of the Warren Commission that efforts be made "to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial."

The Reardon Report concluded that there are a substantial number of cases in which the dissemination of information during the critical pre-trial and trial periods poses a significant threat to the fairness of the trial. The principal sources of this information are attorneys and law enforcement officials, and the Committee's major proposals were to restrict these officers of the court in their communications with newsmen. The only punitive recommendation relating directly to the press was that the contempt power be exercised against any person who disseminates extrajudicial statements wilfully designed to affect the outcome of a trial during the course of the trial, or who violates a valid order not to reveal information disclosed at a closed judicial hearing.

The Committee doffed its hat to the substantial contributions made by the media to the administration of criminal justice. Its recommendations were intended primarily to guide bar and bench, and its references to the press were at least moderate in tone, if not in implication.

For a number of years the free press-fair trial dialogue focused squarely on the Reardon Report (American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating to Fair Trial and Free Press*, Tentative Draft, December 1966). The tentative draft included an excellent background commentary on the issue and a set of specific proposals for new standards. This was followed in December 1967 by a Proposed Final Draft which was approved by the ABA House of Delegates on February 19, 1968. The document ought to be read in its entirety. Briefly it recommended that:

1. Lawyers be restrained from making extrajudicial comments before or during a grand jury investigation or trial or, after a trial, before imposition of a sentence on pain of judicial or bar association reprimand, suspension from practice, or disbarment. Similar rules would apply to law enforcement officers and all judicial employees.

2. Prohibited extrajudicial comment would include

(a) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or

reputation of the accused, except factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, any information necessary to aid in apprehension or to warn the public of dangers the accused may present;

(b) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement, except to announce that the accused denies the charges made against him;

(c) The performance of any examination or tests or the accused's refusal or failure to submit to an examination or test;

(d) The identity, testimony, or credibility of prospective witnesses, except to announce the identity of the victim;

(e) The possibility of a plea of guilty to the offense charged or a lesser offense;

(f) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

3. It would be appropriate for a lawyer or law enforcement officer

(a) To announce the fact and circumstances of arrest, including the time and place of arrest, resistance, pursuit, and use of weapons;

(b) To announce the identity of the investigating and arresting officer or agency and the length of the investigation;

(c) To make an announcement, at the time of seizure of any physical evidence other than a confession, admission, or statement, which is limited to a description of the evidence seized;

(d) To disclose the nature, substance, or text of the charge, including a brief description of the offense charged;

(e) To quote from or refer without comment to public records of the court in the case;

(f) To announce the scheduling or result of any stage in the judicial process;

(g) To request assistance in obtaining evidence.

4. Judges should refrain from any conduct or the making of any statements that may tend to interfere with the right of the people or of the defendant to a fair trial.

5. The public and the press would be excluded from all pretrial hearings on motion of the defendant unless the presiding officer determines that there would be no interference with a fair trial.

6. Where there is a threatened interference with the right to a fair trial motions should be granted for change of venue or venire, continuance, waiver of the right to trial by jury, sequestration of the jury, or a new trial.

7. Prospective jurors should be examined outside the presence of other jurors and if they have been exposed to and remember reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters that may be inadmissible in evidence, or substantial amounts of inflammatory material, they should be subject to challenge for cause without regard to their state of mind.

8. If the jury is not sequestered, the defendant should be permitted to move that the public and the press be excluded from any portion of the trial that takes place outside the presence of the jury.

9. The court should supervise the use to be made of the courtroom by newsmen.

10. The contempt power should be used against any person who, knowing that a criminal trial by jury is in progress or that a jury is being selected, dissemi-

nates by any means of public communication an extrajudicial statement relating to the defendant or to the issues in the case that goes beyond the public record of the court in the case, that is *willfully designed by that person to affect the outcome of the trial*, and that seriously threatens to have such an effect.

In spite of the veiled threat in the final recommendation, the standards were directed primarily to lawyers and court and law enforcement personnel. In an information manual published subsequent to the Report, the Committee emphasized that its new rules did not intend to restrict investigations by newsmen or publications developed through their own initiative, or to inhibit criticism of the courts. Nor do they challenge the right of the media to publish prior criminal records when that information is part of a public record. American Bar Association Legal Advisory Committee on Fair Trial and Free Press, *The Rights of Fair Trial and Free Press,* (1969), pp. 15–19.

### NOTES AND QUESTIONS

Issues Raised in the Report

1. In spite of its considerable resources, prestige, and what might have been rare access to real and prospective jurors, the Reardon Report shows little evidence of any systematic analysis of the crucial, cause-effect relationship between news reports and jury verdicts. Although the Committee was impatient to see its recommendations implemented, it was not oblivious to the relevance of empirical evidence. In its speculation on juror preconceptions and the efficacy of judicial instructions, it noted that "there are no determinative empirical data that will supply ready answers to these questions, and further research along these lines would appear to be feasible and desirable." Reardon Report, Tentative Draft, p. 55.

Whether intended or not, the Committee's analysis left the impression that all crime and court news is, by definition, prejudicial. If so, does it necessarily follow that lawyers and police, therefore, should be banned from releasing, under any circumstances, information relating to prior records, confessions, test results, witnesses, pleas, and comments concerning the merits of the case? Should there be a ban on pictures and interviews, unless requested by the accused? A general inference drawn by the Committee is that the American jury is seriously deficient in fortitude and fairmindedness. Reardon Report, Tentative Draft, pp. 54–67. For a general critique of the Report see Gillmor, *The Reardon Report: A Journalist's Assessment,* 1967 Wis.L.Rev. 215.

Judicial Remedies

2. The Committee recommended, in language suitable for legislative drafting, liberalization of the use of traditional judicial remedies. For example, in considering a motion for a change of venue or a continuance, courts are urged to declare admissible "qualified public opinion surveys * * * as well as other materials having probative value," Reardon Report, Final Draft, p. 8, a category of empirical evidence about which courts have generally been unenthusiastic.

The Committee would also make absolute a defendant's right to waive jury trial in a criminal case when there is reason to believe that prejudicial information has impaired the likelihood of a fair trial. Veniremen would be expected to qualify for jury duty on a higher plane of impartiality than has been the custom, and they would be examined outside the presence of their peers. And examination of a juror, both before and during a trial, would focus on the significant possibility that he has been prejudiced by what he has heard or read about a case. Reardon Report, Final Draft, pp. 9, 10.

But won't the eligibility of a juror continue to be a function of an attorney's

partisanship? Theoretically, the selection of jurors is geared to finding bias-free persons. Strong opinions on the case would disqualify. "Actually, of course, we know that the selection proceeds on radically different grounds, each attorney scrupulously dedicated to the selection of those jurors whose value systems will most favor his client's cause." Schur, *Scientific Method and the Criminal Trial Decision,* 25 Social Research 173 (1958). The Chicago Jury Project found that 60 per cent of the lawyers' *voir dire* time was spent in indoctrinating jurors and only 40 per cent in asking questions designed to separate partial from impartial jurors. Broeder, *The University of Chicago Jury Project*, 38 Neb.L.Rev. 744 (1959).

The Committee also recommended a change of venire (jurors brought in from another locality) under conditions of local prejudice and, justifiably, without a showing of actual prejudice to the parties involved. Either party would be permitted to move for a sequestration or locking up of the jury without the jury's knowing which side initiated the motion—a motion which can be irritating to jurors. Witnesses could also be sequestered, prior to their appearance, when it appeared likely that they would be exposed to prejudicial reports. Reardon Report, Final Draft, pp. 10–11.

What seems to concern the press most is the rigidity of the Reardon rules. Granted that alleged facts may turn out to be false, that confessions may later be ruled inadmissible, that witnesses may change their stories on the stand, and that photographs may interfere with a later determination of identification; it remains highly doubtful that a judicially imposed blackout on all such information, *under all circumstances and in all cases,* serves the bests interests of either the defendant or the public.

Pre-trial Coverage

3. It is on the question of pre-trial coverage that press and bar are farthest apart. The Reardon Committee's own data support this contention. No news media personnel were encountered in a survey of editors who were willing to accept direct external restrictions on the media, Reardon Report, Tentative Draft, p. 178; and most said they would continue to seek restricted pre-trial information from police under certain circumstances, Reardon Report, Tentative Draft, p. 180. And it is safe to conclude, as the Reardon Report recognized, that the press will never voluntarily accept a broad prohibition against the publication of criminal records, which are a matter of public record anyway. There must be room for editorial judgment on these matters, the press believes, faulty though that judgment may be on occasion.

The press is also opposed to its being excluded from pre-trial hearings or arguments heard outside the presence of the jury on motion of the accused, Reardon Report, Final Draft, pp. 7, 11, since most cases never get beyond a preliminary hearing.

The Contempt Penalty

4. Most repugnant to the press is the subtle—and frequently disavowed—revival of the contempt power directed by the Report. Compare the Committee's denial that it is recommending an "expanded use of the contempt power against the news media," Reardon, Tentative Draft, pp. 69–70, with its belief that it is "desirable, and a valuable supplement to other steps recommended in this report, to provide for limited use of the contempt power against a person responsible for dissemination of potentially prejudicial material. * * *" Id. at 151.

It seems clear that this punishment is intended for editors, for the Committee states that it "does not believe that in the

limited circumstances here described, a conviction for contempt would abridge freedom of speech or of the press," Id. at 153. A similar interpretation of the Report is made by Cooper, *The Rationale for the ABA Recommendations,* 42 Notre Dame Law. 863 (1967); and Pemberton, *Constitutional Problems in Restraint of the Media*, 42 Notre Dame Law. 881 (1967).

Is the committee justified in its reliance on *Wood v. Georgia, 370 U.S. 375, (1962),* and *Sheppard v. Maxwell, 384 U.S. 333 (1966),* for its view that the Supreme Court would be willing to sustain the exercise of the contempt power in appropriate cases?

A contemporaneous report by a special committee of the Bar of the City of New York, chaired by Federal Judge Harold Medina, differed with the Reardon Committee on the question of contempt. Such use of the contempt power, Medina concluded, would be unconstitutional. He also doubted whether the courts have the authority over law enforcement officers in the pre-trial period that Reardon presumed. (*State v. Van Duyne,* 204 A.2d 841 (N.J.1964) and *State v. Thompson, 139 N.W.2d 490 (Minn. 1966)* agreed with Medina that courts lacked authority over police in the pre-trial period.) Medina proposed fortified restraints by the bar on its own membership, and self-regulatory codes for police and press. Special Committee on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York, *Freedom of the Press and Fair Trial* (1967).

It is not clear in the Reardon Report whether a *reasonable tendency* or *clear and present danger* test is to be used to trigger a contempt citation. In the meantime, the only safe interpretation for the press is that the Committee is recommending revival of that capricious and, in its own terms, universal power to cite for constructive contempt, a jurisdiction permitting judges to exercise indirectly editorial prerogatives that have been denied them at least since 1941. Reardon Report, Tentative Draft, p. 152. *Bridges v. California, 314 U.S. 252 (1941),* established the clear and present danger test for constructive or out-of-court contempt citations. It is of little comfort that procedural safeguards such as adequate notice, full and fair hearing, trial by jury, and the right of appeal would be observed "to the maximum extent possible." Reardon Report, Tentative Draft, p. 97.

It is possible misuse of the contempt power which genuinely concerns the press. In a joint statement, Robert C. Notson, then president of the American Society of Newspaper Editors, and J. Edward Murray, then chairman of the Society's Freedom of Information and Press-Bar Committee, reflected this concern:

"The intention," they said, "may be clear, and the motive pure. But the individual judge is as independent as the individual editor. So, in practice, we see a great danger that the Reardon emphasis on contempt, even with the clear disclaimers in favor of the press, will result in an expanded use of this power either to control the press directly or to get at attorneys and law enforcement officers who are thought to be violating court orders anonymously." (The Bulletin of the American Society of Newspaper Editors, 2 November 1, 1966).

### RESPONSES TO THE REPORT: THE BAR, THE BENCH, AND THE PRESS

1. Reaction to the Reardon Report was mixed. Lawyers generally favored it. The *New York Times* praised the bar's efforts to put its own house in order; but it saw the contempt power as potentially dangerous. Organizations of publishers, editors, and other newsmen immediately took steps to rebut it. While a few leading dailies—the St.

Louis *Post Dispatch*, the Louisville *Courier-Journal*, and *Newsday*—saw merit in the Report, most reacted in blind panic.

Editors found some comfort in the fact that former Justice Tom Clark, in an interview a day before the Reardon Report was approved, called the new rules unnecessary and said they could result in occasional violation of press freedom. *New York Times*, February 18, 1968, p. 80.

And a week later, the Judicial Conference of the United States, administrative policy arm of the federal judiciary, rejected direct contempt actions against the press as unwise and posing serious constitutional problems. Also rejected were proposals to exclude newsmen from portions of criminal trials and pre-trial hearings, or to adopt court rules to restrict the release of information by United States law enforcement agencies.

The Conference's Committee on the Operation of the Jury System did recommend that each United States District Court control the release of prejudicial information by attorneys who are members of the bar of that Court on penalty of disciplinary action. The Committee also declared that courts have a similar power and duty to prohibit disclosure by courthouse personnel, such as bailiffs, clerks, marshals, and court reporters, and to regulate and control trial participants, spectators and newsmen to preserve decorum in and around the courtroom and to maintain the integrity of the trial. Finally it proposed a total ban on photography and radio or television broadcasting in and around the courtroom, a proposal somewhat out of harmony with the report's otherwise conciliatory tone. *Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue* to the Chief Justice of the United States, Chairman, and the members of the Judicial Conference of the United States (September, 1968), "Specific Recommendations," pp. 22–41. The report is also referred to as the Kaufman Report since Judge Irving R. Kaufman of the United States Court of Appeals served as Committee chairman.

2. An earlier deviation from the spirit of the Reardon Report was the action of the California Court of Appeals in support of Judge Medina's contention that judges lack power over police and news media in the pre-trial period. The California Court held that no mandatory controls may be set up by a court to enforce a blanket rule setting out in advance what information is likely to be prejudicial to all defendants in all cases. *County of Los Angeles v. The Superior Court for County of L. A., 62 Cal.Rptr. 435 (1967).*

3. Federal Circuit Judge George C. Edwards, Jr., who had dissented from the Court of Appeals opinion ordering Samuel Sheppard back to prison and was therefore no apologist for "trial by newspaper," won points with the press when he called the Reardon Report a dangerous threat to the press, the public, and to the freedom of attorneys, "traditionally the most useful controversialists in our nation's history. * * * We should go slowly," said Edwards, "about adopting rules that would prevent Richmond Flowers from commenting on the Liuzzo jury, or would prevent Estes Kefauver from exposing the violent crimes and corrupting influence of the Mafia, or would have made unethical the denunciation of the Teapot Dome Scandals by Senator Walsh." The Bulletin of the American Society of Newspaper Editors, November 1, 1966, p. 14.

4. Demonstrating a peculiar kind of Afghanistanism, the American Newspaper Publishers Association issued a report of its own entitled *Free Press and Fair Trial* early in 1967 designed to checkmate the bar. The publishers' response was superficial, uncompromising, and defensive in tone, as if to say that the press resented having to play with the bar's

deck of cards. Where the bar dealt qualifications, the publishers dealt absolutes. And since free press is an absolute, declared the publishers, compromise is unthinkable. The publisher's premise, that there is no conflict between First and Sixth amendments, not only defied reality but seemed to foreclose future discussion. Do the publishers question whether the bar is even justified in restricting itself? The publishers prefer fact over conjecture in measuring prejudice, but they offer no facts of their own. And they rely on the specious argument, as others have, that few felonies ever result in jury trials, and in still fewer is the question of prejudice raised, and in only a handful of these is relief granted; the problem, therefore, is insignificant and requires no new remedies. Can the American press afford *one* more Sheppard case? And how many Sheppard cases does it take to impair justice?

If the Reardon and ANPA reports are in part misguided—Reardon because it condones secret justice under some circumstances and punishment of the press by an ill-defined contempt power in others, and ANPA because of its mindless self-righteousness—they are nevertheless attempts to examine a complex constitutional problem. The Reardon Report is thoughtful and comprehensive, as well as sincere. Some press and bar outcries border on the irrational. See Brechner, *News Media and the Courts*, Freedom of Information Center Report No. 004 (June, 1967); Felsher & Rosen, The Press in the Jury Box (1966); Sullivan, Trial By Newspaper (1961).

5. Amid charges of overkill and overreaction the free press-fair trial dialogue has moved to local and state levels. In lieu of secret trials, the contempt power, new laws, or repressive and unilateral court rules, press-bar councils have been developed in at least 23 states and some cities. Problems of free press and fair trial are now being discussed by both sides and guidelines issued for the conduct of newsmen and attorneys following the recommendations of the Reardon Report, The Judicial Conference of the United States, and the Katzenbach Rules.

One study showed that newspapers and broadcasting stations, according to prosecuting attorneys, have sharply curtailed use of news which, by definition, is considered prejudicial. In the same study journalists reported that the change is a result both of voluntary action on their part and refusal of law enforcement officials to provide information. Gerald, J. Edward, *Press-Bar Relationships: Progress Since* Sheppard *and Reardon,* 47 Journalism Quarterly 223 (Summer 1970). See also, Bush, Chilton R. (ed.), Free Press and Fair Trial: Some Dimensions of the Problem. Athens: University of Georgia Press, 1971.

The criminal trial is not quite the no-holds-barred contest it used to be. One detects at least traces of restraint in the trials of Sirhan Sirhan, James Earl Ray, and Mosler and Coppolino.

In spite of the fact that there is a better understanding between press and bar on what kind of pre-trial and trial information ought and ought not to be disclosed, cases involving prominent persons as in the Chappaquiddick and the Watergate affairs, and cases with significant social implications as in the courts martial of Lieutenant Calley, Captain Medina and Commander Bucher, and the "political" trials of the Chicago 8, the Harrisburg 7, the Gainsville 8, Ellsberg and Russo, and Angela Davis, lead to extravagances in reporting and to well-devised publicity campaigns that attorneys believe may spell the difference between victory and defeat at the bar. No one has yet proposed how to insulate the celebrated criminal case from the overwhelming curiosity of the mass audience and its skillful stimulation by reporters following traditional journalistic routines.

## H. A REVIVAL OF RESTRAINING ORDERS?

In the Richard Speck case the judge appeared to go beyond the bounds of judicial discretion. The slaughter of eight Chicago nurses was no ordinary crime. And whatever his motivation, Police Chief O. W. Wilson relieved fearful tension in the community when he announced to television cameras that the "killer" was in custody, and that fingerprint evidence—later a key issue in the trial—placed him at the scene of the multiple murders. The best that could be done for Speck under the circumstances was to move his trial from Chicago to Peoria.

Prior to trial, Circuit Court Judge Herbert Paschen issued a 16-point order restricting news coverage of the proceedings. Included was a ban on printing anything which did not occur in open court, a ban going far beyond anything contemplated in either *Sheppard* or the Reardon Report. The Judge also prohibited purchase of trial transcripts, a sure strike against accuracy. These and other restrictions, such as identifying jurors and sketching in the courtroom, were challenged in a suit brought to the Illinois Supreme Court by the Chicago *Tribune*. Under this kind of pressure Paschen retreated, and the trial was concluded without incident.

The Speck case suggests the negative effect of *Sheppard* and the Reardon Report, and it is a matter of deep concern to the news media. Probably very few county attorneys and a miniscule number of law enforcement officials have read either document. They are aware of new standards, of a lengthy debate, of disagreements; but of the specific recommendations they know little. As a consequence they adhere to the rubric—when in doubt, say nothing. Editors across the country, especially those in the smaller communities, are reporting great difficulty in getting even the barest details of crimes from police chiefs and sheriffs. And recently judges have added to the difficulty.

An example was the action of a state court in barring the *Oxnard* (Calif.) *Press-Courier*, and the public, from numerous sessions of a murder trial on what it presumed to be the mandate of the Reardon Report. The newspaper brought suit and, in a ringing justification of public trials, the California Court of Appeals upheld it. The Court noted that the Medina Report, the Kaufman Report and the Sheppard opinion clearly did not recommend closed sessions of public trials as a solution to the problem of possibly prejudicial publicity. (The California Supreme Court later dismissed the proceedings in this case as moot and the case is therefore not officially reported. *Oxnard Publishing Co. v. Superior Court of Ventura County, 68 Cal.Rptr. 83 (1968.)*

A Seattle judge was overruled when in a murder trial he prohibited the reporting of anything that did not take place in front of judge, jury and counsel. When a *Seattle Times* reporter wrote about a preliminary hearing into the admissibility of evidence from which the jury was excluded, he was held in contempt. The Supreme Court of Washington held that the order was void on its face and did not have to be obeyed. *State ex rel. Superior Ct. of Snohomish Co. v. Sperry, 79 Wash.2d 69, 483 P.2d 608, cert. den. 404 U.S. 939 (1971).*

Similarly, the Supreme Court of Arizona held unconstitutional the order of a Phoenix judge prohibiting the reporting of a habeas corpus hearing prior to a murder trial. *Phoenix Newspapers, Inc. v. Superior Court, 101 Ariz. 257, 418 P. 2d 594 (1966).*

In 1972 an Arkansas judge cited a Texarkana newspaper editor for con-

tempt because the paper had reported a rape verdict reached by a jury in open court. The Arkansas Supreme Court reversed noting that "No court * * * has the power to prohibit the news media from publishing that which transpires in open court." *Wood v. Goodson, 485 S. W.2d 213 (Ark.1972).*

A California Court of Appeals stayed a San Bernardino Superior Court judge's order prohibiting newspapers from printing the names of nine inmate witnesses in a prison murder case. Again the proceedings were in open court. "The conclusion is inescapable," said the Court of Appeals, "that a prior restraint on publication in the name of a fair trial should rarely be employed against the communications media." *Sun Co. of San Bernardino v. Superior Ct. for San Bernardino Co., 105 Cal.Rptr. 873, 29 Cal.App.3d 815 (1973).*

A Plymouth, Indiana judge decided in March 1973 that only one news reporter would be permitted to cover a Marshall County Circuit Court murder trial because he believed few reporters understood legal terminology well enough to cope with this particular case. His ruling was appealed by a number of Indiana newspapers. A similar belief in the incompetence of newsmen led a U.S. District Court judge in Chicago a year earlier to hold Chicago newspapers under a threat of fines up to $1,000 a day if their stories caused him to declare a mistrial. A *Chicago Daily News* reporter contended that his stories were consistent with a transcript of the trial.

A federal court in Nevada said in September 1972 that a court could restrict a newspaper from disclosing the names and addresses of the jury members in a notorious murder trial. Publishing the addresses, said the court, might subject jurors to harassment which would not be counterbalanced by any strong public interest in the information. This may be an exceptional case. *Schuster v. Bowen, 347 F.Supp. 319 (D.C.Nev.1972).*

An Oakland, California trial judge cleared the courtroom of spectators and press during argument on the admissibility of evidence in a murder trial, reasoning that the jury might read an account of the proceeding.

Reporter Bob Forkey of the *Bath* (Me.) *Times-Record* was forcibly evicted from an open hearing on a motion in an April 1973 murder case. Superior Court Judge Harold Rubin asked Forkey to sign an agreement to restrict coverage of the hearing, and when he refused, ordered him from the courtroom. On instructions from his editor, Forkey returned and was dragged out of the courtroom by the sheriff.

Whether a criminal record should be divulged or not arose in the trial of Harry Davidoff, a New York labor leader charged on 23 counts of violating the Taft-Hartley Act. The presiding judge warned New York City newspapers that the publication of any material about Davidoff's prior record might result in a mistrial and the distinct possibility of contempt convictions.

### Public Preliminary Hearings?

The question of whether preliminary hearings should be public is unsettled. Since only the prosecution's side is heard and the public may overlook the distinction between a hearing and a trial, the testimony at a hearing may be considered a testament of guilt rather than a finding of probable cause to hold a suspect. At the same time, it appears that preliminary hearings are too often routinized procedures in which magistrates bow to the wishes of prosecutors and are thereby susceptible of inefficiency, bribery and chicanery. "These considerations, as well as the more general one pertaining to the principle of public justice, publicly administered, stand as strong positive arguments for unimpeded public and mass

media *access* to preliminary hearings." Geis, *Preliminary Hearings and Press,* 8 U.C.L.A.L.Rev. 397, 413 (1961). Federal rules generally keep preliminary and other pretrial hearings open to the public.

In an anti-trust case in which a defendant's motion for an order to suppress a bill of particulars in the interest of a fair trial before an impartial jury was turned down, the court said,

"The First Amendment commands that freedom of the press shall not be infringed and this court is loathe to intrude on that guarantee. A free press cannot be shackled by speculations as to inflammatory publicity. For even if media coverage should give rise to unwarranted criticism, though 'it may be designed to harass those whose conduct has been honest and courageous * * * this seems a fair price to pay for a truly open society'." *United States v. General Motors Corp., 352 F.Supp. 1071, 1074 (D.C. Mich.1973).*

Barring the public from an entire pretrial suppression hearing having to do with the legality of the seizure of illicit drugs from a bag carried by a defendant at an airport terminal was, in the opinion of a Federal Court of Appeals, an error of constitutional magnitude depriving the defendant of his right to a public trial. *United States v. Clark, 475 F.2d 240 (2d Cir. 1973).*

Preliminary hearings in state jurisdiction are not necessarily open as a matter of law. See *Azbill v. Fisher, 442 P.2d 916 (Nev.1968); People v. Elliott, 6 Cal.Rptr. 753, 354 P.2d 225 (Cal.1960).*

But in 1966 the Supreme Court of Arizona held unconstitutional the order of a Phoenix judge prohibiting the reporting of a habeas corpus hearing prior to a murder trial. The court reasoned that a trial court could not, in advance of publication, limit the right of a newspaper to print the news and inform the public of that which had taken place in open court in the course of a judicial hearing. *Phoenix Newspapers, Inc. v. Superior Court, 418 P.2d 594 (Ariz.1966).*

The same court in 1971 held that a defendant in a multiple homicide case was not entitled to have reporters and the public excluded from a preliminary hearing. Such a restraint, said the court, "strikes at the very foundation of freedom of the press by subjecting it to censorship by the judiciary * * * a defendant has no right to a secret trial and an accused by request may not foreclose the right of the people from freely discussing and printing proceedings held in open court." Had matters inadmissible in evidence at the trial been discussed, the court intimated that it might have acted differently. "Democracy blooms where the public is informed and stagnates where secrecy prevails," the Arizona court concluded. *Phoenix Newspapers, Inc. v. Jennings, 490 P.2d 563 (Ariz.1971).*

A Florida Court of Appeals ruled a year later that a pre-trial order prohibiting news media from publishing any information about a murder case except testimony presented in open court, including hearings in chambers, operated as a prior restraint on constitutionally privileged communication and was therefore invalid. *Miami Herald Publishing Co. v. Rose, 271 So.2d 483 (Fla.App.1972).*

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## I. THE *DICKINSON* "GAG RULE" CASE

Two Baton Rouge reporters were cited for contempt in November 1971 by a United States District judge for publishing testimony given at an open court hearing in violation of the judge's order. The hearing concerned a VISTA worker who had been indicted on a charge of

conspiring to murder the Mayor of Baton Rouge. The accused alleged that the state court prosecution was completely groundless and intended to harass him in the exercise of his First Amendment rights. The hearing was designed to determine whether the state's prosecutorial motive was legitimate or contrived. During the course of the proceedings the judge pronounced the following order from the bench:

"And, at this time, I do want to enter an order in the case, and that is in accordance with this Court's Rule in connection with Fair Trial—Free Press provisions, the Rules of this Court,

"It is ordered that no report of the testimony taken in this case today shall be made in any newspaper or by radio or television, or by any other news media. This case will, in all probability, be the subject of further prosecution; at least, there is the possibility that it may. In order to avoid undue publicity which could in any way interfere with the rights of the litigants in connection with any further proceedings that might be had in this or other courts, there shall be no reporting of the details of any evidence taken during the course of this hearing today.

"This order is made subject to the sanctions provided by law in the event of any violation of this order.

"Now, gentlemen, by that I do not mean that the press cannot report the fact that a hearing has been held or that a hearing is being held, but it's obvious that the testimony here today could impede another court in its progress toward selecting a jury in this case if such became necessary. Consequently, I do not want—and this order means that there shall be no reporting of the details of the evidence taken in this court today or in any continuation of this trial—of this hearing."

Ignoring the order the two reporters were found guilty of criminal contempt and each fined $300. (349 F.Supp. 227 (D.C.La.1972).)

In upholding the contempt convictions the U.S. Court of Appeals for the Fifth Circuit refused to make the First Amendment question of prior restraint the dispositive issue in the case. Instead it held that, although the District Court judge's order was constitutionally infirm, the two reporters should have respected the order until they had petitioned the Court of Appeals. The Supreme Court had earlier applied a rule requiring obedience to a void but non-frivolqus order in a First Amendment setting in *Walker v. Birmingham, 388 U.S. 307 (1967)* discussed in this text, p. 44. The *Dickinson* court heavily relied on the Supreme Court's decision in *Walker*. Whether or not they would still have met their deadlines under such a prior restraint was a point of disagreement between the judge and the city editor of the *Star-Times*.

Noting that no jury was yet involved in the case and that it had not incited a carnival atmosphere, the court argued 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 political civil rights activities. The District Court's cure, said the Appeals body, was worse than the disease. But the Court of Appeals went on to say:

## UNITED STATES v. DICKINSON

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 ques-

tion 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. "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. It is the judiciary which is vested with the duty and the power to interpret and apply statutory and constitutional law. Determinations take the form of orders. The problem is unique to the judiciary because of its particular role. Disobedience to a legislative pronouncement in no way interferes with the legislature's ability to discharge its responsibilities (passing laws). The dispute is simply pursued in the judiciary and the legislature is ordinarily free to continue its function unencumbered by any burdens resulting from the disregard of its directives. Similarly, law enforcement is not prevented by failure to convict those who disregard the unconstitutional commands of a policeman.

On the other hand, the deliberate refusal to obey an order of the court without testing its validity through 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 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 forth-

coming, 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. They are not yet wrapped in an immunity or given the absolute right to decide with impunity whether a Judge's order is to be obeyed or whether an appellate court is acting promptly enough.

* * *

* * * As a matter of jurisdiction (i), 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". Finally, unlike the compelled testimony situations the District Court's order required that information be withheld—not forcibly surrendered—and accordingly, compliance with the Court's order would not require an irrevocable, irretrievable or irreparable abandonment of constitutional privileges.

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. They may take comfort in the fact that they, as their many forerunners, have thus established an important constitutional principle—which may be all that was really at stake—but they may not now escape the inescapable legal consequence for their flagrant, intentional disregard of the mandates of a Court.

* * *

[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.

**NOTES**

1. The case was returned to the District Court Judge and again he convicted the two reporters and upheld the $300 fines. The Appeals Court concurred for a second time. (476 F.2d 373 (5th Cir. 1973).)

Although the Court of Appeals seemed to appreciate the reporters' need for a *speedy* review, nine months passed between the appeal and the final court ruling.

On October 23, 1973, over the objection of Justice Douglas, the Supreme Court refused to review the case. *Dickinson v. United States, cert. den. 94 S. Ct. 270 (1973).* Their lawyers had argued before the High Court that if the decision were allowed to stand it would arm courts with the power to authorize patently impermissible prior restraints on the exercise of First Amendment rights through the use of the contempt power and so allow them to accomplish indirectly what the Constitution flatly prohibits them from doing directly.

2. The Justice Department had contended that it was not unreasonable for the trial court judge to conclude that newspaper accounts of the hearing might cause, at the time of publication itself, irreversible prejudice to the rights of the accused to have an impartial jury trial. The reporter's lawyers countered that there was never any demonstration—only a theoretical assumption—that anyone's constitutional right to a fair trial would be harmed.

"If the heavy burden which must be borne by the government to support any prior restraint can be met merely by the assertion of the possibility of a conflict * * * between constitutional rights, then freedom of the press as we know it would be held hostage to the fertile imagination of judges," they added.

3. The Reporters Committee for Freedom of the Press advised the media to request, during the appeal of restraining orders, that a judicial proceeding be halted while an order is being appealed.

4. The *Dickinson* case should be read with *Sperry*, the Washington state case in which a judge's order prohibiting the reporting of anything that did not take place in front of judge, jury and counsel was declared void by the state supreme court.

In both cases the trial court entered an order limiting the reporting of proceedings open to the public. In each case there was a violation of the court's order and the respective trial judges found the reporters in contempt of court. In *Dickinson*, after the court's order was ruled invalid, the case was remanded to the trial judge to reconsider the judgment of contempt. In *Sperry*, the trial court's decision was simply reversed and no right of appeal was considered. Indeed, the Supreme Court of Washington emphasized the difficulty of obtaining review.

The issue, an important one, was whether a newspaper may constitutionally be proscribed in advance from reporting to the public those events which occur during an open and public court proceeding. The hearing in both cases had to do with the admissibility of evidence and was held in the absence of the jury. The Washington court held that the violation of an order patently in excess of the jurisdiction of issuing court, that is, void on its face, cannot produce a valid judgment of contempt.

"To sustain this judgment of contempt," said Justice McGovern for the court, "would be to say that the mere possibility of prejudicial matter reaching a juror outside the courtroom is more important in the eyes of the law than is a constitutionally guaranteed freedom of expression. This we cannot say."

In a concurring opinion Justice Rosellini thought it would be an anomaly if the law, while decreeing that a reporter may report with impunity falsehoods about a public official or a public figure decreed at the same time that he could not print the truth about judicial proceedings.

Justice Finley in a concurring opinion saw the problem in more complex terms. Although prior restraint and pre-publication censorship are forbidden under Washington's constitution and the doctrine of *Near v. Minnesota*, he argued that "post-publication accountability, responsibility, and liability of the news media is constitutionally supportable. Actions by members of the news media amounting to potential contamination of a criminal defendant's right to a fair and impartial trial cannot be proscribed in advance. But, such actions where *provably harmful to fair trial and constitutional rights* may subject the news media to post-publication accountability. *State ex rel. Superior Ct. of Snohomish Co. v. Sperry, 483 P.2d 608 (Wash.1971)*.

Future constitutional struggles, then, may revolve around the definition of post-publication accountability and the

degree to which such accountability constitutes an actual prior restraint.

5. Of major concern to the media was the possibility of fallout from the Louisiana ruling. It was not long in coming. A federal district court judge in Florida fined CBS $500 for criminal contempt when it refused to honor his verbal order not to sketch in or out of the courtroom in its June, 1973 coverage of the trial of the "Gainesville Eight." With even the defendants in the case on its side, CBS in its brief to the Fifth Circuit Court of Appeals made both free press and public trial arguments for courtroom sketching. It also characterized the Judge's orders as excessively broad and it took pains to distinguish courtroom sketching from television coverage—which it seemed surprisingly willing to write off.

The Judge's orders were also attacked on due process grounds. The order was not a rule of the District Court, and there had been no notice, no personal service, no opportunity to be heard, and no time limit on the order. The CBS brief appeared to accept the criterion of the *Dickinson* case:

"When this Court rendered its decision in *Dickinson*, it contemplated a civilized situation wherein a person aggrieved by an injunction would seek review rather than violate that injunction. Such a view of civilization contemplates that courts will also be orderly. In this case, the District Court's oral pronouncement in the privacy of chambers, without a court reporter, robbed CBS of any right of review. Moreover, it was done in a 'lawless' manner—not derived from the court's injunctive power, not derived from its rule-making power, not derived from its supervisory power. Thus, the order does not comply with due process as guaranteed by the Fifth Amendment and cannot serve to regulate conduct." (p. 45)

Moreover, there had been no deliberate defiance of or utter disrespect shown for the court: the CBS artist had left the courtroom to do her sketching after the Judge's first order, and had left the courthouse itself to work from memory after a second order. A final point was argued in the brief. The Judge had refused to disqualify himself as an essential witness to the oral orders and had then tried the case without a jury. See *United States v. Columbia Broadcasting System, Inc.* (5th Cir. Case No. 73–2602, 73–2615), Brief of Appellant.

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## J. PUBLIC TRIALS

1. In a few cases, courts have ruled that a defendant may waive a public trial, *Kirstowsky v. Superior Court, 143 Cal. App.2d 745, 300 P.2d 163 (1956); United States v. Sorrentino, 175 F.2d 721 (3d Cir. 1949); People v. Miller, 257 N.Y. 54, 177 N.E. 306 (1931)*, just as he may waive trial by jury. *Patton v. United States, 281 U.S. 276 (1930)*, but he has no absolute right to a private trial, *Singer v. United States, 380 U.S. 24 (1964)*. However, if he has neither had nor waived a public trial, prejudice is presumed and a conviction will likely be reversed. Most cases suggest that the accused must not be deprived of his right to have representatives of the public attend his trial, unless it is demonstrated that granting the right will seriously interfere with the administration of justice. For a general discussion, see *Exclusion of Public During Criminal Trials,* 156 A.L. R. 265 (1945); and Barney, *The Right to Attend Public Trials,* FOI Center Report No. 225 (July 1969).

Shouldn't more attention be given to the proper definition of the word "public"? Does limited seating capacity

in most courtrooms make it doubtful whether a reasonable cross-section of the public can ever be present?

In the notorious Minot Jelke trial, in which the scion of an oleomargarine fortune was charged with pandering, Judge Valente ordered the general public and press excluded from the courtroom in "the interests of good morals." Only friends and relatives were permitted to remain—to protect the accused's interests.

United Press brought an action to restrain the judge from enforcing his ruling, but the highest New York court rejected it, contending that no state statute conferred any enforceable right upon the public to attend trials. And if the right was statutory, said the court, it would be conferred upon the public at large and not upon any individual member of the public. The rationale seemed to be that a ruling in favor of United Press would deprive Jelke of all power to waive his right to a public trial and thereby deprive him of following a course which he thought to be in his own best interests. "The public's interest," said the court, "is adequately safeguarded as long as the accused himself is given the opportunity to assert on his own behalf, in an available judicial forum, his right to a trial that is fair and public." *United Press Ass'n v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954).*

Jelke did assert his right to a public trial, and was granted a new trial. A trial is not public, said the same appeals court, if only a certain privileged class of people are permitted to attend, and there is no member of the press among them. *People v. Jelke, 308 N.Y. 56, 123 N.E. 2d 769 (1954).*

What the New York trial court was saying a federal court had said two years earlier: the rights of an accused take precedence over freedom of the press; and the right to a public trial is the defendant's right and not the right of the media. *United States v. Kleinman, 107 F. Supp. 407 (D.C.1952).* See also *Azbill v. Fisher, 442 P.2d 916 (Nev.1968).*

That both public and press have an interest is asserted in the Oxnard *Press-Courier* case, and in an opinion of the Ohio Court of Appeals pointing out that both newsmen and the public have a right to attend trials, a right which cannot be defeated by the accused signing a waiver. The defendant, in other words, may not insist upon a secret trial. *E. W. Scripps Co. v. Fulton, 125 N.E.2d 896 (Ohio 1955).*

The Ohio court added that since "a great majority of the public, either because of lack of time or space limitations of the courtroom, or lack of direct interest, are prevented or unable to attend judicial proceedings and whereby knowledge of such proceedings can be gained only through the work of news-gathering and disseminating agencies, and therefore, when judicious limitation of those attending a public trial is necessary, such fact should be considered in favor of allowing members of the press to attend."

2. In a landmark 1948 case Justice Black declared, "Counsel have not cited and we have been unable to find a single instance of a criminal trial conducted *in camera* in any federal, state or municipal court during the history of this country. (Courts martial may be regarded as an exception.) Nor have we found any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute." *In re Oliver, 333 U.S. 257 (1948).*

Federal courts have consistently held that public trials provide an effective restraint against possible abuses of judicial power, encourage witnesses to appear, and educate the public as to judicial remedies. *United States v. Kobli, 172 F.2d 919 (3d Cir. 1949).*

The Court of Appeals ruled in the latter case that "the Sixth Amendment precludes the general indiscriminate exclusion of the public from the trial of a criminal case over the objection of the defendant and limits the trial judge to the exclusion of those persons or classes of persons only whose particular exclusion is justified by lack of space or for reasons particularly applicable to them." See also *United States ex rel. Bruno v. Herold, 368 F.2d 187 (2d Cir. 1966), reversed 408 F.2d 125 (2d Cir. 1969)* in which a United States Court of Appeals approved the clearing of a courtroom where a principal witness was intimidated by some of those present.

In the trial of Carmine J. Persico the question of divulging a prior criminal record led to the clearing of the courtroom after Persico waived his right to a public trial because of "prejudicial publicity." Supreme Court Justice George Postel (in New York this is the trial court) ordered the record of the trial sealed until after the jury had returned a verdict. He declined to sequester the jury and suggested it would be cheaper for the taxpayers to sequester the offending newsmen.

Postel's decision was upheld by the Appellate Division of the Supreme Court and five reporters appealed to New York's highest court, the Court of Appeals. That court through Chief Judge Stanley Fuld, who is also chairman of the New York Fair Trial-Free Press Conference, said on March 22, 1972 for a unanimous court that it was wrong for the state court judge to bar the press and the public from the trial. A portion of that opinion follows:

## OLIVER v. POSTEL

30 N.Y.2d 171, 331 N.Y.S.2d 407, 282 N.E.2d 306 (1972).

FULD, Chief Judge: * * *

The questions posed in Matter of United Press Assns. v. Valente, concerning the right of the news media to challenge an order closing the trial of a pending criminal case to the public and the press, are again before us on this appeal, though in a materially different setting and involving altogether different considerations. Here, unlike in *United Press*, the issues are presented in the context of a clash between the constitutional guarantee of freedom of the press and the constitutional right of an accused to a trial by an impartial jury free from the outside influences of prejudicial publicity.

The present case stems from the prosecution of one Carmine Persico for the crimes of conspiracy and extortion. The trial began in the Supreme Court, New York County, before Justice Postel and a jury on November 8, 1971, and, three days later, before any evidence had been presented, *The New York Times* and *The Daily News* published articles reciting that Persico had a criminal record and was reputed to have underworld connections. Claiming that these articles produced a prejudicial atmosphere which would prevent his client from receiving a fair trial, Persico's counsel moved for a mistrial. Justice Postel noting that he considered the articles unfair, polled the jury and, after ascertaining that no juror had read anything in the papers or seen anything on television concerning the case, denied the motion. He did, however, warn the news media, through remarks to the reporters present, that he would hold "in contempt" any "individual reporter" who "report[ed] anything other than [what] transpires in this courtroom" because it "would not be fair reporting insofar as this defendant is concerned."

On the following two days, Friday, November 12 and Saturday, November 13, articles and editorials appeared in the *Times*, the *News* and *The New York Post*, which contained accounts of the [Justice's] denial of the mistrial motion and referred to the previously published

articles concerning Persico's criminal record and associations. The articles were also strongly critical of the [Postel's] threats of contempt. These items prompted the respondent on Monday, November 15, to address additional remarks from the bench to the reporters. He expressed displeasure with the articles and, at one point, took issue with the manner in which they portrayed him.

Immediately following these statements, Persico's lawyer again moved for a mistrial or, in the alternative, "for the exclusion of the public and the press" for the balance of the trial. The assistant district attorney in charge of the prosecution opposed the application; he pointed out that there was no indication that the jurors had seen any of the articles and that, in any event, Persico's rights would be adequately protected, and prejudice avoided, by "warning" the jury, "polling" it and, "if necessary * * * sequestering" it. The respondent, however, stating that the reporters "have done indirectly what the Court has requested them not to do directly" and that their reporting constituted "contumacious conduct", granted the motion and directed that the courtroom be closed to the press and public for the balance of the trial.

The petitioners—five newspapermen "individually and on behalf of other members of the public and press similarly situated"—thereafter brought this * * * proceeding for a judgment directing the respondent to reopen the courtroom. A divided Appellate Division, 37 A.D.2d 498, 327 N.Y.S.2d 444, dismissed the petition on the authority of our decision in the *United Press* case and the petitioners filed a notice of appeal to our court. About a week later, Persico's trial ended with a verdict of acquittal in his favor.

Although the termination of that trial has rendered the appeal academic and moot, the questions presented, particularly since they are likely to recur, are of sufficient importance and interest to justify our entertaining it.

As they did in the court below, the petitioners—and *amici curiae*, including newspaper publishers and editors as well as radio and television broadcasters—contend that the exclusionary order violated not only the First Amendment's guarantees of freedom of speech and of the press but also the public trial guarantee of the Sixth Amendment, now applicable to the States * * *. Accordingly, they ask us to adopt a broader view of the reach of the First Amendment than that taken by the court in *United Press*, and to determine the question, left undecided in that case, as to the scope and content of the provisions relating to a public trial.

* * *

In the earlier case, the order challenged was not aimed or directed at anything which the reporters had written or the newspapers had published. On the contrary, the courtroom was closed—over the objection of the defendant—solely in the interests of public decency and morality because of the obscene and sordid details of the testimony. In sharp contrast, the record in the present case makes it exceedingly plain that the order closing the courtroom—made upon the defendant's application—was aimed specifically at the news media and was intended as a punishment for what the respondent characterized as their "contumacious conduct" in disregarding his prior admonitions not to publish "anything other than [what] transpires in this courtroom." Since the petitioners before us were the direct targets of the court's order, and their ability to comment upon the trial as professional journalists thereby impaired, there is no doubt that they have the requisite "personal stake in the outcome of the controversy" to give them standing to challenge the validity of that order.

It is evident that, if the respondent had actually carried out his threat of punishment for contempt, his action would have clashed with the limitations on the contempt power mandated by the strictures of the First Amendment. As the cited cases demonstrate, the law is settled that the contempt power may not be utilized to impose punishment for the publication of out-of-court statements relating to a pending court proceeding, except where such statements are shown to present "a clear and present danger" or "a serious and imminent threat" to the administration of justice. * * *

The [Justice] did not, it is true, actually hold any reporters in contempt. It is plain, however, as we have said, that his purpose was to punish and discipline the news media because of what had been written. Moreover, his threat of contempt, followed by his condemnation of the subsequent newspaper articles and editorials as "contumacious conduct" and his order closing the trial because of such conduct, could not help but have a deterrent effect on free discussion by the press, substantially similar to that which would have resulted had punishment for contempt been imposed. * * *

In point of fact, there is no support whatever for [Postel's] apparent conclusion that Persico could obtain a fair trial only if the courtroom was closed to the public and the press. [Postel] was understandably concerned about the potential prejudicial effect of the newspaper articles, and he might well have been warranted in regarding them as contrary to the guidelines agreed upon and subscribed to by the New York Fair Trial Free Press Conference.[3] The significant fact, however, is that the respondent had determined, by questioning the jurors, that no one of them had read the articles, and there is likewise not the slightest showing or indication that any of them had seen the second series of news items which preceded the order closing the trial.

Moreover, since the articles complained of dealt with Persico's alleged criminal record and underworld connections, and in no way related to any events which had transpired in the courtroom, their publication obviously would not, indeed could not, have been prevented by refusing to allow the press to attend the trial. In other words, even if the reporting in this case was improper and tended to prejudice the defendant, it is manifest that closing the trial was not the means to be employed to cure the prejudice or prevent a continuation of the impropriety.

* * *

Of course, as the Supreme Court observed in *Sheppard*, the problem of prejudicial publicity is one which the courts must meet not by the mere "palliative" of declaring a mistrial or reversing a conviction but, rather, by taking appropriate remedial steps "by rule and regulation" to "protect their processes from prejudicial outside interferences." In most instances, the trial judge will be able to deal effectively with potential prejudice stemming from adverse press publicity by

[3] Representatives of the news media, the bar, bench and law enforcement agencies in New York, recognizing the importance of harmonizing the First Amendment's guarantee of free press and the Sixth Amendment's of fair trial, organized the Fair Trial Free Press Conference in 1969. Reaffirming the "equal validity" of the two constitutional guarantees, the Conference declared that "The proper administration of justice is the concern of the judiciary, bar, the prosecution, law enforcement personnel, news media and the public. None should relinquish its share in that concern." Moreover, the Conference guidelines, after reciting that "All concerned should be aware of the dangers of prejudice in making pretrial disclosure of * * * Statements as to the character or reputation of an accused person", go on to state that "[t]he public disclosure of [prior criminal charges and convictions] by the news media may be highly prejudicial without any significant addition to the public's need to be informed. Publication of such information should be carefully considered by the news media."

cautioning the jurors to avoid exposure to such publicity and by carefully instructing them to disregard any prejudicial material, which might come to their attention, that was not presented to them in court. However, there may well be extreme situations—in no way comparable to the present case—in which such procedures may be inadequate and ineffectual to assure a fair trial. The court may then find it necessary to sequester the jury for the duration of the trial. But whether the judge would have the power in any such case to close the courtroom to the public and the press in order to protect the defendant's right to a fair trial is, as already indicated, a question we need not here pass upon.

In short, then, it is our conclusion that the respondent's order was an unwarranted effort to punish and censor the press, and the fact that it constituted a novel form of censorship cannot insulate or shield it from constitutional attack. In the area of "indispensable" First Amendment liberties, the Supreme Court has been careful "not to limit [their] protection * * * to any particular way of abridging it" * * *

NOTES

1. In this and other cases where court response to the Reardon recommendations and the *Sheppard* decision has resulted in the concealment of public business, the press has become exercised. A municipal judge in Ohio, for example, excluded news reporters from a preliminary hearing for three men accused of robbery and the murder of a service station attendant. And in Los Angeles, a superior court judge wrapped a curtain of secrecy around a councilman and a parks commissioner charged with bribery. So sweeping was an order prohibiting attorneys, policemen, and business associates of the two from making any public statements about the case that sheriff's deputies refused to release information that the two public officials had been released from jail on bail. A New Jersey superior court judge ordered the press to refrain from attempting to interview jurors or disclose their names before or during trial. In St. Louis County, Missouri, a prosecuting attorney used the Reardon Report to justify the following theory about police secrecy in the case of a fugitive rape suspect:

"Police chiefs don't have to tell you or the public a damned thing. It's their prerogative to handle a case the way they want. There's nothing in the statute that says you or the public have to know a thing about police investigations. * * Police reports are not public."

In October 1973 the police chief of Findlay, Ohio began a policy of denying to the news media access to the names and addresses of those involved in auto accidents, names and addresses of arrested persons, and names and addresses of businesses and homes which had been burglarized. His reasoning was "that divulging names makes targets of complainants, derogates the one complained about and impedes police investigation." The chief also brought a libel suit against two *Republican-Courier* reporters for a story on dissension in the police department.

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## K. OTHER JUDICIAL REMEDIES

1. By no means is the Reardon Report the only or the earliest attempt to balance the rights of free press and fair trial.

The United States Supreme Court in *Marshall v. United States, 360 U.S. 310 (1959)*, where the prosecutor sought to introduce evidence of the defendant's prior criminal record in order to counter the defense of entrapment, and the lower

federal courts in numerous cases, have not hesitated to reverse convictions where it is evident that inflammatory news reports have come to the attention of the jury.

For example, when Francis Bloeth was arrested as a suspect in three murder cases, New York newspapers announced his confession and the results of a psychiatric examination. "Bloeth must go to the chair," declared the prosecutor. "He is as mad as a hatter," countered the defense attorney. A death sentence was affirmed by state courts, but ruling on a subsequent *habeas corpus* petition filed in the federal district court, the United States Court of Appeals held that the jury was sufficiently biased to deprive Bloeth of due process. All jurors except one had read of the case, although all denied any bias. The conviction was overturned. *United States ex rel. Bloeth v. Denno, 313 F.2d 364 (2d Cir. 1963), cert. den. 372 U.S. 978 (1963).* See also *Briggs v. United States, 221 F.2d 636 (6th Cir. 1955); United States v. Powell, 171 F.Supp. 202 (N.D.Cal., S.D.1959); Coppedge v. United States, 272 F.2d 504 (D.C.Cir. 1959); United States v. Smith, 200 F.Supp. 885 (D.Vt.1962); Downey v. Peyton, 291 F.Supp. 746 (W.D.Va. 1968); Gavin v. Florida, 259 So.2d 544 (Fla.App.1972); People v. Sirhan, 102 Cal.Rptr. 385, 497 P.2d 1121 (Cal. 1972).*

2. In *Gordon v. United States, 438 F.2d 858 (5th Cir. 1971)* the Court of Appeals said that "It is for the trial judge to decide at the threshold whether news accounts are actually prejudicial; whether the jurors were probably exposed to the publicity. In making his determination the trial judge must consider such things as (1) the character and nature of the information published, some being more sensational or penetrating than others; (2) the time of the publication in relation to the trial; (3) the credibility of the source to which the information is attributable and (4) the pervasiveness of the publicity, that is the extent of the audience reached by the media employed and the interest invoked. With so many variables involved, every claim of jury prejudice because of newspaper articles appearing during the trial may turn on its own facts from examination of the total circumstances surrounding a given case."

See also *Worcester Telegram and Gazette v. Massachusetts, 238 N.E.2d 861 (Mass.1968)* where the trial judge was said to have full discretion in assessing the effects of news stories. In *Worcester Telegram* contempt convictions of a newspaper and one of its reporters were reversed because there was no proof of a willful design to affect the outcome of the trial. Furthermore a mistrial had been properly declared because of the prejudicial effect of a published article. The court emphasized that the Supreme Court requires "a clear and present danger to the administration of justice." The publication here had simply been a product of carelessness.

3. But when publicity gains in intensity judicial discretion may decrease or at least be subject to appellate review. In *United States v. Thomas, 463 F.2d 1061 (7th Cir. 1972)* an appellate court, rebuffing a trial judge's refusal to poll jurors, said that "the judge's response is to be commensurate with the severity of the threat posed." Upon determination that severe prejudicial information was present, the judge ought to have ascertained which jurors were exposed and whether a fair trial had been jeopardized. And in *Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968),* where newspaper coverage had been massive and prolonged, the court would not accept assurances of the jurors that they would try the case on the merits of the evidence presented. "* * * Whether a juror can render a verdict based solely on evidence adduced in the courtroom," the court added, "should not be adjudged on

that juror's own assessment of self-righteousness and nothing more."

4. Note that in cases of these kinds courts make largely intuitive judgments as to the actual effects of news coverage on the minds of jurors. A departure from purely subjective assessments of the influence of publicity is found in a federal district court ruling in Puerto Rico, *Martinez v. Commonwealth of Puerto Rico, 343 F.Supp. 897 (1972).* Here the court heard expert testimony on attitude formation by a psychologist and the results of a study on jury influence conducted by Rita James Simon and Thomas E. Eimerman at the Institute of Communications Research of the University of Illinois (Simon and Eimerman, *The Jury Finds Not Guilty: Another Look at Media Influence on the Jury,* Journalism Quarterly, Summer, 1971 pp. 343–344). In addition, a University of Puerto Rico professor determined by questionnaire and interview that 59 per cent of prospective jurors in the case were highly prejudiced against persons accused of acts of terrorism (Martinez was charged with violating the Explosives Law of Puerto Rico); and the court thought a fair outcome would depend upon jurors being drawn from the 41 per cent in the survey who were conservatively liberal in their attitudes toward terrorists. But the judge did not find the empirical evidence submitted sufficiently persuasive to grant injunctive relief in the case. More important, the court had given close scrutiny to the results of social scientific investigations in reaching his decision, an uncommon practice in legal proceedings.

For useful reviews of the relationships between social science information and judicial custom see Kindem, *The Legal and Social Scientific Views of Mass Media Effects Upon Jury Trials,* unpublished paper, University of Minnesota (1973); and Robbins, *Social Science Information and First Amendment Freedoms: An Aid to Supreme Court Decisionmaking,* Ph.D. Dissertation, University of Minnesota (1970).

A University of California sociologist conducted a telephone survey to support a change of venue for Angela Davis, and Black psychologists assisted her lawyers in choosing jurors. For an account of the role of social scientists in helping defense attorneys choose jurors in the Harrisburg 7 trial, and insight into the decision-making processes of a jury see Schulman, Shaver, Colman, Emrich and Christie, *Recipe for a Jury,* Psychology Today (May 1973). See also Kalven and Zeisel, The American Jury (1960).

5. Additional judicial remedies are change of venue (moving the trial to a locale where public opinion is less inflamed); change of venire (bringing in jurors from another jurisdiction); continuance (postponing the trial until a prejudicial atmosphere has subsided); declaring a mistrial with or without a new trial; challenging of jurors to ascertain their level of prejudice; locking up or sequestering jurors for the duration of a trial; and seeking an appeal under the due process clause of the 14th Amendment.

Although these remedies are designed to safeguard the rights of a defendant, there are so many problems connected with them that many lawyers consider them inadequate. More important, judges reject motions to implement the remedies far more frequently than they grant them.

For example in recent years while California courts in *Clifton v. Superior Court In and For Humboldt County, 86 Cal.Rptr. 612 (Cal.App.1970), Smith v. Superior Court for Los Angeles County, 80 Cal.Rptr. 693 (Cal.App.1969),* and in *Griffin v. Superior Court for Stanislaus County, 103 Cal.Rptr. 379 (Cal. App.1972),* and a federal court in *Wansley v. Miller, 353 F.Supp. 42 (D.C.Va. 1973),* granted a change of venue on ac-

count of prejudicial publicity, the following courts denied the motion in spite of extensive media coverage: *State v. Steward, 445 P.2d 741 (Mont.1968); Capes v. State, 450 P.2d 842 (Okl.Cr.1969); Walker v. Bishop, 408 F.2d 1378 (8th Cir. 1969); People v. Freeman, 167 N. W.2d 810 (Mich.App.1969); Thacker v. State, 173 S.E.2d 186 (Ga.1970); People v. Di Piazza, 300 N.Y.S.2d 545 (1969); State v. Washington, 236 So.2d 23 (La.1970); Dannelly v. State, 254 So.2d 434 (Ala.Cr.App.1971); Commonwealth v. Hoss, 283 A.2d 58 (Pa. 1971); Devereaux v. State, 473 S.W.2d 525 (Tex.Cr.App.1971); Thomas v. State, 192 N.W.2d 864 (Wis.1972); Gavin v. Florida, 259 So.2d 544 (Fla. App.1972). People v. Salas, 103 Cal. Rptr. 431, 500 P.2d 7 (Cal.1972); State v. Endreson, 506 P.2d 248 (Ariz.1973); State v. Moore, 506 P.2d 242 (Ariz. 1973); State v. Anonymous, 302 A.2d 296 (Conn.Super.1973).*

6. The same disproportion is found in the granting and denying of motions for mistrial. For every one granted at least six are denied. For example, mistrials were granted in *State v. Reynolds, 466 P.2d 405 (Ariz.App.1970),* and in *People v. Keegan, 286 N.E.2d 345 (Ill. 1971),* but similar motions were denied in *People v. Hawkins, 73 Cal.Rptr. 748 (Cal.App.1968), People v. Lowe, 258 N.E.2d 370 (Ill.App.1970), Commonwealth v. Eagan, 259 N.E.2d 548 (Mass.1970), United States v. McKinney, 429 F.2d 1019 (5th Cir. 1970), State v. McVay, 183 S.E.2d 652 (N.C. 1971), Flores v. State, 472 S.W.2d 146 (Tex.Cr.App.1971), United States v. Feaster, 341 F.Supp. 524 (D.C.Ala. 1972), United States v. Sutherland, 463 F.2d 641 (5th Cir. 1972).*

7. For court rulings on motions for continuance see *Delaney v. United States, 199 F.2d 107 (1st Cir. 1952), Commonwealth v. Geagan, 339 Mass. 487, 159 N.E.2d 870 (1959), cert. den. 361 U.S. 895 (1959), Ciucci v. People, 171 N.E. 2d 34 (Ill.1960), People v. Wallace, 91 Cal.Rptr. 643 (Cal.App.1970), State of Arizona v. Hall, 504 P.2d 534 (Ariz. 1972).*

8. Interesting commentaries on the efficacy of judicial instructions to the jury are found in *Leviton et al. v. United States, 193 F.2d 848 (2d Cir. 1951), cert. den. 343 U.S. 946 (1952), United States v. Wolf, 102 F.Supp. 824 (W.D. Pa.1952), Stickler v. Tehan, 365 F.2d 199 (6th Cir. 1966).*

On the question of sequestration of a jury see *Oliver v. Postel, 30 N.Y.2d 171, 331 N.Y.S.2d 407, 282 N.E.2d 306 (1972).* See text p. 434.

9. Certainly the ubiquity of the mass media questions the effectiveness of changes of venue and venire. A continuance may lead to the disappearance of witnesses and evidence, and a defendant unable to raise bail remains in jail. A mistrial may subject a defendant to the expense and psychological burden of a new trial. There is conflicting evidence on the utility of preemptory challenges and challenges for cause of jurors. And judicial instructions to a jury may not overcome extensive trial and pre-trial reporting, although the University of Chicago's Jury Project found that jurors take judicial admonitions very seriously. Jurors don't like being locked up and may respond negatively to a defendant making such a motion.

10. Judges believe the most effective safeguards against prejudicial pre-trial publicity are judicial admonitions to the jury, locking up of jurors (although 44 per cent of judges in this survey never sequester), continuance or postponement of trial, and *voir dire* challenges to jurors.

During a trial judges believe the most effective weapons against prejudicial reporting are motions for a new trial and due process appeals. Judges seem to

agree that criminal records, confessions and reports on the outcome of pre-trial tests are the most damaging forms of news coverage prior to trial. Bush, Wilcox, Siebert and Hough, Free Press and Fair Trial (1970). For a general discussion of judicial remedies see Gillmor, Free Press and Fair Trial, 115–141 (1966).

## L. LEGISLATION

1. It is perhaps inevitable that new laws would be proposed to resolve a social dilemma like the conflict between news reporting and the administration of justice. And so it has been recommended that legislatures, through narrowly drawn contempt or criminal statutes, ban specific press practices which appear to create a serious danger of improperly influencing jury verdicts.

Former Justice Bernard S. Meyer of the Supreme Court of the State of New York has long advocated a law which would interdict any publication threatening the parties in a case, their counsel or witnesses, grand or petit jurors, or the court itself—although this would not extend to criticism of the judge. He envisions two categories of prejudicial matter. First, material which as a matter of law is assumed to present a serious danger such as confessions, criminal records, and speculation about the credibility of witnesses or the guilt of the accused. Second—and the prejudicial nature of this material would depend on the circumstances of the case—interviews with the family of a victim of a crime, statements as to how a witness will testify, publication of the names and addresses of jurors, and appeals to racial, political and economic biases.

Justice Meyer has proposed a delaying statute only, and he intends that premature publication would constitute a misdemeanor for which appropriate penalties would be provided. See Meyer, *Free Press v. Fair Trial: The Judge's View* 41 N.D.L.Rev. 14 (1964); Meyer, *The Trial Judge's Guide to News Reporting and Fair Trial* 60 Journal of Criminal Law, Criminology and Police Science 287 (September 1969). See also Shaffer, *Direct Restraint on the Press* 42 Notre Dame Law Rev. 875 (1967); Signourey, *Fair Trial and Free Press—A Proposed Solution* 51 Mass.L.Q. 117 (1966). Jaffe, *The Press and the Oppressed—A Study of Prejudicial News Reporting in Criminal Cases* 56 J. of Crim.L., C. & P.S. 1, 166–69 (1965); Barron, *A Constitutional Impasse?* 41 N.D.L.Rev. 176 (1965); Note, *The Case Against Trial by Newspaper* 57 Nw.U.L.Rev. 250 (1962); Will, *Free Press vs. Fair Trial* 12 DePaul L.Rev. 197 (1963); Note, *Prejudicial Publicity: Search for Civil Remedy* 42 Notre Dame Law Rev. 953 (1967). Newsmen generally have reacted unfavorably to proposals which make judges the arbiters of when a story shall be covered.

Senator Wayne Morse introduced a fair trial bill (S. 290) for a second time in the 1965 session of Congress: "It shall constitute a contempt of court for any employee of the United States, or for any defendant or his attorney or the agent of either, to furnish or make available for publication information not already properly filed with the court which might affect the outcome of any pending criminal litigation, except evidence that has already been admitted at the trial. Such contempt shall be punished by a fine of not more than $1,000."

Although it was intended only to punish officers of the court. It was challenged on grounds of vagueness, ambiguity, inflexibility and constitutionality, the latter an inherent difficulty in this

kind of legislation. Similar or more stringent legislative proposals have been made in Massachusetts, Florida, and Wisconsin without success.

Isn't the underlying objection to such legislation that the courts would have to sit in continuous judgment over the press? With the ever-present possibility of an endless parade of indictments, trials and appeals, and courts and news media at bitter odds, wouldn't the public suffer, for in such an atmosphere court reporting might be avoided?

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## M. RESOLUTION?

Forthright, intimate and continuing discourse between bench, bar, and press may ultimately be the only solution to the perplexing problem of free press and fair trial. It is unfortunate, therefore, that the Reardon Report was issued at a time when significant progress was being made in the formation of bilateral state councils and committees dedicated to the cooperative promulgation of codes and guidelines of ethical conduct in criminal trials, codes which might be enforced by professional self-respect and the threat of publicity.

The Fair Trial-Free Press Council of Minnesota is an example. An incorporated body, the Council was originally chaired by an associate justice of the Minnesota Supreme Court. Its membership includes representatives of a District Court Judges Association, Municipal Judges Association, Juvenile Court Judges Association, County Attorneys, State Bar Association, State Public Defenders Office, Police and Peace Officers Association, Sheriffs Association, Chiefs of Police Association, Minnesota Newspaper Association, Broadcasters Association, Northwest Broadcast News Association, the University of Minnesota Schools of Journalism and Law. The Council has been active in dealing with specific conflicts of free press and fair trial, and newspaper editors, TV news editors, lawyers and judges have appeared before it.

Although the Reardon Report encourages such cooperation, it has been difficult for news media members of these committees not to feel undercut by the unilateral action of a national bar association. The reflexive response of the media has sometimes been to break off discussions and to return to a defense of their own values in the face of a new threat from bench and bar.

As long as there is consultation and a sincere and constructive exchange of information and opinions, a higher level of performance by both newsmen and lawyers is possible. The Reardon Report, although a significant contribution to this dialogue, will, because it is a judicial initiative, insure a continuing debate between press and bar for a long time to come. In the meantime, tangible alleviations of the problem are being made through bilateral press-bar councils in Arizona, California, Colorado, Idaho, Kentucky, Louisiana, Oregon, Massachusetts, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Minnesota, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington and Wisconsin.

On April 7, 1970 eight national organizations—the American Bar Association, the American Society of Newspaper Editors, the Radio-Television News Directors Association, the National Association of Broadcasters, the Associated Press Managing Editors Association, the Conference of Chief Justices, the National Conference of State Trial Judges, and the National District Attorneys Association—joined in a statement which expressed respect for "the co-equal rights of a free press and a fair trial," and which affirmed that the public has a right to be

informed about the administration of justice while also recognizing that prejudicial information may result in unfairness to the defendant, the public interest and the judicial process.

The Pennsylvania Supreme Court in March 1973 issued strict guidelines to all Pennsylvania police and district attorneys to limit the flow of crime news to the media. Included were prior criminal records, statements made by the accused, "inflammatory" comments about the merits of the case or the character of the defendant, the possibility of a guilty plea, and posed photographs linking the accused to the crime. Some Pennsylvania newsmen feel the new rules "go too far." See *Commonwealth v. Pierce, 303 A.2d 209, cert. den. 94 S.Ct. 164 (1973).*

"For free speech and fair trials are two of the most cherished policies of our civilization," said Justice Black in *Bridges v. California, 314 U.S. 252 (1941)*, "and it would be a trying task to choose between them." It is not a choice that must be sought but rather a delicate balance between the constitutional values of free speech and press and the right to a speedy and public trial before an impartial jury.

Professional norms have gotten in the way of the search for resolution. On the one hand, the reporter acts and reacts in terms of his paramount value, news; and sometimes the compelling appeal of the dramatic story will blind him to truth and other values such as fair play, integrity, and respect for the rights of the accused. On the other hand, the lawyer, trianed in the adversary system, is driven by a will to win, and sometimes by political ambition, so that he sometimes puts tactics above truth, the "fight" above the facts. Combine two such professional drives in a criminal case which contains the elements of a *cause célèbre* and the need for cooperative restraint becomes apparent.

The more vociferous spokesmen for press and bar are, in fact, playing the roles of adversaries rather than allies in their defense of constitutional principles. Too many newsmen view the problem only in terms of oppressive courts and hypocritical lawyers. Their counterparts in the bar view the conflict only in terms of a licentious and avaricious press.

Because the rhetoric is bold and the arguments strong, the debate between free press and fair trial continues frequently in a context of professional insularity. Where the public interest does seem to be overriding, responsible journalists will continue to expose crime and corruption in law enforcement, in goverment, in the courthouse, and sometimes in the press itself. It would be scandalous if they did not. Pulitzer Prizes have been won for investigations which prosecuting attorneys were loathe to undertake. Innumerable examples could be cited.

Early in the 1963 Janice Wylie and Emily Hoffert murder case, police announced that a 19-year-old Negro, George Whitmore, Jr., had confessed to the double slaying, to a third unsolved murder, and to an attempted rape. Accompanying headlines such as "Wylie Murder Solved: Drifter Admits Killing Two" appeared in New York dailies. Some news stories included Whitmore's detailed "confession," and others characterized him as a "horror," a "deranged animal."

But not all of the pieces seemed to fit, and several newspapers began an investigation of their own. They found witnesses who would testify that the accused had been 120 miles away when the two young women had been murdered. Furthermore, it appeared that police had written Whitmore's confession for him. In the meantime, a conviction on the attempted rape charge had been set aside because of the news coverage surrounding his arrest. Noting that the jury had

been infected with racial prejudice and influenced by Whitmore's earlier confession to three murders, a Brooklyn Supreme Court Justice said, "It is inescapable that widespread publicity reported by the press, television coverage and radio contributed in no slight degree to the atmosphere of hostility that surrounded Whitmore's trial."

But it took considerable editorial pressure to get the district attorney to drop the first degree murder charges, nine months after Whitmore's arrest. "If this had not been a celebrated case," said an assistant district attorney, "if this case hadn't got tremendous publicity, if this was what we so-called professionals call a run-of-the-mill murder, Whitmore might well have been slipped into the electric chair for something he didn't do." The press had both hindered and waited upon justice. These examples are taken from Gillmor, Free Press and Fair Trial (1966), Ch. 9. For a detailed account of the Whitmore case, and its implications for our judicial system, see Shapiro, *Annals of Jurisprudence,* the New Yorker (February 8, 15, 22, 1969).

A superb semi-documentary written by Abby Mann and presented by CBS-TV News, "The Marcus-Nelson Murders" portrayed the facts of this case on March 8, 1973. It was converted to a TV series called "Kojack" which began in September of the same year.

And yet the established press has failed to deal with the underlying social conditions which produce crime and disorder, to explain why the poor and the black often regard the judicial system with a blazing hatred, and to point out how the law is sometimes misused as a bludgeon rather than as a means for securing justice. See Chapt. 15, *The News Media and the Disorders,* Report of the National Advisory Commission on Civil Disorders (Kerner Report).

We need to know more about the social psychology of crime and the economic and cultural factors which provoke it. By sins of omission the press often fails to report deficiencies in the court system which the public ought to know: the truth about correctional institutions, judicial delays, unfair treatment of the poor, inept judges, unethical lawyers, the inability to deter organized crime, unequal treatment under the law, inadequate policing of white collar crime. See Whitney North Seymour, The Media and the Courts, *Why Justice Fails,* Chapt. 16, (1973).

The courts make coverage difficult. Courtrooms are too small. Reporting facilities are far less adequate than those provided for newsmen by the legislative and executive branches. David Grey, a student of the interaction patterns between the press and the Supreme Court, notes:

"In fact, it seems somewhat inconsistent for the Court to talk about such First Amendment rights as freedom of the press as an essential part of democratic dialogue and yet discourage efforts at improved public insight into the Court itself and the workings of the law." Grey, The Supreme Court and the News Media (1968).

In the meantime it is reasonable to assume that freedom of the press, as fundamental as it is to the well-being of society, was never meant to prevent a man on trial for his life from receiving a fair trial. In other words, it is possible to be fully aware of the danger imminent in even the slightest encroachment on the right of free expression without denying or sacrificing the high value that an open society places upon human life, as manifested in a civilizing system of law which presumes a man innocent until proven guilty beyond a reasonable doubt.

The right to publish inevitably includes the right to refrain from publish-

ing, and it is the moral responsiblity of the editor to decide whether the public interest justifies destruction of private rights in particular circumstances. The ideal situation, of course, would be one in which the press would have full access to all information about crime and the courts and would make its editorial decisions in the best interests of unimpaired justice. But has the press reached this level of professional maturity and sensitivity?

The influence of news on jury verdicts, the effectiveness of judicial instructions to a jury and other legal remedies such as change of venue, continuance, mistrial, the examination of veniremen and locking up of jurors are questions of human behavior and they must be studied as such with the most sophisticated tools available. Both sides have endorsed scientific investigation. Neither has done much about it.

With or without empirical evidence, the United States Supreme Court has shown that it will reverse convictions on a presumption of prejudice, a doctrine of implied bias as applied in *Irvin, Sheppard,* and as we shall see, *Rideau* and *Estes.* Reversals will serve to reprove and frustrate editors whose news coverage, while advancing no substantial public interest, has nevertheless led to the overturning of otherwise valid convictions.

Through consultation and a constructive exchange of opinions, newsmen and lawyers may become increasingly aware of the fact that some kinds of pre-verdict comment are socially unacceptable.

But restrictive legislation, proposals to revive the fearful contempt power, or unilateral codes, peremptory in tone, which interfere with press coverage without corresponding gains to the administration of justice will serve only to perpetuate an angry confrontation.

Many questions remain unanswered. What did Justice Clark mean to say in the *Sheppard* opinion? Would use of the contempt power against recalcitrant editors during the course of a trial be constitutional? Is the public interest violated by the exclusion of newsmen from preliminary hearings, and from parts of the trial itself? Can there ever be agreement on the question of timing? What might be the consequences of postponing the publication of certain categories of news? Will the Reardon Report have the effect of a judicial blackout on news in the period between arrest and trial? What merit is there in the contention of the American Newspaper Publishers Association that publicity works to the benefit of the suspect or defendant by maintaining the spotlight on public officials and ferreting out witnesses in his behalf?

At present lower courts are applying a *Sheppard-Estes-Reardon* standard to the question of how publicity affects a fair trial.

Sixteen years after his conviction for the murder and rape of a University of Colorado coed, a defendant filed a motion alleging that he had been denied a fair trial because of massive and hostile publicity. Denied twice by the trial court, the motion was finally granted by the Supreme Court of Colorado. That court noted that *Estes* and *Rideau* hold that publicity can be so massive, persuasive and prejudicial that the denial of a fair trial may be presumed. Moreover, the publicity here went far beyond *Sheppard* in some respects and in a surprising number of instances was almost identical to *Sheppard.*

For example, the *Rocky Mountain News* interspersed "Hail Marys" in one sensational story. The *Denver Post,* which had run 236 stories on the case and had retained Erle Stanley Gardner to assist authorities in a "Perry Mason" way, admitted that it would be difficult to find an unbiased jury in Boulder.

The *News* also reported that defense attorneys had obtained a copy of the defendant's confession and that statements made by him to his wife, which she had turned over to police, sustained his guilt. A polygraph expert hired by the *Post* reported that the defendant was lying about the case.

The result of the reporting, some fact some fiction, was a community pervaded by fear and hostility. Contempt proceedings against the press at least should have been considered, said the court. Defendant's conviction and sentence were set aside with instructions either to grant him a new trial or release him. *Walker v. People, 458 P.2d 238 (Colo.1969).*

But in few cases are the effects of publicity thought to be so telling. Intensive publicity was generated when a four-year-old girl was shot in a Los Angeles housing project. "Joy killing," "senseless slaying," "blatant case of murder," said the headlines as the press speculated on motives for the killing, concluding that it was probably part of a battle between street gangs.

At the request of defense counsel the court issued a protective order requiring "all agencies of the public media to refrain from the publication of any matters with respect to the present case except as occur in open court." The *Los Angeles Times* in a class action suit opposed the order and an appeals court ruled that the lower court had not carried the heavy burden of showing justification for a prior restraint. *Sheppard*, said the court, does not sanction such drastic measures against the press. Nor did it seem to the California judges to support Justice White's proposition in *Branzburg* that "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 order, said the appeal court, was an example of judicial overkill and the lower court was directed to vacate those portions of it which referred to the media and their representatives. *Younger v. Smith, 106 Cal.Rptr. 225 (Cal.App. 1973).*

Three 1969 cases also demonstrate the application of the *Sheppard* standard. In *United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969)* a federal court of appeals recognized that the trial court is obligated to provide a constitutionally fair trial and protect a defendant against prejudice from inflammatory and prejudicial publicity as prescribed by *Estes* and *Sheppard.* However, no hard and fast rule of general application can be formulated, the court added, since the determination of the extent, if any, of the impact of prior adverse publicity depends upon the circumstances of each individual case. Here eight months had passed since potentially prejudicial publicity had appeared and there had occurred none of the hazards to fair trial described by the Reardon standards relating to free press and fair trial.

A defendant charged with offering a federal judge a bribe in an income tax evasion case complained that a fair trial was destroyed by pre-trial publicity, notably a letter made public by the judge praising the informer who unwittingly and innocently became the vehicle for the alleged attempt to bribe the judge. But, said a federal court of appeals citing *Irvin, Holt* and *Reynolds,* the trial judge had carefully instructed and questioned prospective jurors and seemingly prejudiced veniremen were excused. More important there was no *Sheppard* atmosphere requiring the judge to set in motion the various judicial remedies even though the *Milwaukee Journal,* during the trial, had published the names, ages and addresses of jurors and the substance

of the testimony of one government witness given outside the jury's presence and later held inadmissible by the district court.

Where there is no threat or menace to the integrity of the trial, the appeals court concluded, the courts should refrain from controlling news coverage of a case. When such threats arise, the court should take appropriate steps to protect its integrity, and the nature of the measures taken by the trial court depend upon the severity of the threat to the integrity of the trial. *Margoles v. United States, 407 F. 2d 727 (7th Cir. 1969).*

The Michigan Court of Appeals held that neither the fact that a local radio and a local television station announced shortly after a defendant's arrest that he was suspected of killing his son with a belt and a frying pan, nor the fact that during the trial an article entitled "Child Brutality and the Cause Of It" appeared in the *Detroit Free Press* was sufficient to establish that publicity had denied the defendant a fair trial where there was no showing made that the article and broadcasts prejudiced the deliberations of any juror or that they were part of an atmosphere which created a high probability of prejudice. *Irvin* and *Sheppard* are still the standards against which these situations are to be measured. *People v. Person, 174 N.W.2d 67 (Mich.App.1969).*

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## SECTION 2. THE CAMERA IN THE COURTROOM

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1. In covering crime and the courts, electronic and photojournalism early became victims of their own youthful brashness, raucous commercialism, and intrusive equipment. And bench and bar have tended to equate TV's power to attract with its power to prejudice.

A Baltimore television station assembled the jury in the 1961 kidnap-murder trial of Melvin Rees, Jr., while his trial was in progress, got the jurors to reenact their deliberations and to discuss the evidence of Rees' guilt or innocence, and the advisability of the death penalty. The night before Rees was sentenced, the station presented a video tape of the show, billing it as a first in public service and an exciting tribute to the American jury system. To *New York Times* television critic, Jack Gould, the spectacle was "chilling in the extreme." *United States v. Rees, 193 F.Supp. 864 (D.Md.1961).*

2. In 1964, the Committee on Civil Rights of the New York County Lawyers Association issued a catalogue of cases in support of its objections to television interference with the rights of an accused.

For example, when a suspect, arrested in connection with a Brooklyn murder, held his head down to conceal his face, a policeman grabbed him by the hair and twisted his head back so his features would be fully exposed to waiting cameras. On May 30, 1963, WNBC-TV interviewed a police officer and two men suspected of murdering a policeman on the roof of a Harlem tenement. One of the suspects, although denying his guilt, was publicly accused by his accomplice, while the arresting officer stated as a matter of fact that the same suspect was guilty of the murder and presented his version of how the crime had been committed.

In another case, an elderly witness whose leg had recently been amputated, was being wheeled out of a New York courtroom when reporters and photographers, in a hectic effort to put questions to him, fell on his stretcher. And television reporters had little difficulty in getting several New York high school boys who were being booked on suspicion of the murder of an elderly woman to incriminate one another in their responses to a cascade of questions.

This genre of television coverage came to the attention of the United States Supreme Court in the case of Wilbert Rideau.

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## RIDEAU v. LOUISIANA

373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963).

Mr. Justice STEWART delivered the opinion of the Court.

On the evening of February 16, 1961, a man robbed a bank in Lake Charles, Louisiana, kidnapped three of the bank's employees, and killed one of them. A few hours later the petitioner, Wilbert Rideau, was apprehended by the police and lodged in the Calcasieu Parish jail in Lake Charles. The next morning a moving picture film with a sound track was made of an "interview" in the jail between Rideau and the Sheriff of Calcasieu Parish. This "interview" lasted approximately 20 minutes. It consisted of interrogation by the sheriff and admissions by Rideau that he had perpetrated the bank robbery, kidnapping, and murder. Later the same day the filmed "interview" was broadcast over a television station in Lake Charles, and some 24,000 people in the community saw and heard it on television. The sound film was again shown on television the next day to an estimated audience of 53,000 people. The following day the film was again broadcast by the same television station, and this time approximately 20,000 people saw and heard the "interview" on their television sets. Calcasieu Parish has a population of approximately 150,000 people.

Some two weeks later, Rideau was arraigned on charges of armed robbery, kidnapping, and murder, and two lawyers were appointed to represent him. His lawyers promptly filed a motion for a change of venue, on the ground that it would deprive Rideau of rights guaranteed to him by the United States Constitution to force him to trial in Calcasieu Parish after the three television broadcasts there of his "interview" with the sheriff. After a hearing, the motion for change of venue was denied, and Rideau was accordingly convicted and sentenced to death on the murder charge in the Calcasieu Parish trial court.

Three members of the jury which convicted him had stated on *voire dire* that they had seen and heard Rideau's televised "interview" with the sheriff on at least one occasion. Two members of the jury were deputy sheriffs of Calcasieu Parish. Rideau's counsel had requested that these jurors be excused for cause, having exhausted all of their peremptory challenges, but these challenges for cause had been denied by the trial judge. The judgment of conviction was affirmed by the Supreme Court of Louisiana. * * * The record in this case contains as an exhibit the sound film which was broadcast. What the people of Calcasieu Parish saw on their television sets was Rideau, in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder, in response to leading questions by the sheriff. The record fails to show whose idea it was to make the sound film, and broadcast it over the local television station, but we know from the conceded circumstances that the plan was carried out with the active cooperation and participation of the local law enforcement officers. And certainly no one has suggested that it was Rideau's idea, or even that he was aware of what was going on when the sound film was being made.

In the view we take of this case, the question of who originally initiated the idea of the televised interview is, in any event, a basically irrelevant detail. For we hold that it was a denial of due process of law to refuse the request for a change of venue, after the people of Cal-

casieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged. For anyone who has ever watched television 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. * * *

The case now before us does not involve physical brutality. The kangaroo court proceedings in this case involved a more subtle but no less real deprivation of due process of law. Under our Constitution's guarantee of due process, a person accused of committing a crime is vouchsafed basic minimal rights. Among these are the right to counsel, the right to plead not guilty, and the right to be tried in a courtroom presided over by a judge. Yet in this case the people of Calcasieu Parish saw and heard, not once but three times, a "trial" of Rideau in a jail, presided over by a sheriff, where there was no lawyer to advise Rideau of his right to stand mute.

The record shows that such a thing as this never took place before in Calcasieu Parish, Louisiana. Whether it has occurred elsewhere, we do not know. But we do not hesitate to hold, without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised "interview." "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death." Chambers v. Florida, 309 U.S. 227, 241.

Reversed.



**Editorial Note:**

[Justice Clark's dissent in Rideau is interesting because it was Clark who wrote the majority opinion in *Irvin v. Dowd* and who would later write the majority opinions in the *Sheppard* and *Billie Sol Estes* cases.]

Mr. Justice CLARK, with whom Mr. Justice HARLAN joins, dissenting.

* * * I agree fully with the Court that one is deprived of due process of law when he is tried in an environment so permeated with hostility that judicial proceedings can be "but a hollow formality." This proposition, and my position with regard thereto, are established in Irvin v. Dowd, 366 U.S. 717 (1961). At this point I must part company with the Court, however, not so much because it deviates from the principles established in Irvin but because it applies no principles at all. It simply stops at this point, without establishing any substantial nexus between the televised "interview" and petitioner's trial, which occurred almost two months later. Unless the adverse publicity is shown by the record to have fatally infected the trial, there is simply no basis for the Court's inference that the publicity, epitomized by the televised interview, called up some informal and illicit analogy to *res judicata,* making petitioner's trial a meaningless formality. See Beck v. Washington, 369 U.S. 541 (1962). * * *

**Editorial Note:**

The Reardon Report recommendations would prohibit the deliberate posing of persons in custody.

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## THE PROBLEMS OF THE CAMERA IN THE COURTROOM

1. Although Judge Joe B. Brown yielded to pressure from the American and Dallas Bar Associations opposing television coverage of the Ruby trial, he did permit photographs and interviews in

the corridors of the courthouse. At the end of the trial he gave permission for full photographic coverage of the verdict, with television controls within his reach. Chief Defense Counsel Melvin Belli's outburst against court and jury after the verdict was read and the undignified stampede of newsmen to provide him with a national forum for his criticism were serious breaches of these court rules.

Also, the failure of cameramen to live up to their promise to use one pooled TV camera and to shut it off as soon as Judge Brown left the bench strengthened the bar's argument that television coverage would make it difficult for the court to control the conduct of attorneys and newsmen.

"The case of Jack Ruby was virtually retried on live coast-to-coast television yesterday after the Dallas jury had returned its verdict and the court had been recessed * * *," the *New York Times* observed in its March 15, 1965, issue.

2. Commercialism raises complex problems which have not yet been explored. How much time would broadcast stations be prepared to devote to the coverage of trials? Would it be full and continuous, or merely the coverage of dramatic moments? Assuming sponsors could be found for the sensational cases, who would sponsor the technical and sometimes tedious civil trials which deal with social questions of great significance?

And how would top management react to testimony in anti-trust suits and litigation involving corporate friends? The Kohler Company hearings in Washington some years ago, for example, were televised in the morning when management testified; but when Walter Reuther, representing labor, testified in the afternoon, the cameras were strangely absent. The National Association of Manufacturers sponsored the program.

3. Television has a show business aura: it is a complex of sponsors, producers, directors, actors, rehearsals, makeup men, sets, special effects, time slots, and ratings. Would the criminal trial become the television spectacular?

Would trial participants be willing or unwilling actors in the courtroom drama? If unwilling, then their human dignity is compromised and their legal rights violated. If willing, their concern might be their effectiveness as actors rather than their compliance with their legal oaths. The American Bar Association cites a case in Amarillo, Texas, where a broadcasting station paid a defendant $1,000 for permission to cover his trial. *U.S. Bar Group Again Supports Ban on Cameras in Courtroom,* New York Times, February 6, 1963, p. 1.

4. Would trials be covered in the tradition of the best documentaries, or would disc jockeys, hucksters, and TV "personalities" be injected? The legal profession is suspicious, and its attitude toward trial coverage may be represented by former Harvard Law Dean Erwin Griswold who says:

"A courtroom is not a stage; and witnesses and lawyers, and judges and juries and parties, are not players. A trial is not a drama, and it is not held for public delectation or even public information. It is held for the solemn purpose of endeavoring to ascertain the truth; and very careful safeguards have been devised out of the experience of many years to facilitate that process. It can hardly be denied that if this process is broadcast or televised, it will be distorted. Some witnesses will be frightened; some will want to show off, or will show off, despite themselves. Some lawyers will 'ham it up.' Some judges will be unable to forget that a million eyes are upon them. How can we say that our primary concern is the equal administration of justice if we allow this to be done?

* * *" Griswold, *The Standards of the Legal Profession: Canon 35 Should Not Be Surrendered,* 48 A.B.A.J. 616 (1962).

5. Mountainous equipment is still a handicap to efficient news coverage. Chief Jesse Curry of the Dallas Police Department described the scene at his station prior to the grotesque murder of Lee Harvey Oswald before a national television audience. In the lobby of the third floor, television cameramen had set up two large cameras and floodlights in strategic positions that gave them a sweep of the corridor in either direction. Technicians stretched their television cables into and out of offices, running some of them out the windows of a deputy chief's office and down the side of a building. Men with newsreel cameras, still cameras, and microphones, more mobile than television cameramen, moved back and forth seeking information and opportunities for interviews.

By the time Chief Curry returned to the police station in mid-afternoon from Love Field where he had escorted President Johnson from Parkland Hospital, he found that "there was just pandemonium on the third floor." The news representatives, he testified before the Warren Commission, "were jammed into the north hall of the third floor, which are offices of the criminal investigation division. The television trucks, there were several of them around the city hall. I went into my administrative offices, I saw cables coming through the administrative assistant office and through the deputy chief of traffic, through his office, and running through the hall they had a live TV set up on the third floor, and it was a bedlam of confusion."

At Billie Sol Estes' preliminary hearing "a television motor van, big as an intercontinental bus, was parked outside the courthouse and the second floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar and four marked cameras were aligned just outside the gates. A microphone stuck its 12-inch snout inside the jury box, now occupied by an overflow of reporters from the press table, and three microphones confronted Judge Dunagan on his bench. Cables and wires snaked over the floor." *New York Times,* September 25, 1962.

And at Samuel Sheppard's trial, photographers with flash cameras and motion picture cameras and television personnel with portable lights jammed the corridors.

6. In a report of the New York City bar, Judge Medina says, "The news photographers have become an unmitigated nuisance. If not restrained, they pounce upon all the participants in the trial, including not only the lawyers and the defendant and his family, but prospective witnesses and others coming in and out of the courtroom." Special Committee on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York (Judge Harold R. Medina, chairman), Freedom of the Press and Fair Trial 48 (1967).

7. If it is a fact that compact and non-distractive equipment is now available, newsmen had better begin using it. And they would do well also to adhere faithfully to their own codes of ethics. In 1965, the Radio and Television News Directors Association proposed a code of broadcast ethics intended to encourage newsmen to conduct themselves with dignity, to keep broadcast equipment as unobtrusive as possible, and to pool coverage where necessary. And in 1959, the National Press Photographers Association adopted Canons of Courtroom Ethics which described in detail cameras, film and light to be used by still, newsreel and TV cameramen. The rules even included restrictions on dress.

Of wonderment to the photojournalist's friend is the marvelously efficient

and inoffensive demonstrations cameramen put on of court and legislative sessions, while actual coverage often turns out to be chaotic.

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### THE BACKGROUND OF OLD CANON 35

1. It all seems to have begun with news coverage of the 1935 Hauptmann trial in the Lindbergh kidnaping case—and what a trial it was! Reed, *Canon 35: Flemington Revisited,* Freedom of Information Center Report No. 177 (1967).

Shortly after the trial, in September, 1937, the American Bar Association adopted Canon 35 of its Judicial Ethics in the following form:

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted."

Canon 35 was amended in 1963 to include television.

All states, with the exception of Colorado, Oklahoma and Texas, have adopted Canon 35, or some modification of it, by statute or court rules. Massachusetts, North Dakota, Oregon, Virginia, and Wisconsin permit the judge some discretion on the question. And in Washington, press and bar groups are experimenting with taping court proceedings.

Rule 53 of the Federal Rules of Criminal Procedure keeps cameras out of federal courtrooms. Canon 35 has been affirmed by the Judicial Conference of the United States, an organization comprising the chief judges of each federal judicial circuit, one district judge from each, and the chief judges of special federal courts. The Chief Justice of the United States is chairman of the Conference.

On August 16, 1972, a new code, the Code of Professional Responsibility, was unanimously approved by the ABA House of Delegates. Canon 3A(7) permits a judge to authorize the use of electronic or photographic equipment in the courtroom for the purpose of presenting evidence, making a record, and for other purposes of judicial administration such as (1) closed circuit TV to another courtroom to accommodate an overflow crowd, (2) closed circuit TV to a press room so that members of the press will not disturb the courtroom by their coming and going, (3) closed circuit TV to the cell of a defendant who refuses to behave in the courtroom, and (4) the making of a film of a trial or other court procedures to use in training court personnel or new judges.

A judge may also authorize the photographic or electronic recording of appropriate court procedures for instructional use in educational institutions if the equipment will not distract participants or impair the dignity of the proceedings, if the parties and witnesses consent, and if the reproduction will not be exhibited until the proceeding has been concluded and all direct appeals have been exhausted.

The language of old Canon 35 is not included in the new guidelines but *Estes v. Texas,* infra, is cited in footnotes.

2. At present, Colorado allows camera coverage only with the defendant's consent. In Texas it is at the discretion of the trial judge. In Oklahoma the situation is unclear. See *Lyles v. State, 330 P.2d 734 (Okl.Cr.1958);* and Okl.Stat. 1971, Title 5, Ch. 1, App. 4, § 35. The two are in conflict.

Since 1954 numerous press-bar conferences have aired the subject, but the bar has stood fast in its objections to the

broadcast media in the courtroom, compromising only to the extent of deleting from the original statement the provocative phrases "are calculated to" and "degrade the court."

3. Even the most liberal of jurists reject the view that the public's right to know entitles the media to broadcast or photograph judicial proceedings. Justice William O. Douglas maintains, for example, that such coverage imperils fair trial because of the "insidious influences which it puts to work in the administration of justice." The historic concept of a public trial, he says, invisages a small close gathering, not a city-wide, statewide or nation-wide arena. The television camera would place added tension upon witnesses, and such a strained atmosphere would not be conducive to the quiet search for truth. Unimportant miniscules of the whole would be depicted, Douglas adds, and they would be the sensational moments. Judges and lawyers would be tempted to play to the galleries. Douglas, *The Public Trial and the Free Press,* 46 A.B.A.J. 842–43 (1960).

It was in this spirit that the Billie Sol Estes case came to the United States Supreme Court. Estes, a Texas financier, came to trial in 1962 for theft, swindling and embezzlement involving the federal government. Over Estes' objections, the trial judge permitted television to cover segments of the trial. Estes was convicted and appealed partly on the grounds that he had been deprived of due process of law by the televising of the trial. In 1964, the Texas Court of Criminal Appeals found no injury to Estes from the telecasts, and Estes appealed to the High Court.

Justice Tom Clark's opinion for the majority closed the courtroom doors to cameras—at least for the immediate future.

## ESTES v. STATE OF TEXAS

381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965).

Mr. Justice CLARK delivered the opinion of the Court.

The question presented here is whether the petitioner, who stands convicted in the District Court for the Seventh Judicial District of Texas at Tyler for swindling, was deprived of his right under the Fourteenth Amendment to due process by the televising and broadcasting of his trial. Both the trial court and the Texas Court of Criminal Appeals found against the petitioner. We hold to the contrary and reverse his conviction.

While petitioner recites his claim in the framework of Canon 35 of the Judicial Canons of the American Bar Association he does not contend that we should enshrine Canon 35 in the Fourteenth Amendment, but only that the time-honored principles of a fair trial were not followed in his case and that he was thus convicted without due process of law. Canon 35, of course, has of itself no binding effect on the courts but merely expresses the view of the Association in opposition to the broadcasting, televising and photographing of court proceedings. Likewise, Judicial Canon 28 of the Integrated State Bar of Texas, 27 Tex.B.J. 102 (1964), which leaves to the trial judge's sound discretion the telecasting and photographing of court proceedings, is of itself not law. In short, the question here is not the validity of either Canon 35 of the American Bar Association or Canon 28 of the State Bar of Texas, but only whether petitioner was tried in a manner which comports with the due process requirement of the Fourteenth Amendment.

Petitioner's case was originally called for trial on September 24, 1962, in Smith County after a change of venue from Reeves County, some 500 miles west. Massive pretrial publicity totaling 11 vol-

umes of press clippings, which are on file with the Clerk, had given it national notoriety. All available seats in the courtroom were taken and some 30 persons stood in the aisles. However, at that time a defense motion to prevent telecasting, broadcasting by radio and news photography and a defense motion for continuance were presented, and after a two-day hearing the former was denied and the latter granted.

These initial hearings were carried live by both radio and television, and news photography was permitted throughout. The videotapes of these hearings clearly illustrate that the picture presented was not one of that judicial serenity and calm to which petitioner was entitled. * * * Indeed, at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings. Moreover, veniremen had been summoned and were present in the courtroom during the entire hearing but were later released after petitioner's motion for continuance had been granted. The court also had the names of the witnesses called; some answered but the absence of others led to a continuance of the case until October 22, 1962. It is contended that this two-day pretrial hearing cannot be considered in determining the question before us. We cannot agree. Pretrial can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence. Though the September hearings dealt with motions to prohibit television coverage and to postpone the trial, they are unquestionably relevant to the issue before us. All of this two-day affair was highly publicized and could only have impressed those present, and also the community at large, with the notorious character of the petitioner as well as the proceeding. The trial witnesses present at the hearing, as well as the original jury panel, were undoubtedly made aware of the peculiar public importance of the case by the press and television coverage being provided, and by the fact that they themselves were televised live and their pictures rebroadcast on the evening show.

When the case was called for trial on October 22 the scene had been altered. A booth had been constructed at the back of the courtroom which was painted to blend with the permanent structure of the room. It had an aperture to allow the lens of the cameras an unrestricted view of the courtroom. All television cameras and newsreel photographers were restricted to the area of the booth when shooting film or telecasting.

Because of continual objection, the rules governing live telecasting, as well as radio and still photos, were changed as the exigencies of the situation seemed to require. As a result, live telecasting was prohibited during a great portion of the actual trial. Only the opening and closing arguments of the State, the return of the jury's verdict and its receipt by the trial judge were carried live with sound. Although the order allowed videotapes of the entire proceeding without sound, the cameras operated only intermittently, recording various portions of the trial for broadcast on regularly scheduled newscasts later in the day and evening. At the request of the petitioner, the trial judge prohibited coverage of any kind, still or television, of the defense counsel during their summations to the jury.

Because of the varying restrictions placed on sound and live telecasting the telecasts of the trial were confined largely

to film clips shown on the stations' regularly scheduled news programs. The news commentators would use the film of a particular part of the day's trial activities as a backdrop for their reports. Their commentary included excerpts from testimony and the usual reportorial remarks. On one occasion the videotapes of the September hearings were rebroadcast in place of the "late movie." * * *

We start with the proposition that it is a "public trial" that the Sixth Amendment guarantees to the "accused." The purpose of the requirement of a public trial was to guarantee that the accused would be fairly dealt with and not unjustly condemned. History had proven that secret tribunals were effective instruments of oppression. * * *

It is said however, that the freedoms granted in the First Amendment extend a right to the news media to televise from the courtroom, and that to refuse to honor this privilege is to discriminate between the newspapers and television. This is a misconception of the rights of the press.

The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings. While maximum freedom must be allowed the press in carrying on this important function in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process. * * *

Nor can the courts be said to discriminate where they permit the newspaper reporter access to the courtroom. The television and radio reporter has the same privilege. All are entitled to the same rights as the general public. The news reporter is not permitted to bring his typewriter or printing press. *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.* (Emphasis added.) * * *

The State contends that the televising of portions of a criminal trial does not constitute a denial of due process. Its position is that because no prejudice has been shown by the petitioner as resulting from the televising, it is permissible; that claims of "distractions" during the trial due to the physical presence of television are wholly unfounded; and that psychological considerations are for psychologists, not courts, because they are purely hypothetical. It argues further that the public has a right to know what goes on in the courts; that the court has no power to "suppress, edit, or censor events, which transpire in proceedings before it," and that the televising of criminal trials would be enlightening to the public and would promote greater respect for the courts.

At the outset the notion should be dispelled that telecasting is dangerous because it is new. It is true that our empirical knowledge of its full effect on the public, the jury or the participants in a trial, including the judge, witnesses and lawyers, is limited. However, the nub of the question is not its newness but, as Mr. Justice Douglas says, "the insidious influences which it puts to work in the administration of justice." These influences will be detailed below, but before turning to them the State's argument that the public has a right to know what goes on in the courtroom should be dealt with.

It is true that the public has the right to be informed as to what occurs in its courts, but reporters of all media, including television, are always present if they wish to be and are plainly free to report whatever occurs in open court through their respective media. * * * The State, however, says that the use of televi-

sion in the instant case was "without injustice to the person immediately concerned," basing its position on the fact that the petitioner has established no isolatable prejudice and that this must be shown in order to invalidate a conviction in these circumstances. The State paints too broadly in this contention, for this Court itself has found instances in which a showing of actual prejudice is not a prerequisite to reversal. This is such a case. It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process. * * *

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. They are the nerve center of the fact-finding process. It is true that in States like Texas where they are required to be sequestered in trials of this nature the jurors will probably not see any of the proceedings as televised from the courtroom. But the inquiry cannot end there. 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. The approaching trial immediately assumes an important status in the public press and the accused is highly publicized along with the offense with which he is charged. Every juror carries with him into the jury box these solemn facts and thus increases the chance of prejudice that is present in every criminal case. 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. Where pretrial publicity of all kinds has created intense public feeling which is aggravated by the telecasting or picturing of the trial the televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them. If the community be hostile to an accused a televised juror, realizing that he must return to neighbors who saw the trial themselves, may well be led "not to hold the balance nice, clear and true between the State and the accused. * * *"

Moreover, while it is practically impossible to assess the effect of television on jury attentiveness, those of us who know juries realize the problem of jury "distraction." The State argues this is *de minimis* since the physical disturbances have been eliminated. But we know that distractions are not caused solely by the physical presence of the camera and its telltale red lights. It is the awareness of the fact of telecasting that is felt by the juror throughout the trial. We are all self-conscious and uneasy when being televised. Human nature being what it is, not only will a juror's eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony.

Furthermore, in many States the jurors serving in the trial may see the broadcasts of the trial proceedings. Admittedly, the Texas sequestration rule would prevent

this occurring there. In other States following no such practice jurors would return home and turn on the TV if only to see how they appeared upon it. They would also be subjected to reenactment and emphasis of the selected parts of the proceedings which the requirements of the broadcasters determined would be telecast and would be subconsciously influenced the more by that testimony. Moreover, they would be subjected to the broadest commentary and criticism and perhaps the well-meant advice of friends, relatives and inquiring strangers who recognized them on the streets.

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. Furthermore, inquisitive strangers and "cranks" might approach witnesses on the street with jibes, advice or demands for explanation of testimony. There is little wonder that the defendant cannot "prove" the existence of such factors. Yet we all know from experience that they exist.

In addition the invocation of the rule against witnesses is frustrated. 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. And even in the absence of sound, the influences of such viewing on the attitude of the witness toward testifying, his frame of mind upon taking the stand or his apprehension of withering cross-examination defy objective assessment. Indeed, the mere fact that the trial is to be televised might render witnesses reluctant to appear and thereby impede the trial as well as the discovery of the truth.

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. Thus, where telecasting is restricted as it was here, and as even the State concedes it must be, his task is made much more difficult and exacting. And, as happened here, such rulings may unfortunately militate against the fairness of the trial. In addition, laying physical interruptions aside, there is the ever-present distraction that the mere awareness of television's presence prompts. Judges are human beings also

and are subject to the same psychological reactions as laymen. Telecasting is particularly bad where the judge is elected, as is the case in all save a half dozen of our States. The telecasting of a trial becomes a political weapon, which, along with other distractions inherent in broadcasting, diverts his attention from the task at hand—the fair trial of the accused.

* * *

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. Furthermore, telecasting may also deprive an accused of effective counsel. The distractions, intrusions into confidential attorney-client relationships and the temptation offered by television to play to the public audience might often have a direct effect not only upon the lawyers, but the judge, the jury and the witnesses. * * * The television camera is a powerful weapon. Intentionally or inadvertently it can destroy an accused and his case in the eyes of the public. While our telecasters are honorable men, they too are human. The necessity for sponsorship weighs heavily in favor of the televising of only notorious cases, such as this one, and invariably focuses the lens upon the unpopular or infamous accused. Such a selection is necessary in order to obtain a sponsor willing to pay a sufficient fee to cover the costs and return a profit. We have already examined the ways in which public sentiment can affect the trial participants. To the extent that television shapes that sentiment, it can strip the accused of a fair trial.

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. Nor are they "purely hypothetical." * * * They are real enough to have convinced the Judicial Conference of the United States, this Court and the Congress that television should be barred in federal trials by the Federal Rules of Criminal Procedure; in addition they have persuaded all but two of our States to prohibit television in the courtroom. They are effects that may, and in some combination almost certainly will, exist in any case in which television is injected into the trial process. * * *

It is said that the ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today.

The judgment is therefore reversed.

Reversed.

Mr. Chief Justice WARREN, whom Mr. Justice DOUGLAS and Mr. Justice GOLDBERG join, concurring.

While I join the Court's opinion and agree that the televising of criminal trials is inherently a denial of due process, I

desire to express additional views on why this is so. In doing this, I wish to emphasize that our condemnation of televised criminal trials is not based on generalities or abstract fears. The record in this case presents a vivid illustration of the inherent prejudice of televised criminal trials and supports our conclusion that this is the appropriate time to make a definite appraisal of television in the courtroom. * * *

I believe that it violates the Sixth Amendment for federal courts and the Fourteenth Amendment for state courts to allow criminal trials to be televised to the public at large. I base this conclusion on three grounds: (1) that the televising of trials diverts the trial from its proper purpose in that it has an inevitable impact on all the trial participants; (2) that it gives the public the wrong impression about the purpose of trials, thereby detracting from the dignity of court proceedings and lessening the reliability of trials; and (3) that it singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others. * * *

It is common knowledge that "television * * * can * * * work profound changes in the behavior of the people it focuses on." The present record provides ample support for scholars who have claimed that awareness that a trial is being televised to a vast, but unseen audience, is bound to increase nervousness and tension, cause an increased concern about appearances, and bring to the surface latent opportunism that the traditional dignity of the courtroom would discourage. Whether they do so consciously or subconsciously, all trial participants act differently in the presence of television cameras. And, even if all participants make a conscientious and studied effort to be unaffected by the presence of television, this effort in itself prevents them from giving their full attention to their proper functions at trial. Thus, the evil of televised trials, as demonstrated by this case, lies not in the noise and appearance of the cameras, but in the trial participants' awareness that they are being televised. To the extent that television has such an inevitable impact it undercuts the reliability of the trial process. * * *

Moreover, should television become an accepted part of the courtroom, greater sacrifices would be made for the benefit of broadcasters. In the present case construction of a television booth in the courtroom made it necessary to alter the physical layout of the courtroom and to move from their accustomed position two benches reserved for spectators. If this can be done in order better to accommodate the television industry, I see no reason why another court might not move a trial to a theater, if such a move would provide improved television coverage. Our memories are short indeed if we have already forgotten the wave of horror that swept over this country when Premier Fidel Castro conducted his prosecutions before 18,000 people in Havana Stadium. But in the decision below, which completely ignores the importance of the courtroom in the trial process, we have the beginnings of a similar approach toward criminal "justice." * * *

* * *

Broadcasting in the courtroom would give the television industry an awesome power to condition the public mind either for or against an accused. By showing only those parts of its films or tapes which depict the defendant or his witnesses in an awkward or unattractive position, television directors could give the community, state or country a false and unfavorable impression of the man on trial. Moreover, if the case should end in a mistrial, the showing of selected portions of the trial, or even of the whole trial, would make it almost impossible to select an impartial jury for a second trial. To permit this powerful medium to use

the trial process itself to influence the opinions of vast numbers of people, before a verdict of guilt or innocence has been rendered, would be entirely foreign to our system of justice.

* * *

In summary, television is one of the great inventions of all time and can perform a large and useful role in society. But the television camera, like other technological innovations, is not entitled to pervade the lives of everyone in disregard of constitutionally protected rights. The television industry, like other institutions, has a proper area of activities and limitations beyond which it cannot go with its cameras. That area does not extend into an American courtroom. On entering that hallowed sanctuary, where the lives, liberty and property of people are in jeopardy, television representatives have only the rights of the general public, namely, to be present, to observe the proceedings, and thereafter, if they choose, to report them.

[There follows seven pages of *photographs*.]

Mr. Justice HARLAN, concurring.

* * *

The question is fraught with unusual difficulties. Permitting television in the courtroom undeniably has mischievous potentialities for intruding upon the detached atmosphere which should always surround the judicial process. Forbidding this innovation, however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation. My conclusion is that there is no constitutional requirement that television be allowed in the courtroom, and, at least as to a notorious criminal trial such as this one, the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment. * * *

* * *

Finally, we should not be deterred from making the constitutional judgment which this case demands by the prospect that *the day may come 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.) If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause. At the present juncture I can only conclude that televised trials, at least in cases like this one, possess such capabilities for interfering with the even course of the judicial process that they are constitutionally banned. On these premises I concur in the opinion of the Court. * * *

Mr. Justice STEWART, whom Mr. Justice BLACK, Mr. Justice BRENNAN, and Mr. Justice WHITE join, dissenting.

I cannot agree with the Court's decision that the circumstances of this trial led to a denial of the petitioner's Fourteenth Amendment rights. I think that the introduction of television into a courtroom is, at least in the present state of the art, an extremely unwise policy. It invites many constitutional risks, and it detracts from the inherent dignity of a courtroom. But I am unable to escalate this personal view into a *per se* constitutional rule. And I am unable to find, on the specific record of this case, that the circumstances attending the limited televising of the petitioner's trial resulted in the denial of any right guaranteed to him by the United States Constitution.

* * * But, as the Court rightly says, the problem before us is not one of choosing between the conflicting guidelines reflected in these Canons of Judicial Ethics. It is a problem rooted in the Due Process Clause of the Fourteenth Amendment. We deal here with matters subject to continuous and unforeseeable change—the techniques of public communication. In an area where all the variables may be modified tomorrow, I cannot at this time rest my determination on hypothetical possibilities not present in the record of this case. There is no claim here based upon any right guaranteed by the First Amendment. But it is important to remember that we move in an area touching the realm of free communication, and for that reason, if for no other, *I would be wary of imposing any per se rule which, in the light of future technology, might serve to stifle or abridge true First Amendment rights.* (Emphasis added.)

* * *

While no First Amendment claim is made in this case, there are intimations in the opinions filed by my Brethren in the majority which strike me as disturbingly alien to the First and Fourteenth Amendments' guarantees against federal or state interference with the free communication of information and ideas. The suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern. 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. And the proposition that nonparticipants in a trial might get the "wrong impression" from unfettered reporting and commentary contains an invitation to censorship which I cannot accept. Where there is no disruption of the "essential requirement of the fair and orderly administration of justice," "[f]reedom of discussion should be given the widest range."

I do not think that the Constitution denies to the State or to individual trial judges all discretion to conduct criminal trials with television cameras present, no matter how unobtrusive the cameras may be. I cannot say at this time that it is impossible to have a constitutional trial whenever any part of the proceedings is televised or recorded on television film. I cannot now hold that the Constitution absolutely bars television cameras from every criminal courtroom, even if they have no impact upon the jury, no effect upon any witness, and no influence upon the conduct of the judge.

For these reasons I would affirm the judgment.

Mr. Justice WHITE, with whom Mr. Justice BRENNAN joins, dissenting.

I agree with Mr. Justice STEWART that a finding of constitutional prejudice on this record entails erecting a flat ban on the use of cameras in the courtroom and believe that it is premature to promulgate such a broad constitutional principle at the present time. This is the first case in this Court dealing with the subject of television coverage of criminal trials; our cases dealing with analogous subjects are not really controlling, cf. Rideau v. State of Louisiana; and there is, on the whole, a very limited amount of experience in this country with television coverage of trials. In my view, the currently available materials assessing the effect of cameras in the courtroom are too sparse and fragmentary to constitute the basis for a constitutional judgment permanently barring any and all forms of television coverage. As was said in another context, "we know too little of the actual impact * * * to reach a conclusion on the bare bones of the * * * evidence before us." It may well be, however, that as further experience and informed judgment do become

available, the use of cameras in the courtroom, as in this trial, will prove to pose such a serious hazard to a defendant's rights that a violation of the Fourteenth Amendment will be found without a showing on the record of specific demonstrable prejudice to the defendant. * * *

Mr. Justice BRENNAN.

I write merely to emphasize that only four of the five Justices voting to reverse rest on the proposition that televised criminal trials are constitutionally infirm, whatever the circumstances. Although the opinion announced by my Brother CLARK purports to be an "opinion of the Court," my Brother HARLAN subscribes to a significantly less sweeping proposition. He states:

"The Estes trial was a heavily publicized and highly sensational affair. I therefore put aside all other types of cases * * *. The resolution of those further questions should await an appropriate case; the Court should proceed only step by step in this unplowed field. *The opinion of the Court necessarily goes no farther, for only the four members of the majority who unreservedly join the Court's opinion would resolve those questions now.*" (Emphasis added.)

Thus today's decision is *not* a blanket constitutional prohibition against the televising of state criminal trials.

### NOTES AND QUESTIONS

1. Again in *Estes*, the Court applies the doctrine of implied bias. Prejudice is inherent in a televised trial, said Justice Clark. It could have a prejudicial impact on jurors, witnesses, trial judge, and on the defendant himself. And we need not wait for empirical documentation of these psychological effects, Clark added. Television causes prejudice, although "one cannot put his finger on its specific mischief."

2. Is Clark's dependence on *Rideau* appropriate if one considers the dissimilar facts of that case? Recall also that Clark dissented in *Rideau* because the majority failed to establish "any substantial nexus between the televised 'interview' and petitioner's trial. * * *"

3. Former Chief Justice Earl Warren, in a concurring opinion, declares that "To permit this powerful medium to use the trial process itself to influence the opinions of vast numbers of people, before a verdict of guilt or innocence has been rendered, would be entirely foreign to our system of justice." Warren was joined by Justices Douglas and Goldberg.

Do the majority opinions bear analysis? Does television coverage of a trial necessarily imply either notoriety or morbid public interest? Could the public interest be sincere? If paid sponsorship is necessary for this kind of coverage, is Justice Clark's conclusion that commercial support will have a direct bearing on a juror's vote as to guilt or innocence anything more than idle speculation? Is Warren convincing in his assumption of an inherent evil in television coverage or in the scrutiny of a wider public?

4. The Chief Justice draws an analogy between the Estes trial and a football game's noisy prognosticators, the television quiz scandals, Castro's stadium trials, and the Soviet Union's trial of Francis Gary Powers. Are such comparisons fair to American journalism?

Is there irony in the fact that Chief Justice Warren uses seven photographs in his opinion to bulwark his argument?

5. Justices Potter Stewart, Hugo Black, William Brennan and Byron White, a rare combination in cases of this kind, dissented partly because they would give some latitude to television's future role and partly because they believed the particular circumstances of the *Estes* case

demonstrated no prejudice to the defendant.

Speaking for the minority, Stewart said that "it is important to remember that we move in an area touching the realm of free communication, and for that reason, if for no other, I would be wary of imposing any *per se* rule which, in the light of future technology, might serve to stifle or abridge true First Amendment rights." Stewart did not wish to escalate the case into constitutional doctrine, for, he said, "the Constitution does not make as arbiters of the image that a televised state criminal trial projects to the public."

6. Justice John Harlan's opinion, although he voted with the majority, is the key opinion in that it keeps the *Estes* case from becoming a blanket constitutional prohibition against televising state criminal trials. It deserves close attention. Harlan would leave room for future experimentation with the new medium, although he conceded that the "mischievous potentialities" of courtroom television had clearly been at work in the Estes case.

7. A surprising characteristic of the majority opinions (especially that of the Chief Justice), are their vague and ill-defined references to "solemn decorum" and "essential dignity," phrases used at least as often as "the public's right to know" to cover up vested interests. Weak defenses encourage bold attacks.

8. Fred Rodell, Yale law professor and long-time student of the Supreme Court, has aptly expressed the alienation he and others feel for judicial pretense:

"Much of the respect, even awe, in which law and lawyers are generally held by laymen has its source in the aura of solemnity which surrounds the craft from the ponderous language to the musty lawbooks that line lawyers' offices, to especially, the almost religious ritual of the courtroom itself. The late Jerome Frank used to ridicule this ceremonial solemnity—of architecture, of judges' uniforms, of standardized and stiffly formal court procedure—with a symbolic phrase, 'the cult of the robe.' But he knew that judges and lawyers loved it because it made them and their work, however, trivial on occasion, look important and impressive. The idea of opening a courtroom, like a ballpark or convention hall, to television offends much of the profession less because of a fear of unfair trials than because of a fear of detracting from the dignity of the court—and of themselves." Rodell, *TV or No TV in Court?* New York Times Magazine, April 12, 1964.

9. In a sensational 1956 murder trial, *Graham v. People, 302 P.2d 737 (Colo. 1956)*, a Colorado district judge permitted radio stations to make tape recordings and television reporters to take sound on film, despite the express request of the accused—the dynamiter of a commercial airliner—that television be excluded. Following the trial, the Colorado Supreme Court broadly evaluated Canon 35 and its own rule that television coverage be at the discretion of the trial judge. After six days of hearings and photographic demonstrations, Justice Otto Moore of the Colorado Supreme Court could find no reason to bar modern camera equipment from the courtroom. "That which is carried out with dignity," he concluded, "will not become undignified because more people may be permitted to see and hear." *In re Hearings Concerning Canon 35, 296 P.2d 465 (Colo.1956).*

Since *Estes*, Colorado has modified its rule to require the defendant's consent, the stated purpose being to avoid retrials.

10. The argument of the *Estes* majority that television's mechanical equipment will distract participants and encumber the courtroom may already be anachronistic. Cameramen and their equipment can be completely concealed. And to argue psychological influence on the

basis of newness and unfamiliarity is to argue in a circle. If television is forever banned, it will be forever unfamiliar. Friendly and Goldfarb, Crime and Publicity 225 (1967). Does the distinction Clark and Warren make between the courtroom role of print and broadcast media have logical clarity?

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## THE STATE OF TV COURT COVERAGE TODAY

1. Since the Estes decision, discussion on the camera in the courtroom has greatly diminished. Many courts have banned cameras from courthouses. The Court of Appeals for the Fifth Circuit in 1967 upheld the contempt conviction of a television news photographer who, in violation of a standing order of the court, took television pictures of a defendant and his attorney in the hallway outside a courtroom after the defendant's arraignment. The order followed recommendations of the Judicial Conference of the United States condemning the taking of photographs and broadcasting in the courtroom or its environs in connection with any judicial proceeding. "A defendant in a criminal proceeding," said the court, "should not be forced to run a gantlet of reporters and photographers each time he enters or leaves the courtroom. * * * Within the courthouse the only relevant consideration is that the accused be afforded a fair trial." The news photographer was fined $25. *Seymour v. United States, 373 F.2d 629 (5th Cir. 1967).* For a strict following of *Estes* see *Bradley v. State of Texas, 470 F.2d 785 (5th Cir. 1972).*

2. A United States Court of Appeals in Illinois told the photographic editor of the *Chicago Journalism Review* that "We think that the district court was acting within its discretion in prohibiting photography and broadcasting inside as well as in the areas adjacent to the courtrooms. Moreover, the extension of the prohibition to the entire floor on which a courtroom is located, as well as the area surrounding the elevators on the first floor, is also permissible as a measure reasonably calculated to promote the integrity of the court's proceedings."

But in the same case the court recognized that there were limitations to the control courts could exert over broadcast and photojournalists. Portions of the rule applying to a combined courthouse and federal office building, and specifically a large glass-enclosed public lobby and the area surrounding the building including an open plaza used for demonstrations, were considered overbroad and beyond the scope permitted by the First Amendment. *Dorfman v. Meiszner, 430 F.2d 558 (7th Cir. 1970).*

3. A television cameraman covering a night burglary took pictures of apprehended suspects coming out of a building. He used a Sun Gun for lighting. Police officers said no pictures and took his camera, conditioning its return on whether the film contained information detrimental to the prosecution and whether the suspects were juveniles. The camera with film was returned intact a day later. In a declaratory judgment a federal district court said the seizing of the camera was an unlawful prior restraint, providing no opportunity for a hearing. The court added that news reporters have a right to be in public places and on public property to gather information photographically or otherwise. The use of light for night photography should be restricted only when it interferes with or endangers the police in their work. *Channel 10, Inc. v. Gunnarson, 337 F.Supp. 634 (D.C.Minn.1972).*

In *Loomis v. Peyton, 323 F.Supp. 246 (D.C.Va.1971)* another district court ruled that a news photo of a defendant in handcuffs did not deny him a fair trial.

4. *In re Acuff, 331 F.Supp. 819 (D.C.N.M.1971)* a third federal district court held that a local federal court rule prohibiting photography, radio and television equipment in the courtroom or on the entire floor on which the courtroom was located was not unconstitutionally overbroad. However, it would not uphold a criminal contempt conviction against a news photographer who had taken a picture of the state attorney-general filing a suit in the clerk's office on the same floor as the courtroom when the picture had been taken at the express invitation of the attorney-general. Furthermore, the court rule had not been printed and disseminated.

5. In Denver, Colorado in 1970 an entire trial was televised with the permission of the defendant, a Black Panther leader who was charged with resisting arrest. An edited version of the film was shown over NET stations on four consecutive evenings with expert commentary by a Harvard Law School professor. The result was a rare view of how a criminal trial proceeds, with no apparent prejudice to the defendant who, upon being acquitted by a white jury, damned the court system generally for what he perceived to be its racism.

The new Criminal Courts Building in Los Angeles is equipped with unobtrusive camera and recording equipment which was used to make a closed circuit television record of the Sirhan Sirhan trial.

6. It takes little imagination to see cameras in the courtrooms of the future, and Prof. Rodell, Judge Skelly Wright, U. S. District Judge William Becker, Dean A. K. Pye of the Duke Law School, David Berger of the Philadelphia Bar Association, and others, envision the day when sound-video tape will supplement the reporter's notes and provide appellate courts with "living" records of important trials. Unobtrusive camera equipment will be built into the courtrooms of tomorrow, as it has been built into the deliberative chambers of the United Nations. And, in the long run, the camera will prove to be a more accurate recording instrument than the pencil and pad.

Perhaps the justices say as much in their *Estes* opinions. "When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial," says Justice Clark, "we will have another case." And Justice Harlan, in his concurring opinion, says that "we should not be deterred from making the constitutional judgment which this case demands by the prospect that the day may come 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." Justice Stewart, dissenting, expresses one of the basic arguments of the media when he says, "The suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern. 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."

7. Until evidence is available, however, the Court's arguments for the deleterious psychological effects of television on jurors, witnesses, counsel, and defendant may be unanswerable. But these arguments are much weaker where appellate courts, and the United States Supreme Court itself, are concerned. Photographic experimentation should have begun with the High Court. Its opinions, which fashion national policy, are delivered orally in open court. "It would be a matchless lesson in the meaning of our constitutional rights and principles," says Judge Wright, "for the peo-

ple of the country to hear the decisions themselves."

At present the citizenry is only vaguely aware of these momentous pronouncements, and, generally speaking, they are poorly reported by the print media. Grey, The Supreme Court and the News Media (1968). No reportorial tool is as accurate, as capable of projecting a meaningful and realistic account of an important event, as the television camera. The ABA has recognized the value of video tape recordings in Canon 3A(7) of the new Code of Professional Responsibility which supplements the reporter's notes and provides appellate courts with "living" records of important trials. Should not judges open their minds to the press so that together they could experiment in depth reporting? A broader, more sensitive reportage will not only deter the maladministration of justice, but it will protect the courts from uninformed attacks, from misconstructions and misinterpretations of their work. Even the cynic or the most vociferous critic of the mass media may ultimately accept the proposition that this society is predicated on the meaningful participation of the news media in the affairs of the land. And to reject the press because of its irresponsible or flamboyant elements is no more reasonable than to reject trial procedure because some lawyers are unethical.

8. It may take decades before suitable trial coverage rules are developed, and the initial experiments will have to be models of excellence. Only then can the case of electronic journalism be decided on its merits and on the central issue: is photography and broadcasting inherently harmful to the judicial process so that an impairment of due process can be assumed without the defendant pointing out specifically how and where prejudice entered the proceedings?

9. Serious questions remain. Who should decide whether and under what conditions television should be admitted to the courtroom—judges or legislators?

Can a distinction be made between "newsworthy" and "sensational?"

Is it a reasonable condition to propose that the broadcast media cover uninterrupted entire trials, even if deadlocked or protracted? Should not the broadcast media have the same editing privileges as the print media?

Does the majority in *Estes* deprecate the integrity of the judicial process itself —as if to suggest that temptations must be withheld from bench and bar lest they succumb?

How would the Court rationalize rejections of requests to televise civil cases, especially those in which there is a large measure of public concern, and those tried without a jury?

Is there any validity to the proposition set forth by newsmen that because television brings the trial to the public, not the public to the trial, there is no risk of a circus or carnival atmosphere being generated?

Considering the public affairs performance of local broadcasting stations, are they up to the challenges that comprehensive court coverage would present?

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## SECTION 3. CONTEMPT AND THE MASS MEDIA

### A. THE ENGLISH EXPERIENCE

1. Contempt of court, said Sir John Fox, an English legal historian, has been a recognized phrase in English law from the Twelfth century to the present. Fox, The History of Contempt of Court 1 (1927). In 1742 Lord Hardwicke identified three kinds of contempt: (1) scan-

dalizing the court itself, (2) abuse of parties who are concerned in causes before the Bench, and (3) prejudicing mankind against a person before the cause is heard. Re *Read and Huggonson (Roach v. Garvan), 2 Atk. 469, 26 Eng. Rep. 683 (1742).*

Today press comment on pending trials, or what is commonly referred to as "trial by newspaper," embraces the latter category and is a common form of criminal contempt. In England it can be punished by fine or imprisonment, or both, in what is called a summary proceeding. This means that punishment is immediate —even if a direct committal to prison— and without benefit of a jury.

Warfare between press and bar in England is at a minimum because Parliament and the courts have given clear priority to fair trial. Their preference is backed by vigorous application of the contempt power whenever publications show even a "reasonable tendency" of polluting the streams of justice—to use an English court's own metaphor.

An affidavit from a party to a civil or criminal suit will set the proceeding in motion. If the court agrees that justice has been impaired, it will order the publisher, his editor, reporters, or printers committed to prison, unless they come before the court and show cause why the ruling should not be made final.

On an appointed day, the hapless editor, having presented petitions explaining, excusing, or justifying the news report in question, appears in court and through his counsel either offers the most abject apology or demeans himself by begging for mercy. *The Times* has commented on this ancient ritual:

"The pattern of case after case today is as familiar as it is squalid. The dominating consideration for the defense is to keep the editor who is alleged to have erred out of prison. With this object the case begins with an abject apology by him. The point of law is then put rather than pressed—the wrath of the court must be averted at all costs; a man already grovelling is hardly in the best position to defend a constitutional principle." June 17, 1958.

Before 1960 there was no right of appeal in England from a conviction for criminal contempt, except at the pleasure of the attorney general or the director of public prosecutions. A group of English lawyers, believing that a contempt charge should be weighed against other constitutional considerations such as free speech and press, effected the passage of legislation which now permits an appeal in all cases of criminal contempt. Administration of Justice Act, 1960, 8 & 9 Eliz. 2, c. 65 § 11(1), 13.

English lawyers dare not hold press conferences or issue publicity releases. After arrest, newspapers, on pain of contempt, carefully avoid pre-trial comment about the accused or the case against him. Preliminary or interlocutory proceedings, open to the public, can be fully reported, but comment must be avoided until after the trial.

2. The severity of the English law of contempt was dramatized in 1949 when John George Haigh was charged with the acid-bath murder of a wealthy woman acquaintance whose dismembered body, along with others, was found concealed in his apartment. Rumor had it that Haigh had drunk the blood of his victims through soda straws, a revolting prospect which later, by his own admission, turned out to be true. References to a "Vampire" appeared on the front page of the *London Daily Mirror* with a description of how the animal drank the pulsing blood of its live victims. On an inside page was a picture of Haigh. A day later, the *Mirror* headlined a page one story, "The Vampire Man Held," and though there was no direct reference to Haigh, the killer was described as a certain dapper man, a description which could be

construed to fit the accused—quite sufficient under English law.

With characteristic speed, the courts struck. Sylvester Bolam, who had been editor of the *Mirror* less than a month, was summarily convicted of contempt and sentenced to Brixton Prison for three months; his publishers paid a fine of 10,000 pounds.

The conduct of the newspaper, said the court, was a disgrace to English journalism and violated every principle of justice and fair play traditionally extended to even the worst of criminals. Moreover, the newspaper had ignored a warning from the Commissioner of Police not to embark upon a chronicle of the grim details. Speaking for the court, *R. v. Bolam, Ex Parte Haigh (1949) 93 Sol.J. 220 (D.C.)* Lord Chief Justice Goddard declared:

"In the long history of the present class of cases there had never, in the opinion of the Court, been one of such a scandalous and wicked character. It was of the utmost importance that the Court should vindicate the common principles of justice and, in the public interest, see that condign punishment was meted out to persons guilty of such conduct. In the opinion of the Court what had been done was not the result of an error of judgment but was done as a matter of policy in pandering to sensationalism for the purpose of increasing the circulation of the newspaper."

And, Goddard warned, "If for the purpose of increasing the circulation of their paper they should again venture to publish such matter as this, the directors themselves might find that the arm of that Court was long enough to reach them and deal with them individually." The Court had taken the view that there must be severe punishment. For a catalogue of English cases see Gillmor, *Free Press and Fair Trial in English Law*, 22 Wash. & Lee L.Rev. 17–42 (1965).

3. English courts discourage investigative reporting. In the first notable case of its kind, the *Evening Standard* hired detectives to investigate the murder and dismemberment of a young girl in Eastbourne. The results were published in a series of articles and photographs, including an account of the married life of the accused, and interviews with prospective witnesses.

In citing the editor for contempt, the court noted that it would not have been possible even for the ingenious mind to have anticipated with certainty what were to be the real issues in the case, to say nothing of the more difficult question of what was to be the relative importance of different issues in the trial. Lord Hewart sternly rejected the contention of the newspaper that it was its duty to investigate crime. The *Evening Standard* was fined 1000 pounds. The *Daily Express* and the *Manchester Guardian,* which had picked up the story, each paid 300 pounds and costs. *R. v. Evening Standard (Editor); Manchester Guardian (Editor); Daily Express (Editor), Ex parte Director of Public Prosecution (1924) 40 T.L.R. 833, 835.*

4. The rationale for this seemingly unlimited judicial power has been stated succinctly by a jurist noted for his liberalism. "The judges must of course be impartial," says Lord Denning, "but it is equally important that they should be known by all people to be impartial. If they should be libelled by traducers, so that people lose faith in them, the whole administration of justice would suffer." Denning, The Road to Justice 73 (1955).

The highest court in England, the Privy Council of the House of Lords, has been singularly unimpressed with the rationalizations of scandalized judges. In a notable 1936 case, *Ambard v. Attorney-General for Trinidad and Tobago,*

[*1936*] *A.C. 322, 335*, for example, Lord Atkin stated:

"But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticizing, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

Whatever the ambiguity in Lord Atkin's magnanimous declaration, the contempt power does deter reasonable criticism of the administration of justice. And, although there is no "trial by newspaper" in England, have the English failed to weigh in the balance the interest of the nation in free discussion?

Justification for the summary punishment of constructive or out-of-court contempt is credited to the famous English jurist, Blackstone, who, in a legal treatise, used for his authority Justice Wilmot's undelivered opinion in *R. v. Almon, Wilm. 243 at 254 (1765)*, a case in which a bookseller was said to have libeled the Chief Justice of England, Lord Mansfield. Wilmot believed that constructive contempt stood upon immemorial usage, that is, it had always been a part of the common law, and was absolutely necessary to the authority of the courts. A clerical error in drawing up an attachment against the bookseller, Almon, led to the case against him being dropped, and so Wilmot's 1765 judgment was never delivered. But it was found in his notes and published posthumously by his son in 1802.

So the case, absent from any of the reports of the period, nevertheless became a widely cited authority for the summary power of the courts to punish constructive contempts.

Legal historians have doubted the "immemorial" basis of Wilmot's rule. Sir John Fox attempted to show that in earlier times criminal contempts committed by a stranger out of court were proceeded against like any other trespass in the common law courts, by indictment and a trial by jury. Punishment by attachment was an arbitrary and oppressive Star Chamber procedure, he believed, which clashed with the whole theory of English law. But Wilmot's undelivered opinion has become legal doctrine. In 1964 it was given affirmation by the United States Supreme Court in a ruling that Governor Ross Barnett of Mississippi was not entitled to trial by jury in a criminal contempt proceeding. *United States v. Barnett, 376 U.S. 681 (1964)*. This section is based on Gillmor, Free Press and Fair Trial (1966), (Chap. 11, "Contempt and the Constitution.") See also Friendly and Goldfarb, Crime and Publicity (1967), Appendix B, and Goldfarb, The Contempt Power (1963).

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## B. THE AMERICAN EXPERIENCE

### Introduction

Wilmot's doctrine became the law of the colonies also, and even after the Revolution, the courts made no effort to change or modify the English law of contempt. Between 1800 and the Civil War, the legislatures began to alter the law of contempt by restricting the power to a limited number of transgressions committed within the immediate boundaries of the courtroom. In some state

laws, publications were expressly excluded from the list of misbehaviors.

The first state law was approved in Pennsylvania in 1809 after a bitter court case drew attention to the abuses of the contempt power. *Respublica v. Passmore, 3 Yeates 441 (1802).* The first American case of constructive contempt was *Respublica v. Oswald, 1 Dallas 319 (Pa.1788).* In that case Chief Justice McKean justified the summary procedure, but on appeal to the House of Representatives, the House questioned the relevance of English precedents, anticipating the Pennsylvania statute of 1809. Pennsylvania forbade summary punishment for publication, substituting the regular procedure of indictment, or a libel action. Under the influence of Edward Livingston's theory—as expressed in his "System of Penal Law Prepared for the State of Louisiana"—that the summary power should be confined to what is said or done directly in the presence of the court, New York also limited the scope of the summary contempt power in its 1829 revised statutes. Criminal punishment was forbidden, even after trial by jury, for publications which were not false or grossly inaccurate reports of official proceedings. See Nelles and King, *Contempt by Publication in the United States,* 28 Colum.L.Rev. 401–31 and 525–62 (1928), for a comprehensive and authoritative account of the evolvement of the contempt power in America in both legal and political contexts. The discussion assumes a conflict between judicial power and the liberal tradition.

Resentment against the common law method of dealing with constructive contempt reached its zenith in the impeachment trial of Judge James Peck before the United States Senate in 1831. Peck, a federal judge, had used the contempt power to suspend from practice for 18 months a lawyer who had criticized his handling of some Spanish land grant cases. The impeachment attempt failed by a one-vote margin, but within nine days Congress enacted the Federal Contempt Act of March 2, 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,*" 18 U.S.C.A. § 401. The English common law power of contempt, alien to the American experience, was to have no status here. By 1860, 23 of the 33 states had enacted similar limitations on the courts' summary contempt power.

From the Civil War to World War I, however, both state and federal courts had abrogated these contempt laws, and English common law rules held sway again. For example, Arkansas courts invoked the separation of powers doctrine to circumvent the Arkansas statute. *State v. Morrill, 16 Ark. 384 (1855).* And in 1907 the United States Supreme Court provided a rationale for state contempt prosecutions by holding, consistent with the common law, that truth was no defense to a charge of constructive contempt. *Patterson v. Colorado, 205 U.S. 454 (1907).*

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## TOLEDO NEWSPAPER CO. v. UNITED STATES

247 U.S. 402, 38 S.Ct. 560, 62 L.Ed. 1186 (1918).

**Editorial Note:**

The *Toledo Newspaper Company* case finally ratified the interpretation of the Act of 1831 which the lower federal courts had come to assume: that "so near thereto" required a causal rather than a geographical construction. The Court upheld the conviction of the *Toledo News-Bee* for attributing bias to a judge in a squabble between the city and a transit company. The majority opinion read the 1831 statute as declaratory of the immemorial and inherent power at common law of the courts to punish the

newspaper's misbehavior which showed a "reasonable tendency" to obstruct justice.

In a powerful dissent—to be recalled in later cases—Justice Holmes renewed what he saw as the geographical dictates of the "so near thereto" clause, sought to discredit the summary power (that is, for the same person to be complainant, judge and jury); and he saw nothing in this particular publication to prevent the judge from doing his sworn duty.

Mr. Justice HOLMES, dissenting.
* * *

The statute in force at the time of the alleged contempts confined the power of Courts in cases of this sort to where there have been "misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice." Before the trial took place an act was passed giving a trial by jury upon demand of the accused in all but the above mentioned instances. * * * And when the words of the statute are read it seems to me that the limit is too plain to be construed away. To my mind they point and point only to the present protection of the Court from actual interference, and not to postponed retribution for lack of respect for its dignity—not to moving to vindicate its independence after enduring the newspaper's attacks for nearly six months as the Court did in this case. Without invoking the rule of strict construction I think that "so near as to obstruct" means so near as actually to obstruct—and not merely near enough to threaten a possible obstruction. "So near as to" refers to an accomplished fact, and the word "misbehavior" strengthens the construction I adopt. Misbehavior means something more than adverse comment or disrespect.

But suppose that an imminent possibility of obstruction is sufficient. Still I think that only immediate and necessary action is contemplated, and that no case for summary proceedings is made out if after the event publications are called to the attention of the judge that might have led to an obstruction although they did not. So far as appears that is the present case. But I will go a step farther. The order for the information recites that from time to time sundry numbers of the paper have come to the attention of the judge as a daily reader of it, and I will assume, from that and the opinion, that he read them as they came out, and I will assume further that he was entitled to rely upon his private knowledge without a statement in open court. *But a judge of the United States is expected to be a man of ordinary firmness of character, and I find it impossible to believe that such a judge could have found in anything that was printed even a tendency to prevent his performing his sworn duty.* (Emphasis added.) I am not considering whether there was a technical contempt at common law but whether what was done falls within the words of an act intended and admitted to limit the power of the Courts. * * * I would go as far as any man in favor of the sharpest and most summary enforcement of order in Court and obedience to decrees, but when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts. Action like the present in my opinion is wholly unwarranted by even color of law.

Mr. Justice BRANDEIS concurs in this opinion.

### NOTES

1. In 1923 Chief Justice William Taft recommended trial by jury and judgment by someone other than the aggrieved judge in all cases of constructive contempt. *Craig v. Hecht, 263 U.S. 255, 278 (1923).* Justice Hugo Black, more recently, made the same argument,

dissenting in *Green v. United States, 356 U.S. 165 (1958)*. But the influence of Wilmot has prevailed. In the *Green* case Justice Frankfurther said that even though the historical assumptions underpinning the procedure for punishment of contempt of court were ill formed, a century and a half of legislative and judicial history of federal law based on such assumptions could not be ignored.

2. By the mid-1920s only four states —New York, Pennsylvania, Kentucky, and South Carolina—still possessed statutes which had withstood judicial efforts to narrow the meaning of legislative restrictions on the contempt power. After the *Toledo Newspaper* case, 43 judicial systems had embraced the contempt power and had defended it against all legislative attempts to curtail it. For 20 years the Act of 1831 posed no obstacle to summary punishment of contempt by publication in federal and most state courts. In California, for example, an influential minister was held in contempt for impugning the motives of a Superior Court judge in a series of radio broadcasts. The Supreme Court of California upheld the conviction in spite of a state statute limiting the contempt power to acts committed in the presence of the court. *Ex parte Shuler, 292 P. 481 (Cal.1941)*.

3. Then in *Nye v. United States,* 313 U.S. 33 (1941), the U. S. Supreme Court did a right about face, restored the earlier interpretation of the "so near thereto" clause and greatly limited the power of the federal judges to punish out-of-court contempts. "So near thereto," said the Court, means physical proximity and should be applied as a geographical rather than causative directive. The "reasonable tendency" rule as applied in *Toledo* and earlier cases, said the Court, would undermine the purposes of the Act of 1831. The case offers a useful summary of the law of contempt up to that point.

## BRIDGES v. CALIFORNIA

314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941).

**Editorial Note:**

In 1941, in what is the landmark case in the field of contempt, the Supreme Court in *Bridges v. California* abandoned the "reasonable tendency" test in favor of the "clear and present danger" test, first articulated by Justice Holmes in the *Schenck* case. For Holmes in *Schenck* the question was to be whether the words used actually created a clear and present danger that would bring about the substantive evil that Congress had a right to prevent. And it would be a question of proximity and degree. Words were not to be punished simply because they had a tendency, however remote, to result in bad conduct.

More important, for the first time, *Bridges* brought out-of-court publications relating to judicial proceedings under the protection of the First Amendment and the due process clause of the Fourteenth.

Union leader Harry Bridges, the Times-Mirror Company, and the managing editor of the Los Angeles *Times* had been found guilty and fined for contempt by the Superior Court of Los Angeles. The case against the newspaper grew out of three editorials written while a trial court was considering appropriate sentences for two labor "goons" found guilty of intimidating non-union workers. One of the editorials concluded: "Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill."

Bridges was cited for a telegram he had sent to the Secretary of Labor—which was published in the newspapers —criticizing a court decision against the CIO, of which he was a leader. In the telegram, Bridges threatened to strike the

Pacific Coast with his ILWU (longshoremen) if the court decision was enforced.

On appeal, both decisions were upheld by the Supreme Court of California. Bridges and the *Times-Mirror* then appealed to the United States Supreme Court and in a single decision joining the two cases that court by a 5–4 decision reversed the California courts.

Mr. Justice BLACK delivered the opinion of the Court.

These two cases, while growing out of different circumstances and concerning different parties, both relate to the scope of our national constitutional policy safeguarding free speech and a free press. All of the petitioners were adjudged guilty and fined for contempt of court by the Superior Court of Los Angeles County. Their conviction rested upon comments pertaining to pending litigation which were published in newspapers. In the Superior Court and later in the California Supreme Court, petitioners challenged the state's action as an abridgment, prohibited by the Federal Constitution, of freedom of speech and of the press, but the Superior Court overruled this contention, and the Supreme Court affirmed. The importance of the constitutional question prompted us to grant certiorari.

In brief, the state courts asserted and exercised a power to punish petitioners for publishing their views concerning cases not in all respects finally determined, upon the following chain of reasoning: California is invested with the power and duty to provide an adequate administration of justice; by virtue of this power and duty, it can take appropriate measures for providing fair judicial trials free from coercion or intimidation; included among such appropriate measures is the common law procedure of punishing certain interferences and obstructions through contempt proceedings; this particular measure, devolving upon the courts of California by reason of their creation as courts, includes the power to punish for publications made outside the court room if they tend to interfere with the fair and orderly administration of justice in a pending case; the trial court having found that the publications had such a tendency, and there being substantial evidence to support the finding, the punishments here imposed were an appropriate exercise of the state's power; in so far as these punishments constitute a restriction on liberty of expression, the public interest in that liberty was properly subordinated to the public interest in judicial impartiality and decorum.

If the inference of conflict raised by the last clause be correct, the issue before us is of the very gravest moment. *For free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them.* (Emphasis added.) But even if such a conflict is not actually raised by the question before us, we are still confronted with the delicate problems entailed in passing upon the deliberations of the highest court of a state. This is not, however, solely an issue between state and nation, as it would be if we were called upon to mediate in one of those troublous situations where each claims to be the repository of a particular sovereign power. To be sure, the exercise of power here in question was by a state judge. But in deciding whether or not the sweeping constitutional mandate against any law "abridging the freedom of speech or of the press" forbids it, we are necessarily measuring a power of all American courts, both state and federal, including this one.

It is to be noted at once that we have no direction by the legislature of California that publications outside the court room which comment upon a pending case in a specified manner should be punishable. As we said in Cantwell v. Connecticut, 310 U.S. 296, such a "declara-

tion of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations." But as we also said there, the problem is different where "the judgment is based on a common law concept of the most general and undefined nature." For here the legislature of California has not appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation. Under such circumstances, this Court has said that "it must necessarily be found, as an original question" that the specified publications involved created "such likelihood of bringing about the substantive evil as to deprive [them] of the constitutional protection." Gitlow v. New York, 268 U.S. 652, 671.

* * *

What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. *For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.* (Emphasis added.)

Before analyzing the punished utterances and the circumstances surrounding their publication, we must consider an argument which, if valid, would destroy the relevance of the foregoing discussion to this case. In brief, this argument is that the publications here in question belong to a special category marked off by history, a category to which the criteria of constitutional immunity from punishment used where other types of utterances are concerned are not applicable. For, the argument runs, the power of judges to punish by contempt out-of-court publications tending to obstruct the orderly and fair administration of justice in a pending case was deeply rooted in English common law at the time the Constitution was adopted. That this historical contention is dubious has been persuasively argued elsewhere. Fox, Contempt of Court, passim, e. g., 207. See also Stansbury, Trial of James H. Peck, 430. In any event it need not detain us, for to assume that English common law in this field became ours is to deny the generally accepted historical belief that "one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press." Schofield, Freedom of the Press in the United States. 9 Publications Amer.Sociol.Soc., 67, 76.

More specifically, it is to forget the environment in which the First Amendment was ratified. * * *

* * * [T]he only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society.

* * *

History affords no support for the contention that the criteria applicable under the Constitution to other types of utterances are not applicable, in contempt proceedings, to out-of-court publications pertaining to a pending case.

We may appropriately begin our discussion of the judgments below by considering how much, as a practical matter, they would affect liberty of expression. It must be recognized that public interest

is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion. Here, for example, labor controversies were the topics of some of the publications. Experience shows that the more acute labor controversies are, the more likely it is that in some aspect they will get into court. It is therefore the controversies that command most interest that the decisions below would remove from the arena of public discussion.

No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. Yet, it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted. Indeed, perhaps more so, because under a legislative specification of the particular kinds of expressions prohibited and the circumstances under which the prohibitions are to operate, the speaker or publisher might at least have an authoritative guide to the permissible scope of comment, instead of being compelled to act at the peril that judges might find in the utterance a "reasonable tendency" to obstruct justice in a pending case.

This unfocussed threat is, to be sure, limited in time, terminating as it does upon final disposition of the case. But this does not change its censorial quality. An endless series of moratoria on public discussion, even if each were very short, could hardly be dismissed as an insignificant abridgment of freedom of expression. And to assume that each would be short is to overlook the fact that the "pendency" of a case is frequently a matter of months or even years rather than days or weeks.

For these reasons we are convinced that the judgments below result in a curtailment of expression that cannot be dismissed as insignificant. If they can be justified at all, it must be in terms of some serious substantive evil which they are designed to avert. The substantive evil here sought to be averted has been variously described below. It appears to be double: disrespect for the judiciary; and disorderly and unfair administration of 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. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

The other evil feared, disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation. The very word "trial" connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper. But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for judges to have a

contempt power by which they can close all channels of public expression to all matters which touch upon pending cases. We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment.

*The Los Angeles Times Editorials.* The Times-Mirror Company, publisher of the Los Angeles Times, and L. D. Hotchkiss, its managing editor were cited for contempt for the publication of three editorials. Both found by the trial court to be responsible for one of the editorials, the company and Hotchkiss were each fined $100. The company alone was held responsible for the other two, and was fined $100 more on account of one, and $300 more on account of the other.

The $300 fine presumably marks the most serious offense. The editorial thus distinguished was entitled "Probation for Gorillas?" [17]

[17] The whole editorial, published in The Los Angeles Times of May 5, 1938, was as follows:

"Two members of Dave Beck's wrecking crew, entertainment committee, goon squad or gorillas, having been convicted in Superior Court of assaulting nonunion truck drivers, have asked for probation. Presumably they will say they are 'first offenders,' or plead that they were merely indulging a playful exuberance when, with slingshots, they fired steel missiles at men whose only offense was wishing to work for a living without paying tribute to the erstwhile boss of Seattle.

"Sluggers for pay, like murderers for profit, are in a slightly different category from ordinary criminals. Men who commit mayhem for wages are not merely violators of the peace and and dignity of the State; they are also conspirators against it. The man who burgles because his children are hungry may have some claim on public sympathy. He whose crime is one of impulse may be entitled to lenity. But he who hires out his muscles for the creation of disorder and in aid of a racket is a deliberate foe of organized society and should be penalized accordingly.

"It will teach no lesson to other thugs to put these men on good behavior for a limited time. Their 'duty' would simply be taken over by others like them. If Beck's thugs, however, are made to realize that they face San Quentin when they are caught, it will tend to make their disreputable occupation unpopular. Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill."

The basis for punishing the publication as contempt was by the trial court said to be its "inherent tendency" and by the Supreme Court its "reasonable tendency" to interfere with the orderly administration of justice in an action then before a court for consideration. In accordance with what we have said on the "clear and present danger" cases, neither "inherent tendency" nor "reasonable tendency" is enough to justify a restriction of free expression. But even if they were appropriate measures, we should find exaggeration in the use of those phrases to describe the facts here.

From the indications in the record of the position taken by the Los Angeles Times on labor controversies in the past, there could have been little doubt of its attitude toward the probation of Shannon and Holmes. In view of the paper's long-continued militancy in this field, it is inconceivable that any judge in Los Angeles would expect anything but adverse criticism from it in the event probation were granted. Yet such criticism after final disposition of the proceedings would clearly have been privileged. Hence, this editorial, given the most intimidating construction it will bear, did no more than threaten future adverse criticism which was reasonably to be expected anyway in the event of a lenient disposition of the pending case. To regard it, therefore, as in itself of substantial influence upon the course of justice would be to impute to judges a lack of firmness,

wisdom, or honor, which we cannot accept as a major premise. * * *

*The Bridges Telegram.* While a motion for a new trial was pending in a case involving a dispute between an A. F. of L. union and a C. I. O. union of which Bridges was an officer, he either caused to be published or acquiesced in the publication of a telegram which he had sent to the Secretary of Labor. The telegram referred to the judge's decision as "outrageous"; said that attempted enforcement of it would tie up the port of Los Angeles and involve the entire Pacific Coast; and concluded with the announcement that the C. I. O. union, representing some twelve thousand members, did "not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board."

Apparently Bridges' conviction is not rested at all upon his use of the word "outrageous." The remainder of the telegram fairly construed appears to be a statement that if the court's decree should be enforced there would be a strike. It is not claimed that such a strike would have been in violation of the terms of the decree, nor that in any other way it would have run afoul of the law of California. On no construction, therefore, can the telegram be taken as a threat either by Bridges or the union to follow an illegal course of action.

Moreover, this statement of Bridges was made to the Secretary of Labor, who is charged with official duties in connection with the prevention of strikes. Whatever the cause might be, if a strike was threatened or possible the Secretary was entitled to receive all available information. Indeed, the Supreme Court of California recognized that, publication in the newspapers aside, in sending the message to the Secretary, Bridges was exercising the right of petition to a duly accredited representative of the United States government, a right protected by the First Amendment.

It must be recognized that Bridges was a prominent labor leader speaking at a time when public interest in the particular labor controversy was at its height. The observations we have previously made here upon the timeliness and importance of utterances as emphasizing rather than diminishing the value of constitutional protection, and upon the breadth and seriousness of the censorial effects of punishing publications in the manner followed below are certainly no less applicable to a leading spokesman for labor than to a powerful newspaper taking another point of view.

In looking at the reason advanced in support of the judgment of contempt, we find that here, too, the possibility of causing unfair disposition of a pending case is the major justification asserted. And here again the gist of the offense, according to the court below, is intimidation.

Let us assume that the telegram could be construed as an announcement of Bridges' intention to call a strike, something which, it is admitted, neither the general law of California nor the court's decree prohibited. With an eye on the realities of the situation, we cannot assume that Judge Schmidt was unaware of the possibility of a strike as a consequence of his decision. If he was not intimidated by the facts themselves, we do not believe that the most explicit statement of them could have sidetracked the course of justice. Again, we find exaggeration in the conclusion that the utterance even "tended" to interfere with justice. If there was electricity in the atmosphere, it was generated by the facts; the charge added by the Bridges telegram can be dismissed as negligible. Reversed.

### NOTES

1. In a dissent concurred in by Chief Justice Stone and Justices Roberts and

Byrnes, Justice Frankfurter saw claims on behalf of liberties no less precious than freedom of speech and press. His argument emphasized the right of the states to decide by law what protection should be afforded their judiciaries. "[T]hat the conventional power to punish for contempt," Frankfurter contended, "is not a censorship in advance but a punishment for past conduct and, as such, like prosecution for a criminal libel, is not offensive either to the First or to the Fourteenth Amendments, has never been doubted throughout this Court's history. * * * The power should be invoked only where the adjudicatory process may be hampered or hindered in its calm, detached, and fearless discharge of its duty on the basis of what has been submitted in Court."

2. The minority held that the actual likelihood of intimidation is irrelevant and that any language by which anyone attempts to influence the actions of a judge, or language which has a *tendency* to influence him, is a danger to impartial and dispassionate deliberation on his part and is not to be protected by the right of free speech guaranteed by the First and Fourteenth Amendments.

Five years later the Court again dealt with contempts arising out of newspaper criticism of judges, and used the opportunity to reaffirm *Bridges* and carry its arguments farther.

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## PENNEKAMP v. FLORIDA

328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946).

**Editorial Note:**

The publisher and associate editor of the *Miami Herald* were found guilty of contempt for editorial criticism of local judges. The newspaper stated that the judges were using legal technicalities to delay and subvert swift convictions of criminal defendants.

The Supreme Court accepted the newspaper's defense that there was no clear and present danger that its editorials would affect the administration of justice in pending cases, and reversed the Florida courts.

"In this case," said Justice Reed for the Court, "too many fine drawn assumptions against the independence of judicial action must be made to call such a possibility a clear and present danger to justice. For this to follow, there must be a judge of less than ordinary fortitude without friends or support or a powerful and vindictive newspaper bent upon a rule or ruin policy, and a public unconcerned with or uninterested in the truth or the protection of their judicial institutions. * * * We conclude that the danger under this record to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible public comment. When that door is closed, it closes all doors behind it."

The late Zechariah Chafee, Jr., an authority on freedom of speech and press, was particularly critical of the majority opinion in *Pennekamp*, and would not have excused the gross inaccuracy of the offending editorials. At least, said Chafee, the newspaper should have been required to print a retraction correcting its initial blunder. Chafee would have made Justice Frankfurter's concurring opinion in the case required reading in every school of journalism, newspaper office and broadcasting station. Chafee, 2 Government and Mass Communications 433 (1947). A part of that opinion follows:

Mr. Justice FRANKFURTER, concurring. * * * This Court sits to interpret, in appropriate judicial controversies, a Constitution which in its Bill of Rights formulates the conditions of a democracy. But democracy is the least static form of society. Its basis is reason not authority.

Formulas embodying vague and uncritical generalizations offer tempting opportunities to evade the need for continuous thought. But so long as men want freedom they resist this temptation. Such formulas are most beguiling and most mischievous when contending claims are those not of right and wrong but of two rights, each highly important to the well-being of society. Seldom is there available a pat formula that adequately analyzes such a problem, least of all solves it. Certainly no such formula furnishes a ready answer to the question now here for decision or even exposes its true elements. The precise issue is whether, and to what extent, a State can protect the administration of justice by authorizing prompt punishment, without the intervention of a jury, of publications out of court that may interfere with a court's disposition of pending litigation.

* * *

Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society. The scope and nature of the constitutional protection of freedom of speech must be viewed in that light and in that light applied. The independence of the judiciary is no less a means to the end of a free society, and the proper functioning of an independent judiciary puts the freedom of the press in its proper perspective. For the judiciary cannot function properly if what the press does is reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the court. A judiciary is not independent unless courts of justice are enabled to administer law by absence of pressure from without, whether exerted through the blandishments of reward or the menace of disfavor. In the noble words, penned by John Adams, of the First Constitution of Massachusetts: "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit." A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other; both are indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press.

A free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies responsibility in its exercise. No institution in a democracy, either governmental or private, can have absolute power. Nor can the limits of power which enforce responsibility be finally determined by the limited power itself. See Carl L. Becker, Freedom and Responsibility in the American Way of Life (1945). 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. Most State constitutions expressly provide for liability for abuse of the press's freedom. That there was such legal liability was so taken for granted by the framers of the First Amendment that it was not spelled out. Responsibility for its abuse was imbedded in the law. The First Amendment safeguarded the right.

* * *

* * * To deny 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. The psychological aspects of this problem become particularly pertinent in the case of elected judges with short tenure.

* * * Thus, "trial by newspapers" has sometimes been explained as a concession to our peculiar interest in criminal trials. Such interest might be an innocent enough pastime were it not for the fact that the stimulation of such curiosity by the press and the response to such stimulated interest have not failed to cause grievous tragedies committed under the forms of law. Of course trials must be public and the public have a deep interest in trials. The public's legitimate interest, however, precludes distortion of what goes on inside the courtroom, dissemination of matters that do not come before the court, or other trafficking with truth intended to influence proceedings or inevitably calculated to disturb the course of justice. The atmosphere in a courtroom may be subtly influenced from without. * * * Cases are too often tried in newspapers before they are tried in court, and the cast of characters in the newspaper trial too often differs greatly from the real persons who appear at the trial in court and who may have to suffer its distorted consequences. * * * The right to undermine proceedings in court is not a special prerogative of the press.

The press does have the right, which is its professional function, to criticize and to advocate. The whole gamut of public affairs is the domain for fearless and critical comment, and not least the administration of justice. But the public function which belongs to the press makes it an obligation of honor to exercise this function only with the fullest sense of responsibility. Without such a lively sense of responsibility a free press may readily become a powerful instrument of injustice. It should not and may not attempt to influence judges or juries before they have made up their minds on pending controversies. Such a restriction, which merely bars the operation of extraneous influence specifically directed to a concrete case, in no wise curtails the fullest discussion of public issues generally. It is not suggested that generalized discussion of a particular topic should be forbidden, or run the hazard of contempt proceedings, merely because some phases of such a general topic may be involved in a pending litigation. It is the focused attempt to influence a particular decision that may have a corroding effect on the process of justice, and it is such comment that justifies the corrective process.

* * *

### NOTES AND QUESTIONS

1. *Craig v. Harney, 331 U.S. 364 (1947)* concerned a contest between the *Corpus Christi Caller-Times* and a local layman judge. The judge had instructed a jury to return a verdict for a plaintiff who sought to regain possession of a business building from an absent serviceman who claimed to have a lease but had paid no taxes. Three times the jury refused to follow the judge's instructions and brought in verdicts for the soldier. Finally, on the threat of being locked up until the proper verdict was delivered, and on the advice of the defendant's attorney, the jury bowed to the judge's wishes but under what it called the "coercion of the court."

While the judge was considering the defendant's motion for a new trial, the newspaper, in an editorial, termed the judge's action a "travesty on justice," and deplored the fact that the office of county judge had not been filled by a competent attorney. The newspaper then hastened to support petitions asking the judge to grant a new trial and to disqualify himself. The newspaper was held in contempt, and the motion for a new trial was denied.

In upholding the contempt conviction, the Texas Court of Criminal Appeals distinguished *Bridges* by suggesting that in *Bridges* the newspaper had kindled a fire already burning, while in this case the

newspaper had ignited the fire. *Ex parte Craig, 150 Tex.Cr.App. 598, 193 S.W. 2d 178, 186–188 (1946).* The conviction was appealed to the United States Supreme Court.

Writing for that Court, Justice Douglas saw a striking resemblance to the *Toledo Newspaper* case in which a "reasonable tendency" test had been used to assess the damage to justice inflicted by newspaper criticism. But that was no longer the Court's test, and, in spite of serious inaccuracies in the news reports, there was no serious or imminent threat to the administration of justice here.

"The fact that the jury was recalcitrant and balked, the fact that it acted under coercion and contrary to its conscience and said so were some index of popular opinion," said Douglas. "A judge who is part of such a dramatic episode can hardly help but know that his decision is apt to be unpopular. But the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. *Judges are supposed to be men of fortitude, able to thrive in a hardy climate.*" (Emphasis added.)

2. Some concluded that the "absolutist" application of the clear and present danger test in the foregoing cases meant that anything short of threatening the court with bodily harm to arrive at a particular decision would be permissible comment. Justice Douglas' language in *Craig* encourages such a conclusion when he says, "But it is hard to see * * * how (the editorial) could obstruct the course of justice in the case before the court. The only *demand* was for a hearing. There was no *demand* that the judge reverse his position—or else." (Emphasis added.)

3. "No modern Justice questions the primacy of free speech as an element in the political process," Wallace Mendelson points out. "But what is food for politics may be poison for a court and jury. Must words calculated to frustrate the judicial process have the same high respect as words offered for grist in the political mill?" Mendelson, The Constitution and the Supreme Court 363 (1959).

Mendelson's comment raises the question of whether the contempt cases since *Nye* have had the composite effect of abolishing the power of the state to reach publications that appear to have interfered with the administration of justice? The cases to date deal only with criticism directed at a judge. They do not consider pressures brought to bear on jury deliberations.

Is what we expect a judge to bear with professional fortitude disastrous to a jury?

The Supreme Court has at least recognized the distinction. In *Craig,* for example, Justice Douglas notes that none of the landmark cases raises questions concerning the "full reach of the power of the state to protect the administration of justice by its courts."

4. *State of Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950),* provided the Court an opportunity to face squarely the issue of "trial by newspaper," to clarify the judge-jury distinction, and to set guidelines for lower courts in their application of the clear and present danger test to pre-trial comment in jury cases. By denying *certiorari* the Court withheld its judgment on the contempt power of the lower courts and perhaps sounded the death knell for cases of this kind.

Justice Frankfurter was so disturbed by what he perceived as a lost opportunity that he wrote a personal memorandum in which he took pains to explain that the denial of *certiorari* did not imply either approval or disapproval of the lower court decision. The depth of his concern is illustrated by an appendix to his memorandum in which he presents the lead-

ing English cases on constructive contempt as if to recommend their doctrine to American courts.

With an air of resignation, the Maryland Court of Appeals had, in a 5–1 decision, reversed a lower court and found restrictions on pretrial comment an invalid restraint on freedom of speech and press. "It is now perfectly clear," said the Maryland court, "that whatever the law of the state, embodied in its constitution, statutes or judicial decisions, the provisions of the Federal Constitution are supreme." See *Baltimore Radio Show v. State, 67 A.2d 507 (1949).*

And in his disconsolate memorandum, *State of Maryland v. Baltimore Radio Show,* supra, Justice Frankfurter made a final appeal for revival of the contempt power:

"The issues considered by the Court of Appeals bear on some of the basic problems of a democratic society. Freedom of the press, properly conceived, is basic to our constitutional system. Safeguards for the fair administration of criminal justice are enshrined in our Bill of Rights. Respect for both of these indispensable elements of our constitutional system presents some of the most difficult and delicate problems for adjudication when they are before the Court for adjudication. It has taken centuries of struggle to evolve our system for bringing the guilty to book, protecting the innocent, and maintaining the interests of society consonant with our democratic professions. One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right. On the other hand our society has set apart court and jury as the tribunal for determining guilt or innocence on the basis of evidence adduced in court, so far as it is humanly possible. It would be the grossest perversion of all that Mr. Justice Holmes represents to suggest that it is also true of the thought behind a criminal charge '* * * 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. Proceedings for the determination of guilt or innocence in open court before a jury are not in competition with any other means for establishing the charge."

5. The very fact that the question of applying the clear and present danger test to juries arose in the *Baltimore Radio* case gives it an important place in our constitutional law. Through its unwillingness to review the lower court decision, the Supreme Court obscured the limits of the contempt power to punish publications seeking to influence juries.

Is it possible that the Court has discarded the contempt power in favor of due process appeals as represented by such cases as *Irvin* and *Sheppard?* Cases since 1950 suggest that it has.

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## WOOD v. GEORGIA

370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962).

**Editorial Note:**

In a Georgia case, a judge in 1962 instructed a grand jury to investigate Negro block voting and to determine if there was any truth to rumors that block voting was being stimulated by unlawful payments to Negro groups and their leaders by political candidates. The judge's instructions were given in the middle of a political campaign, and, in order to publicize his investigation, the judge asked all local newsmen to be present in the courtroom when his charge was read to the grand jury. Next day, with the grand jury now in session, the sheriff of Bibb County, himself a candidate for reelection, issued a press release citicizing the judge's action. Then he sent an open letter to the grand jury in which he im-

plied that the court's charge was based on falsehood, that the County Democratic Executive Committee was responsible for corruption in purchasing votes, and that the grand jury would do well to investigate it.

A month later, the sheriff was cited for contempt on the grounds that his language ridiculed the investigation, imputed lack of judicial integrity to the court, and presented a clear and present danger to the investigation and proper administration of justice in the Superior Court.

A day after the citation was delivered, the sheriff struck again. Restating his original charges, he said that his defense against the contempt citation would be truth. Again he was cited for contempt, this time because the second statement was said to present a clear and present danger to the proper handling of the first contempt citation.

The state court of appeals upheld the contempt convictions, and the Supreme Court of Georgia refused to review the case. The United States Supreme Court reversed.

Although the case did not concern the press directly, its implications may be significant. Chief Justice Warren, in his opinion for the Court, distinguished this case from one in which an *individual* might be investigated before either a grand or petit jury. Here there was no judicial proceeding *per se,* and no showing of a clear and present danger to the work of the grand jury. Instead, the sheriff contributed to a stream of public discussion at a time when public interest in the issue was at its height.

Mr. Chief Justice WARREN delivered the Opinion of the Court:

* * * First it is important to emphasize that this case does not represent a situation where an individual is on trial; there was no "judicial proceeding pending" in the sense that prejudice might result to one litigant or the other by ill-considered misconduct aimed at influencing the outcome of a trial or a grand jury proceeding. * * * Moreover, we need not pause here to consider the variant factors that would be present in a case involving a petit jury. Neither Bridges, Pennekamp nor Harney involved a trial by jury. In Bridges it was noted that "trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper" * * * and of course, the limitations on free speech assume a different proportion when expression is directed toward a trial as compared to a grand jury investigation. Rather, the grand jury here was conducting a general investigation into a matter touching each member of the community. * * * Particularly in matters of local political corruption and investigations it is important that freedom of communication be kept open and that the real issues not become obscured to the grand jury. It cannot effectively operate in a vacuum.

### NOTES AND QUESTIONS

1. Is the Chief Justice suggesting that a clear and present danger of prejudice need not be shown where petit jurors are concerned, and that an implication of bias is quite enough?

2. Although the Supreme Court in *Wood v. Georgia* indicated that a trial judge's power to punish for contempt might be somewhat greater in those cases in which the extra-judicial statements were brought to bear on a jury, the fact remains that the exercise of the contempt power even in jury cases would still require a substantial showing of justification in order to avoid the condemnation of the First Amendment.

3. Is there a contradiction in the Supreme Court voting to reverse criminal convictions influenced by inflammatory news stories and at the same time voting to reverse contempt citations against newspapers that print such material?

4. There has never been any doubt and very little discussion about the power of the courts to punish misbehavior in the presence of the court.

5. The central question remaining, however, is whether the Supreme Court will uphold convictions for constructive contempt where influence has been brought to bear on the jury itself? Justice Black in *Bridges* intimates that the Court would have given much weight to a legislative appraisal by the state that a "specific danger" justified restricting a "particular kind of utterance." Would you recommend a legislative solution to the problem of free press and fair trial?

# Chapter VI

# NEWSMAN'S PRIVILEGE

## SECTION 1. THE CONTROVERSY ABOUT THE REPORTER'S RIGHT TO PROTECT HIS SOURCES

1. Out of what sometimes must appear to be guerrilla warfare between the three branches of government and the news media there has re-emerged a significant constitutional question: Does the First Amendment create a newsman's privilege to refuse to respond to a grand jury subpoena to disclose sources? How are we to balance the common law precept that the state in the interest of ascertaining truth is entitled to every man's evidence, Wigmore, Evidence § 2192, at 70 (McNaughton rev. ed. 1961) against the corollary First Amendment right which posits a societal need for a free and unfettered flow of public information?

The government argues that full compliance with a subpoena serves justice and equality in the operation of the criminal law: the journalist contends that such compliance destroys his confidential relationships with sources and thus impedes the flow of vital news.

In 1972 a divided United States Supreme Court in *Branzburg v. Hayes, 408 U.S. 665 (1972),* struck a balance in favor of everyone's duty, including a President's, to testify. The Court refused to establish either an absolute or a qualified newsman's privilege on the basis of the First Amendment. The Justices in a 5–4 decision vigorously pressed quite divergent views. The majority appeared to be in tune with judicial trends toward narrowing special privileges of this kind. The new Federal Rules of Evidence, however, would expand qualified protection to communications between a psychotherapist and his patient and a policeman and his informer.

Government informers, incidentally, have generally enjoyed the rare privilege of anonymity unless their identity goes to the central issue of guilt or innocence, *Roviaro v. United States, 353 U.S. 53 (1956),* a qualified privilege the Supreme Court is obviously not willing to extend to newspaper "informers." The Watergate affair suggests that press informants may serve a public purpose at least as vital as that served by police informants. The public may agree. In a 1972 Gallup Poll 57 per cent of those sampled favored confidentiality of newsmen's sources, although the public does not seem particularly aroused over the issue.

The common law has firmly exempted compelled testimony in lawyer-client relationships, and in some circumstances in husband-wife, priest-penitent and doctor-patient relationships. Limited privilege has also been granted the disclosure of religious beliefs, political votes, trade secrets, state secrets, and certain classifications of official information. These exemptions are now governed by state and federal statutes.

The Constitution makes no precise exceptions beyond the Fifth Amendment's provision against self-incrimination.

The Supreme Court minority in *Branzburg v. Hayes, supra,* and, since the 1958 case of *Garland v. Torre, 259 F.2d 545 (2d Cir.),* some newsmen contend that the First Amendment implies a qualified confidentiality for a reporter's sources

and his notes and tapes. American courts, however, have been consistent in denying an evidentiary privilege for newsmen either under the common law or on constitutional grounds.

For 100 years newsmen have argued that compelled testimony to disclose their sources would violate the regulations of their employers and perhaps cause them to lose their jobs, or infringe upon their professional privilege as set down in their codes of ethics. They have also pleaded self-incrimination and have tried to show the irrelevancy of their testimony to matters under inquiry. In only a few cases have any of these arguments been successful. It should be noted that many of the early cases dealt with the identity of the source of what became a libelous publication.

2. The Supreme Court's decision in *Branzburg,* which also reviewed the *Caldwell* and *Pappas* cases, seemed to many newsmen to come at a time when the press is particularly vulnerable to governmental intrusions. For that reason, the Court's decision refusing to recognize a First Amendment basis for newsman's privilege was particularly unwelcome to many journalists. Between the 1968 Chicago Convention and the mid-Watergate period, major news media were hit with a blizzard of subpoenas. Only a small fraction of subpoenas and a minority of contempt citations have involved efforts to learn the identity of a reporter's confidential sources, but it is these cases which have sensitized important elements of the news profession to what they perceive to be clear violations of the First Amendment.

*Los Angeles Herald-Examiner* reporter William Farr's refusal to disclose to a Los Angeles county court judge the names of prosecution attorneys who had supplied him with a copy of a witness's deposition in the Manson case is a celebrated example. Farr, who considers himself a law-and-order Republican, was cited for contempt and went to jail for nearly two months. There are serious doubts whether Farr's sensational reports of celebrities on a Manson family death list did serve any genuine public interest. Farr's stories were published in direct defiance of the judge's order to restrict publicity in the case in the interests of fair trial.

In December 1971 the California Court of Appeals affirmed the conviction. The California Supreme Court denied Farr's appeal and the United States Supreme Court rejected his petition for certiorari. *Farr v. Superior Court of Los Angeles County, 22 Cal.App.3d 60, 99 Cal.Rptr. 342, cert. den. 409 U.S. 1011 (1972).*

Peter Bridge of the now defunct *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 had alleged she had been offered a bribe. Bridge had forfeited immunity provided by the New Jersey shield law by naming his source in an article. The Supreme Court of New Jersey declined to hear the case and on October 3, 1972 the United States Supreme Court denied a stay of his contempt sentence. *In re Bridge, 120 N.J. Super. 460, 295 A.2d 3, cert. den. 410 U.S. 991 (1973).*

In December 1972 two *Los Angeles Times* reporters, Jack Nelson and Ronald Ostrow, and the *Times'* Washington bureau chief John Lawrence were ordered to turn over confidential tape recordings of conversations with a witness in the first Watergate trials. They refused and Lawrence was jailed for contempt of court. United States District Court Chief Judge John Sirica's ruling was stayed by the United States Court of Appeals and Lawrence was freed two hours after he was jailed. His source rescued him two days later by releasing the *Times* from its pledge of confidentiality and turning the tapes over to the court.

TV 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 the 1971 riot. They refused and Dan was later sentenced to 30 days in jail. *People by Fischer v. Dan, 342 N.Y.S.2d 731 (App.Div. 1973).*

In early 1972 Edwin Goodman, general manager of WBAI-FM in New York City, was ordered to provide the Manhattan district attorney's office with 30 hours of tapes broadcast during a prison revolt in the Tombs, Manhattan Men's House of Detention. Goodman refused and was sentenced to 30 days in jail. The station was fined $250. *People v. Goodman, 333 N.Y.S.2d 876 (App.Div. 1972).*

In these two cases New York courts, in effect, amended New York's absolute shield law by requiring reporters to testify about the source or content of confidential information if they were witnesses to a crime.

In a second case growing out of the Tombs riot, the *Village Voice* was unable to quash a subpoena demanding the original, unpublished version of an article about the riot in which an inmate confessing his involvement was identified. Interpreting New York's privilege law narrowly and noting that the confession sought went to the basic charge against the inmate, the court reasoned that because the story had been published and the confession "advertised," the inmate, and thereby the newspaper, had waived any right to anonymity. An undisclosed source may be protected, said the court, if it provided news under a cloak of confidentiality either express or implied. Here no promise of confidentiality had been made. *People v. Wolf, 329 N.Y.S.2d 291 (N.Y.Sup.1972).*

*Memphis Commercial Appeal* reporter, Joseph Weiler, was threatened with contempt when he refused to tell a State Senate Committee who his source was for reports on child beatings in a state-operated hospital for the retarded.

An Indiana court in *Lipps v. State, 258 N.E.2d 622 (Ind.1970)* held that there was no privilege between a defendant and a reporter who had been summoned to a jail cell to hear the suspect admit that he had shot a bartender during a robbery. The Indiana statute, said the court, does not provide a privilege between a defendant in a criminal case and a newspaper reporter; and the law creates a right personal to the reporter which only he may invoke.

Anthony Ripley of the *New York Times* was subpoenaed to testify before the House Internal Security Committee after covering the 1968 convention of the Students for a Democratic Society. As a consequence, the entire "establishment" press was prohibited from attending next year's SDS convention.

Clearly the Congress, state legislatures and administrative agencies, as well as the courts, can use the contempt power against reporters who insist upon protecting their sources. Sometimes the action is more direct.

Palo Alto police ransacked the confidential files of the Stanford University *Daily* for photographs of campus demonstrators. In spite of the fact that the police had valid search warrants, a U.S. District Court later condemned the procedure, declaring that a subpoena would have been the proper instrument where a third person himself is not suspected of a crime. *Stanford Daily v. Zurcher, 353 F.Supp. 124 (N.D.Calif.1973).*

The most serious challenges to a reporter's confidentiality and his freedom to gather news have arisen in the context of dissident minority and New Left activities which carry a connotation of "political" crime.

*Boston Globe* reporter Thomas Oliphant, for example, was indicted in May 1973 for accompanying pilots on a food drop mission over Wounded Knee, S.D. He was charged with traveling across state lines to promote a riot and with obstructing federal officials in the performance of their duties.

The FBI, pursuant to a secret subpoena, obtained all long-distance home and office telephone records of columnist Jack Anderson for a six-months period in connection with its investigation of the occupation of the Bureau of Indian Affairs building. In April 1973 Judge John Sirica ordered the FBI to return all the telephone records and to expunge from its records all information obtained by such means. Wiretapping of reporters' telephones appears to have been standard FBI procedure at least since 1969.

Rarihokwats, an editor of *Akwesasne Notes,* an American Indian newspaper, was jailed and subjected to deportation proceedings in 1972 after writing articles critical of government policy toward Native Americans. Rarihokwats is a Canadian citizen. The newspaper also claimed that the Bureau of Indian Affairs was responsible for its loss of second class mailing privileges.

Thomas Forcade and Cindy Ornsteen of the Underground Press Service were arrested by the FBI and jailed for two days in February 1973 for allegedly possessing firebombs in Miami during the GOP convention. They were acquitted in April and now contend that their office and staff were subjected to extensive police surveillance, drug searches and general harassment.

Underground press sources have reported that a recently released FBI document showed that the Eugene, Ore. underground paper *The Augur* was the subject of intensive FBI investigation in 1971–72.

More than 50 reporters appeared on the Nixon Administration "Opponents List." The stars among them were Mary McGrory of the *Washington Star-News,* Ed Guthman of the *Los Angeles Times,* and Daniel Shorr of CBS News.

John Gladding of WCAX-TV, Burlington, Vt., was subpoenaed by defense counsel to testify in a criminal case about his knowledge of a drug raid which resulted in the arrest of 10 persons. Gladding had received advance information of the raid and was present on the scene. He refused to identify his source and a defense attorney moved to compel his testimony.

For a complete accounting of cases in this long-standing conflict between press and government see *Report of Reporters Committee for Freedom of the Press (Legal Research and Defense Fund)*, 1973, summarized by Graham and Landau, *The Federal Shield Law We Need,* Columbia Journalism Review, March/April, 1973, pp. 30–33, and in *New York Times,* Feb. 18, 1973. See also Whalen, Your Right To Know (1973).

It is important to note that there is nothing new about this kind of litigation. Reported cases go back to at least 1874 *People ex rel. Phelps v. Fancher, 2 Hun (N.Y.) 226, 4 Thomp. and C. 467.* In 1857 a select committee of the United States House of Representatives summoned reporter James Simonton of the *New York Times* to reveal the sources of information for a series of articles about Congressmen who were willing to sell their votes. Using very contemporary arguments for his privilege, Simonton refused and spent 19 days in the custody of the House sergeant at arms.

Two *New York Tribune* reporters later received similar treatment from the Senate for refusing to reveal from whom they had received a copy of a secret treaty which their newspaper had published.

In 1915 in *Burdick v. United States, 236 U.S. 79*, the first case of its kind to reach the Supreme Court, the Court looked favorably upon newsmen using the Fifth Amendment guarantee against self-incrimination to protect sources. George Burdick, editor of the *New York Tribune,* refused to tell a grand jury where he had gotten information for stories about customs' frauds, claiming that his testimony might tend to incriminate him. A former Congressman and the wife of a former president of U.S. Steel were being investigated on charges of smuggling jewelry into the country. Burdick was offered a presidential pardon for any offense he might have committed in securing the articles, but he still refused and was fined $500 by a Federal District Court. The Supreme Court struck down the contempt citation on the grounds that one cannot be forced to take a pardon and thereby the personal ignominy of accepting immunity for a crime not charged. Burdick never did reveal the source of his information.

*Burdick* may not be a strong precedent, however, since recent Supreme Court rulings have held that when immunity is granted a witness can be compelled to testify. *Kastigar v. United States, 406 U.S. 441 (1972); Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472 (1972).*

An influential case was *People ex rel. Mooney v. Sheriff of New York County, 269 N.Y. 291, 199 N.E. 415 (1936)* in which a *New York Journal-American* reporter was held in contempt, fined $250 and sentenced to 30 days in jail for refusing to tell a grand jury who his sources were for a series of articles about the numbers racket in New York City. The New York Court of Appeals said that in the absence of a common law privilege the reporter's shield would have to await the action of the legislature.

Even in the absence of shield laws newsmen have sometimes been successful in protecting their sources. In a case involving a story about the Rosenbergs on death row and another about a celebrated St. Paul, Minn. murder the questions asked the reporters were said to be irrelevant to the proceedings. *Rosenberg v. Carroll, 99 F.Supp. 629 (S.D.N.Y.1951); Thompson v. State, 170 N.W.2d 101 (Minn.1969).*

Long before any Nixon administration-press confrontations, reporters were being punished for refusing to cooperate with the judicial system. See Powledge, The Engineering of Restraint. (ACLU: Public Affairs Press, 1971), for an argument that press freedom has been uniquely fragile under the Nixon administration.

In 1896 a *Baltimore Sun* reporter was jailed by a grand jury for speculating on its motivations. Two months later Maryland enacted the country's first reporter's privilege law.

In 1950 Reuben Clein told *Miami Life* readers what had gone on in a grand jury room. For what he called ethical reasons he refused to reveal his source; but a Florida court declared that the Canon of Journalistic Ethics concerning confidentiality must yield when it conflicts with the interests of justice. *Clein v. State, 52 So.2d 117 (Fla.1950).*

An *Augusta (Ga.) Herald* reporter's sentence to prison by a police board was upheld in 1911. *Plunkett v. Hamilton, 70 S.E. 781 (Ga.1911).* In 1929 the contempt conviction of three *Washington Times* reporters who had been investigating violations of the Prohibition laws created the first Congressional interest in a newsman's privilege.

In 1948 two *Newburgh News* reporters wrote a series of articles to convince the district attorney that gambling and prostitution were problems in that New York community. Refusing to reveal their sources to a grand jury summoned by the district attorney, they were sen-

tenced to 10-day jail terms and $100 fines.

And in 1958 Marie Torre, a columnist for the *New York Herald Tribune,* went to jail, in spite of her then novel First Amendment rationale for refusing to name the source of a statement that had provoked Judy Garland into bringing a million-dollar libel suit against CBS. Then Judge Potter Stewart ruled for a unanimous United States Court of Appeals that the duty of a witness to testify in a court of law had roots fully as deep in our history as the guarantee of free press. The question asked of Miss Torre, said the court, went to the heart of the plaintiff's claim. "The right to sue and defend in the courts 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." *Garland v. Torre, 259 F.2d 545 (2d Cir. 1958).*

Mrs. Vi Murphy, a reporter for the Colorado Springs *Gazette Telegraph,* took a contempt citation and a 30-day sentence rather than reveal the source of information for a news report regarding a petition charging a former state supreme court justice with taking a bribe to influence a court decision. *Murphy v. Colorado, unreported, cert. den. 365 U.S. 843 (1961).*

Alan Goodfader, a reporter for the Honolulu *Advertiser,* went to jail for refusing to reveal his source of information for an article predicting the firing of a civil servant. *In re Goodfader's Appeal, 367 P.2d 472 (Haw.1961).*

## BROADCAST JOURNALISM, NEWSMAN'S PRIVILEGE AND THE *SELLING OF THE PENTAGON*

3. Perhaps the most publicized episode in what seems to the press to be a frontal assault against it by government was a sharp encounter between a House Committee and CBS News. On July 1, 1971, a majority of the House Committee on Interstate and Foreign Commerce voted to recommend that the House of Representatives cite CBS and Dr. Frank Stanton for contempt of Congress. Chairman Harley O. Staggers of West Virginia said the issue was whether "calculated deception on television" was going to be tolerated. CBS said the issue was whether editorial freedom in broadcast journalism was going to be at the mercy of congressional investigators.

Since broadcasting is a regulated medium, and since CBS does have tremendous capacity to influence public opinion, is there not some way that accountability for broadcast decisions can be developed without exposing broadcast journalists to contempt citations?

The legal showdown the case may have provided was not forthcoming. Later in July the full House voted to recommit to Committee the recommendation that the House of Representatives cite Dr. Stanton for contempt. The vote to recommit killed the contempt citation.

A good project for the student of mass communication would be to write a hypothetical opinion for a court on the assumption that the House *had* cited Dr. Stanton for contempt. The student preparing such an opinion should reflect on the *Pentagon Papers* case (See Ch. I, p. 114.

A special subcommittee on investigations of Staggers' House Committee had subpoenaed CBS officials and documentary evidence earlier in an attempt to understand the role of the network in an abortive effort by a group of Cuban and Haitian expatriates of questionable character to invade the island of Haiti and depose the government of the late President Duvalier. ("Network News Documentary Practices—CBS 'Project Nassau,' " House Report No. 91–1319, 91st Congress, 2d Session, July 20, 1970.)

Expenditures of CBS News on the project exceeded $200,000, although it

never developed into a broadcast. A careful reading of the Report and an extensive transcript of hearings seems to put CBS in a highly vulnerable position with respect to the integrity, responsibility and legality of its documentary news reporting. Close attention to the Report also suggests why Chairman Staggers and his Committee were predisposed to doubt CBS. It is out of this context and with CBS's involvement in the ludicrous Haitian adventure clearly in the minds of the Congressmen that the much better known "Selling of the Pentagon" story unfolded.

The same Subcommittee attempted to subpoena all the tapes, films, including outakes, and script material involved in the Pentagon story, a hard-hitting exposé of the Defense Department's multimillion-dollar public relations apparatus which seemed to CBS to dedicate itself to glamorizing combat and preserving the public's fear of Communism. What the broadcast journalist might call editing, critics of the program characterized as willful distortion; and Vice President Agnew surmised that the country would be very interested to know why CBS had examined the Pentagon but had no interest at all in presenting the story of its own role in the abortive invasion of Haiti, a reasonable question perhaps.

In its rebroadcast of the Pentagon documentary CBS did air 20 minutes of critical commentary by the Vice President, Rep. F. Edward Hebert (D.–La.), chairman of the House Armed Services Committee, and former Secretary of Defense Melvin Laird.

But CBS refused to comply with the House Committee's subpoena asking for unpublished material gathered by reporters in researching the story. In an unusual display of unanimity the other two networks, the American Society of Newspaper Editors, the ACLU, the Association for Education in Journalism, and leading newspapers publicly supported CBS' stand.

"We agree completely with the position CBS has taken," said Julian Goodman, president of NBC. "*The Selling of the Pentagon* was a legitimate journalistic inquiry. If the furor that has resulted from it should cause even one reporter to be less diligent in pursuing the truth, the whole nation will suffer. Freedom of the press surely should mean that a reporter's background materials cannot be subject to scrutiny or review by a government agency. CBS is absolutely correct in resisting this invasion of a basic journalistic right."

On April 21st CBS and CBS News won a Peabody Award for *The Selling of the Pentagon.* The day before at a hearing of his Subcommittee Chairman Staggers defended his position:

"We are concerned that the public be protected from deliberate staging and distortion of purportedly bona fide news * * *. I cannot accept the proposition that any attempt on the part of * * * Congress to become informed as to the existence and effect of various television production techniques which bear on these questions is offensive to the First Amendment." He added that the question under inquiry is whether TV documentary producers are "engaging in factually false and misleading filming and editing practices * * * giving viewers an erroneous impression that what they are seeing has really happened, or that it happened in the way and under the circumstances in which it is shown. Certainly this is a matter of legitimate legislative interest."

CBS's editing of its program materials was comprehensively analyzed and defended in a CBS News Memorandum, *Criticism of "The Selling of the Pentagon,"* dated Nov. 30, 1971.

On May 26 the original subpoena was rescinded and a slightly re-drafted one is-

sued, asking for the personal appearance of CBS President Stanton. At about this time, however, government forces began to defect. Two members of the Subcommittee, Reps. Brock Adams of Washington and Ogden Reid of New York, former publisher of the defunct *New York Herald Tribune,* publicly opposed harassment of CBS, and Herbert J. Klein, President Nixon's former director of communications, labeled congressional efforts to investigate CBS an "infringement on freedom of the press."

In a two-year period up to mid-1971 CBS, NBC, and their wholly-owned stations were served 124 subpoenas, half of them in the interest of the government itself, half in the interests of plaintiffs and defendants in a number of cases. One *Chicago Sun-Times* reporter got 11 subpoenas in 18 months.

4. Since federal law does not yet recognize newsman's privilege, federal judges are prone to issue subpoenas demanding tapes, notes, and other raw materials of the reporter's trade, especially, as has been noted, where grand juries are investigating the activities of political groups like the Panthers and the SDS Weathermen. Some news media, among them the most prominent, have cooperated with the courts, and with law enforcement agencies as well. Only a minority of reporters have refused to honor subpoenas, but they have been a vocal minority.

Individual newsmen have admitted being on FBI and CIA payrolls for the express purpose of political prying. Such cooperation may be destructive of the press' credibility as an honest broker between polarized elements of the society.

There are also documented cases of police officers impersonating newsmen, suggesting that the two roles may be more reversible than one would like to think, and shattering the validity of journalistic appeals for protection against other forms of government intrusion and harassment.

Underground newspapers assume that the "straight" press prints only police versions of crime news, and periodicals published by activist reporters are asking searching questions about the reportorial fairness of the performance of the commercial press in some of our larger cities.

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## SECTION 2. STATE SHIELD LAWS: THE STATUTORY BASIS FOR NEWSMAN'S PRIVILEGE

1. In the absence of any common law or constitutional protection of the confidentiality of newsmen's sources or the raw materials of their trade, at least 24 states have passed laws shielding newsmen from having to divulge the source and contents of their communications. Fourteen of these statutes are written in absolute terms, although they seldom provide absolute protection; 10 contain conditions or qualifications which are discussed below. And they vary substantially in who and what they protect.* New York's 1970 law, newer than most, exemplifies an unconditional protection

* Relatively absolute privilege against disclosure of sources is provided for in the laws of Alabama (1935), Arizona (1937), Calfornia (1935), Indiana (1941), Kentucky (1936), Maryland (1896), Michigan (1949), Montana (1943), Nebraska (1973, includes unpublished information as well as sources), Nevada (1969), New York (1970, information also), Ohio (1953), Oregon (1973, information also, but no protection in defamation suits), and Pennsylvania (1937).

Qualified privilege laws are found in Alaska (1967), Arkansas (1936), Illinois (1971), Louisiana (1964), Minnesota (1973), New Jersey (1933), New Mexico (1967), North Dakota (1973), Rhode Island (1971), and Tennessee (1973).

which, like Michigan's law, protects confidential information as well as sources:

**N. Y. Civil Rights Law (McKinney) § 79–h Special provisions relating to persons employed by, or connected with, news media:**

(A) Definitions: As used in this section, the following definitions shall apply:

(1) "Newspaper" shall mean a paper that is printed and distributed ordinarily not less frequently than once a week, and has done so for at least one year, and that contains news, articles of opinion (as editorials), features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at the United States post office as second-class matter.

(2) "Magazine" shall mean a publication containing news which is published and distributed periodically, and has done so for at least one year, has a paid circulation and has been entered at a United States post office as second-class matter.

(3) "News Agency" shall mean a commercial organization that collects and supplies news to subscribing newspapers, magazines, periodicals and news broadcasters.

(4) "Press Association" shall mean an association of newspapers and/or magazines formed to gather and distribute news to its members.

(5) "Wire Service" shall mean a news agency that sends out syndicated news copy by wire to subscribing newspapers, magazines, periodicals or news broadcasters.

(6) "Professional journalist" shall mean one who, for gain or livelihood, is engaged in gathering, preparing or editing of news for a newspaper, magazine, news agency, press association or wire service.

(7) "Newscaster" shall mean a person who, for gain or livelihood, is engaged in analyzing, commenting on or broadcasting, news by radio or television transmission.

(8) "News" shall mean written, oral or pictorial information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare.

(B) Exemption of professional journalists and newscasters from contempt.

Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network, shall be adjudged in contempt by any court, the legislature or other body having contempt powers, for refusing or failing to disclose any news or the source of any such news coming into his possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station, or network, by which he is professionally employed or otherwise associated in a news gathering capacity.

2. Generally the courts have construed the shield laws very strictly. For example, in a case involving *Look* magazine and a libel action against it by baseball player Orlando Cepeda, the California shield law was interpreted quite literally.

Cepeda's petition asked that the *Look* writer identify San Francisco Giants officials who he alleged had defamed him. California has had a newsman's privilege law since 1965. Cepeda's attorney deftly submitted that the state statute must be strictly construed to include only "per-

sons connected with or employed upon a *newspaper* or by a *press association* or *wire service,*" * * * or "a *radio* or *television news reporter* * * *" In accepting this narrow interpretation, excluding protection for magazines, the judge observed that only three of the then 11 other states with shield laws had seen fit to include "journals," "periodicals" or "other publications." He also noted that when the California law was amended to include other classes of news media only "press association or wire service" and "radio or television news reporter" were added. And he concluded:

"In the absence of specific statutory language creating it, (the privilege) should not be extended to cover other situations not specifically included in the actual terminology of the statute." *Application of Cepeda, 233 F.Supp. 465 (S.D.N.Y.1964).*

The *Look* magazine writer's offer to answer the question after "all possible means of eliciting that information from other sources have been exhausted" was rejected. A witness, said the court, may not decide when it will be convenient for him to make a deposition and thereby interfere with the orderly judicial process.

3. A New Jersey court said in 1956 that where a newspaper raises the defence of fair comment and good faith in a libel action against it and, through a reporter, testifies that its information came from a "reliable" source, it waives its statutory privilege to protect its source and must submit to cross-examination concerning the "reliability" of that source. Conversely, the court added, it would be inherently unfair to permit the newspaper to use the privilege as a sword rather than a shield on the ground that its source had "waived" the privilege of remaining anonymous. *Brogan v. Passaic Daily News, 123 A.2d 473 (N.J.1956).* See also *Beecroft v. Point Pleasant Printing & Publishing Co., 82 N.J.Super. 269, 197 A.2d 416 (1964).*

The Court in *Brogan* emphasized that the New Jersey statute confers a privilege upon the newsman and not upon his informant. Fifteen years later in a similarly narrow reading of the same statute, New Jersey courts told Peter Bridge that he was protected in not having to identify his sources but that his unpublished information was not covered. *In re Bridge, 295 A.2d 3 (N.J.1972).* And a still earlier New Jersey court withheld the statute's privilege by distinguishing between the "source" of a news release and its "messenger," the person who had delivered it to the newsroom. *State v. Donovan, 30 A.2d 421 (N.J.Sup.1943).* That law was later to be broadened.

4. In *People v. Wolf, 69 Misc.2d 256, 329 N.Y.S.2d 291 (1972)* a New York court held that since it was not clear that the reporter and his source understood their relationship to be confidential, the New York statute did not apply and the newsman could therefore be compelled to reveal the source of his information.

And in 1967, a Maryland court held that only the source and not relevant information in the possession of the newsman was protected by that state's statute. *State v. Sheridan, 248 Md. 320, 236 A. 2d 18 (1967).*

David Lightman of the *Baltimore Evening Sun* was also unable to invoke the Maryland shield law because, said the court, he had not informed his source that he was a reporter. A pipe shop operator had talked with Lightman about the illegal drug traffic in Ocean City, Md. Since the shopkeeper didn't know Lightman was a reporter, said the court, what was conveyed was not confidential and the shopkeeper was not a source within the meaning of the law. Lightman was sentenced to 30 days in jail. *Lightman v. State, 294 A.2d 149 (Md. App.1972).* The U.S. Supreme Court declined to hear his appeal.

California's shield law did not apply to 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 has ruled that a television cameraman does not qualify as a reporter under that state's shield law.

At the very least these cases suggest that newsmen's privilege statutes ought to be very carefully constructed.

5. In a case involving the Black Panther Party, the court accepted the government's demonstration of a compelling and overriding national interest in requiring the testimony of two writers for a Party newspaper. It further decided that the prospective witnesses were primarily members of the Black Panther organization and only secondarily newspaper reporters who would be protected by the California shield law. *In re Grand Jury Witnesses, 322 F.Supp. 573 (N.D.Cal. 1970).* A Court of Appeals reversed contempt convictions in this instance on grounds that questions about the internal management of the newspaper raised grave First Amendment concerns.

When in the *Branzburg* case the reporter's subjects made hashish in front of him, they ceased being news sources and became criminals.

6. There is at least one reported case where a court went beyond the state statute in defining a newsman's privilege. In 1962 a Philadelphia grand jury investigating crime and corruption in city government ordered the general manager and city editor of the *Philadelphia Bulletin* to produce documentary evidence of information relating to news stories on the situation. The newsmen refused on the grounds that notes, tape recordings, medical records, expense records and the like would identify their sources. They were cited for contempt, convicted and sentenced to five days imprisonment and fined $1,000 each. The judge reasoned that the Pennsylvania law protecting news sources did not apply to compulsory disclosure of documents or other inanimate materials. The convictions were appealed.

"The interpretation of that Statute in this case," said the Supreme Court of Pennsylvania, "boils down in the last analysis to the meaning of *'the source of any information* procured or obtained by such person.' We believe the language of the Statute is clear. The common and approved meaning or usage of the words 'sources of information' includes documents as well as personal informants. * * * 'Source' means not only the identity of the person, *but likewise includes documents,* inanimate objects *and all sources of information.* * * * The Act must therefore, we repeat, be liberally and broadly construed in order to carry out the clear objective and intent of the Legislature *which has placed the gathering and the protection of the source of news as of greater importance to the public interest and of more value to the public welfare* than the disclosure of the alleged crime or the alleged criminal." (Emphasis in original.) *In re Taylor, 193 A.2d 181 (Pa.1963).*

7. Led by Maryland in 1896 (see Gordon, *The 1896 Maryland Shield Law: The American Roots of Evidentiary Privilege For Newsmen.* Journalism Monographs, No. 22: February 1972) the states with shield laws as of this writing are Alabama, Alaska, Arizona, Arkansas, California, Illinois, Indiana, Kentucky, Louisiana, Michigan, Minnestoa, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island and Tennessee. Privilege bills are under consideration or tabled in most of the remaining legislatures.

An estimated 54 bills with at least 100 sponsors were filed in the United States

House of Representatives early in the 1973 session. The most notable was that of Rep. Charles W. Whalen, Jr. (R. Ohio). There were at least nine in the Senate, the most unqualified of which was Sen. Alan Cranston's providing that "a person connected with or employed by the news media or press cannot be required by a court, a legislature, or any administrative body to disclose before the Congress or any federal court or agency any information or the source of any information procured for publication or broadcast." Cranston's near absolute bill, supported by Senators Sam Ervin, Jr. and Edward Kennedy, would exempt only information gained while a reporter witnessed a crime and was under no promise of confidentiality.

The American Newspaper Publishers Association coordinated a broad spectrum media effort to draft a bill which includes the following language:

> Section 2: No person shall be required to disclose in any federal or state proceeding either (1) the source of any published or unpublished information obtained in the gathering, receiving or processing of information for any medium of communication to the public, or (2) any unpublished information obtained or prepared in gathering, receiving, or processing of information for any medium of communication to the public.

Its chances of passage are remote. Hearings have been held before subcommittees in both Houses, the Senate subcommittee chaired by Sen. Ervin, the House committee by Rep. Robert W. Kastenmeier of Wisconsin.

8. What do newsmen think about shield laws? A valuable answer to this question comes from an empirical study of newsmen by law professor, Vince Blasi. See Blasi, *The Newsman's Privilege: An Empirical Study*, 70 Michigan Law Review 229, 235 (1971).

Blasi's report should be read in its entirety. A selected summary of his findings follows. Press subpoenas damage source relationships primarily by compromising the reporter's independent or compatriot status in the eyes of sources rather than by forcing the revelation of sensitive information. Seldom do reporters possess information that is not already a matter of public record or already in government hands from non-press sources. And rarely do reporters have information vital to the fact-finding function of courts. Yet experienced investigative reporters do depend on confidential sources for as much as 30 per cent of their stories, especially those dealing with government. Subpoenas make insightful, interpretive reporting more difficult.

James Guest and Alan Stanzler, in a study of 31 newspapers reported that 15 per cent of all *Wall Street Journal* stories were based on confidential sources while, according to Editor Erwin Canham, comparable figures for the *Christian Science Monitor* were from 33 to 50 per cent of major stories. *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Northwestern Law Review 18 (1969).

Blasi found that only eight per cent of his sample of 975 newsmen thought the overall quality of reporting had been adversely affected by the subpoena threat (see Justice White's footnote 33 in *Branzburg v. Hayes*), but they did have excessive fears about sources drying up.

Newsmen would prefer to put their own house in order. Understandings of confidentiality in reporter-source relationships are frequently unstated and imprecise. They are trust relationships for which 68 per cent of Blasi's sample were willing to go to jail to protect. Blasi concludes that reporters feel very strongly that any resolution of their conflicting ethical obligations to sources and society

should be a matter for personal rather than judicial determination, and congruent with this belief they appear willing to testify voluntarily.

This may explain why nearly 50 per cent of the sample opposed shield laws in spite of the fact that there is a growing disillusionment among newsmen with law enforcement practices. If pressed, newsmen would prefer a *flexible ad hoc qualified privilege* which would protect the identity of sources. There is little concern, according to Blasi's study, for protecting the contents of confidential communications.

Still, subpoenas distract reporters from their regular duties when they are issued frequently, frivolously and in unnecessary circumstances. An outright rejection by the Supreme Court of any sort of newsman's privilege was seen by reporters as "poisoning the atmosphere" and altering the balance of forces between government and the press which had kept the government subpoena power in check.

9. If one is convinced that newsmen must develop sources within government agencies, police departments, business corporations and radical movements in order to penetrate the gloss of official statements and press releases and that the submission of notes, tapes and outtakes turn the media into investigative arms of the government, the question is what kind of shield law is needed. Shield laws can be absolute or qualified. Note that Justice Douglas' appeal for an absolute shield in *Branzburg* was rejected by the other eight Justices and has had little support in the lower courts. Douglas chides the *New York Times* for seeking only a qualified privilege in its brief in the *Caldwell* case. And yet Douglas would not protect newsmen who themselves are implicated in a crime. Is he thinking of a *Branzburg* situation?

Proponents of an absolute federal shield law would protect any person who gathers information for dissemination to the public, novelists and dramatists included. Some would limit the definition of communicator to recognized members of the press, including underground, minority and student media and non-fiction freelancers, with the courts deciding upon finer distinctions. The absolute law would cover all governmental proceedings, judicial, legislative and executive at all levels of government. In spite of the problems of federalism and constitutionality raised by a federal law being applied to the states, blanket coverage has been urged because some state laws are weak and there are still some 3,000 counties to contend with.

Both source and content would be covered whether or not the source is confidential or the material published. Again some would qualify the protection afforded nonconfidential information—for example outtakes of a riot—on a showing by the government of overriding and compelling need.

Exceptions—which can quickly become loopholes—for libel suits, for eyewitnesses to crime, or for persons with information relating to national security are generally frowned upon by proponents of absolute bills, unless the exceptions to the privilege are drawn very narrowly. So like Justice Douglas, the absolutists temper their absolutism.

Does an absolute shield law making newsmen the arbiters of the privilege carry risks? Has the professionalization of reporters reached a level where mindless irresponsibility is no longer a problem or can be dealt with by professional sanctions? Is the professionalization of newsmen as far advanced as that of doctors, lawyers and clergymen? Policemen? Would an absolute privilege give an unfair advantage to large news organizations which might wish to push their partisan political views and to arbitrarily withhold information for self-serving reasons? See Lapham, *The Temptations of*

*a Sacred Cow,* Harper's, August 1973 for a spirited argument against shield laws.

Would governmental bodies be blocked in obtaining witnesses and documents from media sources in order to elicit the truth? And where a person accused of a crime requires the identity of his accuser or the testimony of a witness to strengthen his defense, are not the Sixth Amendment rights at stake indispensable to due process? Are the prosecutor's needs equally compelling?

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## SECTION 3. THE CONSTITUTIONAL STATUS OF NEWSMAN'S PRIVILEGE

It is difficult to know whether the Supreme Court ruling in *Branzburg-Caldwell-Pappas* declining to establish on the basis of the First Amendment either an absolute or a qualified newsman's privilege retarded or stimulated efforts toward federal legislation. Justice Byron White observed in his opinion for the Court that Congress has a free hand to make policy in the realm of privilege and he suggested that existing state shield laws would lose none of their force as a result of the Court's decision. Some commentators consider his opinion a call for clearly drawn legislation; others believe that state laws have lost force since the ruling and that a federal law will face a Presidential veto, especially if it defines the privilege in absolute terms.

The 9th Circuit Court of Appeals ruling in the *Caldwell* case *(434 F.2d 1081 (1970)),* reversed in *Branzburg,* was the first time a court had accepted a direct First Amendment rationale for a privilege for the newsman and for the news-gathering process.

"To convert news gatherers into Department of Justice investigators," said the court, "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."

And on the question of Caldwell's attending the grand jury hearing the 9th Circuit Court of Appeals saw the cost to the public as slight (Caldwell stated in an affidavit that there was nothing to which he could testify beyond what he had already made public) but the cost to the news-gathering process unacceptably high.

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## BRANZBURG v. HAYES

## IN THE MATTER OF PAPPAS

## UNITED STATES v. CALDWELL

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, 434 F.2d 1081, upholding refusal of newsman to appear and testify before grand jury with respect to confidential sources, and judgments of the Court of Appeals of Kentucky, 461 S.W.2d 345, and the Supreme Judicial Court of Massachusetts, 266 N. E.2d 297, rejecting claimed rights of newsmen to refuse to testify before grand juries with respect to confidential sources. The Supreme Court, Mr. Justice

White, held that requiring newsmen 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 newsman'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 Mr. Justice WHITE, announced by THE CHIEF JUSTICE. * * *

The writ of certiorari in Branzburg v. Hayes and Branzburg v. Meigs, brings before us two judgments of the Kentucky Court of Appeals, both involving petitioner Branzburg, a staff reporter for the Courier-Journal, a daily newspaper published in Louisville, Jefferson County, Kentucky.

On November 15, 1969, the Courier-Journal carried a story under petitioner's by-line describing in detail his observations of two young residents of Jefferson County synthesizing hashish from marihuana, an activity which, they asserted, earned them about $5,000 in three weeks. The article included a photograph of a pair of hands working above a laboratory table on which was a substance identified by the caption as hashish. The article stated that petitioner had promised not to reveal the identity of the two hashish makers. Petitioner was shortly subpoenaed by the Jefferson County grand jury; he appeared, but refused to identify the individuals he had seen possessing marihuana or the persons he had seen making hashish from marihuana. A state trial court judge ordered petitioner to answer these questions and rejected his contention that the Kentucky reporters' privilege statute, Ky.Rev.Stat. 421.100, the First Amendment of the United States Constitution, or §§ 1, 2, and 8 of the Kentucky Constitution authorized his refusal to answer. Petitioner then sought prohibition and mandamus in the Kentucky Court of Appeals on the same grounds, but the Court of Appeals denied the petition. It held that petitioner had abandoned his First Amendment argument in a supplemental memorandum he had filed and tacitly rejected his argument based on the Kentucky Constitution. It also construed Ky.Rev.Stat. 421.100 as affording a newsman the privilege of refusing to divulge the identity of an informant who supplied him with information but held that the statute did not permit a reporter to refuse to testify about events he had observed personally, including the identities of those persons he had observed.

The second case involving petitioner Branzburg arose out of his later story published on January 10, 1971, which described in detail the use of drugs in Frankfort, Franklin County, Kentucky. The article reported that in order to provide a comprehensive survey of the "drug scene" in Frankfort, petitioner had "spent two weeks interviewing several dozen drug users in the capital city" and had seen some of them smoking marihuana. A number of conversations with and observations of several unnamed drug users were recounted. Subpoenaed to appear before a Franklin County grand jury "to testify in the matter of violation of statutes concerning use and sale of drugs," petitioner Branzburg moved to quash the summons; the motion was denied although an order was issued protecting Branzburg from revealing "confidential associations, sources or information" but requiring that he "answer any questions which concern or pertain to any criminal act, the commission of which was actually observed by [him]." Prior to the time he was slated to appear before the grand jury, petitioner sought mandamus and prohibition from the Kentucky Court of Appeals, arguing that if he were forced to go before the grand jury or to answer questions regarding the identity

of informants or disclose information given to him in confidence, his effectiveness as a reporter would be greatly damaged. The Court of Appeals once again denied the requested writs, reaffirming its construction of Ky.Rev.Stat. 421.100, and rejecting petitioner's claim of a First Amendment privilege. It distinguished Caldwell v. United States, 434 F.2d 1081 (C.A.9, 1970), and it also announced its "misgivings" about that decision, asserting that it represented "a drastic departure from the generally recognized rule that the sources of information of a newspaper reporter are not privileged under the First Amendment." It characterized petitioner's fear that his ability to obtain news would be destroyed as "so tenuous that it does not, in the opinion of this court, present an abridgement of freedom of the press within the meaning of that term as used in the Constitution of the United States."

Petitioner sought a writ of certiorari to review both judgments of the Kentucky Court of Appeals, and we granted the writ.

In the Matter of Paul Pappas originated when petitioner Pappas, a television newsman-photographer working out of the Providence, Rhode Island, office of a New Bedford, Massachusetts, television station, was called to New Bedford on July 30, 1970, to report on civil disorders there which involved fires and other turmoil. He intended to cover a Black Panther news conference at that group's headquarters in a boarded-up store. Petitioner found the streets around the store barricaded, but he ultimately gained entrance to the area and recorded and photographed a prepared statement read by one of the Black Panther leaders at about 3:00 p.m. He then asked for and received permission to re-enter the area. Returning at about 9:00 p.m. that evening, he was allowed to enter and remain inside Panther headquarters. As a condition of entry, Pappas agreed not to disclose anything he saw or heard inside the store except an anticipated police raid which Pappas, "on his own," was free to photograph and report as he wished. Pappas stayed inside the headquarters for about three hours, but there was no police raid, and petitioner wrote no story and did not otherwise reveal what had transpired in the store while he was there. Two months later, petitioner was summoned before the Bristol County Grand Jury and appeared, answered questions as to his name, address, employment, and what he had seen and heard outside Panther headquarters, but refused to answer any questions about what had taken place inside headquarters while he was there, claiming that the First Amendment afforded him a privilege to protect confidential informants and their information. A second summons was then served upon him, again directing him to appear before the Grand Jury and "to give such evidence as he knows relating to any matters which may be inquired of on behalf of the commonwealth before * * * the Grand Jury." His motion to quash on First Amendment and other grounds was denied by the trial judge who, noting the absence of a statutory newsman's privilege in Massachusetts, ruled that petitioner had no constitutional privilege to refuse to divulge to the Grand Jury what he had seen and heard, including the identity of persons he had observed. The case was reported for decision to the Supreme Judicial Court of Massachusetts. The record there did not include a transcript of the hearing on the motion to quash nor did it reveal the specific questions petitioner had refused to answer, the expected nature of his testimony, the nature of the grand jury investigation, or the likelihood of the grand jury securing the information it sought from petitioner by other means. The Supreme Judicial Court, however, took "judicial notice that in July, 1970, there were serious civil disorders in New Bed-

ford, which involved street barricades, exclusion of the public from certain streets, fires, and similar turmoil. We were told at the arguments that there was gunfire in certain streets. We assume that the grand jury investigation was an appropriate effort to discover and indict those responsible for criminal acts." The Court then reaffirmed prior Massachusetts holdings that testimonial privileges were "exceptional" and "limited," stating that "[t]he principle that the public 'has a right to every man's evidence' " had usually been preferred, in the Commonwealth, to countervailing interests. The Court rejected the holding of the Ninth Circuit in Caldwell v. United States, and "adhere[d] to the view that there exists no constitutional newsman's privilege, either qualified or absolute, to refuse to appear and testify before a court or grand jury." Any adverse effect upon the free dissemination of news by virtue of petitioner's being called to testify was deemed to be only "indirect, theoretical, and uncertain." The court concluded that "The obligation of newsmen * * * is that of every citizen, * * * to appear when summoned, with relevant written or other material when required, and to answer relevant and reasonable inquiries." The court nevertheless noted that grand juries were subject to supervision by the presiding judge, who had the duty "to prevent oppressive, unnecessary, irrelevant, and other improper inquiry and investigation," to insure that a witness' Fifth Amendment rights were not infringed, and to assess the propriety, necessity, and pertinence of the probable testimony to the investigation in progress. The burden was deemed to be on the witness to establish the impropriety of the summons or the questions asked. The denial of the motion to quash was affirmed and we granted a writ of certiorari to petitioner Pappas.

United States v. Caldwell arose from subpoenas issued by a federal grand jury in the Northern District of California to respondent Earl Caldwell, a reporter for the New York Times assigned to cover the Black Panther Party and other black militant groups. A subpoena *duces tecum* was served on respondent on February 2, 1970, ordering him to appear before the grand jury to testify and to bring with him notes and tape recordings of interviews given him for publication by officers and spokesmen of the Black Panther Party concerning the aims, purposes, and activities of that organization. Respondent objected to the scope of this subpoena, and an agreement between his counsel and the government attorneys resulted in a continuance. A second subpoena was served on March 16, which omitted the documentary requirement and simply ordered Caldwell "to appear * * * to testify before the Grand Jury." Respondent and his employer, the New York Times, moved to quash on the ground that the unlimited breadth of the subpoenas and the fact that Caldwell would have to appear in secret before the grand jury would destroy his working relationship with the Black Panther Party and "suppress vital First Amendment freedoms * * * by driving a wedge of distrust and silence between the news media and the militants." Respondent argued that "so drastic an incursion upon First Amendment freedoms" should not be permitted "in the absence of a compelling governmental interest—not shown here—in requiring Mr. Caldwell's appearance before the grand jury." The motion was supported by *amicus curiae* memoranda from other publishing concerns and by affidavits from newsmen asserting the unfavorable impact on news sources of requiring reporters to appear before grand juries. The Government filed three memoranda in opposition to the motion to quash, each supported by affidavits. These documents stated that

the grand jury was investigating, among other things, possible violations of a number of criminal statutes, including 18 U.S.C. § 871 (threats against the President), 18 U.S.C. § 1751 (assassination, attempts to assassinate, conspiracy to assassinate the President), 18 U.S.C. § 231 (civil disorders), 18 U.S.C. § 2101 (interstate travel to incite a riot), and 18 U.S.C. § 1341 (mail frauds and swindles). It was recited that on November 15, 1969, an officer of the Black Panther Party made a publicly televised speech in which he had declared that "We will kill Richard Nixon" and that this threat had been repeated in three subsequent issues of the Party newspaper. Also referred to were various writings by Caldwell about the Black Panther Party, including an article published in the New York Times on December 14, 1969, stating that "[i]n their role as the vanguard in a revolutionary struggle the Panthers have picked up guns" and quoting the Chief of Staff of the Party as declaring that "We advocate the very direct overthrow of the Government by way of force and violence. By picking up guns and moving against it because we recognize it as being oppressive and in recognizing that we know that the only solution to it is armed struggle [*sic*]." The Government also stated that the Chief of Staff of the Party had been indicted by the grand jury on December 3, 1969, for uttering threats against the life of the President in violation of 18 U.S.C. § 871 and that various efforts had been made to secure evidence of crimes under investigation through the immunization of persons allegedly associated with the Black Panther Party.

On April 6, the District Court denied the motion to quash, Application of Caldwell, 311 F.Supp. 358 (N.D.Cal. 1970), on the ground that "*every person* within the jurisdiction of the government" is bound to testify upon being properly summoned. (Emphasis in original). Nevertheless, the court accepted respondent's First Amendment arguments to the extent of issuing a protective order providing that although respondent must divulge whatever information had been given to him for publication, he "shall not be required to reveal confidential associations, sources or information received, developed or maintained by him as a professional journalist in the course of his efforts to gather news for dissemination to the public through the press or other news media." The court held that the First Amendment afforded respondent a privilege to refuse disclosure of such confidential information until that had been "a showing by the Government of a compelling and overriding national interest in requiring Mr. Caldwell's testimony which cannot be served by any alternative means." 311 F.Supp., at 362.

Subsequently, the term of the grand jury expired, a new grand jury was convened, and a new subpoena *ad testificandum* was issued and served on May 22, 1970. A new motion to quash by respondent and memorandum in opposition by the Government were filed, and by stipulation of the parties, the motion was submitted on the prior record. The court denied the motion to quash, repeating the protective provisions in its prior order but this time directing Caldwell to appear before the grand jury pursuant to the May 22 subpoena. Respondent refused to appear before the grand jury, and the court issued an order to show cause why he should not be held in contempt. Upon his further refusal to go before the grand jury, respondent was ordered committed for contempt until such time as he complied with the court's order or until the expiration of the term of the grand jury.

Respondent Caldwell appealed the contempt order, and the Court of Appeals reversed. Caldwell v. United States, 434 F.2d 1081 (C.A.9, 1970). Viewing the issue before it as whether

Caldwell was required to appear before the grand jury at all, rather than the scope of permissible interrogation, the court first determined that the First Amendment provided a qualified testimonial privilege to newsmen; in its view, requiring a reporter like Caldwell to testify would deter his informants from communicating with him in the future and would cause him to censor his writings in an effort to avoid being subpoenaed. Absent compelling reasons for requiring his testimony, he was held privileged to withhold it. The court also held, for similar First Amendment reasons, that absent some special showing of necessity by the Government, attendance by Caldwell at a secret meeting of the grand jury was something he was privileged to refuse because of the potential impact of such an appearance on the flow of news to the public. We granted the United States' petition for certiorari.

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. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. 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 com-

pelled 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, 376 U.S. 254, 279–280 (1964). * * *

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. Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad. "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. Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, 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 majority 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. Insofar 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 construction 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. It would be difficult to canvass the views of the informants themselves; surveys of reporters on this topic are chiefly opinions of predicted informant behavior and must be viewed in the light of the professional self-interest of the interviewees. 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 sym-

biotic 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. Moreover, grand juries characteristically conduct secret proceedings, and law enforcement officers are themselves experienced in dealing with informers and have their own methods for protecting them without interference with the effective administration of justice. 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. As Mr. Justice Black declared in another context, "[f]reedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." Associated Press v. United States.

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 for pay 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. Clearly, this system is not impervious to control by the judiciary and the decision whether to unmask an informer or to continue to profit by his anonymity is in public, not private, hands. We think that it should remain there and that public authorities should retain the options of either insisting on the informer's testimony relevant to the prosecution of crime or of seeking the benefit of further information that his exposure might prevent.

* * *

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. To this end it must call wtinesses, in the manner best suited to perform its task. "When the grand jury is performing its investigatory function into a general problem area, * * * society's interest is best served by a thorough and extensive investigation." Wood v. Georgia, 370 U.S. 375, 392 (1962). A grand jury investigation "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." Such an investigation may be triggered by tips, rumors, evidence proferred by the prosecutor, or the personal knowledge of the grand jurors. It is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made. * * * We see no reason to hold that these reporters, any more than other citizens, should be excused from furnishing information that may help the grand jury in arriving at its initial determinations.

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 ad-

ministration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necesary 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. By requiring testimony from a reporter in investigations involving some crimes but not in others, they would be making a value judgment which a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect of what conduct is liable to criminal prosecution. The task of judges, like other officials outside the legislative branch is not to make the law but to uphold it in accordance with their oaths.

*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 crimi-

nal trials.[41] These rules are a major step in the direction petitioners desire to move. They may prove wholly sufficient to resolve the bulk of disagreements and controversies between press and federal officials.

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. Other issues were urged upon us, but since they were not passed upon by the Court of Appeals, we decline to address them in the first instance.

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 marihuana 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 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 Massachu-

[41] The 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. The Guidelines state that: "The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights. In determining whether to request issuance of a subpoena to the press, the approach in every case must be to weigh that limiting effect against the public interest to be served in the fair administration of justice" and that: "The Department of Justice does not consider the press 'an investigative arm of the government.' Therefore, all reasonable attempts should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press." The Guidelines provide for negotiations with the press and require the express authorization of the Attorney General for such subpoenas. The principles to be applied in authorizing such subpoenas are stated to be whether there is "sufficient reason to believe that the information sought [from the journalist] is essential to a successful investigation," and whether the Government has unsucessfully attempted to obtain the information from alternative non-press sources. The Guidelines provide, however, that in "emergencies and other unusual situations," subpoenas may be issued which do not exactly conform to the Guidelines.

setts 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.

Mr. 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. Certainly, we do not hold, as suggested in the dissenting opinion, that state and federal authorities are free to "annex" the news media as "an investigative arm of government." The solicitude repeatedly shown by this Court for First Amendment freedoms should be sufficient assurance against any such effort, even if one seriously believed that the media—properly free and untrammeled in the fullest sense of these terms —were not able to protect themselves.

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 of 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.

In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.

Mr. Justice STEWART, with whom Mr. Justice BRENNAN and Mr. 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 Mr. 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. * * * As private and public aggregations of power burgeon in size and the pressures for conformity necessarily mount, there is obviously a continuing need for an independent press to disseminate a robust variety of information and opinion through reportage, investigation and criticism, if we are to preserve our constitutional tradition of maximizing freedom of choice by encouraging diversity of expression.

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. Familiarity with the people and circumstances involved in the myriad background activities that result in the final product called "news" is vital to complete and responsible journalism, unless the press is to be a captive mouthpiece of "newsmakers."

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, either because of excessive caution or because of a reasonable fear of reprisals or censure for unorthodox views. The First Amendment concern must not be with the motives of any particular

news source, but rather with the conditions in which informants of all shades of the spectrum may make information available through the press to the public.
* * *

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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 wrong-doing, because he will now know he can subsequently be identified by use of compulsory process. The potential source must, therefore, choose between risking exposure by giving information or avoiding the risk by remaining silent.

The reporter must speculate about whether contact with a controversial source or publication of controversial material will lead to a subpoena. In the event of a subpoena, under today's decision, the newsman will know that he must choose between being punished for contempt if he refuses to testify, or violating his profession's ethics and impairing his resourcefulness as a reporter if he discloses confidential information.

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. Obviously, not every news-gathering relationship requires confidentiality. And it is difficult to pinpoint precisely how many relationships do require a promise or understanding of nondisclosure. 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 interference." 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. For it is obviously not true that the only persons about whom reporters will be forced to testify will be those "confidential informants involved in actual criminal conduct" and those having "information suggesting illegal conduct by others." 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, then the simplistic and stultifying absolutism adopted by the Court in denying any force to the First Amendment in these cases.

The error in the Court's absolute rejection of First Amendment interests in these cases seems to me to be most profound. For in the name of advancing the administration of justice, the Court's decision, I think, will only impair the achievement of that goal. People entrusted with law enforcement responsibility, no less than private citizens, need general information relating to controversial social problems. Obviously, press reports have great value to government, even when the newsman cannot be compelled to testify before a grand jury. *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.* (Emphasis added.) 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.

* * *

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 nonconfidential 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.

Mr. 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 Fifth Amendment stands as a barrier. 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. (Emphasis added.)

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.

* * *

A reporter is no better than his source of information. Unless he has a privilege to withhold the identity of his source, he will be the victim of governmental intrigue or aggression. If he can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public, will be ended. If what the Court sanctions today becomes settled law, then the reporter's main function in American society will be to pass on to the public the press releases which the various departments of government issue.

It is no answer to reply that the risk that a newsman will divulge one's secrets to the grand jury is no greater than the threat that he will in any event inform to the police. Even the most trustworthy reporter may not be able to withstand relentless badgering before a grand jury.

The record in this case is replete with weighty affidavits from responsible newsmen, telling how important are the sanctity of their sources of information. When we deny newsmen that protection, we deprive the people of the information needed to run the affairs of the Nation in an intelligent way. * * *

Today's decision is more than a clog upon news gathering. It is a signal to publishers and editors that they should exercise caution in how they use whatever information they can obtain. Without immunity they may be summoned to account for their criticism. Entrenched of-

ficers have been quick to crash their powers down upon unfriendly commentators.
* * *

The intrusion of government into this domain is symptomatic of the disease of this society. As the years pass the power of government becomes more and more pervasive. It is a power to suffocate both people and causes. Those in power, whatever their politics, want only to perpetuate it. Now that the fences of the law and the tradition that has protected the press are broken down, the people are the victims. The First Amendment, as I read it, was designed precisely to prevent that tragedy.

### NOTES AND QUESTIONS

1. Look at footnote 41 in White's opinion which summarizes former Attorney-General Mitchell's "Guidelines for Subpoenas to the News Media," said to have been written by Justice William Rehnquist, a former assistant to Mitchell. They have decreased the number of federal subpoenas issued to the press and have been perpetuated by subsequent attorneys-general.

Note also that none of the Court's opinions discusses the constitutional status of reporter's notes, tapes and other raw materials of his profession. The single question, Justice White emphasizes in a footnote, is "whether a newspaper reporter who has published articles about an organization 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."

2. Both leading opinions show a high regard for the available empirical evidence as to the effect of subpoenas on the flow of news, whatever the quality of that evidence. In a footnote Justice Stewart responding to White's concern about the "speculative nature of the newsman's claim, elaborates on the relationship between empirical studies and constitutional decision-making:

"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 than 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. And the importance to our society of the full flow of information to the public has buttressed this Court's historic presumption in favor of First Amendment values."

3. What present use is being made of grand juries? Too often they are the obedient servant of prosecuting attorneys rather than a shield between a prospective defendant and the vast powers of the state. Some critics contend grand juries now all too frequently play a harassing rather than investigative role with ambitious prosecutors manipulating them in secret sessions? Have grand juries recently become politicized? See Justice Stewart's footnote 34, and Cowan, *The New Grand Jury,* New York Times Magazine, April 29, 1973, Goodell, *Where Did the Grand Jury Go?* Harper's, May 1973, Williams, *Grand Jury: Bulwark of Prosecution Immunity,* 3 Loyola University Law Journal 305 (1972). Why did the British abolish the grand jury in 1933? What would it take to abolish grand juries in the United States?

4. Justice White says that a subpoena is just another example of the application to the press of valid general laws like tax laws or labor-management laws, but these laws are enforced neutrally and impose no particular burden on First Amendment freedoms. Mr. Justice White observes that prosecutors risk a great deal when they subpoena newsmen. Does the

press, as White suggests, have powerful means of protecting itself?

What do reporters actually risk when, having assured their sources that they will go to jail rather than reveal their identities, ignore subpoenas or refuse to testify? James Reston, perhaps facetiously, sees jail sentences as providing reporters much needed respite from the hurly-burly. But should jail be an occupational hazard of journalism?

5. Basing his case on the impounded Paramount Newsreel film of the Memorial Day Massacre of Republic Steel workers in Chicago in 1937 Fred Friendly argues for the potential public benefit of subpoenas in *Justice White and Reporter Caldwell: Finding a Common Ground,* Columbia Journalism Review, September/October 1972, p. 31.

6. Does the newsman have a right to gather information beyond that of the ordinary citizen? Justice White says that reporters have no constitutional right of access to scenes of crime or disaster. Can you visualize, as he does, newsmen constituting a private system of informers, reporting on crime, but really quite unaccountable to the public or anyone else?

7. Justice Stewart essentially assumes that the effect of the Court's ruling will be self-censorship on the part of the media? See Hume, *A Chilling Effect on the Press,* New York Times Magazine, Dec. 17, 1972, p. 13. Might newsmen cease to investigate and publish information about important public issues? Earl Caldwell has threatened to leave newspaper work and Jack Anderson has expressed fears about having to go out of business. Reporters are destroying notes, documents, tapes, etc., to keep them out of the hands of their own managements. These materials could be of great importance to future reporting and to historians. The loss to scholarship is suggested by David Halberstam in an epilogue to his book The Best and the Brightest:

"Originally I had intended to list at the end of the book the names of all the people I had interviewed. However, I recently changed my mind because of circumstances; the political climate is somewhat sensitive these days, and the relationship of reporter to source is very much under attack. The right of a reporter to withhold the name of a source, and equally important, the substance of an interview, is very much under challenge, and the latest Supreme Court decision has cast considerable doubt about what was assumed to be journalistic rights. Even on this book my rights as a reporter have been diminished; I was subpoenaed by a grand jury in the Ellsberg case, although I made it clear to the government that I knew nothing of the passing of the papers. My freedom as a reporter was impaired by the very subpoena of the grand jury and the need to appear there. I will therefore list no names here." (p. 669)

8. Justice White's opinion for the Court does raise at least one problem with shield laws that has not been resolved. Who is a newsman, a journalist, a reporter? Daniel Ellsberg? Prof. Sam Popkin? Underground, minority and student editors? Pollsters, pamphleteers, book writers, freelancers, researchers? Justice White believes that shield laws require the courts to define categories of qualified, legitimate or "respectable" newsmen, a process that offends a First Amendment tradition hostile to any form of state certification.

9. 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 employe 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 free-lance 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 govermment." *State v. Buchanan, 436 P.2d 729 (Or.1968).*

10. An argument against shield laws and for a First Amendment basis for newsman's privilege is that legislative bodies are being asked to make laws affecting freedom of the press against the clear First Amendment proscription that "Congress shall make no law * * *," affecting freedom of the press. This follows in the dubious tradition set by the Newspaper Preservation Act in immunizing newspapers in certain circumstances from the requirements of the anti-trust laws. Instead, it is argued, a claim of privilege should be based squarely on the proposition that the First Amendment incorporates the right to acquire information as well as to publish it, rather than on the chance interpretation of a state or federal statute. Legislatures should not be asked to define the boundaries of press freedom. Given the adverse rulings in *Branzburg v. Hayes,* are you still in favor of shield laws? Justice White clearly prefers a legislative determination as to the scope, if any, of newsman's privilege. But in the case of shield laws is he not delegating what is essentially the judicial function of defining constitutional rights? Would First Amendment claims involve long periods of protracted litigation?

Finally, does the First Amendment include the right to gather information from secret meetings and secret documents? See Note, *The Right of the Press to Gather Information,* 71 Columbia Law Review 838 (1971).

11. Since enactment of an unqualified federal shield law seems unlikely, on the national level we are left with the question of a qualified privilege and the wisdom of Justice Stewart's dissenting opinion in *Branzburg.* Stewart recommended that governmental demands for information from newsmen be based on a showing of (1) the relevance of the information sought to the inquiry being made and (2) the lack of alternative sources of information.

In its decision in the *Caldwell* case, a ruling which seemed to strike an acceptable balance between First and Fifth Amendment rights, the 9th Circuit Court of Appeals, using the language of the District Court below, coupled qualification (2) with a third qualification: the showing of a compelling government or public need for the witness's presence and testimony. *Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), rev'd* 408 U.S. 665. (The language of these qualifications seems to have originated in *People v. Dohrn et al., Circuit Court of Cook County, Criminal Division, No. 69–3808, May 20, 1970)*

Do you agree with Justice Lewis Powell that a newsman should at least appear before the grand jury and that his rights to confidentiality should be determined after questions have been put to him? In *Caldwell* the court emphasized that a reporter would not always be in as sensitive a relationship with his sources as was Caldwell with the Black Panthers.

An interesting sidelight on the *Caldwell* case is the fact 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?

12. All three qualifications were involved in a Wisconsin case subsequent to the bombing of a University research center in Madison in which a research assistant was killed. Here, to use the language of Chief Justice Edward Hill's dissenting opinion in *Branzburg v. Pound, 461 S.W.2d 345 (Ky.1970),* the bombing *did* involve "injury to life, limb, or property," and the testimony sought might have gone to the heart of the matter. The case is *State v. Knops, 183 N. W.2d 93 (Wis.1971)* in which a grand jury was investigating the bombing of Sterling Hall on the University of Wisconsin's Madison campus. On August 26, 1970 the Madison "underground" newspaper *Kaleidoscope* 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 given immunity, and then pleaded that he had a First Amendment privilege against revealing his confidential informants. The Wisconsin Supreme Court rejected his claim and upheld the contempt sentence on the ground that the answers sought carried an overriding public need and right to protect itself from physical attack. "If the public were faced with a choice between learning the identity of the bombers or reading their justifications for anarchy, it seems safe to assume," said the court, "that the public would choose to learn their identities."

The question of relevance came up 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."

Finally Justice Heffernan, dissenting in part, raised the issue of whether the compelling national interest in requiring Knops' testimony could have been served by alternative means. It is a grim irony and 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. Was Knops' testimony then superfluous and no longer of compelling importance? And did official action in the case reflect anathema toward the editor and his newspaper more than a concern for criminal justice?

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## THE RETURN OF A QUALIFIED FIRST AMENDMENT NEWSMAN'S PRIVILEGE

**Editorial Note:**

Earlier cases seem mild compared with the epidemic of subpoenas sought in February 1973 on behalf of President Nixon's ill-fated re-election committee. A dozen reporters and news executives of the *Washington Post, Washington Star-News, New York Times* and *Time* magazine were subpoenaed to produce "all documents, papers, letters, photographs, audio and video tapes * * * all manuscripts, notes, tape recordings, * * * all drafts, copies and final drafts of stories, columns and/or reports which in any way relate" to the Watergate affair.

In *Democratic National Committee v. McCord, 356 F.Supp. 1394 (D.C.D.C. 1973)*, on motions to quash the subpoenas by the news personnel, 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* (see text, p. 498) had declined to create a newsman's privilege in grand jury proceedings based on the First Amendment, Judge Richey held that in these circumstances the news personnel concerned were entitled to a qualified privilege under the First Amendment. The federal district court 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. The federal district court appeared to confine *Branzburg* to the grand jury setting. Judge Richey read Branzburg as permitting a qualified First Amendment privilege to protect newsman's privilege in the civil litigation area.

The factor to be stressed in *Democratic National Committee v. McCord, supra,* is that the cases involved subpoenas arising out of civil litigation. In what might be called a "fishing expedition", the Committee for the Re-election of the President (CRP) seemed to be looking for anything that might help them in a number of civil suits against the opposition party. There are few precedents for such disclosure demands in civil cases.

Judge Richey in quashing the subpoenas noted that the federal district court in Washington was faced with a constitutional issue of the first magnitude. "What is involved," said Richey, "is the right of the press to gather and publish, and that of the public to receive, news from widespread, diverse, and oftimes confidential sources."

The news media had presented affidavits from prominent reporters asserting that enforcement of the subpoenas would lead to disclosure and subsequent depletion of confidential news sources without which investigative reporting would be severely, if not totally, hampered. The competing consideration, of course, is the right of the parties to procure evidence in civil litigation.

Recognizing the reluctance of other courts in civil and criminal cases, including the Supreme Court, to recognize even a qualified newsman'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 Government," 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 * * *."

As we shall see, Richey appeared to be following the recommendation in Justice Powell's concurring opinion in *Branzburg* that a newsman's claim of privilege should be judged "on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony."

There is also a reflection in Richey's ruling of Justice Stewart's dissenting declaration that there had been no showing that alternative sources of information had been exhausted or even approached, or that the documents sought were material to the issue.

"It may well be," Judge Richey concluded, "that, at some future date, the parties in this case will be able to demonstrate that they are unable to obtain the same information from sources other than the movants and that they have a compelling and overriding interest in the information sought."

Note that Judge Richey in this later decision seems to be following the minority opinion of the Supreme Court ruling which assumes a qualified privilege for newsmen. Do you think Richey meant his opinion to apply to criminal cases also?

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## SECTION 4. PROBLEMS IN DEFINING AND ESTABLISHING LEGAL PROTECTION FOR NEWSMAN'S PRIVILEGE

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### WHAT IS A NEWSPAPER?

1. It should be noted tangentially that the Wisconsin court in *Knops* (supra, p. 519) had no hesitation in defining the *Kaleidoscope* as a newspaper for purposes of the contempt prosecution. When the *Los Angeles Free Press,* a widely circulated underground newspaper, sought press passes the courts were not as certain of its journalistic "legitimacy" and withheld from it the definition of newspaper in spite of a weekly circulation in excess of 85,000 and second-class mailing privileges.

Press passes, like shield laws, contribute to the flow of information by providing access to certain newsworthy locations denied to the public generally. In Los Angeles, police and sheriff determined eligibility on the basis of "regular gathering and distribution of hard core news generated through police and fireman activities." What law enforcement officers considered "sociological" coverage—riots, demonstrations, assassinations, news conferences, etc.—did not qualify. The decision is perplexing from both a journalistic and a First Amendment point of view. *Los Angeles Free Press, Inc. v. City of Los Angeles, 9 Cal.App.3d 448, 88 Cal.Rptr. 605 (1970).*

The judicial system partially redeemed itself when it ruled in *Quad-City Community News Service, Inc. v. Jebens, 334 F.Supp. 8 (D.C.Iowa 1971)* that the denial of access by an "underground newspaper" to police department records available to other media constituted a denial of equal protection where officials could show no compelling governmental interest for such discrimination. The federal district court further held that where the standard which police officials used in granting press passes to provide identification at police and fire lines was whether the news media seeking such passes were "established" that standard was not specific enough to pass due process muster.

The suit was brought under the Civil Rights Act and the Iowa Public Record Act by a newspaper called *Challenge* which, although incorporated, had total assets of less than $10 and no physical facilities of its own.

Press access to police records was dependent upon the possession of a press pass and these were issued to members of the "legitimate" press. But the department had no written policy defining what would constitute or qualify one to be a member of the "established" press; and no local ordinances or regulations covered the issuance of passes.

It was apparent, said the court, that the police were engaged in a classic example of post-facto rationalization of a preconceived determination to deny the newspaper's application with no objective comparison of its rights with those of other members of the press. Information was being funneled to the public only through those media considered more responsible because they "cooperated" in presenting what the police department believed to be appropriate.

The court added that the Iowa Public Record Act did not intend to set up a privileged class of citizens and it reiterated the common law principle that the media have no special rights beyond those of other citizens. It concluded with a notable statement:

"The history of this nation and particularly of the development of the institutions of our complex federal system of government has been repeatedly jarred and reshaped by the continuing investigation, reporting and advocacy of independent journalists unaffiliated with major institutions and often with no resource except their wit, persistence, and the crudest mechanisms for placing words on paper."

2. The complexity of the problem of defining a newspaper is revealed in *Deltec, Inc. v. Dun & Bradstreet, 187 F. Supp. 788 (N.D.Ohio 1960)* in which a bi-monthly financial sheet was held not covered by the Ohio shield law since it was not a "newspaper or press association." And in *Securities and Exchange Commission v. Wall St. Transcript Corp., 422 F.2d 1371 (2d Cir. 1970), cert. den. 398 U.S. 958 (1970),* a federal court of appeals rejected an investment advisory newspaper's claim that it did not have to register under the Investment Advisors Act because it was a part of the press and therefore protected from registration requirements by the First Amendment. The court said the paper was not a bona fide newspaper of general circulation.

ALTERNATIVE SOURCES

The issue of alternative sources was dealt with in *Baker v. F & F Investment, 339 F.Supp. 942 (S.D.N.Y.1972).* In that case a federal court would not compel Alfred Balk, a *Columbia Journalism Review* editor, to reveal the source of his information for an article in the July 4, 1962 issue of *Saturday Evening Post* entitled "Confessions of a Block-Buster." The plaintiffs, said the court, had not shown that all other sources of information such as title and mortgage records had been exhausted or that the disclosure of his source by Balk was essential to the protection of the public interest involved.

SHALL THE PRIVILEGE BE ABSOLUTE OR QUALIFIED?

Note that in applying the qualifications of a conditional shield law the burden of proof is on the authorities. Do you agree with Justice Douglas that qualifications such as the "compelling interest" test are equivalent to the "clear and present danger" test and are therefore a burden on First Amendment freedoms?

In any case, under a qualified law the courts become arbiters of the privilege and are charged with balancing the contending rights at issue. Whether you prefer an absolute or qualified shield, then, depends upon whether you prefer to have newsmen or judges make ultimate judgments as to what best serves the public interest.

In June, 1973 a House Judiciary subcommittee voted 5–3 for a bill that would prevent state or federal grand juries from requiring newsmen to disclose confidential information unless their testimony could be shown to be indispensable to a case and unobtainable from any other source. Such qualifications have been incorporated into recent state laws. In Minnesota, for example, exceptions to the privilege are granted only if by clear and convincing evidence it has been demonstrated that the newsman has informa-

tion clearly relevant to a specific violation of the law that cannot be obtained by any alternative means or remedy less destructive of First Amendment rights, and that there is a compelling and overriding public interest at stake in requiring disclosure.

Some news media spokesmen have said that they prefer no bill to one that qualifies in any way their right to refuse to disclose information gathered in the course of their work. Do you agree? Is the qualified shield law a reasonable compromise between absolute privilege and no law at all? Only the absolute shield option seems to be lacking any firm judicial support.

## LIBEL: AN EXCEPTION TO SHIELD LAWS?

A remaining question and an important one is whether a fourth exemption covering libel suits ought to be written into shield laws. What if a plaintiff in a libel suit can make a concrete demonstration that the identity of a news source will lead to persuasive evidence of actual malice on the part of a defendant, a showing that public officials, public figures and persons involved in matters of public interest must make in order to win damages?

Does a risk to the reporter and the news media of an exception for libel suits lie in the fact that suits may be filed primarily for the purpose of discovering the identity of confidential sources and not for compensation for damage to reputation?

These issues were joined in a suit for $2 million compensatory and $10 million punitive damages brought by Mayor Alfonso Cervantes of St. Louis against *Life* magazine. The Mayor sought to identify specific FBI and Department of Justice sources which had provided information for a *Life* story connecting Cervantes with the underworld.

Aside from the identity of sources the story was heavily documented. The Mayor took issue with only four of 87 paragraphs comprising the article but he argued that he could not prove malice if the reporter's sources remained anonymous.

"These arguments in behalf of compulsory disclosure of confidential news sources," said the U. S. Court of Appeals in a narrow ruling, "* * * do not strike us as frivolous. Especially is this so when much of the information supplied by the anonymous informants has been obtained from the private files of Government. Nevertheless, on the facts of the particular case, we believe that in his preoccupation with the identity of *Life's* news sources, the mayor has overlooked the central point involved in this appeal: that the depositions and other evidentiary materials comprising this record establish, without room for substantial argument, facts that entitled both defendants to judgment as a matter of law, *viz.*, that, quite apart from the tactics employed in collecting data for the article, the mayor has wholly failed to demonstrate with convincing clarity that either defendant acted with knowledge (of falsity) or reckless disregard of the truth."

The court added that "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.

"Where there is a concrete demonstration that the identity of the defense news source 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 these

sources, whether they be anonymous or known." *Cervantes v. Time, Inc., 464 F.2d 986, 992–993 (8th Cir. 1972), cert. den. 409 U.S. 1125 (1973).*

The Mayor's dilemma is not dissimilar to that of Mayor Joseph Alioto of San Francisco who sued *Look* magazine for a story also based on anonymous governmental files and charging personal interactions with the West Coast Mafia. Both mayors have the burden of showing that the defendants' published assertions are inherently improbable or that they in fact entertained serious doubts as to their truth, whether the sources are identified or not.

Do you consider the *Cervantes* ruling a fair compromise or does it place an impossible burden upon the plaintiff in a libel suit? How does one judge when the suit is frivolous and brought simply to unearth a source who, in the case of a public official, may be someone close to him or in his employ; or when a suit is a legitimate response to an unfair and irresponsible report which perhaps has no source at all or a notoriously unreliable one?

None of the proposed shield statutes confer immunity on fictitious stories because the reporter still must reveal whether he had a source. Furthermore, a motion for summary judgment filed by a newspaper in a libel suit is usually supported by a set of affidavits showing that the publisher had good reason to believe that the story was true. Where the source is confidential a newspaper has great difficulty in making such a showing. For this reason newspapers try to avoid relying solely on confidential sources. Moreover such stories are less believable. In *Cervantes, Life* had corroboration for what its confidential sources had said.

Is it likely, then, that the identity of a source will be critical to many libel suits? And when the source is identified the plaintiff must still meet the standard of *New York Times.* On the other hand, does newsman's privilege make a mockery of the "actual malice" requirement of the *New York Times* doctrine?

## CONCLUSION

There are still problems of definition and constitutional philosophy in drafting shield laws, and the media are not of one mind as to their advisability. With or without a law many reporters, standing on the rock of the public's right to know, are prepared to take their punishment and risk professional martyrdom for refusing to reveal their sources. Their moral position may be better when they appear before congressional or other non-judicial bodies which lack the sanctity of the courtroom and deal with matters likely to be vaguer and less pressing than the determination of guilt or innocence in a criminal prosecution. Zechariah Chafee made that observation more than 25 years ago. He also said:

"This power to make reporters disclose their confidential sources of information should be exercised with great caution. * * * It is * * * desirable to respect the reporter's claim of confidence except in cases of great necessity where he clearly possesses knowledge which is otherwise unobtainable." Chafee, 2 Government and Mass Communications, 497–99 (1947).

# Chapter VII

# FREEDOM OF INFORMATION: ACCESS TO GOVERNMENTAL INFORMATION— FEDERAL AND STATE

## SECTION 1. THE FREEDOM OF INFORMATION ACT: SECURING INFORMATION FROM THE FEDERAL GOVERNMENT

Government has an obligation to provide a structure for dialogue in the continually increasing sector of national life which is under government control. Such a goal relates to what is sometimes called the people's right to know. This broad term is usually used in too inclusive a fashion to be very precise, but it at least refers to the interest the public has in being informed on the affairs of its government. What obligation, for example, do federal agencies have to make public their rules, "law," and operating practices?

In 1967 section 3 of the Administrative Procedure Act of 1946, 5 U.S.C.A. § 1002 was amended to include the Freedom of Information Act, 5 U.S.C.A. § 552. Here the focus is not on access for opinion but on access to information. The latter, like the former, may someday be predicated as a positive constitutional duty of government. For the present, the Freedom of Information Act is a modest but nevertheless a ground-breaking step for implementing a public right to know.

Section 3 of the Administrative Procedure Act of 1946 contained a Public Information provision which provided that federal agencies were to publish in the Federal Register or make available for public inspection material such as opinions, orders, and policy statements. But Section 3 gave the public rights of inspection with one hand and took them away with another. Section 3 removed from public scrutiny material requiring secrecy in the public interest, relating solely to the internal management of an agency, administrative orders and opinions which for good cause were required to be confidential, and official records sought by persons not properly and directly concerned. See Comment, *The Freedom of Information Act: Access to Law,* 34 Fordham L.Rev. 765 (1968). The new Freedom of Information Act, 5 U.S.C.A. § 552 provides as follows:

**§ 552. Public information; agency rules, opinions, orders, records, and proceedings**

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings

before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) 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; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress. Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 383; Pub.L. 90–23, § 1, June 5, 1967, 81 Stat. 54.

### NOTES AND QUESTIONS

1. The Freedom of Information Act attempts to define the scope of the public's access to agency information. The case law interpreting the Act has been struggling with the issue of *who* should ultimately decide which documents will be made available and which fall under the Act's nine exemptions.

Should the *complainant* bear the burden of specificity in requesting the documents? Recent case law suggests the complainant should not bear that burden. Nor, according to recent case law, should the *courts* bear the burden of sifting through the vast numbers of documents under a blanket claim by the agency that the records are unidentifiable or exempt. Rather, it is the *agency* which should bear the burden of specificity in its denial of requested documents. Only if the courts are told precisely which items are in dispute and why, can the courts adequately review the disputed evidence.

The courts are beginning to realize that narrow interpretation of the exemptions under the Act is the only way which the public will truly have freedom of information.

2. Notice how sections (a)(2) and (b)(6) of the statute try to reconcile the inevitable conflict between a meaningful public right to know and the individual's right to privacy. Is this attempt at resolving these conflicting values successful? Couldn't it be said they are so worded as to stimulate the governmental tendency toward secrecy the Act ostensibly was drafted to thwart without secur-

ing either the right of the public to know or the individual's right to know?

3. Surely a most encouraging aspect of the Freedom of Information Act, even conceding the large exceptions to disclosures found in it, is the enforcement provision. Notice this section allows an individual who wishes to obtain agency records, withheld contrary to the Freedom of Information Act, to have the appropriate federal district court enjoin the agency from withholding the agency records. Notice further that the determination of whether the records are properly withheld is an issue to be resolved in the first instance (de novo) by the court. However, it is the scope of the de novo review which is undefined in the Act that has been the source of so much litigation.

4. Prior to the Freedom of Information Act, the judiciary had already treated as privileged any government material dealing with national security. This judge-made doctrine is referred to as governmental or executive privilege.

Executive privilege was recognized in *United States v. Reynolds, 345 U.S. 1 (1953)*. The case involved a suit against the government by the widows of government workers killed in an Air Force plane crash. The plane was testing secret electronic equipment. Counsel for the widows moved under federal discovery rules for production of the investigatory report and for statements of surviving crew members all of which had been elicited in an official Air Force investigation of the crash. The Secretary of the Air Force refused to make the disclosure sought on the ground that military secrets were involved. Both lower federal courts concluded that if the government refused to produce the documents, an order would be entered on the basis of the federal rules of civil procedure which permitted the court to view the facts on the issue of negligence against the party refusing disclosure. (The theory of this is that since the party knowing the facts refuses to make them available then it is only reasonable to assume that the facts were against the party. The question, of course, was: could such a rule be used against the government?)

The government sought review in the Supreme Court which reversed the lower federal courts.

Chief Justice Vinson held that it was for the Court to determine "whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect." *United States v. Reynolds,* supra, *at pp. 7–8 (1953).*

The Chief Justice then fleshed out the test he would use for resolving the issue of the need for public disclosure against the claim of governmental privilege based on national security or military privilege as follows. *United States v. Reynolds,* supra, *at pp. 9–10 (1953):*

"Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence; even by the judge alone, in chambers."

## ENVIRONMENTAL PROTECTION AGENCY v. MINK

401 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973).

**Editorial Note:**

The Supreme Court case which follows narrowly interprets the Freedom of Information Act by severely limiting the scope of *de novo* judicial review whenever the government claims an exemption under § 552(b)(1) for matter "specifically required by Executive order to be kept secret in the interest of the national defense of foreign policy." On balance, the Court was sympathetic to the government's exemption claims based on national defense and foreign policy.

On the other hand, the *Mink* case is a plus for broadening the reach of materials covered by the Freedom of Information Act in that intra-agency and inter-agency memos may in some circumstances be subject to *in camera* review (examination by the Judge in the privacy of his chambers). Is it a fair reading of the *Mink* case to conclude that the federal courts will be sympathetic to judicial review of exemption claims apart from the sensitive areas of national defense and foreign policy?

Mr. Justice WHITE delivered the opinion of the Court.

The Freedom of Information Act of 1966, 5 U.S.C. § 552, provides that government agencies shall make available to the public a broad spectrum of information but exempts from its mandate certain specified categories of information, including matters that are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," § 552(b)(1), or are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," § 522(b)(5). It is the construction and scope of these exemptions that are at issue here.

Respondents' lawsuit began with an article that appeared in a Washington, D. C., newspaper in late July 1971. The article indicated that the President had received conflicting recommendations on the advisability of the underground nuclear test scheduled for that coming fall and, in particular, noted that the "latest recommendations" were the product of "a departmental under-secretary committee named to investigate the controversy." Two days later, Congresswoman Patsy Mink, a respondent, sent a telegram to the President urgently requesting the "immediate release of the recommendations and reports by inter-departmental committee. * * *" When the request was denied, an action under the Freedom of Information Act was commenced by Congresswoman Mink and 32 of her colleagues in the House.

Petitioners immediately moved for summary judgment on the grounds that the materials sought were specifically exempted from disclosure under subsections (b)(1) and (b)(5) of the Act. In support of the motion, petitioners filed an affidavit of John N. Irwin, II, the Undersecretary of State. Briefly, the affidavit states that Mr. Irwin was appointed by President Nixon as Chairman of an "Undersecretaries Committee," which was a part of the National Security Council system organized by the President "so that he could use it as an instrument for obtaining advice on important questions relating to our national security." The Committee was directed by the President in 1969 "to review the annual underground nuclear test program and to encompass within this review requests for authorization of specific scheduled tests." Results of the Committee's reviews were to be transmitted to the President "in time to allow him to give them full consideration before the scheduled events." In ¶ 5 of the affidavit, Mr. Irwin stated

that pursuant to "the foregoing directions from the President," the Undersecretaries Committee had prepared and transmitted to the President a report on the proposed underground nuclear test known as "Cannikin," scheduled to take place at Amchitka Island, Alaska. The report was said to have consisted of a covering memorandum from Mr. Irwin, the report of the Undersecretaries Committee, five documents attached to that report and three additional letters separately sent to Mr. Irwin. Of the total of 10 documents, one, an Environmental Impact Statement prepared by AEC, was publicly available and was not in dispute. Each of the other nine was claimed in the Irwin affidavit to have been

"prepared and used solely for transmittal to the President as advice and recommendations and set forth the views and opinions of individuals and agencies preparing the documents so that the President might be fully apprised of varying viewpoints and have been used for no other purpose."

In addition, at least eight (by now reduced to six) of the nine remaining documents were said to involve highly sensitive matter vital to the national defense and foreign policy and were described as having been classified Top Secret and Secret pursuant to Executive Order 10501.

On the strength of this showing by petitioners, the District Court granted summary judgment in their favor on the grounds that each of the nine documents sought was exempted from compelled disclosure by §§ (b)(1) and (b)(5) of the Act. The Court of Appeals reversed, concluding that subsection (b)(1) of the Act permits the withholding of only the secret portions of those documents bearing a separate classification under Executive Order 10501: "If the nonsecret components [of such documents] are separable from the secret remainder and may be read separately without distortion of meaning, they too should be disclosed." 464 F.2d 742, 746. The court instructed the District Judge to examine the classified documents "looking toward their possible separation for purposes of disclosure or nondisclosure."

In addition, the Court of Appeals concluded that all nine contested documents fell within subsection (b)(5) of the Act, but construed that exemption as shielding only the "decisional processes" reflected in internal government memoranda, not "factual information" unless that information is "inextricably intertwined with policymaking processes." The court then ordered the District Judge to examine the documents *in camera* (including, presumably, any "nonsecret components" of the six classified documents) to determine if "factual data" could be separated out and disclosed "without impinging on the policymaking decisional processes intended to be protected by this exemption." We granted certiorari, 405 U.S. 974 and now reverse the judgment of the Court of Appeals.

The Freedom of Information Act, 5 U.S.C. § 552, is a revision of § 3, the public disclosure section, of the Administrative Procedure Act, 5 U.S.C. § 1002. * * * The provisions of the Freedom of Information Act stand in sharp relief against those of § 3. The Act eliminates the "properly and directly concerned" test of access, stating repeatedly that official information shall be made available "to the public," "for public inspection." Subsection (b) of the Act creates nine exemptions from compelled disclosures. These exemptions are explicitly made exclusive, 5 U.S.C. § 552(c), and are plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed. Aggrieved citizens are given a speedy remedy in district courts, where "the court shall determine the matter *de novo* and the burden is on the agency to

sustain its action." 5 U.S.C. § 552(a)(3). Noncompliance with court orders may be punished by contempt. *Ibid.*

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. * * *

It is in the context of the Act's attempt to provide a "workable formula" that "balances, and protects all interests," that the conflicting claims over the documents in this case must be considered.

Subsection (b)(1) of the Act exempts from forced disclosure "matters * * * specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." According to the Irwin affidavit, the six documents for which Exemption 1 is now claimed were all duly classified Top Secret or Secret, pursuant to Executive Order 10501, 3 CFR 280 (Jan. 1, 1970). That order was promulgated under the authority of the President in 1953, 18 Fed.Reg. 7049, and, since that time, has served as the basis for the classification by the Executive Branch of information "which requires protection in the interests of national defense." We do not believe that Exemption 1 permits compelled disclosure of documents, such as the six here, that were classified pursuant to this Executive Order. Nor does the Exemption permit *in camera* inspection of such documents to sift out so-called "non-secret components." Obviously, this test was not the only alternative available. But Congress chose to follow the Executive's determination in these matters and that choice must be honored.

* * * Exemption 1 was intended to dispel uncertainty with respect to public access to material affecting "national defense or foreign policy." Rather than some vague standard, the test was to be simply whether the President has determined by Executive Order that particular documents are to be kept secret. The language of the Act itself is sufficiently clear in this respect, but the legislative history disposes of any possible argument that Congress intended the Freedom of Information Act to subject executive security classifications to judicial review at the insistence of anyone who might seek to question them. Thus the House Report stated with respect to subsection (b)(1) that "citizens both in and out of Government can agree to restrictions on categories of information which the President has determined must be kept secret to protect the national defense or to advance foreign policy, such as matters classified pursuant to Executive Order 10501." H.Rep.No.1497, pp. 9–10, U.S.Code Cong. & Admin.News 1966, p. 2427. * * *

* * * Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering. Cf. United States v. Reynolds, 345 U.S. 1 (1953). But Exemption 1 does neither. It states with the utmost directness that the Act exempts matters "specifically required by Executive order to be kept secret." Congress was well aware of the Order and obviously accepted determinations pursuant to that Order as qualifying for exempt status under § (b)(1). In this context it is patently unrealistic to argue that the "Order has nothing to do with the first exemption."

What has been said thus far makes wholly untenable any claim that the Act intended to subject the soundness of executive security classifications to judicial review at the insistence of any objecting citizen. *It also negates the proposition that Exemption 1 authorizes or permits in camera inspection of a contested document bearing a single classification so that the court may separate the secret from the supposedly nonsecret and order disclosure of the latter.* (Emphasis added.) The Court of Appeals was thus in error. The Irwin affidavit stated that each of the six documents for which Exemption 1 is now claimed "are and have been classified" Top Secret and Secret "pursuant to Executive Order No. 10501" and as involving "highly sensitive matter that is vital to our national defense and foreign policy." The fact of those classifications and the documents' characterizations have never been disputed by respondents. Accordingly, upon such a showing and in such circumstances, petitioners had met their burden of demonstrating that the documents were entitled to protection under Exemption 1 and the duty of the District Court under § 552 (a)(3) was therefore at an end.

Disclosure of the three documents conceded to be "unclassified" is resisted solely on the basis of Exemption 5 of the Act. That Exemption was also invoked, alternatively, to support withholding the six documents for which Exemption 1 was claimed. It is beyond question that the Irwin affidavit, standing alone, is sufficient to establish that all of the documents involved in this litigation are "inter-agency or intra-agency" memoranda or "letters" that were used in the decisionmaking processes of the Executive Branch. By its terms, however, Exemption 5 creates an exemption for such documents only insofar as they "would not be available by law to a party * * * in litigation with the agency." This language clearly contemplates that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency. Drawing such a line between what may be withheld and what must be disclosed is not without difficulties. In many important respects, the rules governing discovery in such litigation have remained uncertain from the very beginnings of the Republic. Moreover, at best the discovery rules can only be applied under Exemption 5 by way of rough analogies. For example, we do not know whether the Government is to be treated as though it were a prosecutor, a civil plaintiff, or a defendant. Nor does the Act, by its terms, permit inquiry into particularized needs of the individual seeking the information, although such an inquiry would ordinarily be made of a private litigant. Still, the legislative history of Exemption 5 demonstrates that Congress intended to incorporate generally the recognized rule that "confidential intra-agency advisory opinions * * * are privileged from inspection." Kaiser Aluminum & Chemical Corp. v. United States, 157 F.Supp. 939, 946, 141 Ct.Cl. 38 (1958) (Mr. Justice Reed). * * *

* * *

* * * It appears to us that Exemption 5 contemplates that the public's access to internal memoranda will be governed by the same flexible, common sense approach that has long governed private parties' discovery of such documents involved in litigation with government agencies. And, as noted, that approach extended and continues to extend to the discovery of purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the documents.

* * *

* * * The unmistakable implication of the decision below is that any

member of the public invoking the Act may require that otherwise confidential documents be brought forward and placed before the District Court for *in camera* inspection—no matter how little, if any, purely factual material may actually be contained therein. Exemption 5 mandates no such result. * * * Plainly, in some situations, *in camera* inspection will be necessary and appropriate. But it need not be automatic. An agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material that would be available to a private party in litigation with the agency. The burden is, of course, on the agency resisting disclosure, and if it fails to meet its burden without *in camera* inspection, the District Court may order such inspection. But the agency may demonstrate, by surrounding circumstances, that particular documents are purely advisory and contain no separable, factual information. A representative document of those sought may be selected for *in camera* inspection. And, of course, the agency may itself disclose the factual portions of the contested documents and attempt to show, again by circumstances, that the excised portions constitute the bare bones of protected matter. In short, *in camera* inspection of all documents is not a necessary or inevitable tool in every case. Others are available. Cf. United States v. Reynolds, *supra*. In the present case, the petitioners proceeded on the theory that all of the nine documents were exempt from disclosure in their entirety under Exemption 5 by virtue of their use in the decisionmaking process. On remand, petitioners are entitled to attempt to demonstrate the propriety of withholding any documents, or portions thereof, by means short of submitting them for *in camera* inspection.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

* * *

Mr. Justice STEWART, concurring.

* * *

* * * As the opinion of the Court demonstrates, the language of the exemption, confirmed by its legislative history, plainly withholds from disclosure "matters * * * specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy." In short, once a federal court has determined that the Executive has imposed that requirement, it may go no further under the Act.

One would suppose that a nuclear test that engendered fierce controversy within the Executive Branch of our Government would be precisely the kind of event that should be opened to the fullest possible disclosure consistent with legitimate interests of national defense. Without such disclosure, factual information available to the concerned Executive agencies cannot be considered by the people or evaluated by the Congress. And with the people and their representatives reduced to a state of ignorance, the democratic process is paralyzed.

But the Court's opinion * * * has built into the Freedom of Information Act an exemption that provides no means to question an Executive decision to stamp a document "secret," however cynical, myopic, or even corrupt that decision might have been.

* * *

As the Court points out, "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held

to impose upon such congressional ordering." But in enacting § 552(b)(1) Congress chose, instead, to decree blind acceptance of Executive fiat.

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL joins, concurring in part and dissenting in part.

* * *

The Court holds that Exemption 1 immunizes from judicial scrutiny any document classified pursuant to Executive Order 10501, 3 CFR § 292 (Jan. 1, 1971). In reaching this result, however, the Court adopts a construction of Exemption 1 which is flatly inconsistent with the legislative history and, indeed, the unambiguous language of the Act itself. In plain words, Exemption 1 exempts from disclosure only material *"specifically required* by Executive order to be kept secret *in the interest of the national defense or foreign policy."* (Emphasis added.) Executive Order 10501, however, which was promulgated 13 years before the passage of the Act, does not require that any *specific* documents be classified. Rather, the Executive Order simply delegates the right to classify to agency heads, who are empowered to classify information as Confidential, Secret, or Top Secret. Thus, the classification decision is left to the sole discretion of these agency heads. Moreover, in exercising this discretion, agency heads are not required to examine each document separately to determine the need for secrecy but, instead, may adopt *blanket* classifications, without regard to the content of any particular document. Thus, as §§ 3(b) and 3(c) of the Order make clear, matters for which there is no need for secrecy "in the interest of the national defense or foreign policy" may be indiscriminately classified in conjunction with those matters for which there is a genuine need for secrecy. * * *

* * *

It is of course true, as the Court observes, that the Order "provides that the separating be done by the Executive, not the Judiciary. * * *" But that fact lends no support to a construction of Exemption 1 precluding judicial inspection to enforce the congressional purpose to effect release of nonsecret components separable from the secret remainder. Rather, the requirement of judicial inspection made explicit in § 552(a)(3) is the keystone of the congressional plan, expressly deemed "essential in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion." S.Rep.No.813, at 8; H. Rep.No.1497, at 9. * * *

The Court's interpretation of Exemption 1 as a complete bar to judicial inspection of matters claimed by the Executive to fall within it wholly frustrates the objective of the Freedom of Information Act. That interpretation makes a nullity of the Act's requirement of *de novo* judicial review. * * *

Mr. Justice DOUGLAS, dissenting.

* * *

The Government looks aghast at a federal judge even looking at the secret files and deals with disdain the prospect of responsible judicial action in the area. It suggests that judges have no business declassifying "secrets," that judges are not familiar with the stuff with which these "Top Secret" or "Secret" documents deal.

This is to misconceive and distort the judicial function under § 552(a)(3) of the Act. The Court of Appeals never dreamed that the trial judge would reclassify documents. His first task would be to determine whether nonsecret material was a mere appendage to a "secret" or "top secret" file. His second task would be to determine whether under normal discovery procedures contained in

Rule 26 of the Rules of Civil Procedure, factual material in these "secret" or "top secret" material is detached from the "secret" and would therefore be available to litigants confronting the agency in ordinary lawsuits.

Unless the District Court can do those things, the much advertised Freedom of Information Act is on its way to becoming a shambles. Unless federal courts can be trusted, the Executive will hold complete sway and by *ipse dixit* make even the time of day "top secret." Certainly, the decision today will upset the "workable formula," at the heart of the legislative scheme, "which encompasses, balances, and protects all interests, yet places emphasis on the fullest possible disclosure." S.Rep.No.813, *supra,* at 3. The Executive Branch now has *carte blanche* to insulate information from public scrutiny whether or not that information bears any discernible relation to the interests sought to be protected by subsection (b)(1) of the Act. * * *

I would affirm the judgment below.

* * *

**NOTES AND QUESTIONS**

1. Chief Justice Vinson in *Reynolds* is critical of leaving the question of disclosure of governmental matters which arise in litigation to the "caprice of executive officers." Isn't this, however, what the *Mink* case does? Doesn't it immunize documents concerning "national defense or foreign policy" from any court review so long as they are classified as secret by the government? There is a parallel between the holding of *Reynolds* and the concurring and dissenting opinions in *Mink*. Both seek to place the burden on the government in justifying a claim of privilege. Wouldn't a preferable approach in *Mink* be to require the government to prove "de novo" the validity of its classification of contested documents as "secret"?

2. Under old Executive Order No. 10501, several related documents could be classified at the highest level of classification applicable to any one document within a file. Some of the less sensitive information contained in a "secret" file was therefore arguably not *"specifically* required by Executive order to be kept secret." See *Developments in the Law—The National Security Interest and Civil Liberties,* 85 Harv.L.Rev. 1130 (1972). However, the revised Executive Order 1652, requiring the government to indicate which portions of a document or file are classified as secret and which are not, does not really do very much to improve the public's access to information. It is still an executive decision as to which documents it will choose to classify as "secret."

3. Justice Stewart, in his concurrence in *Mink,* stressed that the decision to prevent *de novo* review, a new and independent examination by a court, of documents classified as secret was based on the Court's interpretation of Congressional intent. This suggests that a new statement of Congressional intent or a Congressional amendment to the Freedom of Information Act could alter the *Mink* holding. See Terry, *What's Left of the FOI Act?,* Col.Journ.Rev., July/Aug. 1973, pp. 58–59.

4. Congressional hearings on the Freedom of Information Act were published in a 1972 report known as the Moorhead Report. (H.Rept. 92–1419, Sept. 20, 1972). This report "was particularly critical of administrative delays and obfuscation which have made it difficult for the press to use the FOI Law, 'for news is a perishable commodity'." Report of the 1972 Sigma Delta Chi Advan. of Freedom of Inform. Comm., p. 10.

Because of the Moorhead study and the narrow holding of *Mink,* proposals H.R. 5425 and H.R. 4960 were intro-

duced in the House of Representatives in 1973 to amend the FOI both substantively and procedurally. These bills are a legislative attempt to open up government information.

Proposed changes include:

First, *de novo* review permitted in FOI 552(a)(3) would be redefined to include *in camera* inspection of agency records, including those falling under the (b)(1) secrecy exemption. *In camera* review (examination by the Judge in the privacy of his chambers) of "classified" documents would in effect alter one of the holdings of *Mink*. Courts would independently determine the merits of government claims that classified documents not be disclosed under the "national defense and foreign policy" exemption.

Second, prompt intra-agency decision –making and appeals procedures would be incorporated into the Act to deal expeditiously with requests for public documents. A Freedom of Information Commission would be established to hear complaints. And third, reimbursement for court costs and attorney fees would be awarded to successful petitioners.

5. *In camera* judicial review of documents is one of the most potent techniques available to the public in securing access to agency documents because it allows for an independent examination of the merits of the agency claim of exemption. As a result of *Mink*, this type of review was curtailed. Where the government claims exemption for documents actually classified as "secret" "in the interest of national defense or foreign policy" under § 552(b)(1), no review at all is permitted. But there are eight other grounds for claiming exemptions. Under *Mink* the scope of de novo review is still limited, though less severely, when an exemption is claimed under § 552(b)(5) for inter-agency and intra-agency memos. The burden is placed on the government to show that no factual information is contained in the memos. Only if it fails to meet this burden by surrounding circumstances is *in camera* review available. The Court emphasizes that *in camera* inspection "need not be automatic."

If *in camera* review is not readily available, what other opportunities are available to the complainant if he seeks to disprove the agency claim of an exemption? What, if any, responsibilities must be placed on the agency when it claims an exemption other than for secret documents to prove its claim? An attempt to expand the complainant's access to documents, since *in camera* review may not automatically be available, is the task before the court in *Vaughn v. Rosen,* the case which follows:

## VAUGHN v. ROSEN, EXECUTIVE DIRECTOR, UNITED STATES CIVIL SERVICE COMMISSION

484 F.2d 820 (D.C.Cir. 1973).

**Editorial Note:**

A law professor doing research on the Civil Service Commission, sought disclosure under the Freedom of Information Act of various government documents, purportedly evaluations of certain agencies' personnel management programs. The Executive Director of the Civil Service Commission claimed exemption from disclosure under § 552(b)(2), (5) and (6). Vaughn filed an action in the District Court. The trial court granted the Government's motion for summary judgment. This appeal followed.

WILKEY, Circuit Judge: * * *

The Freedom of Information Act was conceived in an effort to permit access by the citizenry to most forms of government records. In essence, the Act provides that all documents are available to the public unless specifically exempted by the Act itself. This court has repeatedly stated that these exemptions from disclo-

sure must be construed narrowly, in such a way as to provide the maximum access consonant with the overall purpose of the Act. By like token and specific provision of the Act, when the Government declines to disclose a document the burden is upon the agency to prove *de novo* in trial court that the information sought fits under one of the exemptions to the FOIA. Thus the statute and the judicial interpretations recognize and place great emphasis upon the importance of disclosure.

In light of this overwhelming emphasis upon disclosure, it is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure. In many, if not most, disputes under the FOIA, resolution centers around the factual nature, the statutory category, of the information sought.

In a very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information, and this case provides a classic example of such a situation. Here the Government contends that the documents contain information of a personal nature, the disclosure of which would constitute an invasion of certain individuals' privacy. This factual characterization may or may not be accurate. It is clear, however, that appellant cannot state that, as a matter of his knowledge, this characterization is untrue. Neither can he determine if the personal items, assuming they exist, are so inextricably bound up in the bulk of the documents that they cannot be separated out. The best appellant can do is to argue that the exception is very narrow and plead that the general nature of the documents sought make it unlikely that they contain such personal information.

* * *

* * * In this situation, in which there is a dispute regarding the nature of the information, the Supreme Court in *Mink* provided the outline of how trial courts should approach the job of making this factual determination. Our discussion here is intended to be an elaboration of this outline.

* * * It is quite possible that part of a document should be kept secret while part should be disclosed. When the Government makes a general allegation of exemption, the court may not know if the allegation applies to all or only a part of the information. Isolating what exemptions apply to what parts of a document makes the burden of evaluating allegations of exemption even more difficult.

* * * If justice is to be done and the Government's characterization adequately tested, the burden now falls on the court system to make its own investigation. This is clearly not what Congress had in mind. In two definite ways the present method of resolving FOIA disputes actually *encourages* the Government to contend that large masses of information are exempt, when in fact part of the information should be disclosed.

*First,* there are no inherent incentives that would affirmatively spur government agencies to disclose information. Under current procedures government agencies *lose* very little by refusing to disclose documents. At most they will be put to a court test stacked in their favor, the burden of which can be easily shifted to another by simply averring that the information falls under one of several unfortunately imprecise exemptions. Conversely, there is little to be *gained* by making the disclosure. Indeed, from a bureaucratic standpoint, a general policy of revelation could cause positive harm,

since it could bring to light information detrimental to the agency and set a precedent for future demands for disclosure.

*Secondly,* since the burden of determining the justifiability of a government claim of exemption currently falls on the court system, there is an innate impetus that encourages agencies automatically to claim the broadest possible grounds for exemption for the greatest amount of information. Let the court decide! And the tactical ploy is, to the extent that the number of facts in dispute are increased, the efficiency of the court system involved in that dispute resolution will be decreased. * * *

The simple fact is that existing customary procedures foster inefficiency and create a situation in which the Government need only carry its burden of proof against a party that is effectively helpless and a court system that is never designed to act in an adversary capacity. It is vital that some process be formulated that will (1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information. To possible ways of achieving this goal we now turn our attention.

*Procedures for Testing the Classification of Claims to Exemptions.*

*Detailed Justification*

The problem of assuring that allegations of exempt status are adequately justified is the most obvious and the most easily remedied flaw in current procedures. It may be corrected by assuring government agencies that courts will simply no longer accept conclusory and generalized allegations of exemptions, such as the trial court was treated to in this case, but will require a relatively detailed analysis in manageable segments. An analysis sufficiently detailed would not have to contain factual descriptions that if made public would compromise the secret nature of the information, but could ordinarily be composed without excessive reference to the actual language of the document.

*Specificity, Separation, and Indexing*

The need for adequate specificity is closely related to assuring a proper justification by the governmental agency. In a large document it is vital that the agency specify in detail which portions of the document are disclosable and which are allegedly exempt. This could be achieved by formulating a system of itemizing and indexing that would correlate statements made in the Government's refusal justification with the actual portions of the document.

* * * After the issues are focused, the District Judge may examine and rule on each element of the itemized list. When appealed, such an itemized ruling should be much more easily reviewed than would be the case if the government agency were permitted to make a generalized argument in favor of exemption.

* * *

*Adequate Adversary Testing*

* * * Respect for the enormous document-generating capacity of government agencies compels us to recognize that the raw material of an FOIA lawsuit may still be extremely burdensome to a trial court. In such cases, it is within the discretion of a trial court to designate a special master to examine documents and evaluate an agency's contention of exemption. This special master would not act as an advocate; he would, however, assist the adversary process by assuming much of the burden of examining and evaluating voluminous documents that currently falls on the trial judge.

* * *

The procedural requirements we have spelled out herein may impose a substan-

tial burden on an agency seeking to avoid disclosure. Yet the current approach places the burden on the party seeking disclosure, in clear contravention of the statutory mandate. Our decision here may sharply stimulate what must be, in the final analysis, the simplest and most effective solution—for agencies voluntarily to disclose as much information as possible and to create internal procedures that will assure that disclosable information can be easily separated from that which is exempt. A sincere policy of maximum disclosure would truncate many of the disputes that are considered by this court. And if the remaining burden is mostly thrust on the Government, administrative ingenuity will be devoted to lightening the load.

For the reasons given, the case is remanded for further proceedings consistent with this opinion.

**NOTES**

1. In *Vaughn* the Court reads the *Mink* limitations on *in camera* review as justified in that the judiciary cannot be continually subject to the burdensome task of reviewing voluminous government documents. The solution provided by the court in *Vaughn* places the burden of proving non-disclosure on the government and yet at the same time it facilitates and simplifies the court's and the petitioner's opportunity to analyze the government's proof.

2. The *Reynolds, Mink,* and *Vaughn* cases served as a legal basis to guide the courts when they were faced with a claim of executive privilege which did not fall under the Freedom of Information Act. In the now famous "presidential tapes" case, Special Prosecutor Cox issued a subpoena duces tecum (a subpoena for documents) to the President, calling upon the President to produce before the grand jury investigating the Watergate break-in certain documents and objects in his possession. Specifically, these were tape recordings of specifically identified meetings and telephone conversations that had taken place between the President and his advisers between June of 1972 and April of 1973. The President informed the Court that he had concluded "that it would be inconsistent with the public interest and with the Constitutional position of the Presidency to make available recordings of meetings and telephone conversations in which [he] was a participant. * * *" (*Nixon v. Sirica, 487 F.2d 700 (D.C.Cir. 1973)*, p. 705.)

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## NIXON v. SIRICA AND COX

## U. S. v. SIRICA AND NIXON

## IN RE GRAND JURY PROCEEDINGS

487 F.2d 700 (D.C.Cir. 1973).

**Editorial Note:**

The question before the District Court, and on appeal before the Court of Appeals, was whether the President could, in his sole discretion, disobey the subpoena of the grand jury and thereby withhold relevant evidence in his possession from a grand jury based on his claims of executive privilege, separation of powers, and confidentiality of conversations.

The District Court held that the president could not withhold the evidence but rather that he must submit it, subject to *in camera* review to determine its relevancy. The Court of Appeals agreed, while modifying the order in certain limited respects. As you read the decision, would you say that the court of appeals in its order gave more or less weight to the claims of executive privilege than did the District Court?

PER CURIAM: * * *

We contemplate a procedure in the District Court, following the issuance of our mandate, that follows the path delin-

eated in *Reynolds, Mink,* and by this Court in *Vaughn v. Rosen.* With the rejection of his all-embracing claim of prerogative, the President will have an opportunity to present more particular claims of privilege, if accompanied by an analysis in manageable segments.

Without compromising the confidentiality of the information, the analysis should contain descriptions specific enough to identify the basis of the particular claim or claims.

1. In so far as the President makes a claim that certain material may not be disclosed because the subject matter relates to national defense or foreign relations, he may decline to transmit that portion of the material and ask the District Court to reconsider whether *in camera* inspection of the material is necessary. The Special Prosecutor is entitled to inspect the claim and showing and may be heard thereon, in chambers. If the judge sustains the privilege, the text of the government's statement will be preserved in the Court's record under seal.

2. The President will present to the District Court all other items covered by the order, with specification of which segments he believes may be disclosed and which not. This can be accomplished by itemizing and indexing the material, and correlating indexed items with particular claims of privilege. On request of either counsel, the District Court shall hold a hearing in chambers on the claims. Thereafter the Court shall itself inspect the disputed items.

Given the nature of the inquiry that this inspection involves, the District Court may give the Special Prosecutor access to the material for the limited purpose of aiding the Court in determining the relevance of the material to the grand jury's investigations. Counsels' arguments directed to the specifics of the portions of material in dispute may help the District Court immeasurably in making its difficult and necessarily detailed decisions. Moreover, the preliminary indexing will have eliminated any danger of disclosing peculiarly sensitive national security matters. And, here, any concern over confidentiality is minimized by the Attorney General's designation of a distinguished and reflective counsel as Special Prosecutor. If, however, the Court decides to allow access to the Special Prosecutor, it should, upon request, stay its action in order to allow sufficient time for application for a stay to this Court.

Following the *in camera* hearing and inspection, the District Court may determine as to any items (a) to allow the particular claim of privilege in full; (b) to order disclosure to the grand jury of all or a segment of the item or items; or, when segmentation is impossible, (c) to fashion a complete statement for the grand jury of those portions of an item that bear on possible criminality. The District Court shall provide a reasonable stay to allow the President an opportunity to appeal. In case of an appeal to this Court of an order either allowing or refusing disclosure, this Court will provide for sealed records and confidentiality in presentation.

We end, as we began, by emphasizing the extraordinary nature of this case. We have attempted to decide no more than the problem before us—a problem that takes its unique shape from the grand jury's compelling showing of need. The procedures we have provided require thorough deliberation by the District Court before even this need may be satisfied. Opportunity for appeal, on a sealed record, is assured.

We cannot, therefore, agree with the assertion of the President that the District Court's order threatens "the continued existence of the Presidency as a functioning institution." As we view the case, the order represents an unusual and lim-

ited requirement that the President produce material evidence. We think this required by law, and by the rule that even the Chief Executive is subject to the mandate of the law when he has no valid claim of privilege.

The petition and appeal of the United States are dismissed. The President's petition is denied, except in so far as we direct the District Court to modify its order and to conduct further proceedings in a manner not inconsistent with this opinion.

The issuance of our mandate is stayed for five days to permit the seeking of Supreme Court review of the issues with which we have dealt in making our decision.

So Ordered.

**NOTES**

1. The President as the Chief Executive, is not classified as an "agency" for the purposes of the Freedom of Information Act. Therefore, claims which he makes to prevent disclosure of material are not necessarily limited to nor the same as the exemptions to disclosure listed in the Act. However, an interesting aspect of the Court of Appeals decision is the analogy it drew between the executive claim of confidentiality and the fifth exemption under the Act. Exemption five, concerning inter and intra-agency memoranda, was the same one which the Supreme Court dealt with at great length in *Mink*.

The Court of Appeals in *Nixon v. Sirica and Cox* greatly increased the importance of the Freedom of Information Act cases for it relied on them in resolving an analogous claim of privilege while admitting that the claim does not fall under the Act. This suggests that the principles which will evolve out of the Act may have a much more far-reaching effect than questions which arise specifically between an agency and a person requesting a document. In what was one of the great historical confrontations between the judiciary and the executive in the *Cox* case, the underlying basis for resolving the dispute came from the judicial interpretation of the Freedom of Information Act. Indeed, it seems logical that these principles relating to disclosure of information may be applied to other situations, such as resistance by the press to subpoenas from grand juries for information.

2. Exempt documents or documents not sufficiently identifiable are two grounds for agency non-disclosure. Both were used in *Bristol-Meyers Co. v. Federal Trade Commission, 284 F.Supp. 745 (D.C.D.C.1968), aff'd in part, rev'd in part 424 F.2d 935 (D.C.Cir. 1970), cert. den. 400 U.S. 824 (1970).*

Bristol-Meyers Co., a drug manufacturer, sought under the Freedom of Information Act, to have the Federal Trade Commission produce certain records relevant to a Commission-initiated rule-making proceeding concerning pain-diminishing medicines. Bristol-Meyers requested the Commission to identify in writing "each item of material, whatever its form or nature, which relates to, bears upon, contains or purports to describe, report or discuss, or which otherwise, in whole or in part, records, reflects, evidences, has contributed to or constitutes: (a) information concerning the speed, strength, and duration of effect of certain medicines; (b) information concerning the extent to which any benefit is claimed to be derived from such medicines; (c) the extensive staff investigation alleged to have been made by the Commission, its accumulated experience and available studies and reports concerning the subject matter."

A central issue before the Court was whether these requests were specific enough to be classified as "identifiable records" under the Act. (See 5 U.S.C.A.

§ 552(a)(3).) Judge Holtzoff for the district court defined an "identifiable" record as "a record that is described with sufficient precision in order that by ministerial action of some subordinate the document can be identified and selected out of the files. It does not mean that the head of an agency or his immediate assistant must use judgment in seeking through the file to determine whether a particular document is within the classification asked for. That would be an unreasonable request."

Judge HOLTZOFF added: "* * * The Federal Trade Commission should not be put to the burden of selecting those matters which are properly subject to disclosure out of the vast morass of material that obviously is not subject to the provisions of the Act."

The district court concluded the demand was "far too broad, and far too general" and therefore the F.T.C. did not have to produce the documents.

In reversing this part of the district court decision, the Court of Appeals (424 F.2d 935, D.C.Cir., 1970) concluded that the request for material was sufficiently specific:

> The statutory requirement that a request for disclosure specify "identifiable records" calls for "a reasonable description enabling the Government employee to locate the requested records," but it is "not to be used as a method of withholding records." The F.T.C. can hardly claim that it was unable to ascertain which documents were sought by Bristol-Meyers. The Commission relied on certain materials in promulgating its proposed rule, and referred to them in announcing the rule-making proceeding. Their materials are adequately identified in the request for disclosure of the items mentioned in the Commission's Notice.

3. Litigation has primarily centered on defining the scope of review under § 552(b)(1), (2), (4), (5), and (7) of the Act. The judiciary has attempted to limit these exemptions (with the exception of the *Mink* holding regarding b(1) and thereby broaden access to information.*

The Court of Appeals in *Bristol-Meyers* rejected the argument that because some of the requested items might fall within the exemptions, none had to be shown:

> Among the "identifiable records" sought by the company, there may well be some which are statutorily exempt from disclosure. The difficulty here is that the District Court failed to examine the disputed documents, and to explain the specific justification for withholding particular items. The legislative plan creates a liberal disclosure requirement, limited only by specific exemptions which are to be narrowly construed. * * * The first exemption cited protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). * * * (T)he statutory scheme does not permit a bare claim of confidentiality to immunize agency files from scrutiny. The District Court in the first instance has the responsibility of determining the validity and extent of the claim, and insuring that the exemption is strictly construed in light of the legislative intent.

* A recent example of narrow construction of exemptions under the FOI Act is *Rose v. Department of Air Force*, 495 F.2d 261 (2d Cir. 1974). The government sought to withhold case summaries even with names and other identifying material deleted of adjudications on Honor and Ethics Code complaints at U. S. Service Academies on the basis of two exemptions under the FOI Act. The court rejected both claims for exemption. The Court of Appeals said that neither FOI exemption (b)(2) for data relating "solely to the internal personnel rules of an agency" nor (b)(6) exempting from disclosure data which would constitute an unwarranted "invasion of personal privacy" were applicable.

As for the claim of an exemption under 5 U.S.C.A. § 552(b)(5) of inter-agency and intra-agency memoranda, the Court said:

> This provision does not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memorandum. Purely factual reports and scientific studies cannot be cloaked in secrecy.

As for the exemption claimed under 5 U.S.C.A. § 552(b)(7) for investigatory files compiled for law enforcement purposes,

> the agency cannot, consistent with the broad disclosure mandate of the Act, protect all its files with the label "investigatory" and a suggestion that enforcement proceedings may be launched at some unspecified future date. Thus, the District Court must determine whether the prospect of enforcement proceedings is concrete enough to bring into operation the exemption * * *

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## SOME FINAL COMMENTS ON THE FREEDOM OF INFORMATION ACT

1. A welcome event in freedom of information law was the *Stern* case since it involved a fight for information by a journalist. NBC newsman Carl Stern won his case for disclosure of FBI documents in a case that suggested that the primary purpose of the Freedom of Information Act might yet be fulfilled. The purpose of the statute, as conceived by its proponents, was to make the workings of government more generally available to the public by means of providing to the press easier access to government documents. See generally, Davis, *The Information Act: A Preliminary Analysis,* 34 U.Chi.L.Rev. 761 (1967). The *Stern* case is responsive to this fundamental purpose of the Freedom of Information Act. *Stern v. Richardson, 367 F.Supp. 1316 (D.C.D.C.1973).*

A principal feature of the *Stern* case is its facts: a journalist by suing to enforce the Freedom of Information Act obtained disclosure of FBI documents. But the case is also illustrative of a liberalizing trend in the cases interpreting the Act. The *Stern* case broadly interprets *Mink* not only in readily allowing review in chambers by a judge of materials claimed by the agency to be exempt but in actually compelling disclosure of the documents in controversy to the journalist who sought them. FOI statutory exemptions for intra-agency memos, and investigative files were all held not applicable. The government was required to sustain a heavy burden for each category of documents for which exemption was claimed.

In *Soucie v. David, 448 F.2d 1067 (D.C.Cir. 1971),* the Court of Appeals held: "The policy of the Act requires that the disclosure requirement be construed broadly, the exemptions narrowly." The *Stern* case might suggest that this mandate is being followed by the lower federal courts.

*Weisberg v. United States Department of Justice, 489 F.2d 1195 (D.C.Cir. 1973),* however, casts a shadow over the efficacy of *Stern.*

Weisberg, an author, sought from the FBI some spectograph analysis in connection with the Warren Commission and the Kennedy assassination. The FBI declined to provide the information. A panel of the Court of Appeals reversed the FBI decision, and then, en banc, the Court of Appeals reversed its earlier decision. The question was whether exception (b)(7) of the FOI Act applied. The legislative history of the FOI Act was relied on by the majority to show that Congress intended to protect the investigative files of the FBI. Judge Bazelon dissented.

Another refusal to substantially extend enforcement of the FOI Act in the federal courts was provided by the Supreme Court's 5–4 decision in *Renegotiation Board v. Bannercraft Clothing Co., 94 S. Ct. 1028 (1974).* In *Bannercraft,* the Supreme Court held that a federal district court's power under the FOI Act includes authority to enjoin federal agency action pending resolution of a claim for documents at the request of a party involved in a proceeding before a federal agency. Since the FOI Act does not expressly grant the federal courts such injunctive power, the *Bannercraft* case might be thought to extend the powers of federal courts to enforce FOI Act claims. However, the force of this ruling was severely blunted by the Court's holding that the defense contractors seeking documents in *Bannercraft* must first exhaust administrative remedies before they may obtain an injunction from the federal district court to enjoin administrative proceedings until requested documents are produced.

2. The statute specifically removes from a duty of disclosure information about national defense, foreign policy, or personnel and investigatory files. For these and other reasons, Professor Kenneth Davis observed as early as 1967 that the "press which was the principal political force behind the enactment will benefit only slightly." See Davis, *The Information Act: A Preliminary Analysis,* 34 U.Chi.L.Rev. 761 at 803 (1967). On the other hand Professor Davis also pointed out that the legal profession, unlike the press, would really benefit from the Freedom of Information Act since in his opinion the Act does open up what he calls "secret law." "Secret law," as Professor Davis describes it, consists of the stuff of federal administrative law—orders, opinions, statements of policy, interpretations, staff manuals, and instructions —which prior to the Act had not been easily available. These, however, are materials which usually are primarily of interest to the so-called Washington lawyer, the lawyer who specializes in representing private litigants before federal administrative agencies. Id. at 804. See also Davis, Administrative Law Treatise, 1970 Supp. (1971), Ch. 3A, The Freedom of Information Act, pp. 114–181.

Statistics appear to confirm Professor Davis' prediction. Data submitted to the Foreign Operations and Government Information Subcommittee, a unit of the House Committee on Government Operations, confirm that "the press had made little use of the formal procedures outline under the Act while private interests, especially lobbyists and corporate lawyers, have benefited greatly from the legislation." Miller, *Freedom of Information Act: Boom or Bust for the Press?,* Editor and Publisher, July 8, 1973.

3. Lack of use of the Act by the press may be attributed to the amount of time involved in the appeals process once the matter is in court. News interest in a document sought often will not survive the court delays involved. However, the threat of formal court action itself apparently in many cases has let to informal negotiations between the press and the agency and to the release of agency information without any legal action.

## SECTION 2. PRESS–GOVERNMENTAL CONSENT TO RESTRICT ACCESS AND THE JOURNALIST'S RIGHT OF ACCESS TO GATHER INFORMATION

A fascinating case has raised the issue of whether consent by some journalists to exclusion of other journalists from the periodical press galleries of the United States Senate and House of Representatives violates the First Amendment. The

court held that such press consent could not, consistent with the First Amendment, justify exclusion of a reporter for *Consumer Reports* from Congressional press galleries.

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## CONSUMERS UNION OF UNITED STATES, INC. v. PERIODICAL CORRESPONDENTS' ASSOCIATION

365 F.Supp. 18 (D.C.D.C.1973).

MEMORANDUM OPINION

GESELL, District Judge: * * *

Consumers Union, publisher of a monthly magazine known as *Consumer Reports*, has been denied accreditation to the periodical press galleries of the Senate and House and claims that this action, taken in reliance on Rule 2 of the Rules Governing the Periodical Press Galleries, is unconstitutional.

* * *

Defendants concede that no written guidelines exist for interpreting the indefinite requirement contained in Rule 2. However, during the pursuit of its administrative remedies, the basis for the rejection was clarified in a number of significant particulars. Thus, Senator Cannon, Chairman of the Committee on Rules and Administration, was advised by the Association as follows:

* * *

> The publication Consumer Reports is affiliated with plaintiff which is an "association" under the Rules because it is not primarily a publishing organization but rather is an association organized to work in the interests of consumers. It is this in the nature of plaintiff which distinguishes it from admitted publications and disqualifies Consumer Reports under the Rules.
> * * *

Under the fuzzy tests apparently applied, such periodicals as the Rippon Society's *Rippon Forum,* the Navy League's *Sea Power,* and the National Welfare Rights Organization's *Welfare Fighter* have been denied admission to the Association, despite the unquestionable interest that these publications have in keeping abreast of congressional activities.

Plaintiff points out that many of the Association's present members would appear to fall within the broad scope of Rule 2, both as written and as interpreted by the Committee. For example, Time, Inc., employs a lobbyist in order to advance its views concerning congressional action on postal rates, and such organizations as *Modern Tire Dealer, National Timber Industry,* and the *Military Retirees Journal* undoubtedly represent the views of special interest groups.

* * *

Plaintiff's principal contention on the merits is that Rule 2 of the Rules Governing Periodical Press Galleries, on its face and as interpreted by the Executive Committee of the Association and the relevant congressional authorities, violates plaintiff's First Amendment right to freedom of the press and its Fifth Amendment right to due process and the equal protection of the laws.

* * * A free press is undermined if the access of certain reporters to facts relating to the public's business is limited merely because they advocate a particular viewpoint. This is a dangerous and self-defeating doctrine.

* * *

There should be no glossing over what this record discloses. Under a broad, generalized congressional delegation, authority has been given certain newsmen to prevent other newsmen from having access to news of vital consequence to the public. As a result, a group of established periodical correspondents have undertaken to implement arbitrary and un-

necessary regulations with a view to excluding from news sources representatives of publications whose ownership or ideas they consider objectionable. Responsible officials of the House and Senate have not forestalled such discrimination by promulgating clear eligibility requirements, see Cox v. Louisiana, 379 U.S. 536, 555–558 (1965), nor apparently have they developed any other means of checking abuse of the Association's delegated authority.

The fact that the galleries for newspapermen and radio and television correspondents have operated with much greater liberality and consequent regard for the demands of the First Amendment serves simply to emphasize the arbitrariness of those managing the periodical galleries. All types of news compete and all types of publications are entitled to an equal freedom to hear and publish the official business of the Congress. Quad-City Community News Service, Inc. v. Jebens, 334 F.Supp. 8 (S.D.Iowa 1971). *Cf.* Kleindienst v. Mandel, 408 U.S. 753, 768–769 (1972). * * *

The situation disclosed by this undisputed record flaunts the First Amendment. It matters not that elements of the press as well as Congress itself appear to have been the 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. *Cf.* Nixon v. Condon, 286 U.S. 73 (1932).

There must be an end to this self-regulation by indefinite standards and artificial distinctions developed to censor the ownership or ideas of publications. The Constitution requires that congressional press galleries remain available to all members of the working press, regardless of their affiliation. Exclusion of a publication from the galleries can only be sanctioned under carefully drawn definite rules developed by Congress and specifically required to protect its absolute right of speech and debate or other compelling legislative interest.

* * *

The exclusion of *Consumer Reports* from accreditation to the periodical galleries of the Senate and House violates the First and Fifth Amendments to the Constitution.

### NOTES AND QUESTIONS

1. Judge Gesell refused to hold that reporters have an absolute right to go where they please to ferret out news. He conceded that exclusion of press representatives could be sanctioned but only if such rules of exclusion were drawn with precision in order to protect specific legislative interests such as those involved in the speech and debate clause. U. S. Constitution, Art. I, § 6.

2. Judge Gesell also appeared to take the position that arbitrary denial on access to news by either Congress or by journalists acting under Congressional auspices is a direct First Amendment restraint on the content of news.* Is Judge Gesell in essence saying that action by the press can sometimes be viewed as censorship which violates the First Amendment? Is private action being viewed as state action in the *Consumer Reports* case? *Cf. Chicago Joint Board v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970)* (See this text p. 584); *Herald Co. v. Seawell, 472 F.2d 1081 (10th Cir. 1972)* (See this text p. 670).

* Another area where the right to gather information has been at issue is the area of access to press interviews in federal prisons. Thus, a flat ban on press interviews with inmates was held to infringe on the right of the press to gather news and the right of the public to know. See *Washington Post Co. v. Kleindienst*, 357 F.Supp. 770 (D.D.C.1972, modified and aff'd 494 F.2d 994 (D.C.Cir. 1974). But on June 24, 1974, in *Saxbe v. Washington Post Co.*, — U.S, —, the Supreme Court, 5–4, reversed and held that prison authorities may establish policies barring the press from interviews with prisoners. *Accord*: *Pell v. Procunier*, — U.S. —, decided June 24, 1974.

## SECTION 3. A COMMENT ON STATE LAWS ON ACCESS TO INFORMATION AND OPEN PUBLIC MEETINGS

In 1971 the Philadelphia *Inquirer* conducted an independent investigation into Pennsylvania's public welfare system. The *Inquirer* sought the names and addresses of and funds received by Philadelphia welfare recipients. Requests for this information by the editors of the *Inquirer* (one of whom was the named plaintiff in the cases that follow) to the Secretary of the Pennsylvania Department of Public Welfare and to the Governor were turned down. The *Inquirer* then looked to the courts of Pennsylvania. An examination of the litigation that followed provides an interesting exposure to the problems and issues surrounding state freedom of information laws, such as Pennsylvania's "Right-To-Know" Act.

The Commonwealth Court reversed the decision of the Secretary of Public Welfare and ordered the Department of Public Welfare to grant access to the information sought by the *Inquirer*. The Department and the Commonwealth appealed the decision and the controversy came before the Pennsylvania Supreme Court.

## McMULLAN v. WOHLGEMUTH

308 A.2d 888 (Pa.1973).

### OPINION OF THE COURT

ROBERTS, Justice. * * *

* * * We now reverse the order of the Commonwealth Court.

We are here called upon to decide whether appellees, either under our common law or under the "Right-To-Know Act" (Act of June 21, 1957, P.L. 390, § 1 et seq., 65 P.S. § 66.1 et seq.), are entitled to have access to the names and addresses of and amounts received by public assistance eligibles in Philadelphia. Appellees argue in the alternative that even if access is denied under the above theories, the First Amendment to the United States Constitution guarantees them a right to the information they seek. Appellees' contentions, on this record, are without merit.

[Part I of the court's opinion, dealing with the applicability of provisions of the Public Welfare Code, is omitted. It is enough to note, in passing, that, although the court rejected the arguments in this case, a right of access to government records may be based on statutes other than a "Right-to-Know Act."]

Despite the clear mandate of §§ 404(a)(1) and 425, (of the Public Welfare Code Ed.), appellees nonetheless contend that the "Right To Know Act" entitles them to the information they seek. Appellees have misinterpreted the clear language of the "Right To Know Act", and particularly the exceptions contained therein, as well as §§ 404(a)(1) and 425, supra, and the attendant Department of Public Welfare regulations.

The "Right To Know Act" gives "any member of the Commonwealth" a statutory right of access to every "public record" of a state agency. A "public record" is defined by the Act as:

"Any account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property and any minute, order or decision by an agency fixing the personal or property rights, privileges, immunities, duties or obligations of any person or group of persons. * * *" 65 P.S. § 66.1(2)

That definition, although appearing to be broad enough to encompass the records sought here, McMullan v. Wohlgemuth, supra, 444 Pa. at 567, 281 A.2d at 838, is much narrower when read in conjunc-

tion with the Act's four clear exceptions to the "public record" disclosure definition:

"[T]he term 'public records'—

[1] shall not mean any report, communication or other paper, the publication of which would disclose the institution, progress or result of an investigation undertaken by an agency in the performance of its official duties, except those reports filed by agencies pertaining to safety and health in industrial plants;

[2] *shall not include any record, document, material, exhibit, pleading, report, memorandum, or other paper, access to or the publication of which is prohibited, restricted or forbidden by statute law* or order or decree of court,

[3] [shall not include any record, document, material, exhibit, pleading, report, memorandum or other paper, access to or the publication of which] would operate to the prejudice or impairment of a person's reputation or personal security,

[4] [shall not include any record, document, material, exhibit, pleading, report, memorandum or other paper, access to or the publication of which] would result in the loss by the Commonwealth or any of its political subdivisions or commissions or State or municipal authorities of Federal Funds, excepting therefrom however the record of any conviction for any criminal act. 65 P.S. § 66.1(2)." (Emphasis added.)

Sections 404(a)(1) and 425 of the Public Welfare Code prohibit the disclosure of *names* of public assistance recipients. And the sections *clearly do not* permit the disclosure of addresses or amounts received by recipients where the information obtained is to be used for a "commercial purpose." Therefore, how can it be said that exception (2) of the "Right to Know Act" (noted above) does not exempt from public disclosure the information sought by appellees? The simple answer to this rhetorical question is that it cannot be. Sections 404(a)(1) and 425, supra, are "statute law[s]" which prohibit, restrict and forbid "access to" the names of public assistance recipients, and where to be used for a "commercial" purpose, the addresses and amounts received by those receiving public assistance. Accordingly, the applicability of exception (2) of the "Right to Know Act" to the instant situation is manifestly clear and adversely disposes of appellees' claim.

Appellees also contend they are entitled to the information they seek under the common law of this Commonwealth. Such an assertion must be dismissed. As this Court said in Mooney v. Temple University Board of Trustees, 448 Pa. 424, 429–430, n. 10, 292 A.2d 395, 398, n. 10 (1972): "It is unquestioned that the right to inspect public documents was no broader at common law than it is presently under the statute ["Right to Know Act", supra]; it may have been more restricted by being limited only to persons with a 'personal or property interest' in the matter sought to be disclosed. Wiley v. Woods, 393 Pa. 341, 347–350, 141 A.2d 844, 848–849 (1958). *Therefore, disposition of appellant's claim under the Inspection and Copying Records Act ["Right to Know Act," supra] a fortiorari resolves appellants' claim at common law.*" (Emphasis added.)

In view of the foregoing statutory analysis and the conclusion that the statutory provisions preclude appellees from obtaining the information they seek, we must now consider whether the "Right to Know Act", supra, and §§ 404(a)(1) and 425 of the Public Welfare Code, supra, as applied, are unconstitutional, as being violative of appellees' rights under either the United States Constitution or that of the Commonwealth of Pennsyl-

vania. In essence, appellees argue that to deny them the names of Philadelphia residents receiving public assistance, is tantamount to an abridgement of the press' right to obtain "access" to sources of information, a right purportedly guaranteed the press under both federal and state constitutional provisions. That contention, on these facts, must be expressly rejected.

Appellees suggest, and we agree, that this is *not* a case involving the right of the press to print, publish and distribute information. If it were, the result we reach would be quite different. Cf. New York Times Co. v. United States, 403 U. S. 713 (1971), and the cases cited therein. Here, no impermissible prior restraint is involved. The sole question presented is whether the First Amendment, made applicable to the states through the Fourteenth Amendment, of the United States Constitution, and art. I, § 7 of the Pennsylvania Constitution, guarantee the press the unrestricted right to "gather" news by compelling County Boards and the Department of Public Welfare to furnish appellees with the list of the names of all Philadelphians receiving public assistance. In our view, neither constitutional provision so provides.

It appears clear that this Court has decided that no such absolute right to gather news (i. e., compel the furnishing of information), statutorily protected from disclosure, exists under art. I, § 7 of the Pennsylvania Constitution. Taylor and Selby Appeals, 412 Pa. 32, 193 A.2d 181 (1963). Although the Pennsylvania Legislature has wisely created an absolute statutory right of a newsman to preserve the confidentiality of his sources of information, Act of June 25, 1937, P.L. 2123, § 1, 28 P.S. § 330, *Selby,* supra, explicitly stated that but for the statutory provision, the Commonwealth could constitutionally compel a newsman to divulge his sources. See also Branzburg v. Hayes, et al., 408 U.S. 665 (1972). Implicitly, this Court in *Selby,* expressed its view that art. I, § 7, of the Pennsylvania Constitution goes no further than its federal counterpart in guaranteeing that the press be free to print, publish and distribute.

No United States Supreme Court decisions have been found which directly hold that the First Amendment embodies the right of the press to "gather" news. So, too, there is no authority whatever for judicially compelling the disclosure to the press of material, statutorily restricted.

Nevertheless, it is perhaps logical to assume that such a right to gather news "of some dimensions must exist" if the First Amendment is to have realistic vitality. As Mr. Justice Stewart recently stated in his dissenting opinion in *Branzburg,* supra: "A corollary of the right to publish must be the right to gather news. * * * News must not *unnecessarily* be 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." 408 U.S. at 727 (emphasis added) (citation omitted). Although we agree that such a right, emanating from the First Amendment, does exist, this right, as all other First Amendment rights, is not absolute. See, e. g., *Selby,* supra, 412 Pa. at 39, 193 A.2d at 184, and the cases cited therein. Here, the appellees have no right to compel the disclosure of names explicitly restricted by statute.

In this instance, appellees have advanced no persuasive reasons why the right of the press should be given wider boundaries than that of the public it seeks to inform. As the Court noted in *Branzburg,* supra: "* * * [T]he First Amendment does not guarantee the press a constitutional right of *special access* not available to the public generally." * * * 408 U.S. at 684. *"The right to speak and publish does not carry with it the unrestrained right to gather*

*information." Zemel,* supra, 381 U.S. at 17 (emphasis added).

* * *

Here, the Commonwealth's interest in protecting the privacy of those it aids through public assistance is paramount and compelling. The Legislature, by enacting §§ 404(a)(1) and 425 of the Public Welfare Code, supra, has clearly set forth its intent that maintaining the privacy of the recipient is a crucial element in its quest to preserve "family life" and "encourage self-respect, self-dependency and the desire to be a good citizen and useful to society." Act of June 13, 1967, P.L. 31, No. 21, art. 4, § 401, 62 P.S. § 401. Such a preponderant interest unquestionably outweighs any non-absolute right of the press to "gather news," by compelling the material it seeks. Here, "we are not dealing with freedom of expression at all" but with the appellees' request to have furnished to it a list of all Philadelphia public assistance eligibles.

The statutory ban against disclosing the names of public assistance recipients is a clear recognition and directive by the Legislature that the privacy of the recipient is a fundamental need worthy of protection. This Court, is bound to give great deference to this sound legislative judgment. The statutory limitation imposed on the appellees' asserted First Amendment right to compel the disclosure of those receiving assistance is no greater than necessary to protect the substantial governmental and individual interests involved. * * * Accordingly, in the face of this legislative directive, appellees cannot prevail. Again, we emphasize that this Court is not here concerned with the right of a newspaper to publish information *which it has already acquired.* Cf. New York Times Co. v. United States, supra. What appellees here seek is the compelled disclosure of names of public assistance recipients, statutorily made nonavailable.

Having determined appellees' arguments adversely to them, we need not consider appellants' contention that the disclosure of the names and addresses of and amounts received by public assistance recipients would violate the constitutional right of privacy guaranteed these needy citizens. * * *

The order of the Commonwealth Court is reversed.

EAGEN, J., concurs in the result.

POMEROY, Justice (dissenting).

I find it ironical that the Court, especially at this particular time in our national experience, through a restrictive and erroneous reading of legislative acts, should bar a large metropolitan newspaper from government records of disbursement of public monies to private individuals. Since my reading of these same statutes cannot be reconciled with that of the majority, I must respectfully dissent.

* * *

### NOTES AND QUESTIONS

1. The *Philadelphia Inquirer* began its fight for welfare records in the Spring of 1971. It lost its final appeal in the summer of 1973. Even if it had succeeded in the end, were the more than two years of litigation worth the investigation that the newspaper would have finally made? Perhaps so, in this case, since the welfare system seems to be a continuing controversy of dependable "newsworthiness." But it would seem that not every potential news story could afford the two year wait.

2. This controversy might have had a different result without the issue of invasion of privacy posed by this particular request. Police records, tax records, and so forth, can be the target of a request for information under "Right-to-Know" laws. As a matter of journalistic ethics,

should the *Inquirer* have tried to use such legislation to seek out the recipients of public welfare to ask them questions about their benefits?

3. Note that the *Inquirer* tried to secure judicial review of the state official's discretionary denial of access. Most states give their officials such discretion, but others, such as California, do not. In a recent California decision, the state tax collector was allowed the power to make regulations concerning the public availability of property tax records, but only to protect the safety of the records, to facilitate the orderly operations of the tax bureau, and to prevent chaos in the record archives. The court held that in California there are no implied powers to limit inspection of public records broader than this. *Bruce v. Gregory, 56 Cal.Rptr. 265, 423 P.2d 193 (Cal.1967).*

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## STATE OPEN MEETING LAWS

1. State laws determining whether meetings of state legislative and administrative bodies should be public vary immensely. In some cases state constitutions speak directly to the problem. In others they do not. State laws may treat legislative and administrative proceedings separately or together. If any general statement can be made, it is that the source of this law is not in case law but is almost entirely constitutional or legislative. Open meetings are not part of the common law tradition; not until the late 18th Century were debates in Parliament reported in the British press without attempts at punishment for contempt of the legislature. For some history on the background of the law in this area see Cross, The People's Right To Know, (1953). (See particularly Ch. 12.)

2. New Mexico is one of a minority of states whose constitutions speak directly to the issue of public meetings of the legislature. "All sessions of each house shall be public. * * *" N.M.Const. Art. IV, 12. No exceptions are stated. Its public meeting law is equally simple. "The governing bodies of all municipalities, boards of county commissioners, boards of public instruction and all other governmental boards and commissions of the state or its subdivisions, supported by public funds, shall make all final decisions at meetings open to the public; * * *." N.M.Stat. § 5–6–17 (1966). Only meetings of grand juries are exempted.

Such simplicity does not, of course, end all problems. A recent New Mexico case held that a vote taken by secret ballot was not in violation of this statute since it requires only that decisions be reached in public and does not prescribe the means by which such decisions must be reached. *Board of Education, Village of Jemez Springs v. State Board of Education, 443 P.2d 502 (N.M.1968).*

3. Occupying a middle ground are states whose constitutions or statutes provide for open meetings and state some general exceptions. Thus Texas states that "the sessions of each House shall be open, except the Senate when in Executive session." Texas Const. Art. III, section 10; and New York provides that "the doors of each house shall be kept open except when the public welfare shall require secrecy. * * *" N.Y. Const. Art. III, section 16.

4. Oklahoma, whose constitution is silent on the subject, avoids the New Mexico problem noted above by declaring that "* * * the vote of each member (of any state or local governing body) must be publicly cast and recorded;" and provides for executive sessions, but only for the purpose of discussing the "employment, hiring, appointment, promotion, demotion, disciplining, or resignation of any public officer or employee." Even then, a final vote on an employment matter is subject to the publicly-cast

vote requirement. 25 Okl.Stat.1971, § 201.

5. At the opposite end of the continuum are states with complex open meeting laws stating many exceptions. Virginia, another state whose constitution is silent on the subject, can serve as an example. After briefly stating that "except as otherwise provided * * *, all meetings shall be public meetings", Code of Va.Ann. § 2.1–343 (1968), the statute provides for seven exceptions, including matters of employment, the use of publicly held property, protection of individual privacy, investment of public funds, or discussion of pending litigation involving the particular governmental body. Code of Va.Ann. § 2.1–344 (1968).

6. On the local level, both the state law and the local ordinance, e. g., the city charter, should be examined for an open meeting law. H. L. Cross noted the provision in the charter of St. Paul, Minnesota, as "typical": "All meetings of the council, of all boards, committees, * * * elected, appointed, or employed, shall be public meetings * * *" Cross, The People's Right to Know 188 (1953).

7. Concerning the enforcement of these laws, some states, like Virginia, provide for seeking mandamus or injunction in the appropriate state court. Code of Va.Ann. § 2.1–346 (1968). New Mexico makes violation of its open meeting law a misdemeanor, punishable by a $100 fine. N.M.Stat. § 5–6–17B (1968). Oklahoma provides for a similar fine and the additional possibility of up to thirty days imprisonment in the county jail. 25 Okl.Stat.1971, § 202, and declares that "any action taken in violation" of the statute "shall be invalid." 25 Okl.Stat.1971, § 202. Minnesota 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. Other states do not provide specific enforcement provisions. How effective is enforcement? That is a question that can probably best be answered by experience with each particular state or local law and each particular legislative or administrative body. The best advice to the practicing journalist would be to become familiar with the particular provisions of his or her own area.

# Chapter VIII

# SELECTED PROBLEMS OF LAW AND JOURNALISM

## SECTION 1. A RIGHT OF ACCESS AND REPLY TO THE PRESS?

### A. ACCESS TO THE PRESS—A NEW FIRST AMENDMENT RIGHT

## ACCESS TO THE PRESS—A NEW FIRST AMENDMENT RIGHT



Jerome A. Barron
80 Harv.Law Rev. 1641 (1967).

*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 constitutional 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.

## I. The Romantic View of the First Amendment: A Rationale for Repression

The problem of access to the press is not a new one. When the Newspaper Guild was organizing in the late 1930's, a statement opposing that organization was prepared by the American Newspaper Publishers Association. Not surprisingly that statement was given publicity in almost all the newspapers in the United States. Mr. Heywood Broun, a celebrated American journalist, prepared a two hundred word reply for the Guild organizers and asked the hostile newspapers to print it: "A very large number of newspaper owners who had beaten their breasts as evidence of their devotion to a 'free press' promptly threw the Guild statement into the waste basket and printed not a line of it."

Mr. Broun's experience illustrates the danger posed by the ability of mass communications media to suppress information, but an essentially romantic view of the first amendment has perpetuated the lack of legal interest in the availability to various interest groups of access to means of communication. Symptomatic of this view is Mr. Justice Douglas' eloquent dissent in Dennis v. United States:

> 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.*

The assumption apparent in this excerpt is that, without government intervention, there is a free market mechanism for ideas. Justice Douglas's position expresses the faith that, if government can be kept away from "ideas," the self-operating and self-correcting force of "full and free discussion" will go about its eternal task of keeping us from "embracing what is cheap and false" to the end that victory will go to the doctrine which is "true to our genius."

* * *

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.

## II. Obstacles to Access: The Changing Technology of the Communications Process

* * * 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.

Mr. Broun's experience as representative of the Newspaper Guild in the 1930's led him to write an article in which he expressed concern about the implications of the newspapers' refusal to

print his reply at a time when "[e]very day brings the news that one or two or three more papers have collapsed or combined with their rivals." He has proved a good prophet, for where fourteen English language dailies were published in New York City in 1900, only two morning papers and two afternoon dailies survive. 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 * * *." [17] But, like an inadequate underground press, it is a communications 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.

## III. Making the First Amendment Work

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.

### *A. Beyond Romanticism*

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.

Too little attention has been given to defining the purposes which the first amendment protection is designed to achieve and to identifying the addressees of that protection. An eloquent exception is the statement of Justice Brandeis in *Whitney v. California* that underlying the first amendment guarantee is the assumption that free expression is indispensable to the "discovery and spread of political truth" and that the "greatest menace to freedom is an inert people." In

[17] *Ferry, Masscomm as Educator*, 35 Am. Scholar 293, 300 (1966).

*Thornhill v. Alabama* Justice Murphy described his view of the first amendment:

> The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply *the public need for information and education with respect to the significant issues of the times.* * * * Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

That public information is vital to the creation of an informed citizenry is, I suppose, unexceptionable. Both Justices recognize the importance of confronting citizens, as individual decision makers, with the widest variety of competing ideas. But accuracy does demand one to remember that Justice Brandeis was speaking in *Whitney,* as was Justice Murphy in *Thornhill,* of the constitutional recognition that is given to the necessity of inhibiting "the occasional tyrannies of governing majorities" from throttling opportunities for discussion. But is it such a large constitutional step to take the same approach to nongoverning minorities who control the machinery of communication? Is it too bold to suggest that it is necessary to ensure access to the mass media for unorthodox ideas in order to make effective the guarantee against repression?

Another conventionally stated goal of first amendment protection—the "public order function"—also cries out for recognition of a right of access to the mass media. The relationship between constitutional assurance of an opportunity to communicate ideas and the integrity of the public order was appreciated by both Justice Cardozo and Justice Brandeis. In Palko v. Connecticut Justice Cardozo clearly indicated that while many rights could be eliminated and yet "justice" not be undone, "neither liberty nor justice would exist * * * [without] freedom of thought and speech" since free expression is "the matrix, the indispensable condition, of nearly every other form of freedom." If freedom of expression cannot be secured because entry into the communication media is not free but is confined as a matter of discretion by a few private hands, the sense of the justice of existing institutions, which freedom of expression is designed to assure, vanishes from some section of our population as surely as if access to the media were restricted by the government.

Justice Brandeis, in his seminal opinion in *Whitney*—one of the few efforts of a Supreme Court Justice to go beyond the banality of the "marketplace of ideas"—also stressed the intimacy of the relationship between the goals of a respect for public order and the assurance of free expression. For Brandeis one of the assumptions implicit in the guarantee of free expression is 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 * * *." I would suggest that the contemporary challenge to this "path of safety" has roots in the lack of opportunity for the disadvantaged and the dissatisfied of our society to discuss supposed grievances effectively.

The sit-in demonstrates that the safety valve value of free expression in preserving public order is lost when access to the communication media is foreclosed to dissident groups. It is a measure of the jaded and warped standards of the media that ideas which normally would never be granted a forum are given serious network coverage if they become sufficiently enmeshed in mass demonstration or riot and violence. Ideas are denied admis-

sion into media until they are first disseminated in a way that challenges and disrupts the social order. They then may be discussed and given notice. But is it not the assumption of a constitutional guarantee of freedom of expression that the process ought to work just the other way—that the idea be given currency first so that its proponents will not conclude that unrest and violence alone will suffice to capture public attention? Contemporary constitutional theory has been indifferent to this task of channeling the novel and the heretical into the mass communications media, perhaps because the problem is indeed a recent one.

### *B. The Need for a Contextual Approach*

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 tracks 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: "The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself, and all we are dealing with now is the sound truck."

However, this enlightened view, suggesting the creation of legal principles which fit the dimensions of the particular medium, was probably not accepted by the majority in *Kovacs* and appeared to be rejected by the dissenters. For the Court Justice Reed declared that the right of free speech is guaranteed each citizen that he may reach the minds of willing listeners, and to do so there must be opportunity to win their attention. This statement would have had tremendous impact had Justice Reed meant that the free speech guarantee applied with particular force to those media where the greatest public attention was focused. But what he probably meant was that because some media, albeit the most important ones, are closed, it is important that other means of communication remain more or less unregulated.

The dissenters, in an opinion by Justice Black, are explicit in rejecting any attempt to shape legal principles to the particular medium, reasoning that government cannot restrain a given mode of communication because that would disadvantage the others—"favoritism" would result because "[l]aws which hamper the free use of some instruments of communication thereby favor competing channels." Justice Black's theory appears to be that if all instrumentalities of communication are "free" in the sense of immunization from governmental regulations, problems of access will work themselves out. But what happens in fact is that the dominant media become even more influential and the media which are freely available, such as sound trucks and pamphlets, become even less significant. Thus, we are presented with the anomaly that the protagonist of the "absolute" view of free speech has helped to fashion a protective doctrine of greatest utility to

the owners and operators of the mass communications industry. By refusing to treat media according to their peculiar natures Justice Black has done that very thing he so heartily condemns—he has favored some channels of communication.

Justice Black is not unaware of the inequality in the existing operation of the mass media, but he blurs distinctions among the media and acquiesces in their differing impacts:

> Yet everybody knows the vast reaches of these powerful channels of communication which from the very nature of our economic system must be under the control and guidance of comparatively few people. * * *
>
> * * * For the press, the radio, and the moving picture owners have their favorities, and it assumes the impossible to suppose that these agencies will at all times be equally fair as between the candidates and officials they favor and those whom they vigorously oppose.

For all the intensity of his belief that "it is of particular importance" in a system of representative government that the "fullest opportunity be afforded candidates" to express their views to the voters, Justice Black is nevertheless of the opinion that courts must remain constitutionally insensitive to the problem of getting ideas before a forum. That his approach affords greatest protection to mass media does not come about because of a belief that such protection is particularly desirable. Rather it results from a constitutional approach which looks only to protecting the communications which are presently being made without inquiry as to whether freedom of speech and press, in defense of which so much judicial rhetoric is expended, is a realistically available right. While we have taken measures to ensure the sanctity of that which is said, we have not inquired whether, as a practical matter, the difficulty of access to the media of communication has made the right of expression somewhat mythical.

Once again Justice Jackson was the author of one of the few judicial statements which recognizes that first amendment interpretation is uselessly conceptual unless it attempts to be responsive to the diverse natures of differing modes of communication. Dissenting in Kunz v. New York he thought absolutist interpretations of the first amendment too simplistic and suggested that the susceptibility to public control of a given medium of communication should be in direct proportion to its public impact: "Few are the riots caused by publication alone, few are the mobs that have not had their immediate origin in harangue. *The vulnerability of various forms of communication to community control must be proportioned to their impact upon other community interests.*" Although originally made in a context of the greater likelihood that a riot would be initiated by an harangue than by a newspaper publication, the principle applies equally well to the impact which the new technology has on the informational and public-order goals of the first amendment.

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—criti-

cism 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. Such a test embodies Justice Jackson's observation that community control must be in proportion to the impact which a particular medium has on the community.

### C. *A New Perspective*

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 newspaper—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.

The problem of private restrictions on freedom of expression might, in special circumstances, be attacked under the federal antitrust laws. In Associated Press v. United States,[31] involving an attempt to exclude from membership competitors of existing members of the Associated Press in order to deprive them of the use of the AP's wire service, Justice Black wrote for the Court that nongovernmental combinations are not immune from governmental sanction if they impede rather than expedite free expression:

> [*The First*] *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 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.*

Despite these unusual remarks this opinion reflects a romantic view of the first amendment, for Justice Black assumes the "free flow of ideas" and the "freedom to publish" absent a combination of publishers. Moreover, this was an unusual case; antitrust law operates too indirectly in assuring access to be an effective device.

But the case is important in its acknowledgment that the public interest, here embodied in the antitrust statutes, can override the first amendment claims of the mass media; it would seem that the public interest in expression of divergent viewpoints should be weighted as heavily when the mass media invoke the first amendment to shield restrictions on access. In the opinion for the trial court, Judge Learned Hand at least suggests first amendment protection for the interest which the individual members of the body politic have in the communications process itself. Identification of first

[31] 326 U.S. 1, 20 (1945) (emphasis added).

amendment beneficiaries is not complete if only the interests of the "publisher" are protected.

* * *

Our constitutional theory, particularly in the free speech area, has historically been inoperative unless government restraint can be shown. If the courts or the legislature were to guarantee some minimal right to access for ideas which could not otherwise be effectively aired before the public, there would be "state action" sufficient to support a claim by the medium involved that this violated its first amendment rights. However, the right of free expression is not an absolute right, as is illustrated by *Associated Press,* and to guarantee access to divergent, otherwise unexpressed ideas would so promote the societal interests underlying the first amendment as perhaps to outweigh the medium's claim. Nor is the notion of assuring access or opportunity for discussion a novel theory. In Near v. Minnesota ex rel. Olson, Chief Justice Hughes turned to Blackstone to corroborate the view that freedom from prior restraint rather than freedom from subsequent punishment was central to the eighteenth century notion of liberty of the press. This concern with suppression before dissemination was doubtless to assure that ideas would reach the public: " '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.' "

The avowed emphasis of free speech is still on a freeman's right to "lay what sentiments he pleases before the public." But Blackstone wrote in another age. 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 with 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.

## IV. New Winds of Constitutional Doctrine: The Implications for a Right To Be Heard

### *A. New York Times Co. v. Sullivan: A Lost Opportunity*

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.[39]

Justice Black's concurring opinion in *Times,* joined in by Justice Douglas, is perhaps even more disappointing than the opinion of the Court in its failure to recognize the balancing problems created by the changing nature of the communications process. Once again Justice Black insisted that newspapers be entirely immune from libel actions where public officials are being attacked, and once again his absolutist rhetoric obscured fundamental problems. He seems to identify the "press" with the "people" and to think that immunity from suit for newspapers is equivalent to enhancing the right of free expression for all members of the community:

> * * * 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. * * * An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.

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." [41] 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 newspa-

[39] The decision may have a direct impact on discouraging debate if extended, as Judge Friendly suggests, to protect a defamatory statement about "the participant in public debate on an issue of grave public concern." Pauling v. News Syndicate Co., 335 F.2d 659, 671 (2d Cir.) (dictum), cert. den., 379 U.S. 968 (1964). Individuals will be less willing to engage in public debate if that participation will allow newspapers to defame with relative impunity. Despite this undesirable consequence, the Supreme Court might abandon its "public official" standard in favor of protecting the publication of statements about "public issues." See Note, *The Scope of First Amendment Protection for Good-Faith Defamatory Error,* 75 Yale L.J. 642, 648 (1966); cf. Time, Inc. v. Hill, 385 U.S. 374 (1967) (right of privacy case).

[41] United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y.1943) (L. Hand, J.), quoted with approval in New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

pers 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 has been defamed, the *Times* decision would seem to reduce the likelihood of retractions since the normal mitigation incentive to retract will be absent. For example, the *Times* failed to print a retraction as requested by Sullivan even though an Alabama statute provided that a retraction eliminates the jury's ability to award punitive damages. On the other hand, *Times* was a special case and the Court explicitly left open the question of a public official's ability to recover damages if there were a refusal to retract: [43]

> Whether or not a failure to retract may ever constitute such evidence [of "actual malice"], 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.

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*

[43] Id. at 286. Retraction statutes have some bearing on enforcing responsive dialogue. These statutes, common in this country, require the publisher to "take back" what has already been said if damages in a defamation suit are to be mitigated. If false statements have been made, and the complainant can convince the publisher to retract on the basis of correct information, such a procedure certainly serves a cleansing function for the information process. For a discussion of the status of retractions after the *Times* decision, see Note, *Vindication of the Reputation of a Public Official,* 80 Harv. L.Rev. 1730, 1740–43 (1967).

*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.

### *B. Ginzburg v. United States: The Implications of The "Commercial Exploitation" Doctrine*

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]

> [A]ttention to the economic aspects of the communications industries serves to emphasize the fact that they consist of commercial enterprises, not public service institutions. * * * They sell advertising in one form or another, and they bait it principally with entertainment. Only incidentally do they collect and disseminate political intelligence.
>
> * * *
>
> * * * 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: [49]

> Thus the commercial interests who think to render media universally acceptable, invariably settle for "entertainment" as a strategy of neutrality. A more spectacular mode of the ostrich-head-in-sand could not be devised, for it ensures maximum pervasiveness for any medium whatever.

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

[46] V. O. Key, Public Opinion and American Democracy 378–79, 387 (1961).

[49] H. M. McLuhan, Understanding Media 305 (1964).

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.

However, there is emerging in our constitutional philosophy of the first amendment a strain of realism which contrasts markedly with the prevailing romanticism. The much publicized case of *Ginzburg v. United States* contains the seeds of a new pragmatic approach to the first amendment guarantee of free expression. In *Ginzburg* the dissemination of books was held to violate the federal obscenity statute not because the printed material was in itself obscene but because the publications were viewed by the Court "against a background of commercial exploitation of erotica solely for the sake of their prurient appeal." The books were purchased by the reader "for titillation, not for saving intellectual content."

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 dissemination of books can be prohibited and punished when the dissemination is not for any "saving intellectual content" but for "commercial exploitation," it would seem that the mass communications industry, no less animated by motives of "commercial exploitation," could be legally obliged to host competing opinions and points of view. 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, as did *Ginzburg* where the distributor of books was jailed under an obscenity statute even though the books themselves were not constitutionally obscene. In a companion case to *Ginzburg*, Justice Douglas remarked that the vice of censorship lies in the substitution it makes of "majority rule where minority tastes or viewpoints were to be tolerated." But what is suggested here is merely that legal steps be taken to provide for the airing and publication of "minority tastes or viewpoints," not that the mass media be prevented from publishing their views.

In *Ginzburg* Justice Brennan observed:

> [T]he circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes.

The same approach should be taken in evaluating the protests of mass media against the prospect of a right to access. Is their argument—that the development of legally assured rights of access to mass communications would hinder media freedom of expression—"pretense or reality"? The usefulness of *Ginzburg* lies in its recognition of the doctrine that when commercial purposes dominate the matrix of expression seeking first amendment protection, first amendment directives must be restructured. 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.

### *C. Office of Communication of the United Church of Christ v. FCC: A Support for the Future?*

There are other signs of change in legal doctrine, among the more significant the recent decision in Office of Communication of the United Church of Christ v. FCC.[56] In *Church of Christ,* individuals and organizations claiming to represent the Negro community of Jackson, Mississippi—forty-five percent of the city's total population—requested the FCC to grant an evidentiary hearing to challenge the renewal application of a television broadcast licensee in Jackson. The petitioners contended that the station discriminated against Negroes, both by failure to give meaningful expression to integrationist views contrary to the segregationist position taken by it and by the relatively tiny segment of religious programming assigned to Negro churches. The Commission held that the petitioners were merely members of the public and had no standing to claim a hearing since there was no showing of competitive economic injury or electrical interference. However, in an opinion which may be the harbinger of a new approach for the whole field of communications, the court of appeals reversed the Commission, radically expanding the grounds for standing by holding the interests of community groups in broadcast programming sufficient to obtain an evidentiary hearing on license renewal applications.

* * *

*Church of Christ* marks the beginning of a judicial awareness that our legal system must protect not only the broadcaster's right to speak but also, in some measure, public rights in the communications process. Perhaps this new awareness will stimulate inquiry into the stake a newspaper's readership has in the content of the press. Understanding that *Church of Christ* has a constitutional as well as statutory basis helps to expose the distinction typically made between newspapers and broadcast stations. An orthodox dictum in Judge Burger's otherwise pioneering opinion in *Church of Christ* illustrates the traditional approach:

> 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.

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.

If a contextual approach is taken and a purposive view of the first amendment adopted, at some point the newspaper must be viewed as impressed with a public service stamp and hence under an obligation to provide space on a nondiscriminatory basis to representative groups

[56] 359 F.2d 994 (D.C.Cir. 1966), *noted in* 80 Harv.L.Rev. 670 (1967).

in the community.[66] It is to be hoped that an awareness of the listener's interest in broadcasting will lead to an equivalent concern for the reader's stake in the press, and that first amendment recognition will be given to a right of access for the protection of the reader, the listener, and the viewer.

## V. Implementing a Right of Access to the Press

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.

### *A. Judicial Enforcement*

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 [67] 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.[68] 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. One case has the distinction of being the only American case which has recognized a right of access. In Uhlman v. Sherman [69] an Ohio lower court held that the dependence and interest of the public in the community newspaper, particularly when it is the only one, imposes the reasonable demand that the purchase of advertising should be open to members of the public on the same basis.

But none of these cases mentions first amendment considerations. What is encouraging for the future of an emergent right of access is that it has been resisted by relentless invocation of the freedom of contract notion that a newspaper publish-

[66] This is reminiscent of Professor Chafee's query as to whether the monopoly newspaper ought to be treated like a public utility. Contrary to my position, however, he concluded that a legally enforceable right of access would not be feasible. 2 Chafee, Government and Mass Communications 624–50 (1947).

[67] In Wall v. World Publishing Co., 263 P.2d 1010 (Okl.1953), a reader of the *Tulsa World* contended that the newspaper's invitation to its readers to submit letters on matters of public importance was a contract offer from the newspaper which was accepted by submission of the letter. The plaintiff argued that, by refusal to publish, the newspaper had breached its contract. Despite the ingenuity of the argument, the court held for defendant. Note, however, that a first amendment argument was not made to the court.

[68] Shuck v. Carroll Daily Herald, 215 Iowa 1276, 247 N.W. 813 (1933); J. J. Gordon, Inc. v. Worcester Telegram Publishing Co., 343 Mass. 142, 177 N.E.2d 586 (1961); Mack v. Costello, 32 S.D. 511, 143 N.W. 950 (1913). These cases do not consider legislative power to compel access to the press. Other cases have denied a common law right but have suggested that the area is a permissible one for legislation. Approved Personnel, Inc. v. Tribune Co., 177 So.2d 704 (Fla.1965); Friedenberg v. Times Publishing Co., 170 La. 3, 127 So. 345 (1930); In re Louis Wohl, Inc., 50 F.2d 254 (E.D.Mich.1931); Poughkeepsie Buying Service, Inc. v. Poughkeepsie Newspapers, Inc., 205 Misc. 982, 131 N.Y.S.2d 515 (Sup.Ct.1954).

[69] 22 Ohio N.P. (n. s.) 225, 31 Ohio Dec. 54 (C.P.1919).

er is as free as any merchant to deal with whom he chooses.[70] But the broad holding of these commercial advertising cases need not be authoritative for political advertisement.

* * *

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. A right of access to the pages of a monopoly newspaper might be predicated on Justice Douglas's open-ended "public function" theory which carried a majority of the Court in Evans v. Newton. Such a theory would demand a rather rabid conception of "state action," but if parks in private hands cannot escape the stigma of abiding "public character," it would seem that a newspaper, which is the common journal of printed communication in a community, could not escape the constitutional restrictions which quasi-public status invites. 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.

### *B. A Statutory Solution*

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,[76] a constitutional basis for a right of access has never been considered. In Chronicle & Gazette Publishing Co. v. Attorney General[77] legislation limiting the rates for political advertising to the rates charged for commercial advertising was held constitutional by the Supreme Court of New Hampshire. In upholding the statute Justice Kenison stated: "It is not necessary to consider the extent to which such regulation may go but so long as it does not involve suppression or censorship, the regulation of newspapers is as broad as that over * * * private business." This decision is consistent with a view of the first amendment which permits legislation to effectuate freedom of expression, although the court did not uphold the statute on a theory of constitutional power to equalize opportunities for expression. However, in a dissenting opinion Chief Justice Marble pointed out that the "real purpose" of the statute was to provide for an "economical means of [political] advertising" rather than to counteract the dangers of bribery. Although clearly not put forth for this purpose,[79] Chief Justice Marble's intriguing analysis of the legislative intent is consistent with an access-oriented view of the first amendment—limiting the amount that can be charged for political advertising provides equal opportunities of access for political candidates and views not buttressed by heavy financial support.

Justice Kenison, writing for the court in *Chronicle,* thought that the legislature's failure to compel some measure of

[70] See, e. g., Shuck v. Carroll Daily Herald, 215 Iowa 1276, 247 N.W. 813 (1933).

[76] Belleville Advocate Printing Co. v. St. Clair County, 336 Ill. 359, 168 N.E. 312 (1929); Lake County v. Lake County Publishing & Printing Co., 280 Ill. 243, 117 N.E. 452 (1917) (dictum) (statute setting rates chargeable for official notices imposed no duty to publish); Wooster v. Mahaska County, 122 Iowa 300, 98 N.W. 103 (1904) (dictum) (newspaper had no duty to publish and legislature could not impose one).

[77] 94 N.H. 148, 48 A.2d 478 (1946), appeal dismissed, 329 U.S. 690 (1947).

[79] I surmise that Chief Justice Marble offers this view of the statute because he believes the legislative interest in equalizing opportunities for political advertising is outweighed by the publisher's freedom of contract. Whether he would think the statute unconstitutional if it were defended on a theory that states have power to provide for "freedom of the press," so long as they do not expressly inhibit it, is arguable.

access to the press made it an easy case: [80] "The present statute does not compel the plaintiff or any other newspaper to accept political advertising." This remark at least leaves open the validity of a statute requiring access for political advertising. However, such a statute was given explicit judicial consideration in Commonwealth v. Boston Transcript Co.,[81] where the elegant and now vanished *Boston Evening Transcript* was charged with violation of a statute requiring newspapers to publish the findings of the state minimum wage commission. The court struck the statute down on a freedom of contract theory; the opinion is bare of any mention of free expression problems. Although it was not until 1925 that Justice Sanford observed for the United States Supreme Court that freedom of press was hidden in the underbrush of the fourteenth amendment, failure to discuss freedom of the press in 1924 is probably not pardonable since the Supreme Judicial Court ignored a provision in the Massachusetts constitution prohibiting abridgment of freedom of the press.

But the Massachusetts court in *Boston Transcript* stopped short of suggesting that any statutory compulsion to publish was an invasion of freedom to contract. Rather, the case clearly implies that some regulation in this area is permissible. But it did find one of the constitutional defects of the statute to be the fact that no legitimate state interest was served by the restriction on the publisher. The court was convinced that even without the statute the minimum wage board would "have ample opportunity to print its notice in other newspapers than that published by the defendant at the statutory price." This less pressing need for publication contrasts with the more compelling state interest in equalizing opportunities to reach the electorate presented in *Chronicle* and the interest in access presented by the contemporary character of the mass media, illustrating the importance of a contextual approach.

* * *

A recent United States Supreme Court case, Mills v. Alabama, places new significance on opportunity for reply in the press and thus provides by implication new support for a statutory right of access to the press. In *Mills,* as in *Chronicle,* the state legislature had regulated newspapers under a state corrupt practices act. The Alabama statute made it a criminal offense to electioneer or solicit votes "on the day on which the election affecting such candidates or propositions is being held." The *Birmingham Post Herald,* a daily newspaper, carried a very strong editorial urging the electorate to adopt a mayor-council form of government in place of the existing commission form. The editor of the newspaper, who had written the editorial, was arrested on a charge of violating the statute. The trial court sustained a demurrer to the complaint, but the Supreme Court of Alabama reversed on the ground that reasonable restriction of the press by the legislature was permissible.

In reversing this decision, Justice Black's opinion for the Supreme Court was based on the familiar concept that the press is a kind of constitutionally anointed *defensor fidei* for democracy:

> The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars * * * to play an important role in

[80] 94 N.H. 148, 152–53, 48 A.2d 478, 481 (1946). Another important aspect of the case was the court's answer to the argument that regulation of political advertising rates in the press, without corresponding regulation of other advertising facilities such as job printing and billboard advertising, was unconstitutionally discriminatory: "It is sufficient answer to this argument that the 'state is not bound to cover the whole field of possible abuses.'" Id. at 152, 48 A.2d at 481.

[81] 249 Mass. 477, 144 N.E. 400 (1924).

> 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.

Mr. Justice Black observes that insofar as the Alabama statute is construed to prohibit the press from praising or criticizing the government, it frustrates the informing function of the press. But all this is familiar theory. What makes the *Mills* case something of a departure, and in its own way quietly original, is an interesting commentary by Justice Black. In rebutting Alabama's claim that the legislature's aim was a constitutionally permissible one—to purge the air of propaganda and induce momentary reflection in a brief period of tranquility before election day—Justice Black suggested that this argument failed on its own terms since "last-minute" charges could be made on the day before election and no statutory provision had been made for effective answers: "Because the law prevents any adequate reply to these charges, it is wholly ineffective in protecting the electorate 'from confusive last-minute charges and countercharges.' "

This statement suggests a substitution of the sensitive query "Does the statute prohibit or provide for expression?" for the more wooden and formal question "Does the statute restrain the press?" It is of course clear that *Mills* did not grant a constitutionally endorsed status to legislative or judicial provisions conferring a right of access to assure debate. Quite the contrary, Justice Black prefaced his discussion of the significance of lack of opportunity to reply to "last-minute" charges with the remark that the state's argument about the reflective intent of the statute is illogical *"even if it were relevant* to the constitutionality of the law." But it is the writer's contention that the existence of adequate opportunity for debate, for charge and countercharge, is an extremely relevant consideration in any determination of the constitutionality of legislation in this area. Justice Black's inquiry into the pragmatics of debate is an encouraging step in this direction.

Evidence of an awakening to a more realistic view of the first amendment can be found in another recent case, Time, Inc. v. Hill. Directly presented with the issue of whether the first amendment is always to be interpreted as a grant of press immunity and never as a mandate for press responsibility, a divided Court extended the *Times* doctrine by immunizing newspapers from liability under the New York right of privacy statute unless there is a finding that the publication was made in knowing or reckless disregard of the truth. But in a sensitive and thoughtful opinion, concurring in part and dissenting in part, Justice Harlan protested this "sweeping extension of the principles" of *Times,* largely because he thought an attack on private individuals was unlikely to create the "competition among ideas" which an attack on a public figure might create; the *Hill* situation was thought to be an area where the " 'marketplace of ideas' does not function." I would argue that the marketplace theory will not function even in the *Times* situation without legal imposition of affirmative responsibilities. Nonetheless, Justice Harlan's words may augur well for the future, as may the attitude expressed in Justice Fortas's dissent, joined in by the Chief Justice and Justice Clark:

> The courts may not and must not permit either public or private action that censors the press. But part of this responsibility is to preserve values and procedures which assure the ordinary citizen that the press is not above the reach of the law—that its special prerogatives, granted because of its special and vital functions, are reasonably

equated with its needs in the performance of these functions.

The disenchantment of Justices Harlan and Fortas with the mindless expansion of *Times* discloses a new awareness of the range of interests protected by the first amendment.

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. Professor Cox has noted that our recent experience in constitutional adjudication has revealed an untapped reservoir of federal legislative power to define and promote the constitutional rights of individuals in relation to state government. When the consequence of private conduct is to deny to individuals the enjoyment of a right owed by the state, legislation which assures public capacity to perform that duty should be legitimate. Alternatively, legislation implementing responsibility to provide access to the mass media may be justified on a theory that the nature of the communications process imposes quasi-public functions on these quasi-public instrumentalities.[95]

* * * However, it is not necessary to amend the first amendment to attain the goal of greater access to the mass media. I do not think it adventurous to suggest that, if Congress were to pass a federal right of access statute, a sympathetic court would not lack the constitutional text necessary to validate the statute. If the first amendment is read to state affirmative goals, Congress is empowered to realize them. My basic premise in these suggestions is that a provision preventing government from silencing or dominating opinion should not be confused with an absence of governmental power to require that opinion be voiced.

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.

### C. *Administrative Feasibility of Protecting A Right of Access*

If a right of access is to be recognized, considerations of administrative feasibili-

[95] Evans v. Newton, 382 U.S. 296 (1966); Marsh v. Alabama, 326 U.S. 501 (1946). Both decisions find that private property may become quasi-public without a statute in extreme cases. The Court should surely defer to a congressional determination in an arguable case.

ty require that limitations of the right be carefully defined. The recent case of Office of Communication of the United Church of Christ v. FCC suggests, by analogy, the means by which such a right of nondiscriminatory access can be rendered judicially manageable. In *Church of Christ* the court, while expanding the concept of standing, did not hold that every listener's taste provides standing to challenge the applicant in broadcast license renewal proceedings. Similarly, the daily press cannot be placed at the mercy of the collective vanity of the public. *Church of Christ* suggests an approach to give bounds to a right of access which could be utilized cautiously, but nevertheless meaningfully.

The organizations and individuals requesting standing in *Church of Christ* represented the Negro community in Jackson, Mississippi, almost half of the city's population. Therefore, the court of appeal's grant of standing did not hold that all those who sought standing to challenge the application for license renewal were entitled to it. The court held, instead, that certain of the petitioners could serve as "responsible representatives" of the Negro community in order to assert claims of inadequate and distorted coverage.

A right of access, whether created by court or legislature, necessarily would have to develop a similar approach. One relevant factor, using *Church of Christ* as an analogue, would be the degree to which the petitioner seeking access represents a significant sector of the community. But this is perhaps not a desirable test—"divergent" views, by definition, may not command the support of a "significant sector" of the community, and these may be the very views which, by hypothesis, it is desirable to encourage. Perhaps the more relevant consideration is whether the material for which access is sought is indeed suppressed and underrepresented by the newspaper. Thus, if there are a number of petitioners seeking access for a particular matter or issue, it may be necessary to give access to only one. The unimpressed response of Judge Burger in *Church of Christ* to the FCC's lamentations about that enduring tidal phenomenon of the law, the "floodgates," strikes an appropriate note of calm: "The fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out."

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.[101]

## VI. Conclusion

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 principle. It is the writer's position that it is open to the courts to fashion a remedy

[101] Cf. e. g., In re Louis Wohl, Inc., 50 F. 2d 254 (E.D.Mich.1931).

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.

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## B. THE PROBLEM OF ENFORCING A GENERAL RIGHT OF ACCESS FOR MINORITY VIEWPOINTS: REGULATORY PLURALISM IN THE PRESS

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SCHOOL OF JOURNALISM,
UNIVERSITY OF MISSOURI
AT COLUMBIA

October 1967.
Freedom of Information Center Report No. 005.

*DENNIS E. BROWN, assistant director of the Freedom of Information Center, and JOHN C. MERRILL, professor of journalism at the University of Missouri, present in this paper —another in the FoI Center's discursive "00" series—arguments* for *and* against *Prof. Barron's position.*

* * *

**The Case Against**

If one looks at this complex issue as having to do only with assuring minority opinions a fair hearing, it is little wonder that a proposal like Prof. Barron's would be considered salutary and long overdue.

This, however, is not where the problem ends. If such a proposal were taken seriously by enough powerful people in the United States to bring it into practice, a whole new bag of troubles would be opened to plague the person concerned about protecting the free press. Even as "freedom of the press" implies the freedom to be heard—a freedom for the consumer—we must not forget that it also implies the freedom to print or not to print—a freedom for the publisher.

The First Amendment provides that the government *will not pass any laws* which abridge press freedom. Although press freedom is not defined in the Bill of Rights, an explicit concern with not passing laws which might diminish press freedom appears to be quite clear. When any group—even government seeking to remedy certain ills which it believes it detects—tells a publisher what he must print, it is taking upon itself an omnipotence and paternalism which is not far removed from authoritarianism. It is restricting press freedom in the name of freedom to read.

This paradox brings up the interesting point that "freedom of the press" should not be used synonymously with "freedom of information." It is obvious that the press can have freedom to print anything it desires without making available to the reader everything it has available to print. Its freedom, in other words, imposes an implicit restriction on the reader's freedom to have access to every bit of information or point of view.

Looking at it in this way, it is not difficult to see that press freedom does not imply freedom of information. The latter term refers to the right of the reader to have all material available for reading, while the former term denotes the right of the publisher to publish or not to publish.

**Freedom of the Press: The Concept**

"Freedom of the press," *must* mean something; obviously it does in the sense that it means most anything at any time in any context which the particular person using it wants it to mean. The publisher, of course, stresses the freedom of the *press* concept, while the reader, seeking in vain for his viewpoint or orientation in certain newspapers, stresses the freedom of *information* concept. The government official who attempts to keep certain information from the press, has his own definition: the newspaper has a right to print something if it can get it —a kind of "freedom to print" but not necessarily a "freedom to get" concept.

Perhaps we try to make the term "freedom of the press" cover too much. If we were to understand it narrowly, in the sense clearly indicated by its syntax, we would emphasize *the press* and its *freedom* in the context of information flow. This would mean that "freedom" belongs to "the press." The press alone, in this definition, would be in the position of determining what it would or would not print. The press would have no prior restrictions on its editorial prerogatives; this would be *press freedom*. Those who favor an interpretation of the First Amendment that protects "freedom of information" would hardly agree to a definition that de-emphasizes the rights of "the people."

The vision of a better journalistic world through coercive publishing rests mainly on the assumption that important minority viewpoints are not being made known in the United States, and that this is deleterious to a democratic society. Although this paper is not designed to question seriously this main premise, it seems incumbent on those who advocate controlled access to name some of the important minority positions that are not being publicized by the American press.

**The Authoritarianism of Force**

The person who is concerned about what is *not* in the press does not appear to be primarily concerned about the *freedom* of the *press* to make editorial determinations. However laudable his concern may be, he must recognize that his position is potentially *authoritarian*, just as the existing libertarianism of the press (which he bemoans) is potentially *restrictive*.

He who would compel publication justifies his position by using terms such as "social responsibility of the press" and "the reader's inherent right to know." He, in other words, puts what he considers the good to society above what the individual publisher considers to be his right of editorial self-determination.

Few sincere and concerned persons would quarrel with the position that "the good to society" or "social responsibility" are laudable concepts which should be served by the press. However, trouble comes when these theoretical concepts are applied to the actual workings of the press in society. The *what* of the concept presents considerable difficulty: What, for instance, is the best way to do the most good to society, and what is the best way to be socially responsible? There are many who would feel very strongly that forcing minority opinions (especially "certain" opinions) into a newspaper would be very harmful to the "social good," and that this would be the epitome of social *irresponsibility*.

**Perplexing Questions**

The *how* of the concept adds further complications. How will decisions be made about what shall or shall not be printed? What would be a rational manner of making such determinations if we are to take them out of the hands of individual publishers and editors? A federal court? A federal *ombudsman*? An FPA (Federal Press Agency) organ-

ized on the lines of the Federal Communications Commission?

From among all the "minority" positions in a given community or in the nation, which ones would have a "right" to be published and which ones would not? Which spokesman for any one "minority" would be published as representative of the whole minority? Or would all of them—or many of them—be published, since undoubtedly there is a pluralism in minority opinions even on a single issue? These are basic and important questions —questions which would constantly plague the *authority* which would have to make such decisions.

**The Question of Proper Emphasis**

Minority viewpoints which one authoritative body would deem valuable and thus worthy of publication might, to another authoritative body that is equally perspicacious and dedicated, seem inane, irrational or otherwise lacking in value. Undoubtedly, even among the staunchest advocates of minority rights there is preference for *some* minorities over others. Some, for instance, would find the views of the Congress of Racial Equality more to their liking than, say those of the John Birch Society or the Ku Klux Klan. Presumably, if persons with such preferences were members of the determining body, the minority views of the latter two "minority" groups would find it rather difficult to get "equal" treatment.

Beyond this, there is another rather perplexing and closely related problem. What emphasis should various minority views receive in the press, or even in a single newspaper? Would this be decided by the proportion of the total population which the "minority" under consideration comprises? Would it be decided on the basis of the "worth" or "intrinsic value to society" of the viewpoint espoused? If so, how would such worth be ascertained? Would it be decided on the basis of the economic or political pressure which a particular "minority" group might bring to bear on the power structure?

**What is a "Minority" Opinion?**

This brings us to another question. To some it may not appear to be important, but it certainly would cry out very quickly for an answer under a coercive-printing system. This is the problem of defining a "minority" group or a "minority" viewpoint. We have indicated the complexity of this problem earlier in the paper by placing quotation marks around the term.

Just what is a minority in the sense of seriously considering the forced publication of its opinions or positions? Just as the majority is composed of many minorities, there are minorities within minorities. How does one determine which of these minorities should be heard? Or are they all to be heard with equal force? Or, said in another way, just how do we get at *the* minority opinion?

Many persons will reply that these are unimportant and theoretical questions that should not be permitted to interfere with the serious consideration of a forced-publishing system. Sure, they will say, there will be problems and weaknesses, but we must push on in spite of obstacles toward a New Journalism in which all opinions receive equal and just airing and no minority group can feel slighted by the treatment it receives in the press. This is a beautiful and idealistic aim, indeed, but one which appears naive in view of the practicalities of day-to-day journalism.

It seems likely that a forced-publishing concept will take root only when our society has proceeded much farther along the road toward Orwell's 1984, wherein a paternalistic and omnipotent power structure makes our individual decisions for us. And, even then, with all opinions theoretically blending deliciously into one big View-stew, we would wager

that there will be some "minority" fretting away somewhere on the sidelines—misunderstood, misused, and fighting fiercely to get a greater voice in social affairs.

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## C. A NEW LEGAL DUTY TO PROVIDE ACCESS FOR ADVERTISING: WHAT KIND OF ADVERTISING?

1. What is the significance of discrimination in deciding whether there is any legal duty to accept advertisements. In a case dealing with whether newspapers should be under such an obligation, two Michigan courts emphasized the significance of discrimination. In *Bloss v. Federated Publications, 5 Mich.App. 74, 145 N.W.2d 800 (1966)*, the plaintiff, a theatre-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. For about thirty days, the newspaper had accepted the movie house's ads, but then the paper told the theatre-owner that it did not wish to "accept advertising for theatres concerning suggestive or prurient material." The newspaper also complained that plaintiff's advertising required extensive editorial effort by defendant's employees to meet defendant newspaper's published standards. Plaintiff contended that a newspaper was endowed with a public interest that rendered it subject to "reasonable regulation and demands to the public."

The theatre-owner sought to compel the publisher to print its motion picture advertisements; he also sought damages for the prior refusal of defendant's newspaper to publish the advertisements. The trial court gave summary judgment for the newspaper. On appeal, the Michigan intermediate appellate court, the Michigan Court of Appeals, held that the newspaper is "a business affected with a public interest." But at the tail end of the opinion it was held that the plaintiff's case failed to survive a motion for summary judgment because the "essential element of discrimination is lacking." *Bloss v. Federated Stores, 5 Mich.App. 74, 145 N.W.2d 800 at 804 (1966).*

On appeal to the Supreme Court of Michigan the Supreme Court affirmed. *Bloss v. Federated Publications, 380 Mich. 485, 157 N.W.2d 241 (1968).*

2. The case of *Uhlman v. Sherman*, 22 Ohio N.P.,N.S., 225, 31 Ohio Dec. 54 (1919), was discussed in both the *Bloss* cases. It was heavily relied on by the theatre-owner since it is the only American case which has recognized a right of access to the press. See Barron, *Access to the Press—A New First Amendment Right*, 80 Harv.Law Rev. 1641 at 1667 (1967). *Uhlman* concerned discrimination against one *commercial* advertiser as against other *commercial* advertisers. In other cases, attention is drawn to discrimination against one *political* advertiser as opposed to other *political* advertisers. *Kissinger v. New York City Transit Authority, 274 F.Supp. 438 (S.D.N.Y.1967).** From the point of view of establishing a constitutional right of access for advertisers who meet space and rate requirements, which category of advertising has the strongest First Amendment claim? Cf. *Valentine v. Chrestensen, 316 U.S. 52 (1942)*, text, supra, p. 163.

3. In terms of *need* for access who has the strongest case for access, the theatre-owner in *Bloss* or a dissenting or unpopular political group?

* In *Kissinger*, the New York City subway authority's practice of selling ads for some controversial ideas but refusing to sell time for ads for other controversial ideas was held to be unconstitutional.

*Bloss v. Federated Stores* implies a relationship between obscenity law and a right of access to the press. But a recent Ninth Circuit decision, *Associates & Aldrich Co. v. Times-Mirror*, makes that connection explicit. The case illustrates that the actual significance of legal victories restricting the definition of obscenity in the interests of expanding artistic freedom can be frustrated if a right of access to the press is denied. In such circumstances, the end result may be that censorship by the press is substituted for censorship by the state.

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## ASSOCIATES & ALDRICH COMPANY, INC. v. TIMES MIRROR COMPANY

440 F.2d 133 (9th Cir. 1971).

WRIGHT, Circuit Judge:

This appeal presents the question: May a federal court compel the publisher of a daily newspaper to accept and print advertising in the exact form submitted? The district court, granting a motion to dismiss, answered the question in the negative. We affirm.

Appellant, a motion picture producer, sought to enjoin the appellee, publisher of the *Los Angeles Times*, from screening, censoring or otherwise changing appellant's proffered advertising copy. Invoking the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1343(3) and 42 U.S.C. § 1983, it sought particularly to restrain appellee from altering its advertisements for the motion picture, "The Killing of Sister George."

* * *

* * * Even if state action were present, as in an official publication of a state-supported university, there is still the freedom to exercise subjective editorial discretion in rejecting a proffered article. * * *

Appellant has not convinced us that the courts or any other governmental agency should dictate the contents of a newspaper.

There is no difference between compelling publication of material that the newspaper wishes not to print and prohibiting a newspaper from printing news or other material.

Appellant strongly urges that this case is governed by Red Lion Broadcasting Co. v. Federal Communications Comm., 395 U.S. 367 (1969). * * *

Unlike broadcasting, the publication of a newspaper is not a government conferred privilege. As we have said, the press and the government have had a history of disassociation.

We can find nothing in the United States Constitution, any federal statute, or any controlling precedent that allows us to compel a private newspaper to publish advertisements without editorial control of their content merely because such advertisements are not legally obscene or unlawful.

In evaluating appellant's claim we note that its commercial advertisement was printed by the appellee, save for the deletion of items not essential to appellant's sales message and not altering the fundamental characteristics of appellant's presentation. This type of commercial exploitation is subject to less protection than other types of speech. Valentine v. Chrestensen, 316 U.S. 52 (1942).

Affirmed.

### NOTES AND QUESTIONS

1. The suit against the Los Angeles *Times-Mirror* failed for the same legal reasons that suit by the union against the Chicago daily newspapers failed in *Chicago Joint Board*. See p. 584. Since the newspaper was assuming what is usually thought of as state function—censorship in the interests of public morality—

shouldn't that activity have led to a finding of state action?

2. The court in *Associates & Aldrich* argues that commercial advertising is subject to less constitutional protection than political or editorial advertising. Why? Is it clear that a description of the advertising in *Associates & Aldrich* as commercial is adequate?

3. Shouldn't 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?

4. See generally Barron, Freedom of the Press for Whom? pp. 270–287 (1973).

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## D. A RIGHT OF ACCESS TO THE STATE-SUPPORTED CAMPUS PRESS?

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## AVINS v. RUTGERS, STATE UNIVERSITY OF NEW JERSEY

385 F.2d 151 (3d Cir. 1967).

Before STALEY, Chief Judge, and MARIS and VAN DUSEN, Circuit Judges.

MARIS, Circuit Judge. * * * The plaintiff alleged that he had submitted to the editors of the Rutgers Law Review for publication in the Review an article which reviewed the legislative history of the Civil Rights Act of 1875 as it pertained to school desegregation * * * The articles editor of the Review had rejected the article, stating in his letter of rejection "that approaching the problem from the point of view of legislative history alone is insufficient." The plaintiff asserted that the editors of the Law Review had adopted a discriminatory policy of accepting only articles reflecting a "liberal" jurisprudential outlook in constitutional law, an outlook which, he said, rejects the primacy of legislative history and the original intent of the framers of a constitutional provision. The plaintiff stated that his article represented the "conservative" approach to constitutional law and he contended that its rejection, which he said was solely because of its conservative tenor, violated his constitutional right to freedom of speech. * * *

The plaintiff's basic contention on this appeal is that a law review published by a state-supported university, such as the defendant, is a public instrumentality in the columns of which all must be allowed to present their ideas, the editors being without discretion to reject an article because in their judgment its nature or ideological approach is not suitable for publication. * * *

* * *

Thus, one 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 State.

The plaintiff's contention that the student editors of the Rutgers Law Review have been so indoctrinated in a liberal ideology by the faculty of the law school as to be unable to evaluate his article objectively is so frivolous as to require no discussion.

The judgment of the district court will be affirmed.

### NOTES AND QUESTIONS

1. Does the *Avins* case bear out the Freedom of Information Center Report criticism (see text, supra, p. 571) that minority viewpoints which to one "authoritative body" would appear valuable "might, to another authoritative body" seem "inane, irrational, or otherwise lacking in value?" Or does the ease with which the Court dealt with the plaintiff's contentions prove the opposite? It might be contended that the *Avins* case illustrates that when one goes beyond the traditionally open sections of the newspaper, such as advertising space, into the substantive content of the publication the problem of enforcement becomes insoluble. On the other hand, the *Avins* case may merely demonstrate that the court there found that, given the facts, there was no access problem.

2. Suppose that there were only two or three law journals in the whole country and that the professor in the *Avins* case had filed his court complaint with letters of rejection attached to each of the journals and further that each of these journals rejected plaintiff professor's articles on ideological rather than scholarly grounds?

Same result?

Should it make a difference that the journals in question were published by state rather than privately-sponsored universities?

3. Suppose a monopoly daily newspaper continuously follows a pattern of suppression of any news involving liberal Democrats (or the converse—conservative Republicans). Would the access considerations be different? Why?

4. The struggle for access to the press has met with the most success in the high school and college press. There was a reason success was possible: the party denying access was acting pursuant to public authority and therefore a public restraint on expression was involved. The New Rochelle high school case and the Wisconsin State University case, both of which follow, nevertheless, are significant for access theory generally because they recogize, 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 is *Zucker v. Panitz*. But see *Lehman v. City of Shaker Heights*, —— U.S. —— (1974), Text, Appendix B.

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## ZUCKER v. PANITZ

299 F.Supp. 102 (S.D.N.Y.1969).

METZNER, District Judge. This action concerns the right of high school students to publish a paid advertisement opposing the war in Vietnam in their school newspaper. * * *

* * *

The presence of articles concerning the draft and student opinion of United States participation in the war shows that the war is considered to be a school-related subject. This being the case, there is no logical reason to permit news stories on the subject and preclude student advertising.

Defendants further argue that since no advertising on political matters is permitted, the plaintiffs have no cause for discontent. It is undisputed that no such advertising has been permitted, but this is not dispositive. In Wirta v. Alameda-Contra Costa Transit District, 68 Cal.2d 51, 64 Cal.Rptr. 430, 434 P.2d 982 (1967) (en banc) (rehearing denied 1968), the court held that where motor coaches were a forum for commercial advertising, refusal to accept a proposed peace message violated the First Amendment guarantee of free speech.[2] It said:

"[D]efendants, having opened a forum for the expression of ideas by providing facilities for advertisements on its buses, cannot for reasons of administrative convenience decline to accept advertisements expressing opinions and beliefs within the ambit of First Amendment protection." Id., 64 Cal.Rptr. at 433, 434 P.2d at 985.

* * *

"Not only does the district's policy prefer certain classes of protected ideas over others but it goes even further and affords total freedom of the forum to mercantile messages while banning the vast majority of opinions and beliefs extant which enjoy First Amendment protection because of their noncommercialism." Id., 64 Cal.Rptr. at 434, 434 P. 2d at 986. * * *

Defendants would have the court find that the school's action is protected because plaintiffs have no right of access to the school newspaper. They argue that the recent Supreme Court case of Tinker v. Des Moines Independent Community School Disrict, 393 U.S. 503 (1969), held only that students have the same rights inside the schoolyard that they have as citizens. Therefore, since citizens as yet have no right of access to the private press, plaintiffs are entitled to no greater privilege.

* * *

Defendants have told the court that the Huguenot Herald is not a newspaper in the usual sense, but is part of the curriculum and an educational device. However, it is inconsistent for them to also espouse the position that the school's action is protected because there is no general right of access to the private press.[4]

We have found, from review of its contents, that within the context of the school and educational environment, it is a forum for the dissemination of ideas. Our problem then, as in *Tinker*, "lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities." Id. at 507. Here, the school paper appears to have been open to free expression of ideas in the news and editorial columns as well as in letters to the editor. It is patently unfair in light of the free speech doctrine to close to the students the forum which they deem effective to present their ideas. The rationale of *Tinker* carries beyond the facts in that case.

*Tinker* also disposes of defendants' contention that cases involving advertising in public facilities are inapposite because a school and a school newspaper are not public facilities in the same sense as buses and terminals * * *—that is, they invite only a portion of the public.

This lawsuit arises at a time when many in the educational community oppose the tactics of the young in securing a

[2] See also Kissinger v. New York City Transit Authority, 274 F.Supp. 438 (S.D.N.Y.1967); Wolin v. Port of New York Authority, 268 F.Supp. 855 (S.D.N.Y.1967), aff'd, 392 F.2d 83 (2d Cir. 1968).

[4] Different policy considerations govern whether a privately owned newspaper has an affirmative duty to grant access to its pages, and whether a school newspaper has such a duty. For instance, there would be involved the thorny issue of finding state action, a problem which does not exist regarding a school newspaper.

political voice. It would be both incongruous and dangerous for this court to hold that students who wish to express their views on matters intimately related to them, through traditionally accepted nondisruptive modes of communication, may be precluded from doing so by that same adult community.

Plaintiffs' motion for summary judgment is granted. Settle order.

### NOTES

A similar case having to do with paid advertisements in college papers was decided in 1969 in a federal district court in Wisconsin.

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."

But see *Lehman v. City of Shaker Heights*, —— U.S. —— (1974), Text, Appendix B.

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## LEE v. BOARD OF REGENTS OF STATE COLLEGES

441 F.2d 1257 (7th Cir. 1971).

Before FAIRCHILD and KERNER, Circuit Judges, and CAMPBELL, Senior District Judge.

FAIRCHILD, Circuit Judge. This is an appeal from a judgment, entered on motion for summary judgment, declaring that defendants have unlawfully deprived plaintiffs of freedom of speech by refusing to print in a university campus newspaper editorial advertisements submitted by plaintiffs. The opinion of the district court appears at 306 F.Supp. 1097 (1969), and we will avoid unnecessary repetition. We affirm.

1. *State action.* 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.

2. *The issue presented.* 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.[4]

* * *

[4] Healey v. James (D.Conn., 1970), 311 F. Supp. 1275 (status as campus organization); Antonelli v. Hammond (D.Mass., 1970), 308 F.Supp. 1329 (censorship of articles in newspaper); Brooks v. Auburn University (M.D. Ala., 1969), 296 F.Supp. 188 (speaker on campus); Smith v. University of Tennessee (E. D.Tenn., 1969), 300 F.Supp. 777 (speaker on campus); Danskin v. San Diego Unified School Dist. (1946), 28 Cal.2d 536, 171 P.2d 885 (meeting in school auditorium).

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.

3. *Joinder of the Board of Regents.* The argument on behalf of many of the defendants is confined to the merits. The defendant Board of Regents argues, in addition, (1) that the action is not maintainable against it because if so maintained, it would be an action against the state, and (2) that there is no foundation for declaratory judgment against it because it played no part in formulating the challenged policy. * * *

The judgment is affirmed.

### NOTES AND QUESTIONS

1. Both the New Rochelle High School case and the Wisconsin State University cases involve state-financed print media. Do these cases have any significance for the privately-owned mass circulation daily newspaper?

2. Consider the following: Barron, *"Access—The Only Choice for the*

*Media?*" 48 Texas L.Rev. 766, 776–777 (1970).*

"If the government is denying access, one is at least able to argue that there is a governmental restraint on freedom of expression, which is what is required if the fourteenth amendment is to be successfully invoked. Incidentally, the New Rochelle High School case shows how access with regard to government financed print media may be secured under existing federal legislation. In that case, the federal court was asked to issue a declaratory judgment under section 1983. That statute provides that any person who under color of state law subjects anyone to deprivations of rights secured by the Constitution shall be liable 'to the party injured in an action at law, suit in equity, or other proper proceeding for redress.' Under that provision the high school students sought to enjoin interference with their right to place advertisements in the school newspaper or to otherwise express their views on political issues. The constitutional right infringed was freedom of speech.

"The school authorities argued quite ingeniously that since ordinary citizens 'as yet have no right of access to the private press,' New Rochelle High School students should not be in a better position than the general public. But previous access cases in federal courts in New York had succeeded with regard to advertisements in bus terminals and in the subway. It was argued that these facilities make an invitation to all but that a school newspaper is not a public facility in the same way since all the public are not invited. But the court responded that in an educational institution the interchange of ideas is basic to education and that access for controversial ideas must be assured. Moreover, the court stated in a footnote that 'different policy considerations govern whether a privately owned newspaper has an affirmative duty to grant access to its pages.'

"But really, how different are the access considerations in the context of the daily press? The source of constitutional protection is embedded in a concern of the press to nurture its informing function. The only student newspaper in a high school does not occupy a very different role in terms of community dependencies and expectations than does the only daily newspaper in a community. The daily press is also meant to serve an educational function in its role as supplier of information to the public.

"Surely the only newspaper in a city can be assigned quasi-public status for the purposes of providing access for banished ideas by way of advertisement and right of reply."

Recently a right of access to public media facilities has been denied. See *Lehman v. City of Shaker Heights,* Text, Appendix B.

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## E. A RIGHT OF ACCESS TO THE PRIVATELY-OWNED DAILY PRESS?

### THE CHICAGO NEWSPAPER CASE: A UNION'S FIGHT FOR ACCESS TO THE DAILY PRESS

A case which squarely raised the issue which *Lee v. Board of Regents* did not have to face was *Chicago Joint Board v. Chicago Tribune Company.* 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 posi-

tion in each of the 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, decided to sue the papers on an access theory to enjoin them to publish the ads and to give them compensatory and exemplary damages.

These were the circumstances in which the first major access case, based squarely on an affirmative view of the First Amendment, was born. 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 ran 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. However, does the First Amendment profess to treat the press "with special constitutional regard"? It grants "*freedom of* the press" constitutional protection. Is there a difference?

Judge Marovitz made the very interesting point that it is actually easier for a newspaper to conform to an access standard than it is for a broadcaster since broadcast time is necessarily a more finite commodity than newsprint.

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?

Judge Marovitz's reading of Barron, *Access to the Press—A New First Amendment Right*, 80 Harvard Law Review 1641 (1967), reprinted in the text, p. 553, appears to be that the views expressed there are limited to legislative efforts to secure access to the press. But judicial creation of a First Amendment right of access to the press is specifically discussed and endorsed in a section specifically entitled "Judicial Enforcement". See 80 Harvard Law Rev. 1641 at 1667–1669, text, pp. 566–567. The federal district court opinion in *Chicago Joint Board* raises some searching practical questions concerning the feasibility of a right of access to the press.

Despite grave reservations about the usefulness and the constitutionality of the access idea, the district court opinion does seem to imply, in the final analysis, that if a right of access is to be recognized, it should be provided for legislatively and not judicially. If there was a federal statute which compelled publication by a city's daily newspaper of general circulation in circumstances like that of *Chicago Joint Board*, do you think Judge Marovitz would sustain such a statute?

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—particularly with regard to the newspaper defendants in the *Chicago Joint Board* case —unearthed by union lawyers was a Chicago ordinance which restricted newsstands on public streets to the sale of dai-

ly 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 in *Chicago Joint Board*, unlike the celebrated *Red Lion* decision, text, p. 807, was a victory for the view that freedom of the press has as its primary focus the freedom of the publisher.

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## CHICAGO JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL–CIO v. CHICAGO TRIBUNE COMPANY

435 F.2d 470 (7th Cir. 1970).

Before CASTLE, Senior Circuit Judge, and KILEY and CUMMINGS, Circuit Judges.

CASTLE, Senior Circuit Judge.

Plaintiff-appellant, Chicago Joint Board, Amalgamated Clothing Workers of America, AFL–CIO, prosecutes this appeal from the order of the District Court granting summary judgment to the defendants-appellees, Chicago Tribune Company, Chicago American Publishing Company, and Field Enterprises, Inc., in the Union's action against said defendant newspaper publishers. The Union's complaint, as amended, seeks injunctive relief to compel the defendants to publish an editorial advertisement tendered by the Union; the recovery of compensatory and punitive damages for defendants' refusals to publish such advertisement; the entry of a declaratory judgment declaring that defendants may not arbitrarily refuse to publish advertisements expressing ideas, opinions or facts on political or social issues and that defendants may not refuse to publish such advertisements if they are lawful and the party submitting the advertisement is willing to pay the usual rate and there is no technical or mechanical reason why the advertisement cannot be published; and that defendants be permanently enjoined from refusing to publish such lawful advertisements. Count I of the complaint, which seeks injunctive relief to compel publication of the specific advertisement tendered by the Union, and Count IV which seeks declaratory relief, assert a right in the Union under the First and Fourteenth Amendments to compel the defendant newspaper publishers to accept its lawful editorial advertisements for publication at the usual rates for such advertisements. Counts II and III assert, respectively, alleged breach of contract and the Union's justifiable reliance upon the defendants' representations.

The District Court in granting defendants' motions for summary judgment found no genuine material issue of fact presented by the pleadings, affidavits, depositions and other materials before the court for consideration in connection with the motions, and concluded that absence of state action deprived the court of jurisdiction and no other claim is stated upon which relief might be granted. The appeal herein is grounded on the assertion that the court erred in its conclusion that defendants' refusals to publish the advertisement did not involve state action.

The Union is a Chicago labor union which represents clothing and garment workers. It has conducted a campaign to limit the importation of foreign-made clothing into the United States on the grounds that the importation and sale of such clothing reduces the number of jobs available to its members. The campaign included picketing directed against Marshall Field & Co., the operator of a large

Chicago department store which retails imported clothing and utilizes the advertising columns of the defendants' newspapers to advertise such merchandise.

The defendants Chicago Tribune Company and Chicago American Publishing Company each publish a Chicago newspaper: The Chicago Tribune and Chicago Today, respectively. The defendant Field Enterprises, Inc. is the publisher of The Chicago Sun-Times and The Chicago Daily News. There are no newspapers with general circulation throughout the Chicago metropolitan area other than the four newspapers owned and published by the defendants.

The Union, in an attempt to communicate its position to the general public in the Chicago metropolitan area and to the same readers who are exposed to Marshall Field & Co.'s advertisements, submitted to each of the defendants' four newspapers a full page advertisement which depicted a picket line beneath a representation of the Marshall Field's clock (an identifying feature of the Chicago department store), explained why the Union was picketing the Marshall Field & Co. store, and set forth the Union's basis for its opposition to the sale of imported foreign-made clothing. Each of the newspapers refused to publish the advertisement. Each reserves the right to reject any advertisement.[2]

* * *

[2] The Field Enterprises, Inc. newspapers gave as a reason for its refusal a policy not to print advertisements naming others unless they consent to being named. The Chicago Tribune and Chicago Today stated its refusal was based on its conclusion the tendered advertisement failed to meet standards prescribed in the newspapers' Advertising Acceptability Guide which provide for the rejection of an advertisement which in the newspapers' judgment "reflects unfavorably on competitive organizations, institutions or merchandise" or is "misleading", but further "reserves the right to reject any advertising which in its opinion, is unacceptable". The policy and the standards alluded to apparently provide norms for the rejection of specific types of advertising but they in no manner negate the reservation made by each defendant to reject any advertisement.

The Union contends that Counts I and IV of its complaint allege facts which establish a violation of rights guaranteed it by the First and Fourteenth Amendments, and therefore state a federal claim cognizable by the District Court in the exercise of that court's jurisdiction conferred by 28 U.S.C.A. §§ 1331 and 1343(3), because the factual allegations require a conclusion that the defendants' rejections of its editorial advertisement involved state action. In this connection the Union points to what it characterizes as a special relationship between the defendants' newspapers and the State arising from Illinois statutory provisions exempting newspaper employees from jury service; requiring newspaper publication of certain legal notices, notices of election and municipal ordinances; and excluding the purchase, employment and transfer of such tangible personal property as newsprint and ink for the primary purpose of conveying news from the incidence of retailers' occupation, use and service use taxes; from the Chicago city ordinance restricting newsstands permitted on public streets to the sale of daily newspapers printed and published in the city; and from the custom of providing a designated space in public buildings for the news-gathering use of representatives of the press and other news media. It is urged that because the defendants, taken together, comprise the entire newspaper publishing industry with newspapers of general circulation throughout the Chicago metropolitan area, and are the recipients of economic benefit and favored treatment flowing from public sources as the result of the statutes, ordinance and custom above mentioned, their relationship to the State is such that there is "state involvement" in the operation of defendants' newspapers under the rationale re-

lied upon by the Supreme Court of the United States to make conduct of a private business or enterprise subject to Fourteenth Amendment or other constitutional restrictions directed to state action.
* * *

* * *

More recently, in Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308, the rationale of *Marsh* was extended to a privately-owned shopping plaza which had assumed the status ordinarily associated with a city's central business district. The shopping plaza was held subject to the requirement that its sidewalks and parking area roadways, to which the general public had unrestricted access, be made available to pickets as in the case of other essentially public sidewalks and roadways.

The sidewalks and streets of a company town or a shopping center bear little analogy to the printing press, its product, and the distribution system of a newspaper publisher. Unlike the company town or the shopping center, none of the defendants has consented to unrestricted access by the general public to its advertising columns or pages. Such access is a matter of private contract. Nor in the publication of its newspapers has any of the defendants assumed the performance of a public function which carries with it a concomitant obligation to each member of the general public.

* * *

But the defendant newspaper publishers clearly are not engaged in the exercise of any governmental function, nor do they possess or exercise any delegated power of a governmental nature.

The Union, however, points to language used by the District Court in *Marjorie Webster* which the Union takes as characterizing the association there involved as one which "enjoys monopoly power in an area of vital public concern" (302 F.Supp. 459, 469), and contends that this expression recognizes the existence of an additional standard which is to be equated with state action as a basis for subjecting private conduct to restraints imposed by the First and Fourteenth Amendments. But the context from which the Union borrows the expression indicates that it was used with reference to common-law justification for judicial intervention in the internal affairs of a private voluntary association, rather than as a recognition of an independent basis for subjecting private conduct to federal constitutional limitations. Apart from the question of the appropriateness of the use of such a standard for the latter purpose if the monopoly is not one conferred by the State or does not involve the exercise of a quasi-governmental function, a question we need not here decide, it has no application in the instant case. Neither Field Enterprises, Inc. nor the Chicago Tribune Company [10] enjoys a monopoly in the relevant market area, *i. e.*, the Chicago metropolitan area. The circulation figures for each of the four newspapers published by the defendants (each publishes two newspapers) are set forth in the Union's complaint. The figures clearly establish that neither of these defendant publishers approaches a monopoly position. The figures reflect a relatively high degree of competition between the defendants rather than monopoly control by one of them. And there is no allegation, nor is there any indication in the record, that there was any concert of action between these competitors in the refusal of each of them to accept the

[10] It appears that American Publishing Company, the additional defendant and publisher of Chicago Today, is a wholly owned subsidiary of the Chicago Tribune Company. For the purpose of this part of our opinion we treat these two companies as one publisher.

Union's advertisement for publication. There was no individual "monopoly power", and there was no exercise of monopoly power by means of combination.

The cases relied upon by the Union have no meaningful application to the facts and circumstances here involved. And they reflect no rationale which would afford a basis for concluding that the jury service exemption; the receipt of revenue from publishing legal notices, election notices, and ordinances; the use tax exemption on purchases of newsprint and ink; the ordinance restricting sidewalk newsstand vendors to the sale of local newspapers; and the presence of press facilities in public buildings, either singly or collectively represent that state participation or state involvement which serves to color private conduct with the hue of state action.

The use tax exemption, which newspapers share in common with magazines and periodicals (Time, Inc. v. Hulman, 31 Ill.2d 344, 201 N.E.2d 374), does represent a "state involvement" in the limited sense that any tax exemption does, but not to a degree which constitutes state participation in the conduct or action of the enterprise granted the exemption. Cf. Walz v. Tax Commission of City of New York, 397 U.S. 664.

None of the other factors mentioned in any manner approaches either state involvement or state participation. The jury service exemption runs to the individual newspaper employee. If he chooses to assert the exemption there may be some indirect incidental benefit to his employer, the publisher, in that any operating inconvenience the employee's absence might occasion is avoided. But its impact ends there. It imparts no gloss of state involvement in the publisher's business or participation in the publisher's conduct. Likewise, revenue derived from publication of notices and ordinances, even if substantial, evidences no such effect. The State has no stake in the publisher's profit or lack thereof. The regulatory ordinance confining sidewalk newsstand vendors to the sale of local newspapers has no direct application to the defendants. It regulates the use of streets and sidewalks by vendors for the convenience of the public. It accommodates a primary interest of the public by providing convenient and ready access to a service—the supplying of local newspapers—without burdening the streets and sidewalks with vending stands offering other newspapers and periodicals for which there is less demand. The ordinance is of direct benefit to the public. It balances control of the streets and sidewalks for their primary use with a limited other use thereof in serving a public interest. If the restrictions of the ordinance are of any real benefit to the defendants it is merely incidental and, in our opinion, beside the point. The custom of providing space in public buildings for the news-gathering media is, likewise, an accommodation made to serve public convenience—not the newspapers—so that the government's activities can be freely and quickly reported with a minimum of interference with or disruption of the public's business.

We conclude that the Union's contentions are without merit.

The additional arguments advanced by *amici curiae* are equally unconvincing. It is urged that the privilege of First Amendment protection afforded a newpaper carries with it a reciprocal obligation to serve as a public forum, and if a newspaper accepts any editorial advertising it must publish all lawful editorial advertisements tendered to it for publication at its established rates. We do not understand this to be the concept of freedom of the press recognized in the First Amendment. The First Amendment guarantees of free expression, oral or

printed, exist for all—they need not be purchased at the price *amici* would exact. 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 other contention advanced by *amici* is that in the context of the labor dispute private business rights of a neutral third party may be affected with a public interest which requires that the business (here the newspapers' advertising pages) be opened up to the labor organization for First Amendment purposes. We glean nothing from the constitutional guarantees, or from the decisions expository thereof, which suggests that the advertising pages of a privately published newspaper may so be pressed into service against the publisher's will either in the context of a labor dispute to which the publisher is not a party or otherwise.

The judgment order appealed from is affirmed.

Affirmed.

### NOTES AND QUESTIONS

1. 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.

2. Judge Castle says the tax exemption which newspapers enjoy does not transform the papers into quasi-public entities any more than tax exemptions for religious institutions violates the no-establishment proscription of the First Amendment. Do you think this analogy is an exact one? Which of the many indicia, relied on by union counsel, to show the interdependence of government and the Chicago daily press do you think gave the court the most difficulty?

3. 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."

4. The Seventh Circuit decided two important access cases in 1970. In one case, *Lee v. Board of Regents,* supra, text, p. 580, 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. In another case, *Chicago Joint Board,* the Seventh Circuit decided that a labor union had no right of access to the advertising pages of the Chicago daily press to explain its position in a labor dispute to the people of Chicago. 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. The Wisconsin State University, on the other hand, is a public, tax-supported institution which is bound by constitutional limitations. The odd result is that access to the campus press of state universities is now required but access to the daily press is still barred.

5. There were two Supreme Court reactions in 1971 to the issue of a constitutional right of access to the press. The first was the denial of certiorari by the Supreme Court in the Chicago newspaper case. *Chicago Joint Board, Amalgamated Clothing Workers of America, AFL–CIO v. Chicago Tribune Co.*, cert. den. 402 U.S. 973 (1971).

Yet 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. 261, justified further increasing the significant immunity newspapers already enjoyed by urging the establishment by the states of a right of access to the press. Mr. Justice Brennan, speaking for the Court, said in an opinion joined by Chief Justice Burger and Mr. 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 (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). 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* raise some intriguing questions. The court says "constitutional adjudication" should take account of the individual's interest in access to the press. Is this an implication that a right of access can be established initially as a matter of First Amendment interpretation? Cf. the federal district court opinion in *Chicago Joint Board*, supra.

The Court's remarks in *Rosenbloom* appear 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. Do you think the Justices who joined in Mr. Justice Brennan's opinion for the Court in *Rosenbloom* would have decided the *Chicago Joint Board* case the same way the lower federal courts did? Why?

6. A model access bill was introduced in the Judiciary Committee of the House of Representatives by Congressman Feighan (D.Ohio). See Truth Preservation Act, 91st Cong., 2d Sess., August 12, 1970. The bill was then re

ferred to the Committee on Interstate and Foreign Commerce.*

* The bill reads as follows:

91st Congress
2d Session

H.R. 18941
IN THE HOUSE OF REPRESENTATIVES
August 12, 1970

Mr. Feighan (for himself, Mr. Carter, Mr. Cowger, Mr. Leggett, Mr. Nix, Mr. Powell, and Mr. Thompson of Georgia) introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce

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A BILL

To impose on newspapers of general circulation an obligation to afford certain members of the public an opportunity to publish editorial advertisements and to reply to editorial comment.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That this Act may be cited as the "Truth Preservation Act".

Obligation to Provide Access

Section 1. Each newspaper of general circulation shall—

(1) publish, in accordance with section 2, all editorial advertisements submitted to such newspaper, and

(2) provide, in accordance with section 3, a right of reply to any organization or individual that is the subject of an attack of an editorial nature by such newspaper.

Requirements Respecting Editorial Advertising

Sec. 2. (a) A newspaper of general circulation in a community shall be required to published an editorial advertisement—

(1) only after all newspapers of general circulation in such community have been requested to publish such advertisement and have refused to publish it, and

(2) only if the person requesting publication has tendered a sum sufficient to pay such newspaper's rate for such advertisement (subject to subsection (b)), and the newspaper has the space necessary to carry the advertisement.

(b) No newspaper of general circulation may charge for publication of any editorial advertisement any charge—

(1) in excess of its charges for publication of comparable advertisements which are not editorial advertisements, or

(2) in excess of its charges for publication of other comparable editorial advertisement.

Requirements Respecting Right to Reply

Sec. 3. A newspaper of general circulation which is required under Section 1(2) to provide a right of reply shall afford the individual (or in the case of a comment on an organization, the chief officer or a person delegated by him) a reasonable amount of space in a comparable place in the newspaper as soon as practicable after the newspaper's receipt of the reply.

Enforcement

Sec. 4. Any person aggrieved by the failure of a newspaper of general circulation to comply with any requirement of this Act may obtain a mandatory injunction requiring such newspaper to comply with such requirement. The district courts of the United States shall have jurisdiction of any action brought under this section.

Sec. 5. For the purposes of this Act:

(1) The term "newspaper of general circulation" means a newspaper intended to be read by the general public of any geographic area.

(2) The term "editorial advertisement" means an advertisement which communicates information or expresses opinion on an issue of public importance or which seeks financial support for an individual or organization to enable such individual or organization to advocate or carry out a course of action respecting such an issue.

*New York Times*man Clifton Daniel has argued that it is impossible to write an access statute that would not involve, in the end result, government control of the press. See Daniel, *Right of Access to Mass Media—Government Obligation to Enforce the First Amendment*, 48 Tex. L.Rev. 783 (1970).

7. Journalists have given considerable attention to the access idea. Gilbert Cranberg of the Des Moines *Times-Register*, writing in the *Saturday Review* in an article entitled, *Is Right of Access Coming?* pointed out that the Freedom of Information Committee of the American Society of Newspaper Editors devoted a special section of its report to right of access developments. Said Cranberg: the "unprecedented attention" given by the ASNE to the right of access is a "measure of its impact during the three years since it was proposed—in a *Har-*

*vard Law Review* article." Cranberg concludes that "the strained examples of government association with the press" advanced by union counsel in the *Chicago Joint Board* case "make it evident that the weakest link in the right of access argument is the lack of state action in the operation of newspapers." Cranberg does not think much of the argument for government-press interdependence which relies on the fact that second class mailing delivery for newspapers exceeds the actual mailing cost borne by the taxpayers. Such a differential, notes Cranberg, is true of most mail services. Furthermore, Cranberg asks incisively, is the tax "subsidy" to the newspaper or to the subscriber? See Cranberg, *Saturday Review*, August 8, 1970.

Another distinguished journalist, Ben Bagdikian, reflected on the access question in the *Columbia Journalism Review*. See Bagdikian, *Right of Access: A Modest Proposal,* Columbia Journalism Review, Spring 1969. Although conceding a need for fairer treatment of all individuals and groups in the news and for more access to the press, Bagdikian does not want to solve these problems by legal means. Writes Bagdikian: "The Barron proposal is thoughtful and dramatic. But there are more modest possibilities whose weakness is that they depend for widespread adoption throughout the press on the initiative of the press itself." What are these new proposals? 1. An occasional full page which would be devoted to "six or seven ideas" concerning solution of public proposals. 2. A full page of letters-to-the-editor. 3. The appointment of a full time ombudsman to every newspaper or broadcast station to hear and resolve listener, viewer, and reader complaints. 4. The organization of a local press council consisting of representatives from the community served by the paper to sit down every month with the publisher.

Bagdikian pokes fun at the right of access idea by speculating on some hypothetical consequences if such a right were given legal recognition: "John Banzhaf III would have to make commercials for L & M's without coughing," *Editor & Publisher*, the voice of the print media, would have to print the press releases of the National Association of Broadcasters touting the electronic media, and *Broadcasting* magazine, the voice of the broadcast industry establishment, would have to give "equal space to FCC Commissioner Nicholas Johnson." Note that the last two examples involve industry trade journals rather than newspapers.

Should the right of access be applied to magazines? A recent case, involving a bar association journal, sheds some light on the question.

8. Some major themes of the successful access to the press cases were gathered together in a case brought by the Radical Lawyers Caucus, an association whose members were also members of the Texas State Bar. The Radical Lawyers Caucus asked the Texas Bar Journal to accept an advertisement publicizing a caucus to be held during the annual bar convention. The Bar Journal contended that the Journal was an instrumentality of the State of Texas and therefore could not take political advertising. Ironically, that argument was the Texas Bar Journal's undoing.

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 court reasoned in the *Radical Lawyers Caucus* case that if a state agency refuses to take an advertisement because it objects to the political content of the advertisement, such action is state censorship. The familiar elements of access litigation were found in the case. The court undertook an inquiry into whether the reason for rejection of the advertisement was ideological. The inquiry was directed to finding out whether the rejecting publication or instrumentality (shopping center, bus terminal, etc.) has taken political advertising in the past. The court held that hostility to the politics expressed in the advertisement was unacceptable in a state agency. The case also stands for the increasingly important proposition that a state agency cannot accept commercial advertising while at the same time refusing political and editorial advertising. The court in *Radical Lawyers Caucus* cited a whole string of cases in support of the doctrine that political advertising cannot be discriminated against. As a First Amendment matter, what is the reasoning behind this position? Do you agree with it? Suppose the Texas Bar Journal decided on a new policy of not taking any ads at all, political or commercial? How would that affect groups like the Radical Lawyers Caucus?

Suppose the Texas Bar Journal had not been a state instrumentality but a privately-operated journal of a group of lawyers whose organization received no state support? Same result?

The *Radical Lawyers Caucus* case is one of the rare access-to-print-media cases which deal with a magazine. Suppose the Radical Lawyers Caucus had sought to place the same advertisement in magazines such as *Newsweek* or the *National Review*? Were there special circumstances, beside the fact that the bar journal was a state agency, which made access to the Texas Bar Journal for the Radical Lawyers Caucus imperative?

9. An example of how press-imposed limitations on access to the press can operate to perpetuate a cultural pattern of racial discrimination arose in Montgomery, Alabama. The suit was brought by black residents of that city against the publisher of the two daily newspapers in that city. The suit alleged that the papers granted free space for social announcements (weddings and engagements) but printed only the white announcements in the regular society page. The black social announcements were published in a separate Negro news page. The papers escaped liability on the ground that their actions were private and not subject to constitutional obligation.

The case raised access and state action problems in a slightly different form than the usual one of refusal by a newspaper to publish an editorial advertisement. *Cook v. Advertiser Co., 323 F. Supp. 1212 (M.D.Ala.1971).* The *Cook* case involved a suit against a corporation publishing both of the daily newspapers in Montgomery, Alabama, *The Advertiser* (morning) and *The Journal* (evening). A suit was brought against the defendant corporate newspaper publisher on the ground that constitutional and statutory rights of the Negro plaintiffs had been violated by the defendant in maintaining an all white society page. The case was based on a rarely used federal statute, 42 U.S.C. § 1981, enacted after the Civil War, which provides that all persons in the United States shall have the same right to make and enforce contracts as is enjoyed by white citizens. The federal district court ruled against the Negro plaintiffs. The court held that the statute only applied to state action and did not prohibit private discrimination such as a private newspaper's decision not to publish Negro bridal announcements in the society pages of its newspapers.

Shouldn't the fact that the historical pattern of racial segregation in Montgomery was required by law have led to a conclusion of state action on the part of the papers with regard to their social announcements policies?

If the state action in the Montgomery newspaper case could be hurdled, how do you think the courts would deal with the argument that the newspapers' social announcements policy was a form of editorial discretion?

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## F. A RIGHT OF REPLY TO THE PRESS: A STUDY OF THE *TORNILLO* CASE

There have been two major developments and at least several minor ones in the field of access to the media since the first edition of this text. One of these major developments involves a considerable defeat for access to television and one of them involves a considerable victory for access to the press. 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, Ch. IX, p. 852. 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. Although the *CBS* case squarely endorsed the fairness doctrine and to that extent took an affirmative view of the First Amendment, the opinion was a defeat for the view that the First Amendment supported an access-oriented interpretation which gives a right of entry at least as a general proposition to political and social ideas and over and against commercial ones.

Counterpoised against the defeat for access reflected by the Supreme Court's decision in the *CBS* case was the decision in favor of the Florida right of reply statute by the Supreme Court of Florida. See this text, p. 594. One thing is clear: the almost uniform response of the American press thus far to the decision in the *Tornillo* case has been negative.

With regard to the rights of reply and access to the press in America, where do these developments leave First Amendment theory?

A remarkable victory for the establishment of a First Amendment based right of access to the newspaper press was reflected in the decision of the Supreme Court of Florida in *Tornillo v. Miami Herald, 287 So.2d 78 (Fla.1973)*.

A provision of the Florida Election Code, F.S. 104.38, enacted in 1913 provides 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 mater that calls for the reply.

This 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 during the late nineteen sixties and the past three or four years has seen at least three law suits involving this little-known provision of the Florida Election Code.

The most recent, and perhaps the most controversial, involved a law suit by one Pat Tornillo, leader of the Dade County Classroom Teachers Association. In 1972, Tornillo ran as the Democratic candidate for the Florida nomination of the Democratic Party in the House of Representatives.

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 law breaker. The *Herald* said in an editorial that "it would be inexcusable of the voters if they sent Pat Tornillo to the legislature."

Tornillo sought 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 Dade County Circuit Court dismissed the case and held the Florida right of reply statute unconstitutional and the Attorney General of the State refused to defend the statute. Tornillo appealed to the Supreme Court of Florida where his counsel met an odd pair of allies lined up as amicus with counsel for the *Miami Herald*, the ACLU, and the office of the Attorney General of the State of Florida.

The controversy that has followed the case reflects the crosscurrents in First Amendment litigation today. The national biennial convention of the ACLU went on record for a right of access to the press in 1968 but the National Board set the action aside. Ever since, various ACLU chapters have disagreed on whether a right of access to the press, of which the right of reply is one illustration, is or is not consistent with the First Amendment.

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.

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## TORNILLO v. MIAMI HERALD

287 So.2d 78 (Fla.1973).

PER CURIAM

This cause is before us upon direct appeal from Circuit Court of Dade County, holding Florida Statute 104.38 [1] unconstitutional thereby vesting jurisdiction in this Court under Article V, Section 3(b)(1), Florida Constitution, as amended 1973.

Appellant Tornillo, plaintiff below, who was a candidate for the State Legislature demanded that appellee print verbatim his replies to two editorials printed therein attacking appellant's personal

[1] 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.

character. The appellee refused and Tornillo filed complaint for declaratory and injunctive relief and punitive damages. Pursuant to Florida Statute 86.-091, the Attorney General of this State was advised that appellant intended to contest the constitutionality vel non of Florida Statute 104.38. In view of the circumstances, the trial court granted the request for an emergency hearing.

Preliminarily, the trial court determined that the statutory provision in question is a criminal statute and that absent special circumstances, equity will not ordinarily enjoin commission of a crime. Pompano Horse Club Co. v. State, 93 Fla. 415, 111 So. 801 (1927). Notwithstanding this infirmity in appellant's complaint, the trial court further concluded that F.S. § 104.38 is violative of Article I, Sections 4 and 9 of the Constitution of Florida and the Fourteenth Amendment to the Constitution of the United States as a restraint upon freedom of speech and press and because it is impermissibly vague and indefinite.

Believing that the promulgation of this statute is authorized by Article IV, Section 4, and the First and Fourteenth Amendments to the Constitution of the United States, and Article VI, Section 1, and Article I, Section 4 of the Florida Constitution, and believing that this statute enhances rather than abridges freedom of speech and press protected by the First Amendment, we hold that it does not constitute a violation of the First and Fourteenth Amendments to the Constitution of the United States or Article I, Section 4, Florida Constitution.

The election of leaders of our government by a majority of the qualified electors is the fundamental precept upon which our system of government is based, and is an integral part of our nation's history. Recognizing that there is a right to publish without prior governmental restraint, we also emphasize that there is a correlative responsibility that the public be fully informed.

The entire concept of freedom of expression as seen by our founding fathers rests upon the necessity for a fully informed electorate. * * *

The public "*need to know*" is most critical during an election campaign. By enactment of the first comprehensive corrupt practices act relating to primary elections in 1909 our legislature responded to the need for insuring free and fair elections. Article III, Section 26, and Article VI, Section 9, Constitution of Florida 1885, commanded the Legislature to pass laws "regulating elections and prohibiting under adequate penalties, all undue influence thereof from power, bribery, tumult or other improper practices" and to "enact such laws as will preserve the purity of the ballot given under this Constitution." This act of 1909 did not deal with the subject of the wrongful use of newspapers or other printed or written matter, with the exception of a provision which declared it to be a misdemeanor for any candidate or other person to have or distribute on day of primary at or near any polling place any writing against any candidate in the primary. Florida Statute 104.38 was originally enacted in 1913 as Chapter 6470, Section 12, Laws of Florida, 1913. This second act adopted in 1913 known as the corrupt practices act was enacted to supplement the act of 1909. The statutory provision, the constitutionality vel non which is being questioned in the instant cause, was enacted not to punish, coerce or censor the press but rather as a part of a centuries old legislative task of *maintaining conditions conducive to free and fair elections*. The Legislature in 1913 decided that owners of the printing press had already achieved such political clout that when they engaged in character assailings, the victim's electoral chances were unduly and improperly diminished. To assure fairness in campaigns, the as-

sailed candidate had to be provided an equivalent opportunity to respond; otherwise not only the candidate would be hurt *but also* the people would be deprived of both sides of the controversy.

What some segments of the press seem to lose sight of is that the First Amendment guarantee is "not for the benefit of the press so much as for the benefit of us all." Speech concerning public affairs is more than self expression. It is the essence of self government.

Mr. Justice Learned Hand expressed the role of the press well when he emphasized,

"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 as many different sources and with as many different facets and colors as possible."

In Pennekamp v. Florida, 328 U.S. 331 (1946), the Supreme Court of the United States emphasized that the power of the press must be tempered with responsibility * * *.

The concept which appears throughout the decisions underlying First Amendment guarantees that there is a broad societal interest in the free flow of information to the public by the Supreme Court of the United States was explicitly stated in New York Times v. Sullivan, 376 U.S. 254 (1964) * * *.

The statute here under consideration is designed to add to the flow of information and ideas and does not constitute an incursion upon First Amendment rights or a prior restraint, since no *specified newspaper content is excluded*. There is nothing prohibited but rather it requires, in the interest of full and fair discussion, additional information.

The right of the public to know all sides of a controversy and from such information to be able to make an enlightened choice is being jeopardized by the growing concentration of the ownership of the mass media into fewer and fewer hands, resulting ultimately in a form of private censorship. Through consolidation, syndication, acquisition of radio and television stations and the demise of vast numbers of newspapers, competition is rapidly vanishing and news corporations are acquiring monopolistic influence over huge areas of the country. We take note of a recent article in Florida Trend magazine, March 1973, explicating that the Miami Herald is the largest newspaper published in Florida, that it is larger in size than the next two largest newspapers; and that it is not only a large city daily newspaper but also is a regional and international newspaper.

Freedom of expression was retained by the people through the First Amendment *for all the people* and *not merely for a select few*. The First Amendment *did not create a privileged class* which through a monopoly of instruments of the newspaper industry would be able to *deny to the people the freedom of expression* which the First Amendment guarantees. * * * By this tendency toward monopolization, the voice of the press tends to become exclusive in its observation and its wisdom which in turn deprives the public of their right to know both sides of controversial matters.

Appellant urges that if a newspaper may attack a candidate with impunity and he is provided no right to reply, the public interest in free expression suffers, because they can only hear the publisher's side of the controversy and are denied the dissenting view.

Although we have carefully considered appellee's argument that Red Lion Broadcasting Co. v. F. C. C. is inapplicable to the present cause, we cannot discount certain excerpts therefrom which are applicable to First Amendment guarantees in

general. Therein, the Supreme Court explained that,

"Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication." 395 U.S. at 401, n. 28.

That Court further stated in Red Lion Broadcasting v. F. C. C, in Associated Press v. U. S., and New York Times v. Sullivan, that it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas wherein truth will prevail rather than to countenance a monopolization of that market whether by government or private enterprise.

Florida's right of reply statute is consistent with the First Amendment as applied to this State through the Fourteenth Amendment. In Rosenbloom v. Metromedia, 403 U.S. 29, 47 (1971), we find that the Supreme Court of the United States is inclined to this position by the following quote from the majority opinion:

"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."

To this comment, the Court appended the following note:

"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 (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). 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."

Although appellee attempts to minimize the import of the aforestated quotation, we feel compelled to note that such remarks regarding right to reply legislation is entirely consistent with past precedent establishing the fundamental purpose of the First Amendment to inform the people.

Neither appellant nor appellee takes issue with the holding of the trial court that it lacked jurisdiction to enjoin an alleged violation of Florida Statute 104.38. This provision is criminal in nature and absent special circumstances equity will usually not enjoin commission of a crime.

Appellant urges that the Right of Reply Statute in question is neither impermissibly vague nor unnecessarily broad. We must agree and therefore uphold the constitutionality of this statutory provi-

sion. It is a fundamental principle that this Court has the duty, if reasonably possible, consistent with protection of constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality and if reasonably possible a statute should be construed so as not to conflict with the constitution. Courts are inclined to adopt that reasonable interpretation of a statute which removes it farthest from constitutional infirmity. In Gitlow v. People of New York, 268 U.S. 652, the Supreme Court of the United States stated every presumption is to be indulged in favor of the validity of a statute, and the case is to be considered in the light of the principle that the State is primarily the judge of regulations in the interest of public safety and welfare.

We do not believe that Florida's statutory right of reply is lacking in any of the required standards of preciseness. The statute is sufficiently explicit to inform those who are subject to it as to what conduct on their part will render them liable to its penalties.

We recognize that certainty is all the more essential when vagueness might induce individuals to forego their rights of speech, press and association for fear of violating an unclear law. Scull v. Virginia, 359 U.S. 344 (1959), Ashton v. Kentucky, 384 U.S. 195 (1965).

* * *

Inter alia, appellee attacks the constitutionality of the statute on grounds of vagueness and overbreadth because of the use of the term "any"—referring to the type of reply allowable. * * * Because of the longstanding policy of this Court to give a statute, if reasonably possible, a construction supporting its constitutionality, we hold that the mandate of the statute refers to "any reply" which is wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane.

We conclude that the statute in question is as certain and definite as others heretofore upheld as constitutionally permissible. The following statement made by Judge Tamm in Red Lion Broadcasting Co. v. F. C. C., supra, 381 F.2d at 921, is clearly applicable to the instant cause: "Here there is no broad-reaching, all-embracive statutory provision penalizing knowing as well as unknowing conduct."

Although apparently not raised before the trial court, the brief of Amicus Times Publishing Co. has raised the issue that Florida Statute 104.38 is a deprivation of property right without due process. With this contention, we can not agree. Florida Statute 104.38 is a valid exercise of the state police power enacted to assure the integrity of the electoral process.
* * *

In conclusion, we do not find that the operation of the statute would interfere with freedom of the press as guaranteed by the Florida Constitution and the Constitution of the United States. Indeed it strengthens the concept in that it presents both views leaving the reader the freedom to reach his own conclusion. This decision will encourage rather than impede the wide open and robust dissemination of ideas and counterthought which the concept of free press both fosters and protects and which is essential to intelligent self government.

Newspapers are not wholly dependent on electronic media as were the broadcasters in Red Lion Broadcasting Co. v. F. C. C., supra. However, we have no difficulty in taking judicial notice that the publishers of newspapers in this contemporary era would perish without this vital source of communications. The dissemination of news other than purely local is transmitted over telegraph wires or

over air waves. This not only includes dissemination of news but also in chain newspaper operations so prevalent today, the Miami Herald being one; even editorials are prepared in one place and transmitted electronically to another. Therefore, the principles of law enunciated in Red Lion Broadcasting Co. v. F. C. C., supra, have been taken into consideration in reaching our opinion.

A half free press would be deceptive to the public. Florida Statute 104.38, in the interest of all the people, provides that candidates for public office under certain prescribed circumstances shall have a right of reply, a right of expression. It does not deny to the owner of the instruments of the newspaper industry any right of expression. The statute *assures*, and *does not abridge*, the right of expression which the First Amendment guarantees. The statute supports the freedom of the press in its true meaning—that is, the right of the reader to the whole story, rather than half of it—and without which the reader would be "blacked out" as to the other side of the controversy.

For the foregoing reasons, we find Florida Statute 104.38 to be constitutional and reverse the holding of the trial court that it is unconstitutional.

Accordingly, the judgment of the trial court is reversed and this cause is remanded to the trial court for further proceedings not inconsistent herewith.

It is so ordered.

CARLTON, C. J., ADKINS, McCAIN and DEKLE, JJ., and RAWLS, District Court Judge, Concur.

BOYD, J., Dissents with Opinion.

ROBERTS, Justice (specially concurring):

* * *

* * * The decision in *Columbia Broadcasting* is directed solely to the peculiar and limited nature of broadcasting frequencies, and that decision is not applicable to the instant facts presently before this Court in the case sub judice.

* * *

* * *

Our opinion in the instant cause in no way conflicts with the recent decision of the Supreme Court in *Columbia Broadcasting*, supra.

BOYD, Justice (dissenting):

I respectfully dissent.

This statute carries a penalty provision for violations thereof, and it therefore must be most strictly construed in favor of any person accused thereunder. The statute is so vague on its face as to raise doubts in the minds of those reading it as to the exact underlying legislative intent.

There are no standards as to when a publisher must carry a reply. For example, the following are just some of the important questions left unanswered by this statute. Does the law include both news stories and editorial comment? If a story mentions a "situation", but does not mention the candidate by name, may he reply? When the publisher knows his statements are true, must he publish a statement from the candidate which he knows to be false? If the reply of the candidate libels other persons, must the publisher print it, and, if so, is the publisher subject to liability for any resulting libel suit? If the candidate's reply were to contain obscene language, would the publisher still have to print it—and thereby invite prosecution under our obscenity laws?

* * * Since these constitutional provisions prohibit the government from limiting the right of the publishing press to publish news and comment editorially, it would be equally unconstitutional for the government to compel a publisher to print a statement of any other person, or persons, against that publisher's will.

The majority opinion correctly observes that freedom of speech and freedom of the press carry the duty to speak the truth. And, of course, the constitutional rights of freedom of speech and freedom of the press must be exercised with appropriate regard to the provisions of our libel and obscenity statutes. As in all other areas of public and private service, some errors will, from time to time, surely occur. Yet, recognizing that the survival of a free press is contingent upon the press fulfilling its duty to the general public, the overwhelming majority of those in the publishing press comply with the highest of ethical standards.

* * *

Free people can make proper decisions for their own self-government only when they are adequately informed by a free press. To the extent that government limits or adds to that which a publisher must distribute, freedom of speech and freedom of the press are thereby diminished.

Almost everyone whose name has been carried frequently in the news media has been offended, at one time or another, by stories or comments with which he disagrees. This is part of the price one pays for success and notoriety. If there exists a problem in this state of affairs, the muzzling of a free press is not the solution to such problem.

I therefore dissent.

* * *

### NOTES AND QUESTIONS

1. The Supreme Court of Florida emphasized that there was a crucial difference between right of reply legislation and direct restraints on content which the First Amendment classically had guarded against. The Court explains this distinction as follows:

"The statute here under consideration is designed to add to the flow of information and ideas and does not constitute an incursion upon First Amendment rights or a prior restraint, *since no specified newspaper content is excluded.* There is nothing prohibited but rather it requires, in the interest of full and fair discussion, additional information." 287 So.2d 78, 82.

There is currently a profound quarrel over the inclusiveness of the First Amendment. Some believe that the exclusive addressee of First Amendment protection is the press. Others believe that the First Amendment is designed to provide all members of the public with the information necessary to make the informed judgments which a democratic society presupposes by way of obligation from its members. It is this latter view of the First Amendment which the Supreme Court of Florida endorsed in the *Tornillo* case:

"Freedom of expression was retained by the people through the First Amendment *for all the people* and *not merely for a select few.* The First Amendment *did not create a privileged class* which through a monopoly of instruments of the newspaper industry would be able to *deny to the people the freedom of expression* which the First Amendment guarantees." 287 So.2d 78, 83.

The Supreme Court of Florida's decision in the *Tornillo* case reflects the ferment about the First Amendment theory which has been manifest in United States Supreme Court decisions and in law and journalism circles in this country for nearly a decade.

2. The *Miami Herald* appealed the case to the Supreme Court of the United States. A host of newspapers had joined the *Miami Herald* as *amicus curiae,* friends of the court, in the *Herald's* petition for rehearing to the Supreme Court of Florida. Many of these papers along with other media groups filed briefs on the side of the *Herald*

when the case reached the Supreme Court of the United States.

3. An enforceable right of reply in the press although of relatively long standing in Germany and France has been a fairly unusual phenomenon in the statutory patterns of American states. See Donnelly, *The Right of Reply: An Alternative to An Action for Libel*, 34 Va.L.Rev. 867 (1948). Only Florida, Nevada and Mississippi have enacted such statutes and Nevada has recently repealed its statute. Yet the current interest in right of reply statutes has been considerable. The movement for a First Amendment based right of access to the press, generated by the increasingly noncompetitive and chain dominated press, has sparked most of this interest. Another powerful stimulus was the Supreme Court's ground-breaking decision in *New York Times v. Sullivan, 376 U.S. 245 (1964)*, which so radically revised the American law of libel and provided a measure of relief from libel judgments hitherto unknown in American law.

4. These developments gained impetus from the case of *Rosenbloom v. Metromedia, 403 U.S. 29 (1971)*. There the plurality opinion for the Court called for the enactment of right of reply legislation as an alternative to damage suits for libel in cases where public issues are involved.

In *Rosenbloom v. Metromedia, supra*, the Supreme Court shifted the focal point of the new public law of libel. The touchstone of constitutional privilege in the libel area was no longer to be the status of the libel plaintiff (whether he was a public official or public figure) but rather the content of the libel. The Court said the key to privilege was whether the alleged defamation involved the ventilation of public issues. The premise of *New York Times v. Sullivan*, had been that a public figure of a public official would be able to attract "media attention to counter criticism." In other words, if newspapers were relatively free from the threat of libel by public persons, the cause of free expression would be materially advanced. Vigorous criticism of the major protagonists in public affairs would surely follow. Public people, for their part, would have no difficulty in finding a media forum.

In the *Rosenbloom* case, the Supreme Court found these assumptions to be unsound.

The situation the Court at last confronted in *Rosenbloom* was that, since the *Times* case, newspapers were freer than ever to attack since the spectre of damages in libel actions was so much fainter. But those attacked, on the other hand, had neither the assurance nor the reality of reply in the forum in which they were attacked. For the first time in *Rosenbloom*, a section of the Court accepted the position that the way to assure debate was to provide for right of reply legislation.

The Supreme Court of Florida strongly relied on the endorsement of right of reply legislation contained in the opinion for the Court in *Rosenbloom*. The idea expressed in *Rosenbloom* and *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.

5. The press has given a good deal of attention to the *Tornillo* case. It has been referred to by the *Miami Herald* as a return to the "dark ages". The press, on the whole, is insisting that right of reply legislation is a violation of the First Amendment, the Florida Supreme Court decision notwithstanding.

6. The Circuit Court for Dade County held that the Florida right of reply statute, F.S. 104.38, was subject to the constitutional infirmity of vagueness. The lower court complained that no editor could know in advance exactly what words would offend the statute or the scope of the reply required.

The same vagueness charge was made concerning broadcasting's personal attack rules which provide for a right of reply "when during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character integrity, or like personal qualities of an identified *person* or group. * * *" The validity of the personal attack rules was upheld in *Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969),* where Mr. Justice White dismissed the vagueness argument on the ground that the regulations were sufficiently precise. Was the Florida Supreme Court correct in upholding the vagueness challenge to the Florida right of reply statute on the basis of the *Red Lion* decision?

7. Is the Florida right of reply statute more limited and precise than the personal attack rules upheld in *Red Lion?* The personal attack rule may be invoked by any person or group. At least, on their face, the personal attack rules raise some definitional questions. How does one define a group, for example? The Florida right of reply statute, on the other hand, is directed solely to a very particularized class, political candidates.

8. There is another issue in the *Tornillo* case which because of its novelty as a major factor in First Amendment litigation should be discussed. This is the contention that when First Amendment rights are exercised, compensation must be paid if property rights are even slightly infringed as a result of their exercise.

The Florida right of reply law deprives a newspaper publisher, the *Miami Herald* argued, of property without compensation or due process of law in violation of § 9, Art. I of the Florida Constitution and the Fourteenth Amendment of the United States Constitution.

The newspaper argued that the Florida right of reply statute unconstitutionally takes property from the defendant newspaper and gives it to a plaintiff. In *Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969),* one of the issues that propelled that case to the Supreme Court was whether a person attacked by a radio station should be given free time to reply under the FCC's personal attack rules.

Yet the Supreme Court's opinion in *Red Lion* requiring such free reply time does not contain the slightest suggestion that the provision of free time under either the fairness doctrine or the personal attack rules was an invalid "taking." Although frequencies are licensed on a three-year basis, the licensee has the right to sell broadcast time and the FCC has no jurisdiction, and has never asserted jurisdiction, over the rates charged by broadcast licensees.

Is a free space requirement less of a burden for a newspaper like the *Miami Herald* than the free time requirement was for a broadcaster like the Red Lion Broadcasting Co.? Broadcast time, unlike newspaper space, is finite. Is a newspaper expandable? If advertising business is up, can the paper always put out a larger edition? What of newsprint? A grant of free time appears to be a more costly matter to the station manager in broadcasting than is a grant of free space to the newspaper publisher. Yet the Court of Appeals in *Red Lion* considered the free time requirement as a reasonable burden.

9. Another factor in evaluating the free space provision of a right of reply law is that the notion of property as a barrier to free expression has generally been rejected in modern First Amend-

ment case law. Recent years have seen the rise of a dedication to a public use doctrine in First Amendment cases.

In *Amalgamated Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968)*, the Supreme Court held that the picketers had a First Amendment right to enter a privately owned shopping center. The Supreme Court refused to permit the defense of private property to shield the use of shopping centers for purposes of Communication. See text, p. 53. In the metropolitan areas that surround our cities, many suburbs lack media facilities specifically covering the problems of the suburbs. The mass media facilities that serve the whole metropolitan area, on the other hand, sometimes find the problems that beset a specific suburb or neighborhood not of sufficient interest or concern to warrant coverage. Access for communication purposes to the shopping center in the suburban areas of American cities was, therefore, recognized as indispensable in some circumstances.

Mr. Justice Marshall in the *Logan Valley* case said there were some circumstances where "property that is privately owned may at least, for First Amendment purposes, be treated as though it were publicly held." 391 U.S. 308 at 316. The relevance of *Logan Valley* to a right of access to the mass media has been described as follows:

"Access to property for purposes of communication is therefore not dependent on whether 'it is ordinarily open to the public.' The underlying concept seems to be that when property is open to the public for every purpose except the presentation of views unwelcome to the owners, it should be open to the public for that purpose also. This dedication-to-public-use theory has been applied to public property. The remarkable and pioneering feature of the *Logan Valley* decision is that the Supreme Court applied this theory to private property also." Barron, Freedom Of The Press For Whom? The Right Of Access To The Mass Media (Indiana University Press, 1973) 103.

Since *Logan Valley*, the Supreme Court had decided another shopping center case, *Lloyd Corp. v. Tanner, 407 U.S. 551 (1972)*. See text, p. 57. In that case, the shopping center sought to keep out members of an anti-war group who were distributing handbills. The Center contended that the Fifth Amendment's prohibition against deprivation of "property * * * without due process of law" would be offended if groups could enter the shopping center to disseminate their views when the owners of the center did not wish to admit them. Although the two federal lower courts had supported the anti-war group's First Amendment claim for entry to the Lloyd Center, the Supreme Court reversed and upheld the property claim of the shopping center owners.

*Lloyd Corp. v. Tanner* does not repudiate past decisions. But *Lloyd* does insist on a relationship between the site of the protest and the object of the protest. The anti-Vietnam war activities of the group seeking entry to the Lloyd Center were deemed unrelated to the Center. Is there a relationship between the object of the protest, the reply to the *Miami Herald's* editorial attack on Tornillo, and the site of the protest, the *Miami Herald?* Plaintiff Tornillo was replying to an attack on him in editorials by the newspaper in which he seeks to reply.

Is it more unconstitutional to give free space to Tornillo to implement First Amendment objectives of debate than to rule that privately owned shopping centers may be used for the exercise of First Amendment rights against the wishes of their owners?

It was never suggested in the shopping center cases that payment had to be rendered for the appropriate exercise of First Amendment rights on private property. Is the situation more appropriate with regard to a statutorily recognized right of reply?

10. If there are only one or two daily newspapers in a community, does ownership of them by a single publisher mean that the publisher has absolute dominion over every inch of space within them?

*Cf. Herald Co. v. Seawell, 472 F.2d 1081 (10th Cir.1972)*, see this text, p. 670.

11. Right of reply legislation has been perceptively and sympathetically discussed by at least one distinguished First Amendment commentator, Professor Thomas I. Emerson. See Emerson, The System of Freedom of Expression, 538–539 (1970). Professor Emerson has written that a right of reply "would strengthen and vitalize" freedom of expression:

"It is sufficient to note that a right of reply could be made available in most situations in which an individual claims that false assertions (and other forms of attack on him) have been made. It is particularly applicable in the case of the press, where abandonment of the libel action would be felt the most. Such a procedure is the most appropriate and probably the most effective way to deal with the problem. The person attacked would have an opportunity to get his position and his evidence quickly before the public. He would have a forum in which to continue the dialogue, rather than being forced to withdraw to the artificial arena of the courtroom. The discussion would thus be kept going in the marketplace, and the issues left up to the public, which must make the final decision anyway."

Furthermore, Professor Emerson assumes that the appropriate procedure for "allowing a right of reply would probably have to be established by legislation rather than judicial decision." Id. at 539.

12. It is to be noted that in a construction of the Mississippi right of reply statute by the Supreme Court of Mississippi, where the court gave very careful attention to defining the statute, the Mississippi Supreme Court was altogether silent with regard to any First Amendment objections to right of reply legislation. See *Manasco v. Walley*, 63 So.2d 91 (Miss.1953). A close reading of the Mississippi Supreme Court's construction of the Mississippi right of reply statute demonstrates that that Court provided the statute with a gloss which was entirely consistent with First Amendment and due process standards:

"The provisions of Section 3175, Code of 1942, are penal in their nature, and the statute should be strictly construed. Statutes creating liabilities which did not exist at common law, 'although supposed to be founded on considerations of public policy and general convenience are not to be extended beyond the plain intent of the words of the statute.' *Houston v. Holmes*, 202 Miss. 300, 32 So.2d 138, 139. The Court in interpreting a statute of this kind must look to the statute itself for the legislative intent, and the words of the statute must be given their usual and ordinary meaning. Section 3175, according to the language used, applies only in cases where the newspaper article complained of reflects upon the honesty, integrity or moral character of the candidate; and the Court cannot by judicial interpretation extend the liability imposed by the statute to cases involving other types of objectionable newspaper comment or criticism, which do not fall clearly within the language used in the statute." 63 So.2d 91 at 96 (1953).

## THE DECISION ON THE PETITION FOR REHEARING IN THE *TORNILLO* CASE

After the decision of the Supreme Court of Florida was announced in the *Tornillo* case, the *Miami Herald,* joined by many other newspapers, who filed amicus curiae briefs, filed a petition for rehearing with the Supreme Court of Florida. Appellant contended in its petition for rehearing that § 104.38 was a criminal statute and as such that it failed to meet the constitutional standards of precision required of such statutes. The *Miami Herald* argued on rehearing that the Supreme Court of Florida lacked constitutional power to furnish a saving gloss to a criminal statute. The *Herald* also returned to its general contentions about vagueness saying that the statute presented problems of construction which the Supreme Court of Florida left unanswered. The Supreme Court of Florida denied the petition and pointed out that "no criminal penalty" was sought by Tornillo and that "the validity *vel non* of the criminal penalty is not here involved." *Pat L. Tornillo, Jr. v. The Miami Herald Publishing Company*, 287 So.2d 78 (Fla.1973). The Supreme Court of Florida also pointed out that in order to give a saving construction to a statute the criminal sanction provisions of a statute could be severed if this were necessary to save the statute from constitutional infirmity. For this proposition the Supreme Court of Florida cited the leading First Amendment case of *Gitlow v. People of New York*, 268 U.S. 652 (1925).

On the petition for rehearing, the Supreme Court of Florida addressed itself to the *Herald's* hypothetical questions concerning the interpretation of the statute, *i. e.*, What is a response? An assault? "A conspicuous place"? etc. First, the Supreme Court of Florida pointed out in effect that the definition of words in a statute will always be a matter of mystery to those in whose interest it is to profess to be perplexed. Yet the Supreme Court of Florida remarked on the ability of the Florida newspaper industry to understand completely similar statutory phraseology when such understanding was in its interest. Thus, the Supreme Court of Florida pointed out that Florida has a retraction statute, § 770.02, Florida Statutes, as do many other states, and that the Florida retraction statute contains words such as "good faith", "falsity", "a full and fair correction", "apology", and "conspicuous place." Nevertheless, the Florida retraction statute has had sufficient clarity to have frequently been used by Florida publishers to avoid punitive damages. The Florida retraction statute, § 770.02, contains similar phraseology to that found in the Florida right of reply statute, § 104.38. The retraction statute involves compulsion no less than the right of reply statute. The choice given to the publisher is that between publication of retraction or the assessment against him of punitive damages. Yet the constitutionality of retraction statutes is generally assumed.

The Supreme Court of Florida denied the Miami *Herald's* Petition for Rehearing. See *Tornillo v. The Miami Herald Publishing Co.*, 287 So.2d 78, 89 (Fla. 1973). For the text of the Supreme Court's opinion in Miami Herald v. Tornillo, decided June 25th, 1974, unanimously reversing the Supreme Court of Florida, see Appendix A.

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### ADDITIONAL NOTES AND QUESTIONS ON THE *TORNILLO* CASE

1. After the denial of the *Miami Herald's* petition for rehearing by the Supreme Court of Florida, the *Miami Herald* appealed the decision of the Florida Supreme Court in *Tornillo* to the Supreme Court of the United States. On January 14, 1974, the Supreme Court decided to schedule the *Tornillo* case for oral argument. The Court postponed

for oral argument the question of whether the judgment of the Supreme Court of Florida was sufficiently final to warrant review by appeal to the Supreme Court of the United States. The Supreme Court at oral argument also heard arguments on the merits concerning whether the decision of the Supreme Court of Florida to sustain the Florida right of reply statute as consistent with the First Amendment should be affirmed.

The United States Supreme Court has jurisdiction to review the decision of a state statute against a claim of constitutional invalidity pursuant to 28 U.S.C. § 1257(2). Jurisdiction is conferred, however, only if the judgment below is a "final judgment." Tornillo had contended in response to the *Miami Herald's* request to the Supreme Court to the *Tornillo* case by way of appeal that the *Miami Herald* should not be allowed to assert that the Florida Supreme Court judgment was final when the *Herald* refused at the same time to state that it would print Tornillo's replies to its editorials if the controlling constitutional issue, the constitutional validity of the Florida right of reply statute, were decided in favor of Tornillo.

The *Herald* had argued to the Supreme Court of the United States, as it had to the Supreme Court of Florida, that there were grave problems of ambiguity and applicability presented by the Florida right of reply statute. Thus, the *Miami Herald* said the statutory term "attack" was unclear. The *Herald* also said there was serious questions with regard to lack of clarity concerning the length, whereabouts and content of the reply.

2. The Jurisdictional Statement of the *Miami Herald*, Supreme Court of the United States, filed November 19, 1973, *Tornillo v. Miami Herald, Case No. 73–797, pp. 30–32,* raised the following questions concerning the meaning of the Florida right of reply statute:

"The principal ambiguities in the statute include the following:

"(i) What is a 'newspaper'? Does the term include any publication, such as magazines, newsletters, pamphlets, brochures and handbills? Does it include 'newspapers' published in other states but circulated in Florida?

"(ii) Does the term 'columns' in the statute include editorials, signed columns, news articles and letters to the editor? Does the term include advertisements? Cartoons? Does the term include replies published pursuant to § 104.38, Fla. Stat.?

"(iii) What is an 'assault' on personal character, or an 'attack' on an official record? Do they merely encompass criticism, no matter how truthful or valid? Does personal character include any individual human quality?

"(iv) Need a 'candidate' be mentioned specifically by name to be entitled to a reply, or does a reply right arise if a 'candidate' can be identified in a publication, even though not named? If a publication refers to a group, does each member of the group have a right to reply?

"(v) What is an equally 'conspicuous' place for publication of a reply? Is page four of a newspaper as conspicuous as page five?

"(vi) How lengthy a reply may be made? If a newspaper editorial states only, 'John Doe is not fit for office,' what is the length of the permitted reply? Seven words? Can a statute providing such a 'reply' be seriously considered as enhancing public discussion?

"Although both lower Florida courts which passed upon the statute held it void for vagueness, the Florida Supreme Court sought to circumvent this obstacle in two ways. First, the Court sought to resolve certain ambiguities in the statute by interpretation, holding that a newspa-

per need not publish a reply unless it was:

> " 'wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane.'

"Such an interpretive approach which seeks to remedy massive gaps in the statute cannot cure constitutional infirmities. Criminal statutes affecting freedom of expression must delineate precise standards of conduct without resort to wholesale judicial construction. *Winters v. New York, supra* at 515 (1948); *Ashton v. Kentucky, supra*; *NAACP v. Button*. Moreover, despite the Florida Supreme Court's efforts, major ambiguities and uncertainties remain. The unconstitutional effect of the statute cannot be diminished by the Court's intentions, expressed in its *per curiam* decision denying the Petition for Rehearing, to refine and define the statute's terms in future cases. *E. g., Giaccio v. Pennsylvania*, 382 U.S. 399 (1966).

"The second aspect of the Florida Supreme Court's curative effort was its holding that because the plaintiff was seeking only civil remedies, the Court need not pass upon whether the statute measured up to standards required of criminal statutes. The Court reasoned that even if the statute was impermissibly vague so that it could not be the basis of a criminal prosecution, the statute was sufficient for an implied civil right of action. The Court thus held, in effect, that an unconstitutionally vague criminal statute may be invoked for a civil remedy. Such logic is without precedent."

Re-read the decision of the Florida Court on rehearing. Are any of the questions raised by the *Herald* answered by the Court? Which ones?

## G. THE MASSACHUSETTS COMPULSORY-PUBLICATION-OF-POLITICAL-ADVERTISING CASES

1. The position that any kind of compulsory publication obligation on the press is a violation of freedom of the press has secured some recent support. The Supreme Judicial Court of Massachusetts has recently held unconstitutional, in an advisory opinion, a pending legislative proposal that if a newspaper publishes the paid political advertisement of one candidate, it must publish the paid political advertisement of all other candidates for that office. The proposed bill also would have provided if a newspaper published a paid political advertisement "designed or tending to defeat any position with respect to a question to be submitted to the voters, it must publish any paid political advertisement on any other position with respect to the same question." This provision was also declared unconstitutional. See *Opinion of the Justices to the Senate*, 298 N.E.2d 829 (Mass.1973).

The Massachusetts Supreme Judicial Court said with respect to the validity under the First Amendment of the proposed legislation:

"We are aware of no circumstances in which it has been held that the First Amendment right of free speech gives a private individual the right to require the publication of editorial advertising." *298 N.E.2d 829 at 833 (Mass.1973).*

In *Opinion of the Justices*, 284 N.E.2d 919 (Mass.1972), the Massachusetts Supreme Judicial Court, struck down a proposed compulsory publication statute but left the door open for the consideration of right of access legislation justified by a compelling state interest.

The Florida Supreme Court justified Florida's right of reply law on the ground that a reply by a political candi-

date to an attack by a newspaper during a political campaign assured the integrity of the electoral process and this served a compelling state interest. The difference between the proposed Massachusetts statute and the Florida right of reply statute is that the right of reply statute is invoked only when the paper itself has launched an attack on the candidate. Should this affect the question of whether or not the state interest is compelling?

It should be noted that the *Miami Herald* in its Jurisdictional Statement to the Supreme Court in *Tornillo* gave particular emphasis to the statement of the Massachusetts Supreme Judicial Court that there are "no set of circumstances * * * which would support a legislative mandate that a newspaper * * * must publish."

2. , In an earlier advisory opinion on a bill entitled "An Act further regulating the publication of political advertisements by newspapers or other periodicals," House No. 2287, *Opinion of the Justices*, 284 N.E.2d 919 (Mass.1972), the Supreme Judicial Court of Massachusetts passed on the constitutionality of a proposed bill which provided that a newspaper "shall not refuse to publish a political advertisement for or on behalf of any other candidate or organization relating to the same primary election or referendum, unless such publication would violate other provisions of this chapter." Another provision of the bill provided that a newspaper shall not charge for the publication of a political advertisement an amount greater than would be charged for non-political advertisements offered in similar circumstances. The Supreme Judicial Court of Massachusetts held both provisions invalid since the following words, "political advertisement", "candidate" and "organization" were not defined and therefore the provisions were unconstitutionally vague.

The Massachusetts Supreme Judicial Court observed in the earlier case: "(L)egislation of the type proposed may be drafted which will withstand attack on constitutional grounds." *Cf. Chronicle & Gazette Publishing Co. v. Attorney General*, 94 N.H. 148, 48 A.2d 478 (1946). The *Chronicle* case held constitutional a New Hampshire statute which prevented charges for political advertisements."

It should be noted that the 1972 Massachusetts Judicial Court held that the defects in definition of the earlier statute considered in the first advisory opinion were remedied and that the new bill removed "almost all of the difficulties which were found in the previous bill." In other words, the statute invalidated in 298 N.E.2d 829 (1973) was not invalidated for vagueness but rather for its "chilling effect."

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## A FINAL WORD

The idea that the provision by government of a structure for debate and discussion may implement rather than retard First Amendment values is, increasingly being understood, but not necessarily accepted.

There is still a reluctance on the part of the law to find in the First Amendment itself, absent recognition by statute or regulation, a basis for access to the broadcast media. At most, the law may be able to provide for a right of reply in the press and balanced presentation in broadcasting if the state legislature or the Congress has so provided. Until the legislature so provides, however, the present Supreme Court does not incline to interpret the First Amendment as providing of its own force access rights which a governmental body has not formally specified by statute, decision or regulation. Whether even a statutory right of reply

to the press is permissible will not be clear one way or the other, unless a definitive decision on the issue is obtained from the Supreme Court of the United States in *Tornillo*. For the text of the Supreme Court decision striking down the Florida right of reply law, see Appendix A.

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## SECTION 2. FREEDOM TO TRAVEL AND THE NEWSMAN

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### KENT v. DULLES

357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958).

Mr. Justice DOUGLAS delivered the opinion of the Court.

This case concerns two applications for passports, denied by the Secretary of State. One was by Rockwell Kent who desired to visit England and attend a meeting of an organization known as the "World Council of Peace" in Helsinki, Finland. * * *

The right to travel is a part of the "liberty" of which the citizen cannot be deprived without the due process of law under the Fifth Amendment. * * * Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. * * *

Freedom of movement also has large social values. As Chafee put it:

"Foreign correspondents and lecturers on public affairs need first-hand information. * * * An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspapers. Moreover, his views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems. In many different ways direct contact with other countries contributes to sounder decisions at home." Id., at 195–196. And see Vestal, Freedom of Movement, 41 Iowa L.Rev. 6, 13–14.

* * *

We would be faced with important constitutional questions were we to hold that Congress * * * had given the Secretary [of State] authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement.

Reversed.

Mr. Justice CLARK, with whom Mr. Justice BURTON, Mr. Justice HARLAN, and Mr. Justice WHITTAKER concur, dissenting.

#### NOTES AND QUESTIONS

1. The *Kent* case places freedom to travel as part of the "liberty" protected by the Fifth Amendment. (The Fifth Amendment to the U. S. Constitution states: "* * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law.") But is there not also a basis for placing freedom to travel under the First Amendment? From the point of view of a right to travel, notice that Mr. Justice Douglas' quotation for the Court from Professor Chafee mentions the special need of "foreign correspondents" for "first-hand information."

Perhaps it may be contended that journalists should claim freedom of travel as a First Amendment right while nonjournalists may claim it only as a Fifth Amendment right.

2. Mr. Justice Douglas makes clear from the opinion in *Kent* that the case is decided not on constitutional grounds but on the basis of statutory interpretation, i. e., the restrictions involved were not authorized by the statutes. This approach has been praised on the ground that it places responsibility for travel restriction on Congress where it belongs rather than in the hands of the administration in power which may desire to shield the American public from views contrary to the foreign policy views of the State Department. See *The Supreme Court, 1964 Term*, 79 Harv.L.Rev. 56 at 127 (1965).

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## APTHEKER v. SECRETARY OF STATE

378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964).

Mr. Justice GOLDBERG delivered the opinion of the Court.

This appeal involves a single question: the constitutionality of § 6 of the Subversive Activities Control Act of 1950, 64 Stat. 993, 50 U.S.C. § 785. * * * The present case, therefore, is the first in which this Court has been called upon to consider the constitutionality of the restrictions which § 6 imposes on the right to travel.

The substantiality of the restrictions cannot be doubted. The denial of a passport, given existing domestic and foreign laws, is a severe restriction upon, and in effect a prohibition against, world-wide foreign travel. Present laws and regulations make it a crime for a United States citizen to travel outside the Western Hemisphere or to Cuba without a passport. By its plain import § 6 of the Control Act effectively prohibits travel anywhere in the world outside the Western Hemisphere by members of any "Communist organization"—including "Communist-action" and "Communist-front" organizations. * * * Since freedom of association is itself guaranteed in the First Amendment, restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given association.

* * *

The Government alternatively urges that, if § 6 cannot be sustained on its face, the prohibition should nevertheless be held constitutional as applied to these particular appellants. The Government argues that "surely Section 6 was reasonable as applied to the top-ranking Party leaders involved here." It is not disputed that appellants are top-ranking leaders: Appellant Aptheker is editor of Political Affairs, the "theoretical organ" of the Party in this country and appellant Flynn is chairman of the Party. * * * this Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects. *Similarly, since freedom of travel is a constitutional liberty closely related to rights of free speech and association,* we believe that appellants in this case should not be required to assume the burden of demonstrating that Congress could not have written a statute constitutionally prohibiting their travel. (Emphasis added.)

Accordingly the judgment of the three-judge District Court is reversed and the cause remanded for proceedings in conformity with this opinion.

Reversed and remanded.

## ZEMEL v. RUSK

381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965).

Mr. Chief Justice WARREN delivered the opinion of the Court.

The questions for decision are whether the Secretary of State is statutorily authorized to refuse to validate the passports of United States citizens for travel to Cuba, and, if he is, whether the exercise of that authority is constitutionally permissible. We answer both questions in the affirmative.

* * *

We think that the Passport Act of 1926, 44 Stat. 887, 22 U.S.C. § 211a (1958 ed.), embodies a grant of authority to the Executive to refuse to validate the passports of United States citizens for travel to Cuba. That Act provides, in pertinent part:

"The Secretary of State may grant and issue passports * * * under such rules as the President shall designate and prescribe for and on behalf of the United States * * *."

This case is therefore not like Kent v. Dulles, supra, where we were unable to find, with regard to the sort of passport refusal involved there, an administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved it. * * * It must be remembered, in reading this passage, that the issue involved in Kent was whether a citizen could be denied a passport because of his political beliefs or associations. In finding that history did not support the position of the Secretary in that case, we summarized that history "so far as material here"—that is, so far as material to passport refusals based on the character of the particular applicant. In this case, however, the Secretary has refused to validate appellant's passport not because of any characteristic peculiar to appellant, but rather because of foreign policy considerations affecting all citizens.

* * *

The right to travel *within* the United States is of course also constitutionally protected, cf. Edwards v. People of State of California, 314 U.S. 160, 62 S.Ct. 164. But that freedom does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area or the nation as a whole. So it is with international travel. That the restriction which is challenged in this case is supported by the weightiest considerations of national security is perhaps best pointed up by recalling that the Cuban missile crisis of October 1962 preceded the filing of appellant's complaint by less than two months.

Appellant also asserts that the Secretary's refusal to validate his passport for travel to Cuba denies him rights guaranteed by the First Amendment. His claim is different from that which was raised in Kent v. Dulles, and Aptheker v. Secretary of State, for the refusal to validate appellant's passport does not result from any expression or association on his part; appellant is not being forced to choose between membership in an organization and freedom to travel. Appellant's allegation is, rather, that the "travel ban is a direct interference with the First Amendment rights of citizens to travel abroad so that they might acquaint themselves at first-hand with the effects abroad of our Government's policies, foreign and domestic, and with conditions abroad which might affect such policies." We must agree that the Secretary's refusal to validate passports for Cuba renders less than wholly free the flow of information concerning that country. While we further agree that this is [a] factor to be considered in determining whether appellant

has been denied due process of law, we cannot accept the contention of appellant that it is a First Amendment right which is involved. For to the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition (and it would be unrealistic to assume that it does not), it is an inhibition of action. There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.

* * *

The District Court therefore correctly dismissed the complaint, and its judgment is affirmed.

Affirmed.

Separate dissents were filed by Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice GOLDBERG.

### NOTES AND QUESTIONS

1. The disabilities that restrictions on travel place on writers and public figures is illustrated Mr. Justice Goldberg's opinion for the Court in *Aptheker*. There it was pointed out by *Aptheker* in his complaint that he wished to travel to Europe to acquire information and then "write, publish, teach, and lecture." Aptheker's effort to connect travel with the freedom to gather information and news was successful, for while the Court in *Aptheker* decided the case on freedom of association grounds, the Court did say that freedom of travel is closely related to free speech. Perhaps the Court means that, if foreign travel is restricted, free speech is restrained because the sources of information abroad, necessary to make discussion, debate and research meaningful and challenging, are artifically dried up.

2. The rejection of a First Amendment right of travel in *Zemel* raises the question of what difference it makes since freedom to travel is protected under the Fifth Amendment. Some commentators insist it makes a difference. It has been argued that travel should be "analyzed according to the preferred position theory of the First Amendment, an analysis which would have entitled it to greater protection than is available under the Fifth Amendment alone." See Note, *Travel and the First Amendment: Zemel v. Rusk,* 14 U.C.L.A.L.Rev. 470 at 472 (1966). This position is defended on the ground that the liberty which may not be deprived without due process of law under the Fifth Amendment involves a balancing test between the individual's right to travel and the need of government for the travel restriction at stake. But it is argued that a First Amendment approach would measure the damage to the information process as opposed to the governmental need for the travel restriction. Apparently it is felt for such a task that the "preferred position" approach would be used and thus the First Amendment interest in an unclogged information process would more often prevail. However, it is not at all clear that a "preferred position" approach is anything close to the dominant test in First Amendment adjudication. Similarly, "balancing" tests under the First Amendment have been known to be as crude as any that might be used under the Fifth. See Mr. Justice Black's dissent in *Barenblatt v. United States,* supra, text, p. 82.

3. In *Zemel,* reliance on the First Amendment, not for its protection of freedom of association, but for a freedom of travel to gather news and information was dealt with. The Court said "freedom to travel is not a First Amendment

right." And in terms not very hopeful for the future of a constitutional doctrine for freedom of information Chief Justice Warren said *"The right to speak and publish does not carry with it the unrestrained right to gather information."*

The Chief Justice appeared to be fearful that recognizing a freedom to travel predicated on the First Amendment as the basis for an attack on passport restriction because of a "decreased data flow" would submit too broad an area of governmental regulation to First Amendment attack.

From the freedom of information point of view, is the problem so much one of finding the proper constitutional home for freedom of travel or is it one of stimulating the recognition that the newsman's interest in travel, in terms of acquiring the information to intelligently inform the public, is vitally related to the objective of producing an adequately informed electorate? Judicial "balancing" tests between abstractions such as the "individual" (otherwise unidentified) and the "state" are unlikely to take account of such interests.

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## KLEINDIENST V. MANDEL: THE RIGHT OF THE FOREIGN JOURNALIST TO ENTER THE UNITED STATES

The *Mandel* case, which follows, does not concern the right of the American journalist to go abroad, but the converse, the right of a foreign journalist to enter the United States.

The distinguished Belgian journalist and Marxist theorist, Ernest Mandel, had been invited to participate in academic conferences in this country. Mandel was found ineligible for admission to this country under § 212(a)(28)(D) and (G)(2) of the Immigration and Nationality Act of 1952, which denies entry to those who advocate or publish "the economic, international and governmental doctrines of world communism." The Attorney General has the power to waive ineligibility under § 212(d) of the Immigration and Nationality Act. The Attorney General declined to waive ineligibility on the ground that on a 1968 trip to this country Mandel had engaged in activities not stated in his visa application. Mr. Justice Douglas described these activites as follows:

> "* * * the activities which the Attorney General labeled 'flagrant abuses' of Dr. Mandel's opportunity to speak in the United States appear merely have to have been his speaking at more universities than his visa application indicated. * * *"

A three judge federal court ruled that American citizens have a First Amendment right to have Mandel enter and to hear his views. The Supreme Court reversed. Declaring that Congress constitutionally has complete authority to grant or deny entry to aliens, the Court held that when the Attorney General for a bona fide reason refuses to waive the ineligibility for entry of an alien, the judiciary should not set the determination aside.

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## KLEINDIENST v. MANDEL

408 U.S. 753, 33 L.Ed.2d 683, 92 S.Ct. 2576 (1972).

Mr. Justice BLACKMUN delivered the opinion of the Court.

The appellees have framed the issue here as follows:

"Does appellants' action in refusing to allow an alien scholar to enter the country to attend academic meetings violate the First Amendment rights of American scholars and students who had invited him?"

* * *

In March Mandel and six of the other appellees instituted the present action against the Attorney General and the Sec-

retary of State. The two remaining appellees soon came into the lawsuit by an amendment to the complaint. All the appellees who joined Mandel in this action are United States citizens and are university professors in various fields of the social sciences. They are persons who invited Mandel to speak at universities and other forums in the United States or who expected to participate in colloquia with him so that, as the complaint alleged, "they may hear his views and engage him in a free and open academic exchange."

Plaintiffs claim that the statutes are unconstitutional on their face and as applied in that they deprive the American plaintiffs of their First and Fifth Amendment rights. Specifically, these plaintiffs claim that the statutes prevent them from hearing and meeting with Mandel in person for discussions, in contravention of the First Amendment; that § 212(a)(28) denies them equal protection by permitting entry of "rightists" but not "leftists" and that the same section deprives them of procedural due process; that § 212(d)(3)(A) is an unconstitutional delegation of congressional power to the Attorney General because of its broad terms, lack of standards, and lack of prescribed procedures; and that application of the statutes to Mandel was "arbitrary and capricious" because there was no basis in fact for concluding that he was ineligible, and no rational reason or basis in fact for denying him a waiver once he was determined ineligible. Declaratory and injunctive relief was sought.

* * *

In a variety of contexts this Court has referred to a First Amendment right to "receive information and ideas."

* * *

In the present case, the District Court majority held:

"The concern of the First Amendment is not with a non-resident alien's individual and personal interest in entering and being heard, but with the rights of the citizens of the country to have the alien enter and to hear him explain and seek to defend his views; that, as *Garrison* [v. Louisiana, 379 U.S. 64, 85 S. Ct. 209, 13 L.Ed.2d 125 (1964)] and *Red Lion* observe, is of the essence of self-government." 325 F.Supp., at 631. The Government disputes this conclusion on two grounds. First, it argues that exclusion of Mandel involves no restriction on First Amendment rights at all since what is restricted is "only action—the action of the alien coming into this country." Brief, at 29. Principal reliance is placed on Zemel v. Rusk, 381 U.S. 1 (1965), where the Government's refusal to validate an American passport for travel to Cuba was upheld. The rights asserted there were those of the passport applicant himself. The Court held that his right to travel and his asserted ancillary right to inform himself about Cuba did not outweigh substantial "foreign policy considerations affecting all citizens" that, with the backdrop of the Cuban missile crisis, were characterized as the "weightiest considerations of national security." Id., at 13, 16, 85 S.Ct., at 1279. The rights asserted here, in some contrast, are those of American academics who have invited Mandel to participate with them in colloquia debates, and discussion in the United States. In light of the Court's previous decisions concerning the "right to receive information," we cannot realistically say that the problem facing us disappears entirely or is nonexistent because the mode of regulation bears directly on physical movement. In *Thomas* the registration requirement on its face concerned only action. In *Lamont* too, the face of the regulation dealt only with the Government's undisputed power to control physical entry of mail into the country. See United States v. Robel, 389 U.S. 258, 263 (1967).

The Government also suggests that the First Amendment is inapplicable because appellees have free access to Mandel's ideas through his books and speeches, and because "technological developments," such as tapes or telephone hookups, readily supplant his physical presence. This argument overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning. While alternative means of access to Mandel's ideas might be a relevant factor were we called upon to balance First Amendment rights against governmental regulatory interests —a balance we find unnecessary here in light of the discussion that follows * * *—we are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access.

* * *

The Court without exception has sustained Congress' "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." * * *

* * * The appellees recognize the force of these many precedents. In seeking to sustain the decision below, they concede that Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by § 212(a)(28)(D) and (G)(v), and that First Amendment rights could not override that decision. But they contend that by providing a waiver procedure, Congress clearly intended that persons ineligible under the broad provision of the section would be temporarily admitted when appropriate "for humane reasons and for reasons of public interest." S. Rep.No.1137, Committee on the Judiciary, 82d Cong., 2d Sess., 12 (1952). They argue that the Executive's implementation of this congressional mandate through decision whether to grant a waiver in each individual case must be limited by the First Amendment rights of persons like appellees. Specifically, their position is that the First Amendment rights must prevail at least where the Government advances no justification for failing to grant a waiver. They point to the fact that waivers have been granted in the vast majority of cases.

Appellees' First Amendment argument would prove too much. In almost every instance of an alien excludable under § 212(a)(28), there are probably those who would wish to meet and speak with him. The ideas of most such aliens might not be so influential as those of Mandel, nor his American audience so numerous, nor the planned discussion forums so impressive. But the First Amendment does not protect only the articulate, the well known, and the popular. Were we to endorse the proposition that governmental power to withhold a waiver must yield whenever a bona fide claim is made that American citizens wish to meet and talk with an alien excludable under § 212(a)(28), one of two unsatisfactory results would necessarily ensue. Either every claim would prevail, in which case the plenary discretionary authority Congress granted the Executive becomes a nullity, or courts in each case would be required to weigh the strength of the audience's interest against that of the Government in refusing a waiver to the particular alien applicant, according to some as yet undetermined standard. The dangers and the undesirability of making that determination on the basis of factors such as the size of the audience or the probity of the speaker's ideas are obvious. Indeed, it is for precisely this reason that the waiver decision has, properly, been placed in the hands of the Executive. * * *

In summary, plenary congressional power to make policies and rules for exclusion of aliens has long been firmly es-

tablished. In the case of an alien excludable under § 212(a)(28), Congress has delegated conditional exercise of this power to the Executive. We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant. What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address or decide in this case.

Reversed.

Mr. Justice DOUGLAS, dissenting.

* * *

An ideological test, not a racial one, is used here. But neither, in my view, is permissible, as I have indicated on other occasions. Yet a narrower question is raised here. Under the present Act aliens who advocate or teach "the economic, international, and governmental doctrines of world communism" are ineligible to receive visas "except as otherwise provided in this chapter." The "except" provision is contained in another part of the same section and states that an inadmissible alien "may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular office" admit the alien "temporarily despite his inadmissibility."

* * *

Dr. Mandel is not the sole complainant. Joining him are the other appellees who represent the various audiences which Dr. Mandel would be meeting were a visa to issue. While Dr. Mandel, an alien who seeks admission, has no First Amendment rights while outside the Nation, the other appellees are on a different footing. The First Amendment involves not only the right to speak and publish but also the right to hear, to learn, to know. Martin v. Struthers, 319 U.S. 141, 143, 63 S.Ct. 862, 863, 87 L.Ed. 1313; Stanley v. Georgia, 394 U. S. 557, 564, 89 S.Ct. 1243, 1247, 22 L. Ed.2d 542.

Can the Attorney General under the broad discretion entrusted in him decide

> that one who maintains that the earth is round can be excluded?

* * *

I put the issue that bluntly because national security is not involved. Nor is the infiltration of saboteurs. The Attorney General stands astride our international terminals that bring people here to bar those whose ideas are not acceptable to him. Even assuming, *arguendo,* that those on the outside seeking admission have no standing to complain, those who hope to benefit from the traveller's lectures do.

Thought control is not within the competence of any branch of government. Those who live here may need exposure to the ideas of people of many faiths and many creeds to further their education. We should construe the Act generously by that First Amendment standard, saying that once the State Department has concluded that our foreign relations permit or require the admission of a foreign traveler, the Attorney General is left only problems of national security, importation of heroin, or other like matters within his competence.

We should assume that where propagation of ideas is permissible as being within our constitutional framework, the Congress did not undertake to make the Attorney General a censor. * * *

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN joins, dissenting.

* * *

I do not mean to suggest that simply because some Americans wish to hear an alien speak, they can automatically com-

pel even his temporary admission to our country. Government may prohibit aliens from even temporary admission if exclusion is necessary to protect a compelling governmental interest. Actual threats to the national security, public health needs, and genuine requirements of law enforcement are the most apparent interests which would surely be compelling. But in Dr. Mandel's case, the Government has, and claims, no such compelling interest. Mandel's visit was to be temporary. * * * The only governmental interest * * * is the Government's desire to keep certain ideas out of circulation in this country. This is hardly a compelling governmental interest. * * * Without any claim that Mandel "live" is an actual threat to this country, there is no difference between excluding Mandel because of his ideas and keeping his books out because of their ideas. Neither is permitted. Lamont v. Postmaster General. * * *

### NOTES AND QUESTIONS

1. Although the Belgian journalist Mandel was not in the end allowed to enter this country, the Court's opinion in *Kliendienst v. Mandel* may prove helpful in other situations. The Court did acknowledge and support a First Amendment right to "receive information and ideas." Furthermore, the Court's analysis of *Zemel v. Rusk* offers new opportunities for the future. The Court pointed out that in *Zemel* what was at stake were the rights of the passport applicant. His interest in informing himself did not outweigh the national security interest. But the rights of the American academics who invited Mandel to this country and who wished to hear him speak in light of the First Amendment right to receive information were deemed to weigh more heavily against a national security claim. Furthermore, the Court made the important declaration that a right to acquire information is not satisfied by access to a man's ideas through his writings. The Court appears to believe that if there is a First Amendment right to receive information there may be no substitute for "sustained face to face debate, discussion, and questioning" if that right is to be satisfied.

2. The Court ruled against Mandel because of the plenary congressional power which exists to regulate the admission and exclusion of aliens. The Court said that it would balance First Amendment rights against a national security claim only when the Attorney General has exercised discretion "for which no justification whatsoever is advanced." There is more than a hint in *Mandel* that in such a situation, the balancing process might weigh in favor of the journalist because so much more is at stake than just the desire of an alien journalist to visit this country. What is at stake, as the lower federal court said in *Mandel,* is the right "of the citizens of the country to have the alien enter and to hear him explain and seek to defend his views."

3. The theory of the lower federal court in *Mandel* is that American citizens have the First Amendment right to receive information which includes the right to have a foreign journalist enter this country in order to hear him. If this theory should ever be adopted by the Supreme Court in an explicit holding, might the case also affect the status of American journalists who wish to go abroad? In *Zemel v. Rusk,* Zemel wished to travel to satisfy his "curiosity" about conditions in Cuba. But if a group of citizens of the United States have a collective right to authorize the admission of an alien otherwise ineligible for admission, then shouldn't an American newsman have a right to go abroad in order to receive information first hand in behalf of American citizens who wish to know about conditions in foreign countries?

## SECTION 3. INFLUENCING THE OPINION PROCESS: LOBBYING, CORRUPT PRACTICES, AND REGULATION OF CAMPAIGN FINANCING

### A. LOBBYING: PROBLEMS OF DEFINITION

## UNITED STATES v. RUMELY

345 U.S. 41, 73 S.Ct. 543, 97 L.Ed. 770 (1953).

**Editorial Note:**

The Select Committee on Lobbying Activities of the United States House of Representatives was created by House Resolution 298 on August 12, 1949. The Resolution authorized the Committee to study and investigate:

"* * * (1) all lobbying activities intended to influence, encourage, promote, or retard legislation; and (2) all activities of agencies of the Federal Government intended to influence, encourage, promote or retard legislation."

The Select Committee wished one Rumely, secretary of a group styled the Committee for Constitutional Government, to disclose the names to it of those who made book purchases from the Rumely group. Among the disclosures sought by the Select Committee from the Rumely group was the name of a Toledo woman who gave Rumely $2000 for distribution of a book by John T. Flynn. Rumely refused to make the disclosures and was convicted under a federal statute punishing refusal "to give testimony or to produce relevant papers 'upon any matter' under congressional inquiry." The Court of Appeals reversed the federal district court. The Supreme Court, per Mr. Justice Frankfurter, affirmed. The Court sought to avoid the constitutional issues and gave a very limited or narrow construction to "lobbying activities." The Court interpreted that phrase to apply to "representations made directly to the Congress, its members, or its committees." The Supreme Court, relying on this interpretation of "lobbying activities," held that the House of Representatives had not authorized the Select Committee to ask for the information it sought from Rumely.

Mr. Justice DOUGLAS concurring:

* * *

I cannot say, in the face of (the) close consideration of the question by the House itself, that the Select Committee exceeded its authority. The House of Representatives made known its construction of the powers it had granted. If at the beginning there were any doubts as to the meaning of Resolution 298, the House removed them. The Court is repudiating what the House emphatically affirmed, when it now says that the Select Committee lacked the authority to compel respondent to answer the questions propounded.

Of necessity I come then to the constitutional questions. Respondent represents a segment of the American press. Some may like what his group publishes; others may disapprove. These tracts may be the essence of wisdom to some; to others their point of view and philosophy may be anathema. To some ears their words may be harsh and repulsive; to others they may carry the hope of the future. We have here a publisher who through books and pamphlets seeks to reach the minds and hearts of the American people. He is different in some respects from other publishers. But the differences are minor. Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas. * * *

If the present inquiry were sanctioned, the press would be subjected to harassment that in practical effect might be as serious as censorship. A publisher, compelled to register with the Federal Gov-

ernment, would be subjected to vexatious inquiries. A requirement that a publisher disclose the identity of those who buy his books, pamphlets, or papers is indeed the beginning of surveillance of the press. True, no legal sanction is involved here. Congress has imposed no tax, established no board of censors, instituted no licensing system. But the potential restraint is equally severe. The finger of government leveled against the press is ominous. Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. Then the spectre of a government agent will look over the shoulder of everyone who reads. The purchase of a book or pamphlet today may result in a subpoena tomorrow. Fear of criticism goes with every person into the bookstall. The subtle, imponderable pressures of the orthodox lay hold. Some will fear to read what is unpopular, what the powers-that-be dislike. When the light of publicity may reach any student, any teacher, inquiry will be discouraged. The books and pamphlets that are critical of the administration, that preach an unpopular policy in domestic or foreign affairs, that are in disrepute in the orthodox school of thought will be suspect and subject to investigation. The press and its readers will pay a heavy price in harassment. But that will be minor in comparision with the menace of the shadow which government will cast over literature that does not follow the dominant party line. If the lady from Toledo can be required to disclose what she read yesterday and what she will read tomorrow, fear will take the place of freedom in the libraries, book stores, and homes of the land. Through the harassment of hearings, investigations, reports, and subpoenas government will hold a club over speech and over the press. Congress could not do this by law. The power of investigation is also limited. Inquiry into personal and private affairs is precluded. And so is any matter in respect to which no valid legislation could be had. Since Congress could not by law require of respondent what the House demanded, it may not take the first step in an inquiry ending in fine or imprisonment.

### NOTES AND QUESTIONS

1. There is nothing in the majority opinion in *Rumely* which would prohibit a more broadly worded authorizing resolution by the Select Committee, which would indeed permit a governmental shadow "over literature that does not follow the dominant party line" either in the form of investigations into and hearings concerning purchases of books or pamphlets or requests that publishers furnish the names of those who buy their books. Does this explain why Justice Douglas rejected the Frankfurter rationale in *Rumely* while joining in the Frankfurter result?

2. *Talley v. California,* text, p. 159, is completely consistent with the result in *Rumely,* isn't it? *Rumely* did not have to tell the Select Committee who the lady in Toledo was who was buying the books of John T. Flynn. This result, as we have seen, was based on non-constitutional grounds. But *Talley's* case really supplies the rationale which might have been used if Mr. Justice Douglas' wish had prevailed and the case had been decided on constitutional grounds. How? By asserting that the lady in Toledo did not have to reveal her identity because the First Amendment protected anonymous expression?

3. 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 "re-

ceiving any contributions or expending any money" 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.

A key section provides that "any person (except a political committee as defined in the Federal Corrupt Practices Act, and duly organized State or local committees of a political party), who by himself, or through any agent or employee or other persons in any manner whatsoever, directly or indirectly, solicits, collects, or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid, in the accomplishment of the following purposes: (a) The passage or defeat of any legislation by the Congress of the United States, (b) To influence, directly or indirectly, the passage or the defeat of any legislation by the Congress of the United States," is subject to the law.

The Court noted in *Harriss* that many states had enacted legislation regulating lobbying. See Smith, *Regulation of National and State Legislative Lobbying,* 43 U.Det.L.J. 663 (1966). But the most important aspect of the *Harriss* case was that it clarified what to some extent the *Rumely* case left open: some government regulation of lobbying was permissible. 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.* Justice Douglas still insisted that the narrow scope the Court gave to the Federal Regulation of Lobbying Act was still inadequate. He wrote: "No construction we give it (the Act) today will make clear retroactively the vague standards that confronted appellees when they did the acts now charged against them as criminal." What does he mean? Do you agree with him?

Justice Jackson also protested in a dissent in *Harriss* the Court's rewriting of the Lobbying Act in order to save it. His position appeared to be that as actually written the Act trespasses rather heavily on the limitation in the First Amendment prohibiting Congress from abridging the "right of the people * * * to petition the government for a redress of grievances." Justice Jackson argued that the task of writing a valid lobbying statute, a task which Jackson thought was constitutionally possible, should be left to the Congress and not attempted by the Court.

The effort of the Court in *Harriss* to rewrite the Lobbying Act has 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." Professor Jerrold Walden has criticized this construction of the Act because it results in making "behemoth lobbying organizations such as the NAM and the Chamber of Commerce * * * largely immune from the requirements of the Act." See Walden, *More about Noerr—Lobbying, Antitrust and the Right to Petition.* 14 U.C.L.A. L.Rev. 1211 at 1233–1234 (1967).

What relationship does removing from the scope of regulation organizations which spent their own funds or fund ex-

penditures 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? *Cf.* discussion in *United States v. International Union, United Automobile, Aircraft and Agricultural Imp. 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 involved consideration of the Federal Corrupt Practices Act.

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## B. CORRUPT PRACTICES LEGISLATION AND THE PRESS

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### MILLS v. ALABAMA

384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966).

Mr. 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 of 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 confusive 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.

Mr. Justice DOUGLAS, with whom Mr. Justice BRENNAN joins, concurring.

Separate opinion of Mr. Justice HARLAN.

* * *

### NOTES AND QUESTIONS

1. Assume that the Alabama Corrupt Practices Act were amended to provide an exception for "last minute charges" made just prior to an election so that charges could be answered in the press even on election day. The purpose of the amendment would be to render the Alabama Corrupt Practices Act a reasonable restriction of the press. Do you think Mr. Justice Black would have been persuaded by such an attempt? See text, Ch. VIII, pp. 568, 569. Would even Justice Black have acquiesced if the Alabama Corrupt Practices Act provided for a two-week moratorium on electioneering or vote solicitation preceding all state elections?

2. In *Mills,* the Alabama Corrupt Practices Act case, the argument was pressed on the Court which, if accepted, would have deferred decision of First Amendment issues: it was contended that the judgment before the Court was not sufficiently final to be reviewed by the Supreme Court. Justice Douglas concurred in the result in *Mills* and gave emphatic approval to the Court's decision to face the constitutional issues in view of what he considered to be the consequences of lack of resolution by the United States Supreme Court. (The Alabama Corrupt Practices Act provision at issue had been upheld as constitutional by the

Alabama Supreme Court.) The "chilling" effect on the Alabama press was described as follows:

"The threat of penal sanctions has, we are told, already taken its toll in Alabama: the Alabama Press Association and the Southern Newspaper Publishers Association, as amicus curiae, tell us that since November 1962 editorial comment on election day has been nonexistent in Alabama."

Narrow construction of the term "lobbying" in *Rumely* and *Harriss* minimized the investigative scope of the legislative investigation in *Rumely* 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?

3. The student should note Mr. Justice Clark's discussion of state corrupt practices legislation (text, p. 161) in his dissent in *Talley v. California,* 362 U.S. 60 (1960), as well as the discussion of the Federal Regulation of Lobbying Act in the text, p. 161.

4. Cf. *Mills v. Alabama, supra,* with the decision of the Supreme Court of Florida sustaining a right of reply to political candidates during campaigns, *Tornillo v. Miami Herald,* this text, p. 594.

5. The Federal Corrupt Practices Act, 18 U.S.C.A. § 610 (1964) prohibited campaign contributions and expenditures by labor unions and corporations in federal elections. In *United States v. International Union United Automobile, Aircraft and Agricultural Workers of America, 352 U.S. 567, 1 L.Ed.2d 563, 77 S. Ct. 529 (1957),* the Court upheld an indictment charging a union with having used union dues to sponsor commercial television broadcasts designed to influence the electorate to elect certain candidates for Congress in the 1954 election.

In the *Auto Workers* case Frankfurter pointed out that the Federal Corrupt Practices Act had it origins in the "popular feeling that aggregate capital unduly influenced politics. * * *" Discussing the origins of the provision under review Frankfurter wrote:

"As the historical background of this statute indicates, its aim was not merely to prevent the subversion of the integrity of the electoral process. Its underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government.

This Act of 1907 was merely the first concrete manifestation of a continuing congressional concern for elections 'free from the power of money.' "

It is interesting that Frankfurter distinguished a previous case involving the Federal Corrupt Practices Act in a manner having significance for the future of regulation of lobbying:

"United States v. CIO, 335 U.S. 106, presented a different situation. The decision in that case rested on the Court's reading of an indictment that charged defendants with having distributed only to union members or purchasers an issue, Vol. 10, No. 28, of 'The CIO News,' a weekly newspaper owned and published by the CIO. That issue contained a statement by the CIO president urging all members of the CIO to vote for a certain candidate. Thus, unlike the union-sponsored political broadcast alleged in this case, the communications for which the defendants were indicted in CIO was neither directed nor delivered to the public at large. The organization merely distributed its house organ to its own people. The evil at which Congress has struck * * * is the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party."

If a labor *newspaper* were distributed to the public at large urging a particular candidate's election, would that warrant an indictment of the union under the Federal Corrupt Practices Act? See *United States v. CIO, 335 U.S. 106 (1948).*

Frankfurter's analysis of *United States v. CIO,* was caustically criticized in Douglas' dissent in the *Auto Workers* case: "One has a right to freedom of speech not only when he talks to his friends but also when he talks to the public. It is startling to learn that a union spokesman or the spokesman for a corporate interest has fewer constitutional rights when he talks to the public than when he talks to members of his group." But is Douglas' irony justified? What Frankfurter's analysis suggests is that an individualistic theory of expression is meaningful only if an individualistic approach to politics and opinion exists and is practised. If the opinion process is to be viewed as fair game for power aggregates, whether in the form of capital or labor, to mold or warp as they choose "the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government" is threatened or undermined.

Professor Walden has urged that a distinction be recognized between "lobbying which often mobilizes political and economic pressures, and petitioning which is grounded in entreaty." See Walden, *More About Noerr-Lobbying, Antitrust and the Right to Petition,* 14 U.C.L.A.L. Rev. 1211 at 1243–1244 (1967).

Such an analysis may be illuminating.

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### C. REGULATION OF CAMPAIGN FINANCING

In the aftermath of Watergate with its disclosures of misbehavior in the financing of political campaigns, new interest has been directed to legislative efforts to clean up the whole process of campaign financing. In the late fall of 1973, a three judge federal court invalidated § 104(b) of the Federal Election Campaign Act of 1971 which prohibited certain forms of media advertising on behalf of candidates for federal office unless the candidate certifies that the cost of such advertising will not exceed campaign spending limits.

The decision came as a shock to those who viewed legislation imposing limitations on campaign spending as a particularly salutary means of equalizing the opportunity to run for political office.

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## AMERICAN CIVIL LIBERTIES UNION, INC. v. W. PAT JENNINGS

366 F.Supp. 1041 (D.C.D.C.1973).

PARKER, Judge: In this case plaintiffs seek injunctive and declaratory relief against the Clerk of the United States House of Representatives and other government officials charged with the responsibility of supervising and enforcing the provisions of the Federal Election Campaign Act of 1971, Public Law 92–225, 86 Stat. 3 (FECA or Act) and applicable regulations promulgated thereunder, 11 C.F.R. § 1.1 et seq. (Regulations).

Plaintiffs challenge, as violative of the First Amendment, the regulatory procedure adopted to enforce spending limitations in the communications media imposed upon candidates for Federal office by Title I of the Act. They also seek to void, as unconstitutional on their face and as applied, certain provisions contained in Title III of FECA, requiring covered "political committees" to comply with extensive reporting and disclosure requirements.

We find that the challenged provisions of Title I impose impermissible prior restraints and their enforcement is enjoined. We enter a declaratory judgment clarifying and restricting the scope of Title III which removes plaintiffs from its purview.

The underlying facts and the present posture of this litigation can be briefly summarized. In early September 1972, plaintiffs, the American Civil Liberties Union (ACLU) and the New York Civil Liberties Union (NYCLU), * * * submitted * * * to The New York Times (Times) a proposed advertisement which expressed their opposition to the Nixon Administration backed legislation designed to limit court ordered busing. The advertisement, which appears fully as an appendix to this opinion, listed, in the form of an "honor roll," the names of 102 United States Representatives who had previously opposed this anti-busing policy. Plaintiffs were hopeful that through publication of the advertisement public support would be generated favorable to the position they had adopted on this highly publicized and controversial problem of national import. Any intention to aid in the election or re-election campaign of any political candidate has been specifically denied.

The Times, through one of its responsible officers, and on advice of counsel, notified the plaintiffs that their failure to comply with certain certification requirements mandated by Title I of the Act precluded publication of the advertisement. Because those requirements were not satisfied by the plaintiff, the Times, rather than risk criminal penalties under FECA, refused the publication for print.

On the heels of this refusal plaintiffs filed with the Court the present suit challenging the constitutionality of the FECA provisions cited by the Times in rejecting the advertisement, and sought injunctive relief prohibiting their enforcement. * * *

Plaintiffs further challenged and requested the Court to enjoin the enforcement of Title III of the Act, which establishes certain registration, filing and notice requirements for organizations engaged in the political process. In this regard plaintiffs contend that the printing of the proposed communication would, in effect, cause them to be deemed a political committee within the meaning of the Title, thereby compelling them to disclose, *inter alia,* lists of their contributors. Such disclosure, they allege, violates their constitutional right to freedom of association. At no time have the defendants attempted or threatened to enforce the Title III disclosure provisions against the plaintiffs. * * *

* * * [T]he Court found harbored within the provisions of Titles I and III sufficient First Amendment impediments and restraints to warrant the issuance of a preliminary injunction. * * *

The threat of prosecution under FECA having been eliminated, The New York Times published, on October 27, 1972, the revised anti-busing advertisement submitted by the plaintiffs. This advertisement contains in its entirety and embellishes upon, by reference to this suit, the original submission of September, 1972. The defendants thereafter moved to dismiss the action or, in the alternative, for an order granting summary judgment on the merits. Plaintiffs cross-moved for summary judgment and a supporting memorandum was submitted by The New York Times.

* * *

### *THE MERITS*

#### *Title I of the Act*

The plaintiffs do not question the authority of Congress to pass legislation regulating Federal elections. Indeed, authority in that area appears to rest on solid foundation. They do challenge, however, certain procedures and requirements

adopted to secure adherence to the general policies established by the Act.

* * *

Within this framework, § 104 of the Act and its implementing regulations require that the media, before making regular charges for publication, be assured — in fact, take reasonable steps to substantiate any assurance — that presumably valid requirements imposed by Congress upon Federal office seekers, and those actively supporting or opposing such candidacy, have been satisfied. Publication without these representations, on the one hand, makes the media vulnerable to criminal prosecution. In this respect, Title I is tantamount to government prescription of what may or may not appear in public print. On the other hand, compliance with the certification requirements is nothing less than the enforcement of a system of prior restraints upon publication.

Attempts to impose prior restraints have been consistently met with judicial disfavor.

* * *

Title I of the Act establishes impermissible prior restraints, discourages free and open discussion of matters of public concern and as such must be declared an unconstitutional means of effectuating legislative goals.

Of course, the prior restraints at issue in this case are not imposed by the Government directly. But the fact that censorship is indirect, accomplished by means of criminal sanctions directed to the media, in no way diminishes its constitutional infirmity. On the contrary, we think the unconstitutionality of these prior restraints is, if anything, aggravated by the means chosen to enforce them.

Exposure to criminal penalties under Title I and the Regulations places a severe and unnecessary burden upon the communications media to determine whether or not the proposed advertisement should be designated as being made on behalf of a candidate. If the media are not satisfied that the advertisement falls outside FECA's scope, and if the required certification is indeed lacking, the advertisement will not be published.

This problem, although of independent severity, is magnified by the failure of Congress to define clearly the crucial phrase "on behalf of a candidate" so as to exclude from its coverage expressions of opinion unintended and incapable of regulation. In view of such imprecision, it is quite conceivable, as the background of this suit so pointedly evidences, that organizations similar to plaintiffs (nonpartisan and politically unaffiliated) may submit matters for print which, although issue oriented, will nevertheless be viewed by the media, and understandably so, as requiring FECA certification. The fact that the supervisory officers may later conclude differently does not vitiate the First Amendment infirmities presented by Title I, the terms of which are, or at least should be, designed in part to offer guidance to media personnel charged with the delicate responsibility of determining the applicability of FECA. These individuals, not the defendants, must in the first and crucial instance interpret and evaluate the strictures of the Act as they relate to a particular proposed communication. Having not only been placed in the unenviable position of enforcers of this statute, which is aimed at regulating politicians and not the media, but also faced with criminal sanctions for any questionable performance of this duty, the press is entitled to, and the Constitution demands, proper guidance free from ambiguity and vagueness.

* * *

Although Title I does not technically constitute a licensing system, the effects of its procedure are sufficiently comparable so as to permit this Court to apply that principle.

Each time an advertisement is submitted which relates to matters of public concern and in which candidates for federal office are in some way identified the media must determine whether the message is affirmatively "on behalf of" that candidate, or if it is in denigration of any opposing candidate. The legislation provides scarce definitional or clarifying assistance under which the seller of advertising space can confidently proceed. Considering the penalties involved and the presumptions built into the Regulations it is reasonably predictable, if not certain, that any and all doubts will be resolved in favor of requiring the certification. The end result is either that the affirmatively named candidates must give the necessary certification or the person or organization submitting an ad deemed "derogatory", as the government contends was done in this case, must certify non-affiliation. In either case, groups similar to plaintiff will be forced to adhere to and be restrained by a system of prior restraints. Anyone wishing to voice views on public issues which inherently touch upon Federal candidates and their positions, must first either 1) obtain the imprimatur of a candidate on whose side they may be allied concerning any given issue or 2) in the case of "derogatory" statements they must make representation as to non-authorization or non-consent.

However, it must be borne in mind that, in the latter situation, the media is (sic) obligated to require a § 4.4 certification from opposing candidates whenever their consent may be reasonably implied under the circumstances. The deleterious effects of this Title upon the First Amendment can readily be demonstrated. Candidates favorably named in ads, or those whose consent to derogatory advertisements may be implied, are provided with the opportunity of effectively blocking publication by refusing to make the requisite certification statements. They simply may not desire, for political reasons or otherwise, their names associated with certain organizations, notwithstanding the complimentary tone or benefit derived the communication. By refusing to comply with the Act's requirements, any such candidate wields potential veto power over attempts to communicate public views. This presents additional and grave constitutional questions of a candidate's ability to bridle a citizens' or an organizations' right to speak "on that candidates behalf," even as that term is defined in the amended version of Regulation § 4.4(a). Such support might prove embarrassing or detrimental to the candidate's campaign, in which case the candidate is free to reject such support. But the airing of opinion in a public forum must not be subordinated to political expediencies. The final authority given to a candidate under the Act to prohibit the expression of views made on his behalf, albeit by those from whom he may wish to be disassociated, presents an opportunity for such subordination and in so doing may dampen the free and robust ventilation of opinion.

If an advertisement falls within the derogatory category, the advertiser must, to the satisfaction of the media, establish that there has been no authorization of, or consent, either implied or actual, by Federal candidates opposed to the denigrated candidate. The requirements levied upon the press in this regard — to establish the veracity of non-authorization or non-consent statements — place a burden upon the press (significantly nowhere delineated or elaborated upon) to look behind any representations of the communicator. Whatever imprecision may exist in the language of § 104, Regulation § 4.5 leaves no doubt that the media *must* take certain precautions with regard to derogatory ads and that any doubts must be resolved in favor of requiring § 4.11 certifications. These prior steps to publication carry with them

the ominous threat of preventing the publication of views by persons and organizations not intended to be covered by the Act.

These required procedures of both the media and the advertiser, considered in conjunction with the relative ease with which a candidate may prevent publication, create the prohibited previous restraints.

* * * Accordingly, we permanently enjoin its enforcement.

* * *

In light of the foregoing we now conclude that plaintiff organizations, on the basis of the advertisement, are not subject to Title III regulation. The government's acquiescence in that conclusion notwithstanding, the protection of constitutional rights requires that the vagueness surrounding Title III complained of in this suit be removed. The clarification of the Title and the declaratory judgment are designed to meet that end. * * *

### NOTES AND QUESTIONS

1. Is a principal constitutional defect of the provisions of the Federal Election Campaign Act of 1971 that the press is made the involuntary agent of government? The classic example of a prior restraint involved a government administrator who scrutinized the content of a publication before permitting its publication. Under the Federal Election Campaign Act (FECA), the newspaper is put in the place the government censor occupied in common law England. In the Court's view, FECA placed a direct burden on First Amendment freedom. The burden is particularly severe, in the Court's view, in these circumstances: If the newspaper publishes a political campaign advertisement without taking reasonable steps to substantiate an assurance that the requirement imposed by FECA upon federal office seekers, their opponents, and supporters, have been met, the newspaper personnel are liable for criminal sanctions.

2. The Court found vagueness and other constitutional difficulties in FECA's requirement that the media must determine with respect to newspaper advertisements in which candidates for federal office are involved "whether the message is affirmatively 'on behalf of the candidate,' or if it is in denigration of any opposing viewpoint." Not only was this requirement bare of any "definitional or clarifying assistance," but a further problem was presented by the fact that in the case of "derogatory" ads, a certificate had to be obtained from opposing candidates. As a result of this procedure, candidates could block publication of ads by refusing to grant such certification.

The ad could only be published after the newspaper had satisfied itself that there had been no authorization by federal candidates running against the "denigrated candidate." The whole procedure was, according to the court, in the light of the general presumption against prior restraints, a violation of the First Amendment.

3. Read *Tornillo v. Miami Herald,* Supreme Court of Florida, decided July 1973, with *ACLU v. Jennings.* In *Tornillo,* a state right of reply law for candidates attacked by daily newpapers during a campaign was upheld by the Florida Supreme Court. See this text, p. 594. Counsel for Tornillo have relied on the following passage in *ACLU v. Jennings* as a justification for their request that the U. S. Supreme Court uphold the Florida Supreme Court in *Tornillo:*

"A major purpose of the First Amendment is to protect the free discussion of governmental affairs. This includes discussions of candidates, and all matters relating to political matters and processes. Any attempt to limit the free unfettered dissemination of individual opinion cannot be favorably viewed."

Do you agree with this interpretation?

For another example of the constitutional problems raised by legislative efforts to equalize opportunity to participate in the electoral process through political ads in newspapers see the Massachusetts compulsory publication of political advertising cases. See *Opinion of the Justices to the Senate,* 298 N.E.2d 829 (Mass.1973), this text, p. 607.

4. The Court in *ACLU v. Jennings* went to considerable lengths to avoid holding the disclosure provisions of Title III of FECA unconstitutional. The strict record-keeping requirements set up by Title III were designed to secure the fullest disclosure of federal campaign funds. However, the Court reasoned these provisions might be interpreted in such a way as to infringe on the constitutional protection afforded to privacy and freedom of association. The Court decided to prevent this possibility. Relying on the narrowing interpretation of Title III of FECA employed by the Second Circuit in *United States v. National Committee for Impeachment,* 469 F.2d 1135 (2d Cir. 1972), the court in *ACLU v. Jennings* gave a saving construction to Title III which by narrowing it removed its vagueness. The Court essentially precluded the application of Title III to groups concerned with the funding of movements concerned with national policy as distinguished from groups primarily focusing on solicitations and expenditures directed to the nomination or election of candidates.

## SECTION 4. THE PRESS AND THE ANTITRUST LAWS

### AN INTRODUCTORY NOTE ON THE NEWSPAPER INDUSTRY AND THE ANTITRUST LAWS

Since the beginning of the century there has been a steady decline in the number of U. S. daily newspapers. This decline and trends toward local monopolies, cross-media affiliations, and conglomerate ownership poses one of the most urgent problems facing the free flow of information in a participatory democracy.

Sixty-three per cent of daily newspaper circulation is now controlled by group or chain ownership which accounts for nearly 50 per cent of the nation's total number of dailies. The vast majority of FM radio stations are owned by AM broadcasters. A majority of AM stations are owned by television interests. Television interests control approximately half of our CATV systems. Print media own about one third of the broadcast media. Broadcasters are heavily invested in the book publishing industry. Regional ownerships dominate mass communication in specific areas. And consolidation in the communications industry proceeds at an accelerating rate seemingly dictated by an array of economic inevitabilities. See Bagdikian, *The Information Machines,* Chapt. 6 and 8 (1971); Mintz and Cohen, *America Inc.: Who Owns and Operates the United States,* Chapt. 2 (1971); Bishop, *The Rush to Chain Ownership,* Columbia Journalism Review (November/December, 1972); Johnson, *The Media Barons and the Public Interest,* Atlantic (June, 1968); Eversole, *Concentration and Ownership in the Communications Industry,* Journalism Quarterly (Summer, 1971); Grotta, *Consolidation of Newspapers: What Happens to the Consumer?* Journalism Quarterly (Summer, 1971); and Report of the Special Committee on Mass Media, *The Uncertain Mirror,* Vol. I (1970).

Although the societal effects of concentration of ownership in mass communication are not yet fully understood, one must fear damage to the "multitude of tongues" argument made famous by Judge Learned Hand in his opinion in *United States v. Associated Press,* 52 F.

Supp. 362 (S.D.N.Y.1943) which follows. That notion is grounded in the proposition that diversity in speech and press is somehow central to the meaning of the First Amendment.

The antitrust laws are one weapon of public policy—however puny—traditionally used to combat monopoly in communications as well as in other industries; and they are meant to apply to broadcasting as well as to the print media. See *United States v. RCA,* 358 U.S. 334 (1959). Moreover, § 313 of the Federal Communications Act provides that if a licensee is found guilty of a violation of the provisions of the antitrust laws "the court, in addition to the penalties imposed by (the antitrust) laws may * * * order * * * that the license of such licensee shall * * * be revoked." 47 U.S.C.A. § 313 (1962). The FCC's oscillating reactions to license applications for broadcasting facilities in the same community where the applicant already owns newspaper facilities is considered elsewhere in this book. See Ch. IX, supra, pp. 921–929. Our focus in this section, however, is on the application of the antitrust laws to the newspaper industry itself.

The major weaponry of antitrust enforcement insofar as that industry is concerned are found in the following provisions of the antitrust laws. The first antitrust law, the Sherman Act, was enacted in 1890 "to protect trade and commerce against unlawful restraints and monopolies." 15 U.S.C.A. § 1 (1970), § 1 of the Sherman Act prohibits joint or concerted action that constitutes a restraint of trade; it is directed at joint action. 15 U.S.C.A. § 1 provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade, or commerce among the several States, or with foreign nations, is declared to be illegal."

§ 2 of the Sherman Act condemns monopolizing and can be applied to actions of a single enterprise. 15 U.S.C.A. § 2 provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be guilty of a misdemeanor."

The defense of monopoly under § 2 of the Sherman Act has been stated to mean that "the individual business must have deliberately acquired sufficient power over a defined market to control prices or exclude others from that market." See Kirkpatrick, *Crossroads of Antitrust and Union Power,* 34 Geo.Wash.L.Rev. 288 at 290 (1965). The over-all purposes of the antitrust laws have been described as dedicated to the maintenance of a free market. This philosophy has been described as follows, Kirkpatrick, supra: "* * * special situations apart, public reliance is on the free market, maintained by antitrust's prohibitions of group action in unreasonable restraint of trade and of the anticompetitive effects of dominating power used to control the market and exclude competitors. The antitrust principles embodied in sections 1 and 2 of the Sherman Act are intended to prevent such violations of public policy. The two sections of the act are complementary, seek the same objectives and should be read in the light of the rule of reason. Essentially this is all that antitrust means."

A subsequent antitrust act, the Clayton Act, since amended, was first enacted in 1914. This statute was designed to reach activity which would not constitute a Sherman Act violation but which nevertheless was still anticompetitive. It was aimed at reaching anticompetitive activity in its incipiency. § 7 of the Clayton Act is particularly important in the context of the newspaper industry since it is aimed

at mergers. The corporate merger device has been steadily used to accomplish the pattern of consolidation of existing daily newspapers which has characterized the American newspaper industry since the turn of the century. Section 7 of the Clayton Act, 15 U.S.C.A. § 18, provides in pertinent part:

"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."

Illustrative of the application of § 7 of the Clayton Act to a newspaper merger is *United States v. The Times Mirror Co., 274 F.Supp. 606 (D.Cal.1967),* reported in the text, infra, p. 649.

How significant a role can antitrust intervention play in retarding the decline of competition in the newspaper industry? How significant a role can the antitrust laws play in retarding the growth of monopoly? These apparently are distinct questions because excess capacity in terms of plant and equipment, dependence on advertising, and labor problems make operation of even two competing dailies in smaller cities difficult unless some cooperative effort to share plant and equipment is taken. See the discussion concerning the Newspaper Preservation Act, 15 U.S.C.A. §§ 1801–04 (Supp.1971) in the text, infra, p. 662.

In the following cases and comments, the student should be alert to some basic questions. (1) To what extent can the problem of concentration of ownership and decline in absolute numbers of daily newspapers be corrected by the antitrust laws or by more imaginative use of the antitrust laws? See infra, p. 662. (2) To what extent is the pattern of newspaper consolidation the product of market forces beyond the remedy of the antitrust laws? (3) To what extent can new solutions be developed to restore some measure of competitiveness to the daily press?

(4) Is there necessarily a connection between diversity of ownership and the presentation of competing viewpoints? This last issue figures in the *Associated Press* cases with which this section begins, and in the discussion of the Newspaper Preservation Act with which it ends. As you read the *Associated Press* cases, ask yourself whether they are antitrust cases or First Amendment cases. Basically do they rest on a theory about the communication of ideas which may itself be defective?

## A. ANTITRUST POLICY AND A FREE PRESS

## ASSOCIATED PRESS ET AL. v. UNITED STATES

326 U.S. 1, 89 L.Ed. 2013, 65 S.Ct. 1416 (1945).

**Editorial Note:**

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), states that the objectives of the antitrust laws and the interests protected by the First Amendment come very close to converging. This is a more radical observation than may at first blush appear. For it carries with it some rather innovative implications. First, 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 are not the newspaper industry but the American public and their stake in as free a flow of information as possible. Judge Learned Hand's opinion in the *Associated Press*

case indeed treats the AP as quasi-public and relies on this quasi-public status to justify government regulation to secure First Amendment objectives. The following passage in *U. S. v. AP,* contains many of the ideas mentioned above and has been a continually quoted source for authority and thought on the law of the American press:

"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."

As you reflect on this passage, what assumptions are made? One of Learned Hand's major premises appears to be that the more outlets (for example, the more newspapers) the more varied and untrammelled debate will be. But newspapers are fed in the main by 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 necessarily follow that antitrust policy works toward First Amendment objectives?

There is an undercurrent in Learned 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. What the student should reflect on, however, as he studies the media in this setting, is whether antitrust policy can be an effective implement to secure in the media that "multitude of tongues" which Judge Learned Hand says is the reason for a constitutional status for freedom of speech and press in the first place.

Reflect on Judge Hand's statement of these issues as you read the opinion which follows.

Mr. Justice BLACK delivered the opinion of the Court.

The publishers of more than 1200 newspapers are members of the Associated Press (AP), a cooperative association incorporated under the Membership Corporations Law of the State of New York, Consol.Laws c. 35. Its business is the collection, assembly and distribution of news. The news it distributes is originally obtained by direct employees of the Association, employees of the member newspapers, and the employees of foreign independent news agencies with which AP has contractual relations, such as the Canadian Press. Distribution of the news is made through interstate channels of communication to the various newspaper members of the Association, who pay for it under an assessment plan which contemplates no profit to AP.

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 non-member 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. See International News Service v. Associated Press, 248 U.S. 215, 229, 2 A.L.R. 293. 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.

Nor is a publisher who engages in business practices made unlawful by the Sherman Act entitled to a partial immunity by reason of the "clear and present danger" doctrine which courts have used to protect freedom to speak, to print, and to worship. That doctrine, as related to this case, provides protection for utterances themselves, so that the printed or spoken word may not be the subject of previous restraint or punishment, unless their expression creates a clear and present danger of bringing about a substantial evil which the government has power to prohibit. Bridges v. California, 314 U.S. 252, 261. Formulated as it was to protect liberty of thought and of expression, it would degrade the clear and present danger doctrine to fashion from it a shield for business publishers who engage in business practices condemned by the Sherman Act. Consequently, we hold that publishers, like all others charged with violating the Sherman Act, are subject to the provisions of the summary judgment statute. And that means that such judgments shall not be rendered against publishers or others where there are genuine disputes of fact on material issues. Accordingly, we treat the cause as did the court below, and will consider the validity of the By-Laws and the contract exclusively on the basis of their terms and the background of facts which the appellants admitted. * * *

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 non-members 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.

* * * It is true that the record shows that some competing papers have gotten along without AP news, but morning newspapers, which control 96% of the total circulation in the United States, have AP news service. And the District Court's unchallenged finding was that "AP is a vast, intricately reticulated organization, the largest of its kind, gathering news from all over the world, the chief single source of news for the American press, universally agreed to be of great consequence."

Nevertheless, we are asked to reverse these judgments on the ground that the evidence failed to show that AP reports, which might be attributable to their own "enterprise and sagacity", are clothed "in the robes of indispensability." The absence of "indispensability" is said to have been established under the following chain of reasoning: AP has made its news generally available to the people by supplying it to a limited and select group of publishers in the various cities; therefore, it is said, AP and its member publishers have not deprived the reading public of AP news; all local readers have an "adequate access" to AP news, since all they need do in any city to get it is to buy, on whatever terms they can in a protected market, the particular newspaper selected for the public by AP and its members. We reject these contentions. The proposed "indispensability" test would fly in the face of the language of the Sherman Act and all of our previous interpretations of it. Moreover, it would make that law a dead letter in all fields of business, a law which Congress has consistently maintained to be an essential safeguard to the kind of private competitive business economy this country has sought to maintain.

* * * It is further said that we reach our conclusion by application of the "public utility" concept to the newspaper business. This is not correct. We merely hold that arrangements or combina-

tions designed to stifle competition cannot be immunized by adopting a membership device accomplishing that purpose.

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. Perhaps it would be a sufficient answer to this contention to refer to the decisions of this Court in Associated Press v. N. L. R. B., and Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., 293 U.S. 268. 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.

We now turn to the decree. Having adjudged the By-Laws imposing restrictions on applications for membership to be illegal, the Court enjoined the defendants from observing them, or agreeing to observe any new or amended By-Law having a like purpose or effect. If further provided that nothing in the decree should prevent the adoption by the Associated Press of new or amended By-Laws "which will restrict admission, provided that members in the same city and in the same 'field' (morning, evening or Sunday), as an applicant published in a newspaper in the United States of America or its Territories, shall not have power to impose, or dispense with, any conditions upon his admission and that the By-Laws shall affirmatively declare that the effect of admission upon the ability of such applicant to compete with members in the same city and 'field' shall not be taken into consideration in passing upon its application." Some of appellants argue that this decree is vague and indefinite. They argue that it will be impossible for the Association to know whether or not its members took into consideration the competitive situation in passing upon applications for membership. We cannot agree that the decree is ambiguous. We assume, with the court below, that AP will faithfully carry out its purpose. Interpreting the decree to mean that AP news is to be furnished to competitors of old members without discrimination, through By-Laws controlling membership, or otherwise, we approve it.

* * * If, as the government apprehends, the decree in its present form should not prove adequate to prevent further discriminatory trade restraints against non-member newspapers, the Court's retention of the cause will enable it to take the necessary measures to cause the decree to be fully and faithfully carried out.

The judgment in all three cases is affirmed.

Affirmed.

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

Mr. Justice DOUGLAS, concurring. * * *

Mr. Justice FRANKFURTER, concurring. * * *

Mr. Justice ROBERTS, dissenting in part. * * *

Mr. Justice MURPHY, dissenting. * * *

### NOTES AND QUESTIONS

1. Obviously the most significant aspect of the *Associated Press* case is the Supreme Court's determination that newspapers are covered by the antitrust laws. The newspaper industry relied on the theory that newspapers were not interstate commerce and therefore not covered by the Sherman Antitrust Act which only applies to interstate commerce. Similarly, the newspaper industry relied on the First Amendment guarantee of freedom of the press as the equivalent of a constitutional exemption from the antitrust laws. The interstate commerce argument came rather late in the day since so many areas of economic life had been held to be 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 Mr. Justice Black deal with it in his opinion?

2. Both Mr. Justice Roberts and Mr. 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). The editors point out that access to a comprehensive news service is indispensable for a daily newspaper today:

"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 sizeable independent fortune an entrepreneur simply will not launch a newspaper without assurance of access to the requisite news-gathering facilities."

3. Notice 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 Learned Hand had ascribed to it in the district court. A much more recent reaction on his part to viewing private property as quasi-public for First Amendment purposes is found in *Amalgamated Food Employees Local 590 v. Logan Valley Plaza Inc.,* 391 U.S. 308 (1968), text, supra, p. 53. See also *Lloyd Corp. v. Tanner,* 407 U.S. 551 (1972).

Mr. 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 by-laws, such as those struck down in AP, private restraints on or by the press are generally not subject to legal control?

4. In Roberts, *Antitrust Problems in the Newspaper Industry,* 82 Harv.L.Rev. 319 at 332 (1968), it is pointed out that

as a result of the Supreme Court directing the AP to frame new rules of admission, the membership of the AP considerably expanded.

However, Roberts is critical of the new AP rules of admission since admission requirements require certain standards of paid circulation, staff, plant, and the ability to supply AP with local news before a new newspaper can join. It is contended these requirements restrict entry on the part of newcomers into the newspaper industry because the requirements create a vicious circle. One can only meet the admission requirements if one is an established newspaper, but one cannot become established unless one can gain access to a wire service.

Roberts is also critical of the surviving competing wire service, UPI, on the ground that its admission requirements are still very onerous for new entrants to the newspaper business. See Roberts, supra, 319 at 333–336 (1968).

5. Mr. Justice Murphy in dissent made a great point of the fact that the AP doesn't dominate access to news and that other wire services exist (one of the wire services which existed at the time of the decision of the Associated Press, the INS, has since been absorbed by competitors.)

But doesn't Justice Murphy's point miss the threat to the public interest that the admission requirements of the AP pose?

6. If the AP continued to dominate entry into the newspaper business, perhaps the reporting of news with a "minimum of political and sectional bias" (Justice Murphy's appraisal of AP performance) will itself be jeopardized.

7. Justice Black rejected AP's argument that its service was not indispensable because a newspaper could subscribe to a different wire service. The district court's treatment of this point is instructive:

"News is history; recent history, it is true, but veritable history, nevertheless; and history is not total recall, but a deliberate pruning of, and calling from, the flux of events. Were it possible by some magic telepathy to reproduce an occasion in all its particularity, all reproductions would be interchangeable; the public could have no choice, provided that the process should be mechanically perfect. But there is no such magic; and if there were, its result would be immeasurably wearisome, and utterly fatuous. In the production of news every step involves the conscious intervention of some news gatherer, and two accounts of the same event will never be the same. * * *

For these reasons it is impossible to treat two news services as interchangeable, and to deprive a paper of the benefit of any service of the first rating is to deprive the reading public of means of information which it should have; it is only by cross-lights from varying directions that full illumination can be secured. Nor is it an answer that the by-law challenged only applies to a "field", in which by hypothesis there is already an AP newspaper in which AP dispatches will appear. That is true, but the final product to the reader is not the AP dispatch simpliciter; but how and where it appears in the paper as it comes before him. That paper may print it verbatim, or a summary of it, or a part of it. The last two are certainly as authentically new and original as the dispatch itself; they bear somewhat the same relation to it that it does to the first report, or that the first report does to the event or occasion. And, even though the whole dispatch be printed verbatim, its effect is not the same in every paper; it may be on the front page, or it may be in an obscure corner; depending upon the importance attached to it. The headlines may plangently call it to readers' attention, or they may be formal and unarresting. There is no part of a newspaper which is not the

handiwork of those who make it up; and their influence is often most effective when most concealed."

## B. SOME ANTI-COMPETITIVE PRACTICES

### (1) BLOCK-BOOKING IN TELEVISION AND EXCLUSIVE TERRITORY PROVISIONS IN FEATURE SYNDICATE CONTRACTS

*United States v. Loew's, Inc.* 371 U.S. 38 (1962), considered the block-booking of copyrighted motion pictures for television exhibition. The various defendants included Loew's, Screen Gems, Inc., Associated Artists and other national distributors of copyrighted motion pictures for television. No combination or conspiracy was alleged between the various defendants, the sole claim of illegality resting on the manner in which each defendant had marketed its product.

The following practice was typical of those challenged as violating the antitrust laws: Associated Artists negotiated contracts which were found to be block-booked with station WTOP of Washington, D. C. WTOP was to pay $118,800 for the license of 99 pictures. In order to obtain classic films like "Treasure of the Sierra Madre", "Casablanca", "Johnny Belinda", and "Sergeant York", among others, WTOP also had to take such items as "Nancy Drew Troubleshooter", "Tugboat Annie Sails Again", "Kid Nightingale", "Gorilla Man", and "Tear Gas Squad".

Stating that it would follow the principles of the *Paramount Pictures Case,* 334 U.S. 131 (1948), the Supreme Court held that this block-booking practice was in violation of the Sherman Antitrust Act, § 1 as amended 15 U.S.C.A. § 1.

The Antitrust Division of the Department of Justice brought suit against a number of feature syndicates on the ground that they had contracted with newspapers not to license their features to any other newspaper within an area surrounding the contracting newspaper's city of publication. The Justice Department charged that the licensing contracts covered an "arbitrary and unreasonably broad territory surrounding the contracting newspaper's city of publication." Defendant Chicago Tribune-New York News Syndicate, Inc. made a motion to dismiss. A federal district court denied the motion and held that such agreements were "in unreasonable restraint of trade." *United States v. Chicago Tribune-New York News Syndicate, Inc.,* 309 F.Supp. 1301 (S.D.N.Y.1970).

### (2) REFUSALS TO DEAL AND CROSS-MEDIA COMPETITION

## LORAIN JOURNAL CO. v. UNITED STATES

342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162 (1951).

Mr. Justice BURTON delivered the opinion of the Court.

The principal question here is whether a newspaper publisher's conduct constituted an attempt to monopolize interstate commerce, justifying the injunction issued against it under §§ 2 and 4 of the Sherman Antitrust Act. For the reasons hereafter stated, we hold that the injunction was justified.

This is a civil action, instituted by the United States in the District Court for the Northern District of Ohio, against The Lorain Journal Company, an Ohio

corporation, publishing, daily except Sunday, in the City of Lorain, Ohio, a newspaper here called the Journal. The complaint alleged that the corporation, together with four of its officials, was engaging in a combination and conspiracy in restraint of interstate commerce in violation of § 1 of the Sherman Antitrust Act, 15 U.S.C.A. § 1, and in a combination and conspiracy to monopolize such commerce in violation of § 2 of the Act, as well as attempting to monopolize such commerce in violation of § 2. * * *

The appellant corporation, here called the publisher, has published the Journal in the City of Lorain since before 1932. In that year it, with others, purchased the Times-Herald which was the only competing daily paper published in that city. Later, without success, it sought a license to establish and operate a radio broadcasting station in Lorain. 92 F.Supp. 794, 796, and see Lorain Journal Co. v. Federal Communications Comm., 86 U.S.App. D.C. 102, 180 F.2d 28.

The court below describes the position of the Journal, since 1933, as "a commanding and an overpowering one. It has a daily circulation in Lorain of over 13,000 copies and it reaches ninety-nine per cent of the families in the city." * * * The Sunday News, appearing only on Sundays, is the only other newspaper published there.

From 1933 to 1948 the publisher enjoyed a substantial monopoly in Lorain of the mass dissemination of news and advertising, both of a local and national character. However, in 1948 the Elyria-Lorain Broadcasting Company, a corporation independent of the publisher, was licensed by the Federal Communications Commission to establish and operate in Elyria, Ohio, eight miles south of Lorain, a radio station whose call letters, WEOL, stand for Elyria, Oberlin and Lorain. Since then it has operated its principal studio in Elyria and a branch studio in Lorain. Lorain has about twice the population of Elyria and is by far the largest community in the station's immediate area. Oberlin is much smaller than Elyria and eight miles south of it.

While the station is not affiliated with a national network it disseminates both intrastate and interstate news and advertising. About 65% of its program consists of music broadcast from electrical transcriptions. * * *

Substantially all of the station's income is derived from its broadcasts of advertisements of goods or services. About 16% of its income comes from national advertising under contracts with advertisers outside of Ohio. This produces a continuous flow of copy, payments and materials moving across state lines.

The court below found that appellants knew that a substantial number of Journal advertisers wished to use the facilities of the radio station as well. For some of them it found that advertising in the Journal was essential for the promotion of their sales in Lorain County. It found that at all times since WEOL commenced broadcasting, appellants had executed a plan conceived to eliminate the threat of competition from the station. Under this plan the publisher refused to accept local advertisements in the Journal from any Lorain County advertiser who advertised or who appellants believed to be about to advertise over WEOL. The court found expressly that the purpose and intent of this procedure was to destroy the broadcasting company.

The court characterized all this as "bold, relentless, and predatory commercial behavior." 92 F.Supp. at 796. To carry out appellants' plan, the publisher monitored WEOL programs to determine the identity of the station's local Lorain advertisers. Those using the station's facilities had their contracts with the publisher terminated and were able to renew them only after ceasing to advertise through WEOL. The program was ef-

fective. Numerous Lorain County merchants testified that, as a result of the publisher's policy, they either ceased or abandoned their plans to advertise over WEOL.

1. *The conduct complained of was an attempt to monopolize interstate commerce.* It consisted of the publisher's practice of refusing to accept local Lorain advertising from parties using WEOL for local advertising. Because of the Journal's complete daily newspaper monopoly of local advertising in Lorain and its practically indispensable coverage of 99% of the Lorain families, this practice forced numerous advertisers to refrain from using WEOL for local advertising. That result not only reduced the number of customers available to WEOL in the field of local Lorain advertising and strengthened the Journal's monopoly in that field, but more significantly tended to destroy and eliminate WEOL altogether. Attainment of that sought-for elimination would automatically restore to the publisher of the Journal its substantial monopoly in Lorain of the mass dissemination of all news and advertising, interstate and national, as well as local. It would deprive not merely Lorain but Elyria and all surrounding communities of their only nearby radio station.

* * * the publisher's conduct was aimed at a larger target—the complete destruction and elimination of WEOL. The court found that the publisher, before 1948, enjoyed a substantial monopoly in Lorain of the mass dissemination not only of local news and advertising, but of news of out-of-state events transmitted to Lorain for immediate dissemination, and of advertising of out-of-state products for sale in Lorain. WEOL offered competition by radio in all these fields so that the publisher's attempt to destroy WEOL was in fact an attempt to end the invasion by radio of the Lorain newspaper's monopoly of interstate as well as local commerce.

* * *

The distribution within Lorain of the news and advertisements transmitted to Lorain in interstate commerce for the sole purpose of immediate and profitable reproduction and distribution to the reading public is an inseparable part of the flow of the interstate commerce involved. * * * Unless protected by law, the consuming public is at the mercy of restraints and monopolizations of interstate commerce at whatever points they occur. Without the protection of competition at the outlets of the flow of interstate commerce, the protection of its earlier stages is of little worth.

2. *The publisher's attempt to regain its monopoly of interstate commerce by forcing advertisers to boycott a competing radio station violated* § 2. * * * The surrounding circumstances are important. The most illuminating of these is the substantial monopoly which was enjoyed in Lorain by the publisher from 1933 to 1948, together with a 99% coverage of Lorain families. Those factors made the Journal an indispensable medium of advertising for many Lorain concerns. Accordingly, its publisher's refusals to print Lorain advertising for those using WEOL for like advertising often amounted to an effective prohibition of the use of WEOL for that purpose. Numerous Lorain advertisers wished to supplement their local newspaper advertising with local radio advertising, but could not afford to discontinue their newspaper advertising in order to use the radio.

WEOL'S greatest potential source of income was local Lorain advertising. Loss of that was a major threat to its existence. The court below found unequivocally that appellants' conduct amounted to an attempt by the publisher to destroy WEOL and, at the same time, to regain the publisher's pre-1948 substantial monopoly over the mass dissemination of all news and advertising.

To establish this violation of § 2 as charged, it was not necessary to show that success rewarded appellants' attempt to monopolize. The injunctive relief under § 4 sought to forestall that success. While appellants' attempt to monopolize did succeed insofar as it deprived WEOL of income, WEOL has not yet been eliminated. The injunction may save it. * * *

Assuming the interstate character of the commerce involved, it seems clear that if all the newspapers in a city, in order to monopolize the dissemination of news and advertising by eliminating a competing radio station, conspired to accept no advertisements from anyone who advertised over that station, they would violate §§ 1 and 2 of the Sherman Act. * * * It is consistent with that result to hold here that a single newspaper, already enjoying a substantial monopoly in its area, violates the "attempt to monopolize" clause of § 2 when it uses its monopoly to destroy threatened competition.

The publisher claims a right as a private business concern to select its customers and to refuse to accept advertisements from whomever it pleases. We do not dispute that general right. * * *

The right claimed by the publisher 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 that Act.

3. *The injunction does not violate any guaranteed freedom of the press.* The publisher suggests that the injunction amounts to a prior restraint upon what it may publish. We find in it no restriction upon any guaranteed freedom of the press. The injunction applies to a publisher what the law applies to others. The publisher may not accept or deny advertisements in an "attempt to monopolize * * * any part of the trade or commerce among the several States * * *." 15 U.S.C.A. § 2; Associated Press v. United States, supra, * * *. Injunctive relief under § 4 of the Sherman Act is as appropriate a means of enforcing the Act against newspapers as it is against others.

4. *The decree is reasonably consistent with the requirements of the case and remains within the control of the court below.* * * *

The judgment accordingly is affirmed.

Affirmed.

Mr. Justice CLARK and Mr. Justice MINTON took no part in the consideration or decision of this case.

### NOTES AND QUESTIONS

1. For an indication of other ramifications growing out of the efforts of the ownership of the *Lorain Journal* to drive out their radio competition, see *Mansfield Journal Co. v. FCC, 180 F.2d 28 (D.C.Cir. 1950),* reported in the text, Chapter IX, infra, p. 917. The *Mansfield Journal* was the sole newspaper in Mansfield, Ohio, which was located 50 miles from Lorain, Ohio. The *Mansfield Journal* and the *Lorain Journal* were under the same ownership. The *Mansfield Journal,* like the *Lorain Journal,* had tried to prevent its advertisers from advertising on a competing radio station. Accordingly, when the *Mansfield Journal* sought a license to construct AM and FM radio stations in Mansfield, the FCC held that the clearly monopolistic behavior of the paper justified, on the basis of the public interest, the denial of the application. The Court of Appeals affirmed.

2. The *Lorain* and *Mansfield Journal* cases introduced the problem of cross-media competition. Do these cases indicate any policy reasons as to why common ownership of different media in the same community should or should not be discouraged? See also Chapter IX, infra, p. 921.

### (3) Tie-in Arrangements and Combination Advertising Rates

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## TIMES–PICAYUNE PUB. CO. v. UNITED STATES

## UNITED STATES v. TIMES–PICAYUNE PUB. CO.

345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953).

Mr. Justice CLARK delivered the opinion of the Court.

At issue is the legality under the Sherman Act of the Times-Picayune Publishing Company's contracts for the sale of newspaper classified and general display advertising space. The Company in New Orleans owns and publishes the morning Times-Picayune and the evening States. Buyers of space for general display and classified advertising in its publications may purchase only combined insertions appearing in both the morning and evening papers, and not in either separately. The United States filed a civil suit under the Sherman Act, challenging these "unit" or "forced combination" contracts as unreasonable restraints of interstate trade, banned by § 1, and as tools in an attempt to monopolize a segment of interstate commerce, in violation of § 2. After intensive trial of the facts, the District Court found violations of both sections of the law and entered a decree enjoining the Publishing Company's use of these unit contracts and related arrangements for the marketing of advertising space. In No. 374, the Publishing Company appeals the merits of the District Court's holding under the Sherman Act; the Government, in No. 375, seeks relief broader than the District Court's decree. Both appeals come directly here under the Expediting Act.

Testimony in a voluminous record retraces a history of over twenty-five years. Prior to 1933, four daily newspapers served New Orleans. The Item Company, Ltd., published the Morning Tribune and the evening Item. The morning Times-Picayune was published by its present owners, and the Daily States Publishing Company, Ltd., an independent organization, distributed the evening States. In 1933, the Times-Picayune Publishing Company purchased the name, good will, circulation, and advertising contracts of the States, and continued to publish it evenings. The Morning Tribune of the Item Co., Ltd., suspended publication in 1941. Today the Times-Picayune, Item, and States remain the sole significant newspaper media for the dissemination of news and advertising to the residents of New Orleans.

The Times-Picayune Publishing Company distributes the leading newspaper in the area, the Times-Picayune. The 1933 acquisition of the States did not include its plant and other physical assets; since the State's absorption the Publishing Company has utilized facilities at a single plant for printing and distributing the Times-Picayune and the States. Unified financial, purchasing, and sales administration, in addition to a substantial segment of personnel servicing both publications, results in further joint operation. Although both publications adhere to a single general editorial policy, distinct features and format differentiate the morning Times-Picayune from the evening States. 1950 data reveal a daily average circulation of 188,402 for the Times-Picayune, 114,660 for the Item, and 105,235 for the States. The Times-Picayune thus sold nearly as many copies as the circulation of the Item and States together.

Each of these New Orleans publications sells advertising in various forms. * * * From 1924 until the Morning Tribune's demise in 1941, the Item Company sold classified advertising space solely on the unit plan by which advertis-

ers paid a single rate for identical insertions appearing in both the morning and evening papers and could not purchase space in either alone. After the Times-Picayune Publishing Company acquired the States in 1933, it offered general advertisers an optional plan by which space combined in both publications could be bought for less than the sum of the separate rates for each. Two years later it adopted the unit plan of its competitor, the Item Co., Ltd., in selling space for classified ads. General advertisers in the Publishing Company's newspapers were also availed volume discounts since 1940, but had to combine insertions in both publications in order to qualify for the substantial discounts on purchases of more than 10,000 lines per year. Local display ads as early as 1935 were marketed under a still effective volume discount system which for determining the discount bracket in the States permitted cumulation of linage placed in the Times-Picayune as well. In 1950, however, the Publishing Company eliminated all optional plans for general advertisers, and instituted the unit plan theretofore applied solely to classified ads. As a result, since 1950 general and classified advertisers cannot buy space in either the Times-Picayune or the States alone, but must insert identical copy in both or none. Against that practice the Government levels its attack grounded on §§ 1 and 2 of the Sherman Act.

After the District Court at the outset denied the Government's motion for partial summary judgment holding the unit contracts *per se* violations of § 1, the case went to trial and eventuated in comprehensive and detailed findings of fact. The Times-Picayune and the States though published by a single publisher, were two distinct newspapers with individual format, news and feature content, reaching separate reader groups in New Orleans. The Times-Picayune, the sole local morning daily which for twenty years outdistanced the States and Item in circulation, published pages, and advertising linage, was the "dominant" newspaper in New Orleans; insertions in that paper were deemed essential by advertisers desiring to cover the local market. Although the local publishing field permits entry by additional competitors, the Item today is the sole effective daily competition which the Times-Picayune Publishing Company's two newspapers must meet. On the other hand their quest for advertising linage encounters the competition of other media, such as radio, television and magazines. Nevertheless the District Court determined, the adoption of unit selling caused a substantial rise in classified and general advertising linage placed in the States, enabling it to enhance its comparative position toward the Item. The District Court found, moreover, that the defendants had instituted the unit system, economically enforceable against buyers solely because of the Times-Picayune's "dominant" or "monopoly position," in order to "restrain general and classified advertisers from making an untrammeled choice between the States and the Item in purchasing advertising space, and also to substantially diminish the competitive vigor of the Item."

On the basis of these findings, the District Judge held the unit contracts in violation of the Sherman Act. The contracts were viewed as tying arrangements which the Publishing Company because of the Times-Picayune's "monopoly position" could force upon advertisers. Postulating that contracts foreclosing competitors from a substantial part of the market restrain trade within the meaning of § 1 of the Act, and that effect on competition tests the reasonableness of a restraint, the court deemed a substantial percentage of advertising accounts in the New Orleans papers unlawfully "restrained." Further, a violation of § 2 was found: defendants by use of the unit

plan "attempted to monopolize that segment of the afternoon newspaper general and classified advertising field which was represented by those advertisers who also required morning newspaper space and who could not because of budgetary limitations or financial inability purchase space in both afternoon newspapers."

Injunctive relief was accordingly decreed. The District Court enjoined the Times-Picayune Publishing Company from (A) selling advertising space in any newspaper published by it "upon the condition, expressed or implied, that the purchaser of such space will contract for or purchase advertising space in any other newspaper published by it;" (B) refusing to sell advertising space separately in each newspaper which it publishes; (C) using its "dominant position" in the morning field "to sell any newspaper advertising at rates lower than those approximately either (1) the cost of producing and selling such advertising or (2) comparable newspaper advertising rates in New Orleans." Hence these appeals.

* * *

Advertising is the economic mainstay of the newspaper business. Generally, more than two-thirds of a newspaper's total revenues flow from the sale of advertising space. * * * When the Times-Picayune Publishing Company in 1949 announced its forthcoming institution of unit selling to general advertisers, about 180 other publishers of morning-evening newspapers had previously adopted the unit plan. Of the 598 daily newspapers which broke into publication between 1929 and 1950, 38% still published when that period closed. Forty-six of these entering dailies, however, encountered the competition of established dailies which utilized unit rates; significantly, by 1950, of these 46, 41 had collapsed. Thus a newcomer in the daily newspaper business could calculate his chances of survival as 11% in cities where unit plans had taken hold. Viewed against the background of rapidly declining competition in the daily newspaper business, such a trade practice becomes suspect under the Sherman Act.

Tying arrangements, we may readily agree, flout the Sherman Act's policy that competition rules the marts of trade. * * * By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the "tied" product's merits and insulates it from the competitive stresses of the open market. But any intrinsic superiority of the "tied" product would convince freely choosing buyers to select it over others, anyway. * * * Conversely, the effect on competing sellers attempting to rival the "tied" product is drastic: to the extent the enforcer of the tying arrangement enjoys market control, other existing or potential sellers are foreclosed from offering up their goods to a free competitive judgment; they are effectively excluded from the marketplace.

* * *

And since the Court deemed it "unreasonable, *per se*, to foreclose competitors from any substantial market", neither could the tying arrangement survive § 1 of the Sherman Act. 332 U.S. at page 396, 68 S.Ct. at page 15. That principle underpinned the decisions in the Movie cases, holding unlawful the "block-booking" of copyrighted films by lessors, United States v. Paramount Pictures, 1948, 334 U.S. 131, 156–159, 68 S.Ct. 915, 928–930, 92 L.Ed. 1260, as well as a buyer's wielding of lawful monopoly power in one market to coerce concessions that handicapped competition facing him in another. * * *

Once granted that the volume of commerce affected was not "insignificant or insubstantial", the Times-Picayune's market position becomes critical to the case. The District Court found that the

Times-Picayune occupied a "dominant position" in New Orleans; the sole morning daily in the area, it led its competitors in circulation, number of pages and advertising linage. But every newspaper is a dual trader in separate though interdependent markets; it sells the paper's news and advertising content to its readers; in effect that readership is in turn sold to the buyers of advertising space. This case concerns solely one of these markets. The Publishing Company stands accused not of tying sales to its readers but only to buyers of general and classified space in its papers. For this reason, dominance in the advertising market, not in readership, must be decisive in gauging the legality of the Company's unit plan.

* * * But the essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next. Solely for testing the strength of that lever, the whole and not part of a relevant market must be assigned controlling weight.

We do not think that the Times-Picayune occupied a "dominant" position in the newspaper advertising market in New Orleans. Unlike other "tying" cases where patents or copyrights supplied the requisite market control, any equivalent market "dominance" in this case must rest on comparative marketing data. Excluding advertising placed through other communications media and including general and classified linage inserted in all New Orleans dailies, as we must since the record contains no evidence which could circumscribe a broader or narrower "market" defined by buyers' habits or mobility of demand, the Times-Picayune's sales of both general and classified linage over the years hovered around 40%. Obviously no magic inheres in numbers; * * * If each of the New Orleans publications shared equally in the total volume of linage, the Times-Picayune would have sold 33⅓%; in the absence of patent or copyright control, the small existing increment in the circumstances here disclosed cannot confer that market "dominance" which, in conjunction with a "not insubstantial" volume of trade in the "tied" product, would result in a Sherman Act offense * * *

* * * The District Court determined that the Times-Picayune and the States were separate and distinct newspapers, though published under single ownership and control. But that readers consciously distinguished between these two publications does not necessarily imply that advertisers bought separate and distinct products when insertions were placed in the Times-Picayune and the States. So to conclude here would involve speculation that advertisers bought space motivated by considerations other than customer coverage; that their media selections, in effect, rested on generic qualities differentiating morning from evening readers in New Orleans. Although advertising space in the Times-Picayune, as the sole morning daily, was doubtless essential to blanket coverage of the local newspaper readership, nothing in the record suggests that advertisers viewed the city's newspaper readers, morning or evening, as other than fungible customer potential. We must assume, therefore, that the readership "bought" by advertisers in the Times-Picayune was the selfsame "product" sold by the States and, for that matter, the Item.

The factual departure from the "tying" cases then becomes manifest. The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant "tying" product, resulting in economic harm to competition in the "tied" market. Here, however, two newspapers under single ownership at the same place, time, and terms sell indistinguishable

products to advertisers; no dominant "tying" product exists (in fact, since space in neither the Times-Picayune nor the States can be bought alone, one may be viewed as "tying" as the other); no leverage in one market excludes sellers in the second, because for present purposes the products are identical and the market the same. * * *

The Publishing Company's advertising contracts must thus be tested under the Sherman Act's general prohibition on unreasonable restraints of trade. * * * For our inquiry to determine reasonableness under § 1 must focus on "the percentage of business controlled, the strength of the remaining competition [and], whether the action springs from business requirements or purpose to monopolize".

The record is replete with relevant statistical data. The volume discounts available to local display buyers were not held unlawful by the District Court, and the Government does not assail the practice here. That segment of advertising linage by far the largest revenue producer of the three linage classes sold by all New Orleans newspapers, is thus eliminated from consideration. Consequently, only classified and display linage data can be scrutinized for possible forbidden effects. * * *

*Classified.*—* * *

* * * Thus, over a period of ten years' competition while facing its morning-evening rival's compulsory unit rate the New Orleans Item's share of the New Orleans classified linage market declined 3%; viewed solely in relation to its evening competitor, its percentage loss amounted to 5%.

* * *

*General Display.*—* * *

Meanwhile the Item flourishes. The ten years preceding this trial marked its more than 75% growth in classified linage. Between 1946 and 1950 its general display volume increased almost 25%. The Item's local display linage is twice the equivalent linage in the States. And 1950, the Item's peak year for total linage comprising all three classes of advertising, marked its greatest circulation in history as well. In fact, since in newspapers of the Item's circulation bracket general display and classified linage typically provide no more than 32% of total revenues, the demonstrated diminution of its New Orleans market shares in these advertising classes might well not have resulted in revenue losses exceeding 1%. Moreover, between 1943 and 1949 the Item earned over $1.4 million net before taxes, enabling its then publisher in the latter year to transfer his equity at a net profit of $600,000. The Item, the alleged victim of the Times-Picayune Company's challenged trade practices, appeared, in short, to be doing well. * * * In any event, uncontradicted testimony suggests that unit insertions of classified ads substantially reduce the publisher's overhead costs. Approximately thirty separate operations are necessary to translate an advertiser's order into a published line of print. A reasonable price for a classified ad is necessarily low. And the Publishing Company processed about 2,300 classified ads for publication each day. Certainly a publisher's steps to rationalize that operation do not bespeak a purposive quest for monopoly or restraint of trade. * * *

Consequently, no Sherman Act violation has occurred unless the Publishing Company's refusal to sell advertising space except *en bloc*, viewed alone, constitutes a violation of the Act. Refusals to sell, without more, do not violate the law. * * *

We conclude, therefore, that this record does not establish the charged violations of § 1 and § 2 of the Sherman Act. We do not determine that unit ad-

vertising arrangements are lawful in other circumstances or in other proceedings. Our decision adjudicates solely that this record cannot substantiate the Government's view of this case. Accordingly, the District Court's judgment must be reversed.

Reversed.

Mr. Justice BURTON, with whom Mr. Justice BLACK, Mr. Justice DOUGLAS, and Mr. Justice MINTON join, dissenting.

### NOTES AND QUESTIONS

1. The Court in *Times-Picayune* distinguishes the block-booking in *Paramount* from the combination advertising rate in *Times-Picayune*. In *Paramount* block-booking was held illegal, but the Court did not apply the block-booking analogy to *Times-Picayune* on the ground that, there, copyrights supplied the requisite market control, but that market dominance in *Times-Picayune* had to be based on an analysis of the New Orleans newspaper advertising market and, from that vantage point, there was no market dominance.

But there were other grounds for invalidating the combination in *Times-Picayune*. The Court said in *Times-Picayune* that the case did not demonstrate a situation where "past monopolistic success both enhances the probabilities of future harm and supplies a motivation for further forays." The Court presented, as an example of such monopolistic activity, the *Lorain Journal* case where a newspaper refused to sell space to advertisers if they also bought advertising in the competing local radio station. But wasn't there a real probability of future anticompetitive harm as a result of the combination rate in the *Times-Picayune* case? It has been urged that a tie-in arrangement, such as that in *Times-Picayune*, should be condemned because it "permits the papers to reduce competition still more drastically by driving out any paper not a party to a similarly advantageous arrangement." See Roberts, supra, 319 at 347.

In *Times-Picayune* the Court's emphasis was on present market dominance and lack of relative concern for the future of the *Item*, the victim of the combination rate. Does the Court's holding in *Times-Picayune* square with its concern that "daily newspaper competition within individual cities has grown extinct"?

If you were to *defend* the Court's position on the ground that it was designed to stimulate continued multi-newspaper competition in New Orleans, what arguments would you make?

2. In the presentation by the American Newspaper Publishers Association before the Antitrust Subcommittee of the House Judiciary Committee, Hearings on S. 1312, The Failing Newspaper Act, Part 3, 1407 at 1498–1499 (1967), the point is made that "there is today such a plethora of sources of news, views and advertising that it would be absurd to start with any assumption or prima facie case that there is any threat of a 'monopoly' in any of the above sources or outlets." Do you think that there is an interchangeable substitutability of advertising media between newspapers or magazines and newspapers or radio and television? How does this question bear on the resolution of the antitrust problems in *Times-Picayune*?

3. One commentator has observed that the result of the majority opinion in the *Times-Picayune* case can be justified in one respect. Although the unit rule benefited the Times-Picayune Company because it expanded advertising linage, "it did not work to the disadvantage of the *Item* and since section 1 aspects of the government's case were premised principally on that supposition, exoneration on this count was in order." See Barber, *Newspaper Monopoly In New Orleans: The Lessons for Antitrust Policy*, 24 Lou-

isiana L.Rev. 503 at 534 (1964). However, Professor Barber contends that Sec. 2 of the Sherman Act was violated. The Court said the *Times-Picayune* invoked the unit rule for reasons that in the main constituted "legitimate business aims." But Professor Barber believed the record disclosed that under the "timing of the action and the circumstances then prevailing * * * the company was largely prompted by a desire to 'slow the Item down.' "

4. In 1958, the *Times-Picayune* purchased the *Item* for a reported $3.4 million and thus became the sole daily newspaper publisher in New Orleans. At the time negotiations began, the New Orleans *Item* was experiencing a loss.

Professor Barber has described the New Orleans newspaper experience as demonstrating the inadequacies of an antitrust policy which emphasizes market behavior rather than market position. Writes Professor Barber at 538:

"At the core of the entire problem was the company's dominant market position. This was the real subject of concern. Yet the Justice Department limited its attention to practices that not only were without adverse competitive impact, but in any case, depended on the strength, specifically, of the Times-Picayune; in short the government had flailed at what it thought were shadows instead of facing up to the substance of the matter."

5. What Professor Barber urges is that recognition be given to the fact that "given the Times-Picayune Company's substantial circulation, no other publisher could survive if he had to operate a fully integrated operation." See Barber, at p. 545. Barber suggests that the *Times-Picayune* should have been compelled to share printing facilities with a competing paper. Professor Barber suggests that the decree approved by the Supreme Court in the *Associated Press* case provides support by analogy to this suggested solution. How?

As to the connection between diversity of viewpoint and divergence of ownership, Professor Barber makes the following observation at 546: "The value of a second paper is substantial whether it takes a sharply contrasting point of view of major public issues or whether it only reflects a modestly different selection of news and expression of opinion." Why?

6. Professor Barber also stresses the limitations of the antitrust laws: "only a very few communities are big enough, given present conditions to support more than one paper, and of those that can sustain competition this will mean just two publishers." See Barber, supra, p. 549. If competitive dailies are desirable and the antitrust laws are of limited utility, what other means are available to expand the numbers of the daily press?

7. In *Kansas City Star Co. v. United States*, 240 F.2d 643 (8th Cir. 1957), *cert. den.* 354 U.S. 923 (1958), a case with aspects common to both *Lorain Journal* and *Times-Picayune*, the antitrust laws proved to be of some utility. There the Court of Appeals affirmed the district court's finding of antitrust violations against the Kansas City Star Co. and some of its officers. The court characterized the Supreme Court decision in *Times-Picayune* as turning on the failure to prove the fact of market dominance. Market dominance was proven here by a showing that the Star was delivered to 96% of all the homes in the metropolitan area *and* that its share of the total advertising revenues for area newspapers was over 94% as compared to 4% for its nearest competitor. (The court rejected the *Star's* claim that it was in vigorous and robust competition with the 78 weekly and suburban papers in the four county area.)

The court then discussed how the *Star* used this dominant position to exclude

competition. In addition to threatening advertisers with refusals to take their ads if they advertised in competitive publications, or placing their ads in unlikely places in the *Star* if they did so, two practices are worthy of particular mention. First was the use of the dissemination of news to control advertising. A big league baseball player was a partner in a florist's shop which advertised in a competing paper. The *Star* informed the florist's shop that if it continued this practice, the *Star* would discontinue publicizing the baseball player.

The Star Co. also owned WDAF–TV, the only television station in Kansas City from 1949 to the date of the indictment. The court affirmed the finding that the *Star*, using its dominant position to protect and aid its newspaper advertising, made it clear that advertisers could not buy time on WDAF–TV unless they also advertised in the *Star*. The court characterized WDAF–TV as more of an appendage to the successful operation of the Star than an independent entity.

Observe that the anti-competitive aspects of cross-media ownership, mentioned in the notes following *Lorain Journal,* supra, are rather vividly raised by this case.

Would the court's handling of the question of market dominance in *Kansas City Star Co.* satisfy Professor Barber? Why?

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## C. THE DWINDLING DAILY PRESS: MERGERS AND CONCENTRATION OF OWNERSHIP

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### UNITED STATES v. TIMES MIRROR CO.

274 F.Supp. 606 (D.C.Cal.1967).

FERGUSON, District Judge. This action was commenced on March 5, 1965, when the government filed its complaint in a civil action alleging that the acquisition on June 25, 1964, by the Times Mirror Company of all the shares of stock of The Sun Company for $15,000,000 violates the antitrust laws of the United States.

The government challenges the acquisiton by the publisher of the largest daily newspaper in Southern California (the Los Angeles Times) of the largest independent daily newspaper publisher in Southern California (The Sun Company). It contends that Times Mirror's acquisition and ownership of the stock of The Sun Company constitutes an unlawful control and combination which unreasonably restrains interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and that the effect of the acquisition may be to substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

The government seeks an order of divestiture and an injunction which would prohibit the defendant from purchasing any other newspaper in the relevant geographic market.

* * *

**Editorial Note:**

The opinion stated that the *Times Mirror* is a holding company with interests in commercial printing and book publishing. Its principal enterprise is the *Los Angeles Times* which has had the largest daily newspaper circulation in California since 1948. The *Times* operates its own feature syndicate which distributes 35 newspaper features to 1000 publications around the world. Finally, the Los Angeles Times-Washington Post News Service provides news to 90 daily newspapers.

* * *

At the time of the acquisition, The Sun Company was the largest independent

publishing company in Southern California. The company was located in San Bernardino County, which adjoins Los Angeles County to the east. It was locally owned, primarily by the Guthrie family, and none of its owners had significant interests in other newspapers. * * *

The Sun Company was in sound financial condition. * * *

With its three newspapers, the morning Sun, the evening Telegram and the Sunday Sun-Telegram, The Sun Company dominated the daily newspaper business in San Bernardino County. * * *

In 1964 the Sun was the only morning newspaper published daily in San Bernardino County. Its daily circulation was 53,802. The Sun-Telegram was the largest Sunday newspaper published there with a circulation of 70,664. They were the only newspapers other than the Los Angeles papers (the Times and the evening and Sunday Herald-Examiner) which were home delivered throughout San Bernardino County.

* * *

Both the morning Sun and the Sunday Sun-Telegram carried a substantial amount of state, national and international news, complete stock reports of the New York and American Stock Exchanges, national sports news, nationally known columnists, comics and other syndicated features, and Los Angeles television and radio logs. The Sun maintained editorial and advertising offices in the larger communities of San Bernardino County and purchased the whole of the county as exclusive territory for certain of its syndicated features.

*The Acquisition.*

Negotiations for the acquisition of The Sun Company by the defendant extended over several years on a sporadic basis. * * *

In 1964 * * * a proposal was made by Times Mirror for $12.5 million in cash which was refused. In June, 1964, the Pulitzer Publishing Company of St. Louis made a cash offer to Mr. Guthrie of $15 million.

Mr. Guthrie realized the $15 million offer of Pulitzer could not be ignored. However, he preferred that The Sun Company be sold to Times Mirror for a number of reasons. First, he felt that the interests of Times Mirror and The Sun Company in the development of the West were the same. Second, Norman Chandler was a director of three of the largest corporations in San Bernardino County: Kaiser Steel Corporation, The Atchison, Topeka & Santa Fe Railroad and Safeway Stores, Inc. Third, he treasured the friendship that existed between the Chandler family and his family beginning in the days of General Otis. Finally, he disapproved of the Pulitzer policies and politics.

Because of the Pulitzer offer, Mr. Guthrie, Sr., asked his son, James K. Guthrie, to call Otis Chandler, Norman Chandler's son and the publisher of the Times, and inform him that an offer of $15 million had been made to purchase the newspaper and to say that if Times Mirror were truly interested they had better move quickly. Mr. Guthrie had made the decision to sell because of advice concerning his estate planning.

* * * Mr. Guthrie told Mr. Chandler that he had received an offer of $15 million from the Pulitzers. Mr. Chandler stated, "We will meet the price of $15 million". They shook hands and five days later the sale was formally completed.

* * *

*Purpose of Section 7.*

It is the conclusion of the court that the acquisition violates § 7 of the Clayton Act and full relief may be granted thereunder. * * *

The Supreme Court, in Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (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 of what was considered to be a rising tide of economic concentration in the American economy. Apprehension in this regard was bolstered by the publication in 1948 of the Federal Trade Commission's study on corporate mergers. * * * 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. at 315–16, 82 S.Ct. at 1518–19.

The Court declared:

1. 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.

* * *

*The Product Market.*

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 * * *.'"

**Editorial Note:**

Section 7 of the Clayton Act, 15 U.S.C. § 18 provides in pertinent part:

"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."

* * *

The argument that the Times and the Sun did not compete with each other and for that reason there could not be an antitrust violation has lost all its validity since the 1950 amendment. The fact that two merging companies presently compete or do not compete is not the significant issue. Congress has directed that the courts must look to the effect and impact of the merger. If its effect is anticompetitive, then there is a violation. * * *

It makes little difference when one newspaper acquires another what the merger is called, whether it be horizontal or product-extension. The issue is whether the effect is to substantially lessen competition in any section of the country. To claim that a reader will or will not buy a newspaper or shift his readership to another newspaper which is available to him is not the significant test under § 7. To characterize or not to characterize one newspaper as a substitute for the other is to lose sight of the intent of Congress as plainly set forth in *Brown Shoe* and the subsequent Supreme Court cases which have cut across all contentions except the anticompetitive effect of the merger.

* * *

In the final analysis, the daily newspaper business is a commercial reality which is universally recognized as a line of commerce. * * *

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., 180 F.Supp. 125 (D.C.Mass.), modified, 284 F.2d 582 (1st Cir. 1960), certiorari denied 365 U.S. 833, 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., supra:

"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.

*Competition for Advertising.*

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.

*The Geographic Market.*

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 Times Mirror Company, in evaluating the acquisition of the Sun, used the daily newspaper business in San Bernardino County as the relevant market area. It recognized San Bernardino County as the basic area of circulation overlap between the Times and the Sun. It treated

the county as a daily newspaper market and determined the market share of the Times and Sun by computing their "percentage of field" against total daily newspaper circulation in San Bernardino County.

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. In each case the geographic market must be determined with sufficient precision to weigh the anticompetitive effects of the merger. The Times claims that the largest part of its circulation was in the west part of San Bernardino County, while the largest part of the circulation of the Sun was in the east part. 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.

The defendant claims that by reason of the fact that until the level of 80% to 85% of circulation of both newspapers is reached, there is no geographical overlap between them and that, therefore, San Bernardino County is not a proper geographic market. * * *

In any event, San Bernardino County is a recognized market which encompasses not just 75% but almost all of the circulation overlap between the two newspapers.

The argument of defendant that the geographical overlap must occur before the two companies did 75% of their business is also contrary to a teaching found in Brown Shoe v. United States, supra.

* * *

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. Traditionally, most newspapers in Southern California have been evening papers, one reason being the strength of the Los Angeles Times' circulation throughout Southern California. In 1956 only 8 of the 36 newspaper publishers in Southern California had morning papers, and of these only the Riverside Press Enterprise was still independently owned. The morning field was dominated by the Times, which accounted for 70% of Southern California's morning circulation.

* * *

In San Bernardino County the following events have taken place since the acquisition:

1. On March 31, 1965, the Richardson Newspapers, publishers of the Po-

mona Progress Bulletin, purchased the Ontario-Upland Report.

2. On October 1, 1965, the Colton Courier ceased daily publication.

3. On April 1, 1966, the Rialto Record-News quit the daily newspaper field.

4. On May 8, 1967, the Lake Union Publishing Company, partially owned by the Scripps League, acquired the Fontana Herald-News, theretofore an independent daily. The Fontana and Ontario-Upland newspapers were the next two largest independent dailies after the Sun.

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 difficulty of entry anyplace within the Southern California daily newspaper market is illustrated best by the recent failure of one of the most powerful publishers in the United States, the New York Times, to successfully establish a West Coast edition.

*Domination Over the Acquired Company.*

The evidence clearly establishes that the defendant has taken active control of The Sun Company and has exercised control in such areas as the selection of top management, the editorial content and the advertising policy of the paper.

Within two months of the acquisition, the old Board of Directors of The Sun Company was supplanted by a new Board on which officers and executives of The Times Mirror Company constituted a majority. The positions of Secretary, Treasurer and Assistant Secretary-Treasurer were filled by executives of the defendant. Six months later James A. Guthrie was replaced as president of The Sun Company by Otis Chandler, publisher of the Times.

After the acquisition, the Sun stopped its joint advertising campaign with the Riverside Press Enterprise against the Los Angeles metropolitan papers. This change occurred as the result of suggestions from executives of the Times.

There is a legal presumption that when one corporation achieves control of another, there is an elimination of competition between them.

*Conclusion.*

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.

*Form of Relief.*

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. The enthusi-

asm with which the government seeks this relief is recognized, particularly as against such a dominant company in the newspaper business as The Times Mirror Company. * * *

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. For example, on May 1, 1967, the Victorville Daily Press, a weekly, became a daily and the government admits "it is a bit early to predict what its fate will be". In the event that it should become a failing paper and the defendant acquired it, a study must be made of the effect of the acquisition. It may be anticompetitive, or it may come within the congressional exemption as expressed in *Brown Shoe*. 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.

*Findings of Fact and Conclusions of Law:*

Pursuant to the provisions of Rule 52 of the Federal Rules of Civil Procedure, this opinion shall constitute the findings of fact and conclusions of law of the court.

*Judgment.*

It is the judgment of this court and the same is directed to be prepared separately and entered under Rule 58 of the Federal Rules of Civil Procedure as follows:

It is adjudged and decreed—

1. That the acquisition and ownership of stock of The Sun Company by the defendant, The Times Mirror Company, is in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

2. That the defendant is directed to divest itself of the stock of The Sun Company and shall not thereafter in any form or manner acquire any interest in or control over The Sun Company.

3. That the defendant shall within 60 days from the date this judgment becomes final lodge with the court a plan for divestiture which shall provide for the continuation of The Sun Company as a strong and viable company.

4. That divestiture shall be in accordance with such orders as the court directs.

5. That the court shall retain jurisdiction over the parties with reference to the action to make such further orders as may be proper to carry out the judgment.

6. That the plaintiff shall recover its costs of this action.

### NOTES AND QUESTIONS

1. In *Times Mirror v. United States, 390 U.S. 712* (1968) the district court's judgment in the *Times Mirror* case was affirmed.

2. The Court's chronology of what has happened, since the acquisition by *Times Mirror* of the *San Bernardino Sun,* to the other independent daily newspapers in San Bernardino County is a good example of the pattern of concentration of ownership and continual attrition in the number of daily newspapers—a pattern which has come to characterize the American press. Why is it that the remaining independent dailies, which used to compete with the *Sun*, became weaker after the demise of the *Sun* rather than stronger?

3. The court ordered the Times Mirror Co. to divest itself of its stock in such a way that The Sun Company will "continue as a strong and viable company." What does divestiture really mean in this context? Is it clear that the *Sun* will reemerge as an independent newspaper, according to the court's definition of an independent newspaper (one whose owners "do not publish another newspaper at another locality"?)

4. Mr. Guthrie owner of the *San Bernardino Sun* refused to sell to the Pulitzers on the ground, among others, that he disapproved of the politics of the Pulitzers. From the perspective of Justice Black's opinion for the Court in Associated Press, which acquisition presented more likelihood for both antitrust and First Amendment objectives to be secured, the Chandler or the Pulitzer acquisition?

5. If the Pulitzers of the *St. Louis Post-Dispatch* had succeeded in acquiring the *San Bernardino Sun*, would that have constituted an antitrust violation? Presumably not. No Pulitzer paper was dominant in the Los Angeles market and the acquisition of the *Sun* by the Pulitzers might indeed have introduced direct competition, not only for the other independent daily newspapers in San Bernardino County, but for the *Los Angeles Times* also. Can you explain why this might be so?

6. Do you think that one of the assumptions of the district court in *Times Mirror* was that the *San Bernardino Sun* might eventually become a competitor of the *Los Angeles Times*?

7. *Times-Picayune* was a tie-in case and the *Times Mirror* is a merger case. Conceding this distinction, is there any language in the *Times Mirror* court's discussion of market dominance which indicates, in the light of the Supreme Court's affirmance, that, if the *Times Picayune* case were decided today it would be decided the other way? Why?

8. It should be noted in this regard that the *Loew's* case, above p. 638, was like *Times-Picayune*, a tie-in case. In characterizing the relevant market in *Loew's*, the Court said, 371 U.S. 38 at 45 (1962), "(E)ven absent a showing of market dominance, the crucial economic power (to effect an illegal tie) may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." Remember that by "tie-in" is meant the "tying" of the purchase of a desirable product with the purchase of an undesirable or unwanted product through the device of requiring a purchaser who wants the one to buy both.

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## D. JOINT OPERATING AGREEMENTS: FAILING COMPANIES, FAILING NEWSPAPERS, AND THE NEWSPAPER PRESERVATION ACT

### (1) THE CITIZEN PUBLISHING COMPANY CASE

**Editorial Note:**

In 1940, the Citizen Publishing Company, publisher of the only evening daily newspaper in Tucson, Arizona, entered into a joint operating agreement with the Star Publishing Company, publisher of the only morning daily newspaper and the only Sunday newspaper in Tucson. For eight years prior to their agreement the Citizen Publishing Co. had been operating at a substantial loss.

Under the terms of their agreement, the news and editorial departments of the two newspapers would remain separate, while a new corporation formed by Star and Citizen, Tucson Newspapers, Inc. (TNI), would operate all of the other departments of these newspapers (principally advertising, circulation, and printing) as a joint venture. The agreement also provided that profits would be pooled and that signatories to the agreement would not engage in any other publishing business in the county (i. e., they would not compete).

In 1965 an out of state publisher offered to purchase the Star for $10 million, providing that the joint operating

agreement remained in effect. Pursuant to another term in the agreement, Citizen was given the opportunity to purchase the *Star* at this price. This it did, exercising its option through Arden Corp., a holding company formed expressly for this purpose, whose sole stockholder was the principal owner of Citizen Publishing. This transaction resulted in a merger, with the news and editorial staffs of the *Star* under the control of the *Citizen* through Arden Corp., which continued publishing the *Star* as a separate paper.

About the time the merger was completed, the United States brought an antitrust action, *United States v. Citizen Publishing Co.*, 280 F.Supp. 978 (D.Ariz. 1968). The government sought to enjoin the merger as violative of § 7 of the Clayton Act (15 U.S.C.A. § 18 (1970) ) and attacked the 1940 joint operating agreement as violative of §§ 1 and 2 of the Sherman Act (15 U.S.C.A. §§ 1, 2 (1970) ).

The agreement was held by the district court to constitute a price-fixing, profit-pooling and market allocation agreement, which was illegal per se under the Sherman Act. The court held that the publishers, by means of the joint operating agreement, had acquired market control over the newspapers in Tucson, Arizona, in violation of the Sherman Act.

The court entered a decree directing the divestiture of the evening newspaper and a modification of the joint operating agreement.

The District Court's conclusions of law, and its judgment and decree follow:

James A. WALSH, Chief Judge.

* * *

## CONCLUSIONS OF LAW

1. The court has jurisdiction over each of the defendants and over the subject matter of this action.

2. The 1940 operating agreement constitutes a price fixing, profit pooling and market allocation agreement illegal *per se* under Section 1 of the Sherman Act.

3. The defendants, by entering into and operating pursuant to the 1940 operating agreement, acquired monopoly power over the daily newspaper business in Tucson, in violation of Section 2 of the Sherman Act.

4. The defendants, in entering into the operating agreement of 1940, did so with the intent and purpose of eliminating all commercial competition in the daily newspaper business in Tucson, in violation of Section 2 of the Sherman Act.

5. The acquisition of Star by Arden in 1965 was in furtherance of, and a part of, a combination and conspiracy by defendants to monopolize the daily newspaper business in Tucson.

6. Defendants have combined and conspired to monopolize interstate trade and commerce.

7. The acquisition of Star by Arden in 1965 was an acquisition by one corporation engaged in commerce of another corporation engaged in commerce and was a violation of Section 7 of the Clayton Act.

8. Plaintiff is entitled to a decree directing divestiture of Star and modification of the operating agreement.

## JUDGMENT AND DECREE

The Court having this day made and entered its Findings of Fact and Conclusions of Law herein, it is now

Ordered, adjudged, and decreed:

1. The "Operating Agreement" entered into between Citizen Publishing Company and Star Publishing Company, which became effective on July 1, 1940, provides for price fixing, profit pooling, and market allocations by the parties to

the Agreement; and such provisions of the "Operating Agreement" are illegal *per se* under Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. The acquisition of all of the stock of Star Publishing Company by defendant Arden Publishing Company and the subsequent acquisition and ownership by defendant Arden Publishing Company of all of the assets of Star Publishing Company were and are in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

3. Defendants Arden Publishing Company and William A. Small, Jr., are directed to divest themselves of The Arizona Daily Star, either by defendant Arden Publishing Company selling the assets acquired by it from Star Publishing Company or by defendant William A. Small, Jr., selling and disposing of all of the stock of Arden Publishing Company.

4. Defendants, other than Star Publishing Company, shall within ninety (90) days from date of this judgment and decree lodge with the Court and serve upon plaintiff a plan which will provide for such divestiture and for the continuation of The Arizona Daily Star under ownership wholly free from any interests of or control by said defendants, or any of them. Such plan shall provide, as well, for the modification of the "Operating Agreement" so as to eliminate price fixing, market allocations, and profit pooling.

5. Defendants, and each of them, and each of their directors, officers, agents, and employees, and all persons acting for them, are hereby restrained and enjoined, effective upon divestiture, from in any manner or by any means fixing prices, or pooling profits, or allocating markets in the business of publishing daily newspapers of general circulation in Pima County, Arizona.

6. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to apply to the Court at any time for such other orders and directions as may be necessary or appropriate in relation to the construction or carrying out of this judgment and decree, for the amendment or modification of any provisions hereof, or the enforcement of compliance therewith.

### NOTES AND QUESTIONS

1. The District Court permitted the continued sharing by the parties of substantially the same mechanical equipment and of a joint advertising department as well. If attempts at sharing costs were not designed to prolong the life of a financially weak newspaper, might they then otherwise have been considered to be antitrust violations? The court did order divestiture by Arden Publishing of Star Publishing since Arden's acquisition of Star merged the ownership of the news departments of the *Star* and the *Citizen.*

What is the antitrust philosophy behind allowing newspapers, if one of them is financially weak, to share operating facilities but not to merge?

2. There was considerable displeasure among the Arizona publishers involved in Citizen Publishing after the decree and Senator Carl Hayden of Arizona introduced a bill in the Senate, (S. 1312, 90th Cong. 1st Sess.), the so-called Failing Newspaper Act to undo the result of that case. His and other Congressional efforts eventually resulted in the passage of the Newspaper Preservation Act, text, *infra,* p. 662.

3. Prior to the Federal District Court decision in *Citizen Publishing Co.*, one commentator pointed to the language in the *Times Mirror* case, which quoted *Brown Shoe* to the effect that § 7 of the Clayton Act would not invalidate "a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market."

He suggested that even without enactment of special legislation exempting newspaper joint operating agreements from the antitrust laws, the "failing company" doctrine may have special significance in the newspaper field and therefore might shield some newspaper mergers from antitrust attacks. See Flackett, *Newspaper Mergers: Recent Developments in Britain and the United States,* 12 Antitrust Bull. 1033 at 1051 (1967).

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## CITIZEN PUBLISHING COMPANY v. UNITED STATES

393 U.S. 131, 89 S.Ct. 927, 22 L.Ed.2d 148 (1969).

**Editorial Note:**

The Supreme Court affirmed the District Court. In his opinion for the Court, Mr. Justice Douglas explained why the 1940 operating agreement constituted a price fixing, profit pooling, and market allocation agreement illegal *per se* under Section 1 of the Sherman Act.

Mr. Justice DOUGLAS delivered the opinion of the Court.

* * *

The purpose of the agreement was to end any business or commercial competition between the two papers and to that end three types of controls were imposed. First was *price fixing.* The newspapers were sold and distributed by the circulation department of TNI; commercial advertising placed in the papers was sold only by the advertising department of TNI; the subscription and advertising rates were set jointly. Second was *profit pooling.* All profits realized were pooled and distributed to the Star and the Citizen by TNI pursuant to an agreed ratio. Third was a *market control.* It was agreed that neither the Star nor Citizen nor any of their stockholders, officers, and executives would engage in any other business in Pima County—the metropolitan area of Tucson—in conflict with the agreement. Thus competing publishing operations were foreclosed.

* * *

The decree does not prevent all forms of joint operation. It requires, however, appellants to submit a plan for divestiture and re-establishment of the Star as an independent competitor and for modification of the joint operating agreement so as to eliminate the price-fixing, market control, and profit pooling provisions. 280 F.Supp. 978. The case is here by way of appeal. 15 U.S.C. § 29.

We affirm the judgment. The § 1 violations are plain beyond peradventure of doubt. Price-fixing is illegal *per se.* United States v. Masonite Corp., 316 U. S. 265, 276. Pooling of profits pursuant to an inflexible ratio at least reduced incentives to compete for circulation and advertising revenues and runs afoul of the Sherman Act. Northern Securities Co. v. United States, 193 U.S. 197, 328. The agreement not to engage in any other publishing business in Pima County was a division of fields also banned by the Act. Timken Co. v. United States, 341 U.S. 593. The joint operating agreement exposed the restraints so clearly and unambiguously as to justify the rather rare use of a summary judgment in the antitrust field. See Northern Pac. R. Co. v. United States, 356 U.S. 1, 5.

**Editorial Note:**

Justice Douglas then discussed the application of the "failing company" doctrine as a defense available to Citizen, and concluded with some First Amendment considerations.

The only real defense of appellants was the failing company defense—a judicially created doctrine.[2] * * *

[2] See Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L.Rev. 226, 339 (1960); Hale & Hale, Failing Firms and the Merger Provision of the Antitrust Laws, 52 Ky.L.Rev. 597, 607 (1964); Connor, Section 7 of the Clayton Act: The

[T]he requirements of the failing company doctrine were not met. That defense was before the Court in International Shoe Co. v. Federal Trade Commission, 280 U.S. 291, where § 7 of the Clayton Act was in issue. The evidence showed that the resources of one company were so depleted and the prospect of rehabilitation so remote that "it faced the grave probability of a business failure." 280 U.S., at 302. There was, moreover, "no other prospective purchaser." Ibid. It was in that setting that the Court held that the acquisition of that company by another did not substantially lessen competition within the meaning of § 7. 280 U.S., at 302–303.

In the present case the District Court found:

"At the time Star Publishing and Citizen Publishing entered into the operating agreement, and at the time the agreement became effective, Citizen Publishing was not then on the verge of going out of business, nor was there a serious probability at that time that Citizen Publishing would terminate its business and liquidate its assets unless Star Publishing and Citizen Publishing entered into the operating agreement."

The evidence sustains that finding. There is no indication that the owners of Citizen were contemplating a liquidation. They never sought to sell the Citizen and there is no evidence that the joint operating agreement was the last straw at which Citizen grasped. Indeed the Citizen continued to be a significant threat to the Star. How otherwise is one to explain the Star's willingness to enter into an agreement to share its profits with Citizen? Would that be true if as now claimed the Citizen was on the brink of collapse?

The failing company doctrine plainly cannot be applied in a merger or in any other case unless it is established that the company that acquires it or brings it under dominion is the only available purchaser. For if another person or group could be interested, a unit in the competitive system would be preserved and not lost to monopoly power. So even if we assume *arguendo* that in 1940 the then owners of the Citizen could not long keep the enterprise afloat, no effort was made to sell the Citizen; its properties and franchise were not put in the hands of a broker; and the record is silent on what the market, if any, for the Citizen might have been. Cf. United States v. Diebold, Inc., 369 U.S. 654, 655.

Moreover, we know from the broad experience of the business community since 1930, the year when the *International Shoe* case was decided, that companies reorganized through receivership, or through Chapter 10 or Chapter 11 of the Bankruptcy Act often emerged as strong competitive companies. The prospects of reorganization of the Citizen in 1940 would have to be dim or nonexistent to make the failing company doctrine applicable to this case.

The burden of proving that the conditions of the failing company doctrine have been satisfied is on those who seek refuge under it. That burden has not been satisfied in this case.

We confine the failing company doctrine to its present narrow scope.

"Failing Company" Myth, 49 Geo.L.J. 84, 96 (1960).

The failing company doctrine was held to justify mergers in United States v. Maryland & Virginia Milk Producers Assn., 167 F. Supp. 799, aff'd 362 U.S. 458, and in Union Leader Corp. v. Newspapers of New England, 284 F.2d 582.

For cases where the failing company doctrine was not allowed as a defense see United States v. Diebold, 369 U.S. 654; United States v. El Paso Gas Co., 376 U.S. 651; United States v. Von's Grocery Co., 384 U.S. 270; United States v. Philadelphia National Bank, 374 U.S. 321, 372, n. 46; United States v. Third National Bank, 390 U.S. 171.

The restraints imposed by these private arrangements have no support from the First Amendment as Associated Press v. United States, 326 U.S. 1, 20, teaches.

Neither news gathering nor news dissemination is being regulated by the present decree. It deals only with restraints on certain business or commercial practices. The restraints on competition with which the present decree deals and which we approve comport neither with the antitrust laws nor with the First Amendment. * * *

The other points mentioned are too trivial for discussion. Divestiture of the Star seems to us quite proper. At least there is no showing of that abuse of discretion which authorizes us to recast the decree.

Affirmed.

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

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Mr. Justice HARLAN, concurring in the result.

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Mr. Justice STEWART, dissenting. * * *

### NOTES AND QUESTIONS

1. Perhaps it is fair to say that all the opinions in the *Citizen Publishing* case share the view that a newspaper which is truly a "failing" one may enter into a joint operating agreement such as the one under review. What divides the Justices apparently is what set of circumstances properly can be taken to indicate that a newspaper is a "failing" one. Thus Mr. Justice Douglas' opinion for the majority stresses several times that at the time of the 1940 agreement between the *Star* and the *Citizen,* the owners of the *Citizen* were not seeking to sell nor was the Citizen about to go out of business. These facts are crucial to the Court's refusal to allow the application of the "failing company" defense to what otherwise is a violation of the antitrust laws.

For Mr. Justice Harlan apparently what was important was the trial judge's finding that "both the newspapers are now 'in sound financial condition.' "

2. Mr. Justice Stewart's dissent took still a different view. Mr. Justice Stewart believed that previous decisions of the Court had established that a failing newspaper could not "combine with a competitor if its independence could be preserved by sale to an outsider." Justice Stewart says that this doctrine has been extended by the majority of the Supreme Court in the principal case by a new doctrine: a failing company defense cannot be utilized unless the failing company can show that it made substantial affirmative efforts to sell to a noncompetitor. Mr. Justice Stewart criticized this approach. But in a newspaper context are not the policy interests in a free and competitive press particularly strong for the creation of such a "failing newspaper" doctrine in antitrust law exactly along the lines criticized by Mr. Justice Stewart? It is argued in the *Citizen Publishing* case that as a result of the joint operating agreement the two separate editorial pages of the two papers which were parties to the agreement were maintained. But how truly divergent in terms of ideology can editorial pages be operated under such common auspices?

Wouldn't judicial insistence on serious efforts to sell to an outsider be more likely to assure real editorial independence? On the other hand, if a newspaper is truly a "failing" one, what outsider will care to undertake the serious economic risk presented by challenging an entrenched competitor long established in

the market? In other words, are such purchasers mythical? Perhaps the difficulty with the majority's approach is not that it is new doctrine and therefore unfairly applied to the parties in the *Citizen Publishing* case but rather that insistence that the "failing newspaper" actively seek an independent outsider as a purchaser is unlikely to produce one.

In 1970 Congress responded to the pleas of publishers and came to the rescue by passing the Newspaper Preservation Act, 15 U.S.C.A. §§ 1801 *et seq.* (supp.1971). The Act provides a special exemption from the antitrust laws to newspapers in the same city which had preexisting joint operating agreements.

As a result of this legislation, 44 newspapers in 22 cities were allowed to set joint advertising and subscription rates which might otherwise have been deemed to have violated the antitrust laws. Among those parties who will benefit from this new exemption from the antitrust laws for newspapers in "probable danger of financial failure" are such "failing" corporations as Hearst, Scripps-Howard, Newhouse, Cox, John Knight and the Mormon Church.

The Act is reprinted below in its entirety.

### (2) The Newspaper Preservation Act

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The *Citizen Publishing Co.* case caused great concern among newspaper publishers. When that case was decided, 44 daily newspapers in 22 cities were operating under the terms of joint operating agreements similar to the one struck down in *Citizen*. The cities are listed below as are the dates when the various agreements became effective:

Albuquerque, N. M., 1933
El Paso, Tex., 1936
Nashville, Tenn., 1937
Evansville, Ind., 1938
Tucson, Arizona, 1940
Tulsa, Okla., 1941
Madison, Wisc., 1948
Ft. Wayne, Ind., 1950
Bristol, Tenn.-Va., 1950
Birmingham, Ala., 1950
Lincoln, Neb., 1950

(Source: 116 Cong.Rec. 1783 (1970) (remarks of Senator Hruska.)
Salt Lake City, Utah, 1953
Shreveport, La., 1953
Franklin-Oil City, Pa., 1956
Knoxville, Tenn., 1957
Charleston, W. Va., 1958
Columbus, Ohio, 1959
St. Louis, Mo., 1959
Pittsburgh, Pa., 1961
Honolulu, Hawaii, 1962
San Francisco, Calif., 1965
Miami, Fla., 1966

### THE NEWSPAPER PRESERVATION ACT, 15 U.S.C. §§ 1801 et seq. (supp. 1971)

**§ 1801. Congressional declaration of policy**

In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.

**§ 1802. Definitions**

As used in this chapter—

(1) The term "antitrust law" means the Federal Trade Commission Act and each statute defined by section 44 of this

title as "Antitrust Acts" and all amendments to such Act and such statutes and any other Acts in pari materia.*

(2) The term "joint newspaper operating arrangement" means any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: *Provided*, That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined.

(3) The term "newspaper owner" means any person who owns or controls directly, or indirectly through separate or subsidiary corporations, one or more newspaper publications.

(4) The term "newspaper publication" means a publication produced on newsprint paper which is published in one or more issues weekly (including as one publication any daily newspaper and any Sunday newspaper published by the same owner in the same city, community, or metropolitan area), and in which a substantial portion of the content is devoted to the dissemination of news and editorial opinion.

(5) The term "failing newspaper" means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure.

* Of the same subject matter; laws *pari materia* must be construed with reference to each other.

(6) The term "person" means any individual, and any partnership, corporation, association, or other legal entity existing under or authorized by the law of the United States, any State or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any foreign country.

**§ 1803. Antitrust exemption**

(a) It shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend any joint newspaper operating arrangement entered into prior to July 24, 1970, if at the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication: *Provided*, That the terms of a renewal or amendment to a joint operating arrangement must be filed with the Department of Justice and that the amendment does not add a newspaper publication or newspaper publications to such arrangement.

(b) It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.

(c) Nothing contained in the chapter shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity.

Except as provided in this chapter, no joint newspaper operating arrangement or any party thereto shall be exempt from any antitrust law.

**§ 1804. Reinstatement of joint operating arrangements previously adjudged unlawful under antitrust laws**

(a) Notwithstanding any final judgment rendered in any action brought by the United States under which a joint operating arrangement has been held to be unlawful under any antitrust law, any party to such final judgment may reinstitute said joint newspaper operating arrangement to the extent permissible under section 1803(a) of this title.

(b) The provisions of section 1803 of this title shall apply to the determination of any civil or criminal action pending in any district court of the United States on July 24, 1970, in which it is alleged that any such joint operating agreement is unlawful under any antitrust law.

### NOTES AND QUESTIONS

1. House Report No. 91–1193 (1970, U.S.Code Cong. & Adm.News 2925), which accompanied the Act stated that the Newspaper Preservation Act's (NPA) objectives included providing a limited exemption from the antitrust laws for joint newspaper operating agreements which had been entered into in the 22 cities mentioned previously and permitting the joint operating agreement in Tucson to be reinstated notwithstanding the Supreme Court's opinion in the *Citizen Publishing Co.* case, *supra.* How did the Newspaper Preservation Act accomplish this? See § 1804(b) of the Act.

2. Observe the standards required of newspapers entering into joint operating agreements: § 1803(a) requires that not more than one newspaper is "likely to remain or become a financially sound publication"; and § 1803(b) provides that not more than one paper be "other than a failing newspaper." Note that a "failing newspaper" is defined by § 1802(5) to mean one that is in "probable danger of financial failure." Assuming that these two standards are the same, what is the relationship between the "failing newspaper" standard and the "failing company" doctrine as outlined by Justice Douglas in *Citizen*? Douglas referred there to a "grave probability of financial failure", "no other prospective purchaser" and "dim or non-existent" prospects of reorganization. It has been suggested that it is clear that the two tests differ and that the standards of § 1803 enlarge the principle of the failing company as applied to newspaper joint operating agreements. See Comment, *The Newspaper Preservation Act*, 32 U.Pitt.L.Rev. 347, at 352 (1971). Do you agree? On the failing company doctrine in this and other contexts, see generally, *"Failing Company" Defense to Actions for Violations of § 7 of Clayton Act (15 U.S.C. § 18)*, 11 ALR Fed. 858 (1972).

3. Notice that while the Act is clearly intended to apply to joint operating agreements already in effect, it specifically prohibits amending an existing agreement to add another newspaper. See 15 U.S.C. § 1803(a). Does this effectively foreclose the establishment of a new paper in a city where existing papers operate under a joint agreement? The new paper would have to bear by itself the costs of circulation and printing that the existing papers shared.

4. Would the result of the *Times-Picayune* case, be clearly valid under the NPA? If newspapers operating under a joint agreement can set joint ad rates, one more barrier to new entrants into the newspaper business is entrenched.

5. When examining § 1802(2) to see what the NPA means by a "joint newspaper operating agreement" you should consider the agreement between the *Star* and the *Citizen* as illustrative, since it seems fairly obvious that Con-

gress had that agreement in mind when it passed the Act.

6. The Newspaper Preservation Act requires that the Attorney General give his consent before a new agreement, not in force when the Act was passed, can be entered into. See 15 U.S.C. § 1803(b). Note that the Attorney General is required to make a finding that the policy and purpose of the Act would be effectuated before granting his consent. It has been suggested that a court might require a finding by the Attorney General that the agreement is helpful to the maintenance of an editorially and reportorially independent and competitive press before a newspaper can assert the Act as a defense to a charge of violation of the antitrust laws. Comment, 32 U.Pitt.L.Rev. 347, 353 (1971). Do you see any problems with such a requirement? One author suggests that the administration need no longer be concerned with an unfavorable press. Will "suggesting to the Attorney General in a lowered voice" whose joint agreements should or should not be approved affect press criticism of the Administration? Wright, *How to Succeed by Failing*, 19 Cath.U.L.Rev. 177 at 185 (1969). Is such a problem real or illusory?

7. Which segment of the press benefits most from the Newspaper Preservation Act? One comment points out that newspaper chains participate in 15 of the 22 current joint operating agreements. *Newspaper Preservation Act: A Critique*, 46 Ind.L.J. 392, 395 (1971).

8. Antitrust policy generally involves balancing market competition against other interests that may be more or less important to society.

Was the Newspaper Preservation Act necessary to preserve editorial and reportorial independence? In other words, was this independence really threatened by the law as it existed in the *Citizen Publishing Co.* case? Advocates of the NPA argue that the choice is between having all the newspapers in one city owned by a single publisher and allowing joint newspaper operating agreements to exist as exemptions from the antitrust laws. It has been argued that while the criteria of a failing newspaper are more stringent under *Citizen Publishing Co.* than under the Newspaper Preservation Act, the existence of independent newspapers was not threatened by the law as it existed under *Citizen Publishing Co.* See *Comment*, 32 U.Pitt.L.Rev. 347, 357 (1971).

9. Do you think the Newspaper Preservation Act works to maintain an independent press? Can editorial and reportorial independence be maintained by eliminating economic competition between papers subject to the Act? Will the fact that two newspapers with completely separate identities no longer exist affect editorial independence? Even if the two papers support different political candidates or different shades of the political spectrum, in a purely mechanical way, can such "balance" truly be viewed as editorial independence? Do you think the two papers would make these decisions free of such outside influence? Is the assumption of the NPA that they should?

One writer argues that the Act assumes that financially strong newspapers, uninhibited by such commercial pressures as advertising or circulation competition, have a greater ability to take courageous and unpopular editorial positions on public issues. *Newspaper Preservation Act: A Critique*, 46 Ind.L.J. 392, 406 (1971).

See also Roberts, *Antitrust Problems in the Newspaper Industry*, 82 Harv.L.Rev. 319, 349 (1968).

### (3) JUDICIAL INTERPRETATION OF THE NEWSPAPER PRESERVATION ACT

In July 1971, Bruce Brugmann, publisher of the San Francisco *Bay Guardian*, a monthly having a circulation of 17,000, charged that, as a result of the Newspaper Preservation Act, joint advertiser and subscription rates charged by the two San Francisco daily newspapers, the *Morning Chronicle* and the evening *San Francisco Examiner* were legitimized. The *Bay Guardian* has been crippled in efforts to secure advertisers and advertising in the San Francisco area. The reason for this, Brugmann contended, was that advertisers who wished to advertise in one San Francisco daily newspaper were required to advertise in both dailies due to the joint advertising rate. As a result, commercial advertisers were not able to afford to advertise in other print media.

The *Guardian* filed suit against the Hearst Corporation, publisher of the *San Francisco Examiner*, the *San Francisco Chronicle*, their joint publishing company, the San Francisco Printing Co., Inc., Randolph Hearst, chairman of the executive committee of the Hearst Corporation, and Charles de Young Thieriot, *Chronicle* publisher. The *Guardian* contended that the Newspaper Preservation Act is a violation of the freedom of press and filed suit in the federal district court in San Francisco. As you read the opinion in the case, how would you summarize the *Guardian's* constitutional argument?

## BAY GUARDIAN COMPANY v. CHRONICLE PUBLISHING CO.

344 F.Supp. 1155 (N.D.Calif.1972).

CARTER, Chief Judge: ◆

* * *

The defendants since September, 1965, have operated under a joint operating agreement. By that agreement one newspaper (News-Call-Bulletin) was put out of existence while the two remaining dailies (Examiner and Chronicle) were allotted the afternoon and morning markets respectively. All printing is done by a jointly owned subsidiary, the San Francisco Newspaper Printing Company, a named defendant. The editorial staffs of the two remaining papers, the Chronicle and Examiner, are kept independent, though they jointly publish a unified Sunday edition. Profits from all operations are pooled and shared on a 50/50 basis. Thus the defendant papers have eliminated all competition between them and have achieved a monopoly position in the San Francisco daily newspaper market, so that profits are now quite substantial.

The plaintiffs are the owners and publishers of a small paper that has been a bimonthly paper and is now monthly. They contend that the defendants' monopoly position in the San Francisco market enables the defendants to destroy or weaken any potential competition. They contend that this monopoly position accounts for the continually declining quality of the editorial and news content of both papers. They contend that the profit sharing, joint ad rates, and other cooperative aspects of the joint operating agreement enable the defendants to establish and perpetuate a stranglehold on the San Francisco newspaper market. The plaintiffs contend that the Act is unconstitutional because it unfairly encourages this journalistic monopoly.

The Act provides that newspapers in economic distress may enter into joint operating agreements. It further provides that existing joint operating agreements are also allowable if at the time an agreement was entered into one of the papers was not financially sound.

Newspapers for purposes of the Act were defined to include only those publishing one or more issues weekly. Per-

missible joint operating agreements are accorded an exemption from the operation of the Federal Trade Commission Act, and other antitrust acts. That exemption was specifically extended to any civil or criminal proceedings pending on July 24, 1970, the date the Act was passed.

For the purposes of ruling upon the plaintiffs' motion to strike the affirmative defenses related to the Act, the Court has assumed that the Act is applicable to the defendants' joint operating agreement. The terms of the Act provide that it is to apply to daily newspapers, no more than one of which "was likely to remain or become a financially sound publication" (§ 1803(a) ). The Court offers no opinion at this time whether the defendant newspapers will be able to prove at the time of trial that they came within that definition when they began joint operations.

I. *First Amendment*

Plaintiffs contend that the Act is unconstitutional because it permits the defendant newspapers to combine so as to prevent the plaintiffs' newspaper from publishing. This effect of the Act, they contend, causes it to be in violation of the freedom of the press guarantee of the First Amendment.

The simple answer to the plaintiffs' contention is that the Act does not authorize any conduct. It is a narrow exception to the antitrust laws for newspapers in danger of failing. Thus it is in many respects merely a codification of the judicially created "failing company" doctrine. See, 83 Harv.L.R. 673 (1970).

Much of plaintiffs' argument seems directed at a phantom Act which conveys a government license to monopolize to certain newspapers at the expense of others. Whatever might be the constitutional status of such an Act, it is not the one now before us. The Act pertinent to this case does not confer any license to monopolize and indeed has a specific provision prohibiting "predatory practices" (§ 1803(c) ). * * *

Here the Act was designed to preserve independent editorial voices. Regardless of the economic or social wisdom of such a course, it does not violate the freedom of the press. Rather it is merely a selective repeal of the antitrust laws. It merely looses the same shady market forces which existed before the passage of the Sherman, Clayton and other antitrust laws.

Such a repeal, even when applicable only to the newspaper industry, does not violate the First Amendment.

Plaintiffs contend that the Act confers a privileged economic status upon the defendant newspapers and thus denies the plaintiffs equal protection of the laws. (As applied to federal government through the Fifth Amendment, Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

The kernel of the plaintiffs' reasoning is that the Act affects First Amendment rights and thus should be subjected to a more rigorous standard of propriety, "the compelling interest" test. The Court does not believe that the cases cited by the plaintiffs provide support for these contentions.

* * * The Act in question does not regulate or restrict publishing, rather it merely permits newspapers to merge when they might not otherwise have been able to do so because of the antitrust laws.

* * *

There is no contention that the plaintiffs have ever published more frequently than twice monthly. By the terms of the Act they would therefore not qualify for its exemption. The Court expresses the opinion, however, that it is entirely rational for Congress to decide that daily newspapers are more vital to the well being of the nation and accordingly make

rules or exceptions for dailies that are not made for bimonthlies.

* * *

The plaintiffs contend that the Act permitted the defendants to eliminate one of the former newspapers in the city (News-Call-Bulletin) and thus deprive the San Francisco public of the guarantee of freedom of the press. The Court does not so read the Act. There is nothing contained in the Act which would appear to authorize the elimination of a newspaper as part of a joint operating agreement. Indeed the whole tenor of the Act is the preservation of existing papers. It is a matter of evidence to be determined at trial whether the conduct of the defendants while entering their joint operating agreement bars them from the protection of the Act. There is nothing in the provisions of the Act to lead the Court to believe that it contemplates or permits the elimination of an established editorial voice.

* * *

*Conclusion*

The Court concludes that the Newspaper Preservation Act is a constitutional statute that violates neither the First nor Fifth Amendment to the Constitution. The Court further concludes that the Act does not pre-empt but merely modifies in part the operation of state antitrust laws. Finally, the Court concludes that the Act can constitutionally be applied in this action to conduct occurring both before and after passage.

Accordingly, on the basis of the foregoing conclusions,

It Is Ordered that the plaintiffs' motion to strike the 1st and 2nd affirmative defenses asserted in the answer be, and the same is hereby denied.

### NOTES AND QUESTIONS

1. The ultimate significance of any statute rests on the interpretation given it by the courts. Compare how Judge Carter interprets the Act with the interpretation given it by the commentators discussed previously. Compare his statement that the Act is "in many respects merely a codification of the judicially created failing company doctrine" with the view that the NPA creates a less stringent standard. What other hints does Judge Carter's opinion give as to how the courts might view the Act in practice? What significance might the reluctance of the Court in the *Citizen Publishing Co.* case to create a "failing newspaper" doctrine have on judicial interpretation of the Newspaper Preservation Act?

2. Note that Judge Carter points out that the NPA must be pleaded and proved as an affirmative defense to an action for violation of the antitrust laws, and that if it is not, it might be viewed as having been waived by the defendant newspapers.

3. Journalist and access critic, Gilbert Cranberg, has contended that the Newspaper Preservation Act may, ironically, serve to furnish the necessary government involvement to permit courts to view newspaper denials of access as state action. See Cranberg, *Is "Right of Access" Coming?* Saturday Review, August 8, 1970. Do you agree with Cranberg on the state action point? From a First Amendment perspective, can the press have it both ways? If governmental efforts to preserve the editorial pages in a city is constitutional, right of reply legislation to encourage debate in that city may also be constitutional. See also on the First Amendment implications of the oscillating attitudes of some segments of the press to government legislation in aid of the press as exemplified by the Newspaper Preservation Act, Barron, Freedom of the Press for Whom? pp. 18–19 (Indiana University Press, 1973):

> If passage of the failing newspaper act was rooted in a concern that as many

communities as possible should continue to have two editorial pages to read, then the Newspaper Preservation Act is federal legislation designed to provide for diversity of opinion. But if Congress has constitutional power to enact legislation to encourage diversity of viewpoint in the press, then Congress can enact legislation to give readers rights of access to the press. The scope of legislation to assure diversity of expression cannot fairly or logically be limited to serving the interests of publishers to the exclusion of the interests of the newspaper public.

4. One court, *America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc.*, 347 F.Supp. 328 (N.D.Ind.1972), firmly rejected the state action argument advanced above. There, the operator of a tavern showed continuous, unrated, "adult" films for his patrons and wanted to advertise that fact in the local newspapers. Since 1950, the Fort Wayne newspapers, the *Journal-Gazette* and the *News-Sentinel,* had been operating under a joint agreement. Fort Wayne Newspapers, Inc., the joint operations company (recall TNI in the *Citizen Publishing Co.* case), had set an advertising policy that persons engaged in showing such films, such as the operator in Fort Wayne, could place an ad in the papers, but that ad would be limited to the advertiser's name and telephone number.

The tavern owner brought an action charging that his civil rights were being violated, 42 U.S.C.A. § 1983, and further, that such a joint advertising policy was in violation of the Sherman Act, 15 U.S.C.A. §§ 1, 2.

The court rejected his claim under the Civil Rights Act, 42 U.S.C.A. § 1983. That act requires state action for a violation and the court found none present in the Newspaper Preservation Act's exemption from the antitrust laws.

The court, engaging in a potentially significant reading of the NPA, found in § 1803(c), which states that no conduct can be engaged in under a joint operating agreement that would be unlawful if engaged in by a single entity, the "obvious negative implication" that if a practice would be lawful if engaged in by a single entity, such conduct would not become unlawful merely because engaged in by two newspapers operating under a joint agreement. The court then cited with approval *Chicago Joint Bd., Amal. Clothing Workers of America v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970) and other similar cases to hold that since one newspaper could refuse this tavern keeper's ads, Fort Wayne Newspapers, Inc., speaking for two newspapers, could refuse them as well.

See the materials on the right of access, supra in Chapter VIII.

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## A NOTE ON THE CONFLICT BETWEEN LOCAL AND CHAIN NEWSPAPER PRESERVATION

### Is The Daily Newspaper A "Quasi-Public" Institution?

The cases in this section reveal both a pattern of concentration of ownership in the American daily newspaper press and of continual acquisition by large chains of newspaper properties which had formerly been independently owned. Usually, independent local ownership of newspapers dies willingly but occasionally there is a fight to retain local ownership. A question which then is raised is whether the law makes such resistance possible. At least in this context, the fight for local ownership prevailed.

In early 1960, S. I. Newhouse set out to acquire an interest, hopefully a controlling interest, in the *Denver Post.* By May 1960, he had purchased a minority interest in the *Post.* Newhouse brought the lawsuit the following opinion de-

scribes on the ground that some *Post* stockholders were dedicated to the purpose of locking the stock control of the *Post* corporation in such a manner as to prevent Newhouse or any other person from gaining control of the *Post* corporation and thus perpetrating corporate control in the so-called incumbent group. Thus when the company purchased one block of stock for sale and transferred it to an Employees Stock trust, the dominant shareholders in the *Post* maintained that their efforts were designed to keep the Denver *Post* in local hands. S. I. Newhouse on the other hand, claimed their efforts were an unlawful conspiracy to keep the control of the stock of the *Post* in the hands of the defendants who were being sued. The lower federal district court had granted relief against the defendants as sought by plaintiff Herald Company, a corporation whose stock was owned entirely by S. I. Newhouse. The court of appeals reversed, per Hill, Circuit Judge. *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972) The court made the following significant observations about the role of a daily newspaper in a large American city like Denver:

"Basic in many of the rules of law pertaining to the relationship between officers and directors of a corporation and the corporate stockholders is the motive of profit for the corporation. A corporation publishing a newspaper such as the Denver Post certainly has other obligations besides the making of profit. It has an obligation to the public, that is, the thousands of people who buy the paper, read it, and rely upon its contents. Such a newspaper is endowed with an important public interest. It must adhere to the ethics of the great profession of journalism. The readers are entitled to a high quality of accurate news coverage of local, state, national, and international events. The newspaper management has an obligation to assume leadership, when needed, for the betterment of the area served by the newspaper. Because of these relations with the public, a corporation publishing a great newspaper such as the Denver Post is, in effect, a quasi-public institution.

"Such a newspaper corporation, not unlike some other corporations, also has an obligation to those people who make its daily publication possible. A great number of the employees are either members of a profession or highly skilled and specialized in their crafts. Many of them have dedicated their lives to this one endeavor. The appellants' sincere interest in their employees also refutes the allegation of illegal design. The Post's concern for their employees is exemplified in all the employee benefits provided. * * *"

### NOTES AND QUESTIONS

1. The Court of Appeals in *Seawell* disagreed with the district court's conclusion that the price paid by the corporation in the purchase of its stock for its employees by means of a stock trust plan was exorbitant. Similarly, the court concluded that the motive of the directors of the *Post* in implementing the employees stock trust had been to benefit the public, the corporation and the employees. The doctrine of *Seawell* is that directors of a private newspaper corporation will be shielded from a stockholder's derivative suit even if they have taken a course of action which does not bring the maximum profit to the newspaper corporation. In other words, directors of a newspaper corporation may, in some circumstances, sacrifice the profit a sale of stock would bring in order to preserve the independent local ownership of the paper. The basis for this decision appears to rest on the Court's remarkable characterization of the Denver *Post* as a "quasi-public institution."

2. The intriguing and ground-breaking feature of *Seawell* is the language to the effect that a newspaper is a "quasi-

public institution." The traditional view has been that the newspaper is private property which its owners may do with as they please. To suggest an obligation to employees and to the area served by the newspaper is a rather radical concept. Such a view obviously has considerable relevance for the proponents of a constitutional right of access to the privately-owned press. Hitherto the view has been that newspapers are immune from First Amendment obligation to their readers because a private newspaper's decision to deny publication to a particular editorial advertisement is obviously without constitutional significance since the requisite state action is missing.

Read *Chicago Joint Board* again. See text, p. ——. If the reasoning of *Seawell* were applied to *Chicago Joint Board*, would the result be different?

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## SECTION 5. THE MEDIA AND THE LABOR LAWS

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### A. A FREE PRESS AND THE NEWSMAN'S RIGHT TO COLLECTIVE BARGAINING

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## ASSOCIATED PRESS v. NATIONAL LABOR RELATIONS BOARD

301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1937).

Mr. Justice ROBERTS delivered the opinion of the Court.

In this case we are to decide whether the National Labor Relations Act, as applied to the petitioner by an order of the National Labor Relations Board, exceeds the power of Congress to regulate commerce pursuant to article 1, § 8, abridges the freedom of the press guaranteed by the First Amendment, and denies trial by jury in violation of the Seventh Amendment of the Constitution.

In October, 1935, the petitioner discharged Morris Watson, an employee in its New York office. The American Newspaper Guild, a labor organization, filed a charge with the Board alleging that Watson's discharge was in violation of section 7 of the National Labor Relations Act (29 U.S.C.A. § 157) which confers on employees the right to organize, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; that the petitioner had engaged in unfair labor practices contrary to subsections (1) and (3) of section 8 (29 U.S.C.A. § 158(1, 3) by interfering with, restraining, or coercing Watson in the exercise of the rights guaranteed him by section 7 and by discriminating against him in respect of his tenure of employment and discouraging his membership in a labor organization. * * *

* * *

First. Does the statute, as applied to the petitioner, exceed the power of Congress to regulate interstate commerce? The solution of this issue depends upon the nature of the petitioner's activities, and Watson's relation to them. The findings of the Board in this aspect are unchallenged and the question becomes, therefore, solely one of law to be answered in the light of the uncontradicted facts. * * *

The Associated Press is engaged in interstate commerce within the definition of the statute and the meaning of article 1, section 8, of the Constitution. * * * The petitioner, however, insists that editorial employees such as Watson are remote from any interstate activity and their employment and tenure can have no direct or intimate relation with the course of interstate commerce.

We think, however, it is obvious that strikes or labor disturbances amongst this class of employees would have as direct an effect upon the activities of the petitioner as similar disturbances amongst those who operate the teletype machines or as a strike amongst the employees of telegraph lines over which petitioner's messages travel.

* * *

Second. Does the statute, as applied to the petitioner, abridge the freedom of speech or of the press safeguarded by the First Amendment? We hold that it does not. It is insisted that the Associated Press is in substance the press itself, that the membership consists solely of persons who own and operate newspapers, that the news is gathered solely for publication in the newspapers of members. Stress is laid upon the facts that this membership consists of persons of every conceivable political, economic, and religious view, that the one thing upon which the members are united is that the Associated Press shall be wholly free from partisan activity or the expression of opinions, that it shall limit its function to reporting events without bias in order that the citizens of our country, if given the facts, may be able to form their own opinions respecting them. The conclusion which the petitioner draws is that whatever may be the case with respect to employees in its mechanical departments it must have absolute and unrestricted freedom to employ and to discharge those who, like Watson, edit the news, that there must not be the slightest opportunity for any bias or prejudice personally entertained by an editorial employee to color or to distort what he writes, and that the Associated Press cannot be free to furnish unbiased and impartial news reports unless it is equally free to determine for itself the partiality or bias of editorial employees. So it is said that any regulation protective of union activities, or the right collectively to bargain on the part of such employees, is necessarily an invalid invasion of the freedom of the press.

We think the contention not only has no relevance to the circumstances of the instant case but is an unsound generalization. The ostensible reason for Watson's discharge, as embodied in the records of the petitioner, is "solely on the grounds of his work not being on a basis for which he has shown capability." The petitioner did not assert and does not now claim that he had shown bias in the past. It does not claim that by reason of his connection with the union he will be likely, as the petitioner honestly believes, to show bias in the future. The actual reason for his discharge, as shown by the unattacked finding of the Board, was his Guild activity and his agitation for collective bargaining. The statute does not preclude a discharge on the ostensible grounds for the petitioner's action; it forbids discharge for what has been found to be the real motive of the petitioner. These considerations answer the suggestion that if the petitioner believed its policy of impartiality was likely to be subverted by Watson's continued service, Congress was without power to interdict his discharge. No such question is here for decision. Neither before the Board, nor in the court below nor here has the petitioner professed such belief. It seeks to bar all regulation by contending that regulation in a situation not presented would be invalid. Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances.

The act does not compel the petitioner to employ any one; it does not require that the petitioner 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 petitioner 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 anti-trust 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 petitioner 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 petitioner is free at any time to discharge Watson or any editorial employee who fails to comply with the policies it may adopt. * * *

The judgment of the Circuit Court of Appeals is affirmed.

Mr. Justice SUTHERLAND, dissenting.

Mr. Justice VAN DEVANTER, Mr. Justice McREYNOLDS, Mr. Justice BUTLER, and I think the judgment below should be reversed.

* * * If freedom of the press does not include the right to adopt and pursue a policy without governmental restriction, it is a misnomer to call it freedom. And we may as well deny at once the right of the press freely to adopt a policy and pursue it, as to concede that right and deny the liberty to exercise an uncensored judgment in respect of the employment and discharge of the agents through whom the policy is to be effectuated.

* * *

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.

* * *

### NOTES AND QUESTIONS

1. *AP v. NLRB*, is the fountainhead of any understanding of the relationship of labor law to the press. The case makes clear that the press is subject to the labor laws just as it is subject to the anti-trust laws. For Mr. Justice Roberts, this is just a corollary of the major premise that the "publisher of a newspaper has no special immunity from the application of the general laws."

2. Apparently it does not occur to the dissenters in *AP v. NLRB* that, while labor union members who work for AP may be partial to the claims of labor, the ownership of the AP might be equally susceptible to the point of view of capi-

tal. Mr. Justice Sutherland doesn't question the news impartiality of the member publishers who comprise the Associated Press. Does this help to explain his attitude toward government regulation of the press?

3. The holding of *AP v. NLRB,* that newsmen have a right to collective bargaining, is not only an important one for the working press. It has significant implications for the legal status of the press generally. *AP v. NLRB* makes clear that freedom of the press is meant to reach other interests and values beyond the freedom of the publisher.

Notice that the Court uses *AP v. NLRB* for the proposition that the press is subject to regulation with the proviso that the regulation must not affect the impartial dissemination of news or place a special burden on the press. Perhaps, the obligation of publishers to bargain collectively is not a "special burden." But, if editorial writers are permitted to form a union and to bargain collectively, presumably the publishers are correct if they assert that this makes them more sympathetic to the aspirations of labor generally.

Yet the Court denied that this factor was sufficient to affect the "impartial distribution of news."

Can you think of a labor practice by an editorial writer or reporter which might affect the "impartial distribution of news"? On the other side of the ledger, if, as a matter of policy, a publisher orders his staff never to carry labor news, would that violate the "impartial distribution of news" which *AP v. NLRB* is said to demand?

4. Morris Watson was fired for "incompetency" a short time after this case was decided. Do you think Justice Robert's opinion for the Court invited that result?

## B. THE FIRST AMENDMENT AND THE QUESTION OF WHETHER THE NEWSMAN CAN BE REQUIRED TO JOIN A UNION

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## EVANS v. AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS

354 F.Supp. 823 (S.D.N.Y. 1973).

**Editorial Note:**

M. Stanton Evans and William F. Buckley, Jr., 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) [29 U.S.C. § 158(a)(3)] of the National Labor Relations Act, at least 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 National Labor Relations Act allowed AFTRA to require them to join the union, to compel 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 Evans and Buckley 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.

Plaintiffs Evans and Buckley moved for summary judgment against AFTRA on the ground that they were not constitutionally required to join AFTRA or submit to its discipline.

BRIEANT, District Judge:

* * *

Radio and television differ from the press in that the press is open, at least in theory, to all. Any citizen (if he has Five Million Dollars) is legally free to start a competing newspaper in any of our major cities to set forth his own opinion. A latter day Paine with a mimeograph machine is deemed to have access to the "market-place of ideas" for Constitutional purposes, equal to those who own and control the leading journals of news and opinion. Accordingly, there is no legal requirement for the press to present a "fair" balance of opinion and analysis. Subject only to the laws of libel, there is not even a requirement of truthfulness and accuracy.

The situation is different with respect to radio and television. Frequencies available are limited. Accordingly, access is limited. Licenses issued pursuant to the authority of Congress are in the nature of franchises, allocating the airwaves among those desiring to be heard and seen. Although acquired practically without cost, many licenses have been "sold" for substantial sums. Broadcasting franchises are held in the public interest.

The Federal Communications Commission ("FCC") may not grant or renew a station license, except upon a finding that "public convenience, interest, or necessity will be served thereby" (47 U.S.C. § 307(a) et seq.). One of the essential elements for consideration in determining public necessity is the "quality and *fairness* of the licensee's programming." Hale v. F.C.C., 138 U.S.App.D.C. 125, 425 F.2d 556 (1970).

* * *

The statutory standard, public convenience, interest and necessity, is "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy", and "to maintain * * * a grip on the dynamic aspects of radio transmission." * * *

The aforementioned Congressional policies exist primarily for the benefit of the public, or listeners and viewers, but also benefit members of that class of persons available to be hired by broadcasters. There are a limited number of persons in the country situated as are plaintiffs, qualified by education and dogma to be hired to discharge this public duty of fair and balanced presentation of competing viewpoints. Plaintiffs have been so hired. While broadcasters would have standing to claim freedom from any union interference with the discharge of the fairness duty imposed upon them by law, they, in 1967, after a strike, bargained away this right with Aftra, presumably for economic value received, or labor peace equivalent to economic benefit.

We think that Evans and Buckley are so specially situated as to have standing also to assert for themselves, and for the general public, the rights assured by Congress to hear broadcasts of commentary, analysis and political opinion from diverse philosophic viewpoints.

* * *

The foregoing discussion of freedom of speech must be taken to relate to those, and only those, who serve as analysts, commentators and those whose speech on radio and television contains in substantial portion expressions of their own philosophy, conclusions, opinions, bias and evaluation, applied in accordance with their own personal opinions and tenets, and presented as such. * * *

* * *

As to those persons who are actors, artists and professional talent, the businesses in which they are engaged, or the services which they perform, are not intimately associated with the exercise of First Amendment rights. As to them, the un-

doubted need which Congress has found to exist for trade union protection may be sufficient to justify such prior restraint as may result. * * *

As to artists, actors and professional talent other than commentators, the union has a reasonable fear of the erosion of its role in the event that an artist or entertainer were permitted to "opt out" of the union on a claim of First Amendment rights.

The fact that in the past employers may have attempted to evade prior union contracts by passing off as commentators and analysts those who were not, does not justify the First Amendment restraint here found.

It is not necessary to declare Section 8(a)(3) unconstitutional on its face in order to effectuate plaintiffs' rights; rather we construe the section as not intending to provide any means whereby a union could place a direct threat of prior restraint upon a person so situated as are plaintiffs, as a combined result of (a) compulsory membership; (b) the need to subscribe to terms and conditions of union discipline; (c) the need to refrain from speaking through a broadcast outlet judged unfair, or not organized; (d) the need to refrain from crossing a picket line; and (e) the need to heed any other union directions which would operate directly or indirectly as a prior restraint on freedom of speech.

Insofar as Evans is concerned, the record is clear that he has confined his broadcasting efforts solely to the area of commentator and analyst on news and public affairs, expressing his own opinion, philosophy and conservative bias. Buckley has done all that too, but he has suffered himself to be called a "TV Star", and possibly may have appeared on some program in the past, or may in the future choose to participate in some program, where the format may be such as to cast him in the role of a mere entertainer, without any substantial opportunity to express his personal opinions, analysis and comments as such. If so, he must join Aftra. We do not consider service as a moderator to be such performance, unless the moderator is restricted by the program format from expressing any personal philosophy or opinion. * * *

*The Free Rider*

In its brief, defendant argued for the first time that plaintiffs were seeking to be "free riders" in attaining the benefits of AFTRA's efforts as their collective bargaining agent, and that if they were not required to join or pay dues, and presumably, not required to subject themselves to union discipline, they, at the very least, had to pay to the union an amount equal to the dues.

* * *

If there were any substantial "free rider" benefits, possibly a news commentator could be required to pay an amount not greater than union dues without seriously impinging his First Amendment rights, or chilling his freedom of expression.

*Conclusion*

Defendant's motion for summary judgment is denied. Plaintiffs' motion is granted, and a single judgment shall be settled on fifteen (15) days notice, or on waiver of notice, declaring the rights of plaintiffs as hereinbefore provided.

### NOTES AND QUESTIONS

1. Evans and Buckley 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. 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,* supra, *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 BMI in New York City or Chicago, all reflecting the national growth of broadcasting with its mostly recorded, rather than live, music. Instead of disputes with performers at the local level, the Board was now considering disputes with engineers and technicians. *WELL and WELL–FM,* 74 NLRB 1054 (1947); *Western Gateway Broadcasting*, 77 NLRB 49 (1948); *WBSR, Inc.,* 91 NLRB 63 (1950).

At first the Board concerned itself with disputes in the broadcast industry regardless of the size of the station. For a time a broadcaster was required by the Board to have a gross income of at least $200,000 before it would take jurisdiction over a labor dispute. *Hanford Broadcasting Co.*, 110 NLRB 1257 (1954). This minimum was lowered by the Board to $100,000 in 1958, *Raritan Valley Broadcasting Co.,* 122 NLRB 90 (1958), and, in its own version of the multiple ownership rules, the Board held that several nominally separate broadcast stations would be considered as a single employer for purposes of meeting the $100,000 requirement where they comprised an integrated enterprise with common management, common ownership and interrelated operations. *Radio and Television Broadcast Technicians Local No. 1264 v. Broadcast Services of Mobile, Inc.*, 380 U.S. 255 (1965).

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 agreements with the networks originally covered only "entertainers and artists." Does this help to explain part of Evans' and Buckley's difficulties with union membership? Have broadcasters always considered themselves as part of the "press"?

2. The court tries to distinguish between what plaintiff Buckley can and cannot do and still avoid AFTRA membership. Are the court's distinctions adequate, or even realistic? Could a person of Mr. Buckley's character ever "moderate" a panel *without* expressing his own views?

Consider also the court's exclusion of commentators "on matters such as professional sports, meteorology, * * *, fashions * * *" from Messers. Buckley's and Evans' category. What makes such commentary different? The court would include this group in the category of "actors, artists, and professional talent." The court finds that, as to them, the need for trade union protection may be sufficient to justify prior restraints on expression. Would you exclude as many people from the protected group as the court appears to? The status of investigative reporters for the major networks or, for that matter, local stations would appear to be in doubt. Are such persons actors and artists or members of the press? It appears that there are categories of people that the court has not considered. Dan Rather of CBS or Carl Stern of NBC might be surprised to find themselves categorized with actors, artists or professional talent. What of the status of a broadcast journalist who both editorializes and delivers the news? Should

such persons be exempt from AFTRA membership and sanctions?

3. Mr. Evans had a contract with CBS News. One of his contentions was that, if he refused to join in some AFTRA activity, AFTRA would later threaten CBS with a strike if it allowed Mr. Evans to broadcast. The *Evans* case holds that AFTRA can not do that. But suppose that CBS News had kept Mr. Evans off the air for its own reasons, rather than as a response to an AFTRA demand. Evans probably could not successfully sue CBS for specific breach of his contract. Neither would Evans be likely to prevail by relying on the fairness doctrine as part of his campaign to stay on CBS. A personal services contract is not usually specifically enforceable. The fairness doctrine only requires that broadcasters present a balanced presentation of controversial issues of public importance. The doctrine is not supposed to give a specific individual any rights to appear on the air to give his views.

4. Notice that Judge Brieant doesn't seem very convinced when he speaks of the legal presumption that there is unlimited entry to the print media: "Anyone (if he has five million dollars) is legally free to set up a competing newspaper." If this case is affirmed on appeal, might the case be useful to impose some obligations on the owners of newspapers with regard to the publication of editorial advertising? Or is that too great a leap from the principal case?

5. Both the AP and the TV networks can be thought of as seeking the "impartial dissemination of the news". In both cases it was argued that union membership hampered impartial dissemination of the news. Why did the AP lose and the networks (through Buckley and Evans) win? See generally, *Are TV and Radio Commentators Exempt from Union Membership?* 53 B.U.L.Rev. 745 (1973).

## A NOTE ON BLACKLISTING

6. When a labor union forbids its member to accept employment from a specified list of employers, this practice is called "blacklisting" and it constitutes an unfair labor practice.

The American Federation of Television and Radio Artists has recently 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.

A judge has recently ruled for the NLRB that AFTRA's unfair list constitutes a secondary boycott, in that agents and recording companies are being pressured into not dealing with LK, and that the unfair list is 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.

7. A comment in the Boston University Law Review calls into question the *Evans* court's distinctions between commentators and artists and suggests that the comic and the actor may express their political views in a manner that might be more meaningful to the general public than political views expressed by a political analyst. If that is so, should the First Amendment be interpreted to protect all broadcast employees in the manner in which Evans and Buckley have sought protection?

If the First Amendment is not viewed as an absolute, the problem in this context becomes balancing the public interest in wide open debate with the public interest in stable industrial relations. The comment suggests 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. The comment argues that the *Evans* decision could do more harm than good to the values protected by the First Amendment. Do you agree? See *Are Television and Radio Commentators Exempt from Union Membership?*, 53 B.U.L.Rev. 745 (1973).

8. As we go to press, the *Evans* case has been reversed by the United States Court of Appeals for the Second Circuit. —— F.2d —— (2d Cir.1974).

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## C. THE PRESS AND THE FAIR LABOR STANDARDS ACT

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### MINIMUM WAGES AND MAXIMUM HOURS FOR NEWSPAPER EMPLOYEES: MABEE v. WHITE PLAINS PUB. CO.

327 U.S. 178, 66 S.Ct. 511, 90 L.Ed. 607 (1946).

**Editorial Note:**

The Fair Labor Standards Act of 1938 established a minimum wage and a maximum number of hours for employees engaged in interstate commerce unless otherwise exempted by the Act 29 U.S.C.A. § 216(b). The Act specifically provided that weekly or semi-weekly newspapers with circulations of less than three thousand were not covered. Daily newspapers, no matter how small their out-of-state circulation, were apparently covered under the statute. For example, the White Plains Publishing Co. sent 45 copies out of the state. That paper contended that so small a number out of the 9,000 to 11,000 copies published was too thin a foundation on which to support a conclusion that such a newspaper was in interstate commerce.

Moreover, the 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, you will recall, 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 papers but not others. Therefore the White Plains Publishing Co. contended that the statutory exemptions for small circulation newspapers [weekly and semi-weekly] represented discriminatory regulation.

Mr. Justice DOUGLAS delivered the opinion of the Court.

Respondent publishes a daily newspaper at White Plains, New York. * * *

Respondent argues that to bring it under the Act, while the small weeklies or semi-weeklies are exempt by reason of § 13(a)(8), is to sanction a discrimination against the daily papers in violation of the principles announced in Grosjean v. American Press Co. 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. Labor Board, 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. * * *

We hold that respondent is engaged in the production of goods for commerce. * * *

Reversed.

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

Mr. Justice MURPHY, dissenting.

## NOTES AND QUESTIONS

1. Prior to the decision in *White Plains*, a federal court had already considered the contention that the application of the Fair Labor Standards Act of 1938, 29 U.S.C.A. § 215(a)(1)(5) to newspaper publishers was unconstitutional because "the press is immune from Congressional regulation by virtue of the terms of the First Amendment * * *." *Sun Publishing Co. v. Walling, 140 F.2d 445 at 447 (6th Cir. 1944).*

*Associated Press v. NLRB* had involved the application of the National Labor Relations Act, 29 U.S.C.A. § 151 to the news distributing business. The National Labor Relations Act dealt with the right of employees in interstate commerce to organize and engage in collective bargaining. But in the *Sun Publishing Co.* case the argument of the publishers was that enforcement of the minimum wage and maximum hour provisions of the Fair Labor Standards Act might drive financially weak newspapers out of business entirely. The United States Court of Appeals for the Sixth Circuit rejected this argument and observed that the guaranty of freedom of the press was not "a guarantee to a publisher of economic security, or a sanction to free him from the business hazards to which others are subject."

2. What reasons does the Supreme Court give for accepting the contention that even mailing 45 copies out of state is enough to constitute interstate commerce?

3. Why do you think Congress exempted small circulation weekly and semi-weekly newspapers from minimum wage requirements? Why aren't these policies relevant for small circulation dailies as well?

4. What is the Supreme Court's theory for its conclusion that the exemption for small weekly newspapers was not discriminatory?

5. Discrimination on the basis of circulation is held to be a permissible guide to whether a newspaper will be regulated under the Fair Labor Standards Act. But discrimination on the basis of circulation in terms of exempting small circulation newspapers from state taxation was held not permissible in *Grosjean*. See text, supra, p. 155. Does the Court give a convincing explanation for this distinction?

Suppose it could have been shown conclusively that small circulation weeklies and semi-weeklies were far more sympathetic to the majority party in Congress than daily newspapers. Would that have affected the Court's decision?

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## OKLAHOMA PRESS PUB. CO. v. WALLING

327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946).

Mr. Justice RUTLEDGE:

These cases bring for decision important questions concerning the Administrator's right to judicial enforcement of *subpoenas duces tecum* issued by him in the course of investigations conducted pursuant to § 11(a) of the Fair Labor Standards Act, 52 Stat. 1060, 29 U.S.C.A. § 211(a). His claim is founded directly upon § 9, 29 U.S.C.A. § 209, which incorporates the enforcement provision of §§ 9 and 10 of the Federal Trade Commission Act, 38 Stat. 717, 15 U.S.C.A. §§ 49, 50. The subpoenas sought the production of specified records to determine whether petitioners were violating the Fair Labor Standards Act, including records relating to coverage. Petitioners, newspaper publishing corporations, maintain that the Act is not applicable to them, for constitutional and other reasons, and insist that the question of coverage must be adjudicated before the subpoenas may be enforced.

* * *

Coloring almost all of petitioners' position, as we understand them, is a primary misconception that the First Amendment knocks out any possible application of the Fair Labor Standards Act to the business of publishing and distributing newspapers. The argument has two prongs.

The broadside assertion that petitioners "could not be covered by the Act," for the reason that "application of this Act to its newspaper publishing business would violate its rights as guaranteed by the First Amendment," is without merit. Associated Press v. Labor Board, and Associated Press v. United States, Mabee v. White Plains Publishing Co. * * *

* * * The contention drawn from the exemption of employees of small newspapers by § 13(a)(8) deserves only slightly more attention. It seems to be twofold, that the Amendment forbids Congress to "regulate the press by classifying it" at all and in any event that it cannot use volume of circulation or size as a factor in the classification.

Reliance upon Grosjean v. American Press Co., to support these claims is misplaced. There the state statute singled out newspapers for special taxation and was held in effect to graduate the tax in accordance with volume of circulation. Here there was no singling out of the press for treatment different from that accorded other business in general. Rather the Act's purpose was to place publishers of newspapers upon the same plane with other businesses and the exemption

for small newspapers had the same object. 83 Cong.Rec. 7445. Nothing in the *Grosjean* case forbids Congress to exempt some publishers because of size from either a tax or a regulation which would be valid if applied to all.

What has been said also disposes of the contention drawn from the scope of the commerce power and its applicability to the publishing business considered independently of the Amendment's influence. Associated Press v. Labor Board; Associated Press v. United States.

Other questions pertain to whether enforcement of the subpoenas as directed by the circuit courts of appeals will violate any of petitioners' rights secured by the Fourth Amendment and related issues concerning Congress' intent. It is claimed that enforcement would permit the Administrator to conduct general fishing expeditions into petitioners' books, records and papers, in order to secure evidence that they have violated the Act, without a prior charge or complaint and simply to secure information upon which to base one, all allegedly in violation of the Amendment's search and seizure provisions. * * *

The short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure, but raise only the question whether orders of court for the production of specified records have been validly made; and no sufficient showing appears to justify setting them aside.

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 in 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.

* * *

* * * Both were corporations. 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. These were subjects of investigation authorized by § 11(a) the latter expressly, the former by necessary implication. It is not to be doubted that Congress could authorize investigation of these matters. In all these respects, the specifications more than meet the requirements long established by many precedents. * * *

On the other hand, petitioners' view if accepted would stop much if not all of 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 enforce-

ment which Congress has placed upon him. And if his functions could be thus blocked, so might many others of equal importance. * * *

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of these cases.

Mr. Justice MURPHY, dissenting.

### NOTES AND QUESTIONS

1. The Court in *Oklahoma Press Publishing Co.* points out that the case does not raise the issue of whether Congress could enforce a regulatory program including the press by excluding from commerce the circulation of a publisher refusing to conform. Suppose the Fair Labor Standards Act were amended to make such exclusion the penalty for a publisher who refused to meet the wages and hours requirements of the Fair Labor Standards Act? Would such a penalty be valid?

2. By allowing administrative officials to subpoena the press for records, does a possibility arise that government may use the subpoena power as a means of reprisal against a hostile press? Should this possibility alter the Court's Fourth Amendment analysis? Are there any safeguards in the *Oklahoma Press Publishing Co.* against the possibility of abuse of the subpoena power by government against the press?

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## D. RECENT PROBLEMS OF LABOR-MANAGEMENT RELATIONS IN THE NEWSPAPER INDUSTRY

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1. In the fall of 1973, advancing technology and the future security of newspaper printers clashed at *The Washington Post* and the *Post* was struck for two days in November. An article in the *Post* entitled "A Craft in Crisis: Printers and the Post", *The Washington Post,* Sunday, October 28, 1973, at C3, by *Post* staff writer William Greider, described the problem. The Linotype machine, the article explained, is obsolete or nearly so. The future of newspaper production belongs to the computer. While at present this means that new machines will be introduced to speed up the process and permit one worker to do the jobs of many, eventually it will mean that a reporter or a classified ad taker will sit at a typewriter and automatically originate electronic impulses which a computer will organize and translate into a piece of film, ready for the press. The computer will even organize the type into a whole page, replacing the human make-up artists, and it may one day be used to connect the reporter's typewriter directly to the press itself.

In contrast to this technological vision stands the printer's union, the International Typographers, with a long tradition of intellectual acumen and fierce individualism.

The printers and the *Post* had begun negotiations on what both considered a threshold contract. The newspaper wanted to clear away all of the restrictive work rules, including the practice of "setting bogus", which prevented a "quantum jump to the new technology." The printers wanted to stake out the survival of the craft, establishing its jurisdiction over key points in the future production system and maintaining job security. The union said "setting bogus" is an important bargaining chip that it would cash in only if the price was right, and the company's proposals did not seem adequate. At any rate, both sides understood that once this threshold was passed, and the steady reduction of printers had begun, the union would never again wield the leverage it had at this time.

The tensions that both sides brought with them to the bargaining table were aggravated by the frustrating results of the various piecemeal automation techniques in which the *Post* had invested over the last decade in an attempt to speed up the production process.

The tensions came to a head in early November, when a printer was fired by the *Post* for "neglect of duty", and the other printers refused, in response, to finish the shift. The resulting labor dispute, characterized as an "illegal work stoppage" by the *Post* and as a lock-out by the printers, cost the newspaper a Saturday and Sunday edition, and saw an attempt by non-union *Post* employees to put out a Monday newspaper using the new technology, without the union's help. That attempt was frustrated by other unions in sympathy with the printers. In a "settlement at dawn"' on Monday, the *Post* agreed to rehire the printer, and the members of the union returned to work. See *The Washington Post*, Tuesday, November 6, 1973, p. A1 col. 5, p. A4 col. 1.

2. An earlier example of union-management strife in the newspaper industry is demonstrated by an issue which arose in the principal case in the federal court of appeals. The union threatened to expel members for violation of a rule prohibiting them from working in a shop with non-members. The United States Court of Appeals for the Seventh Circuit held that § 8(b)(1)(A) of the National Labor Relations Act permitted "unions to enforce their internal policies upon their membership as they see fit." See *ANPA v. NLRB, 193 F.2d 782 (7th Cir. 1951)*.* Recall also that the issue of union discipline was central to the difficulties Messers. Evans and Buckley had with AFTRA. That case casts some doubt, does it not, on the Seventh Circuit's statement referred to above?

See also *Publishers' Ass'n of New York City v. New York Mailers' Union, 317 F.2d 624 (2d Cir. 1963)*, which involved union disciplinary proceedings brought against a union member, a foreman, who disciplined another union member. The collective bargaining agreement provided that the union should not discipline the foreman for carrying out the instructions of the employer.

3. It should not be thought that the balance of advantage in terms of battle tactics with regard to labor problems is entirely weighted on the union side of the scale. In *Clune v. Publishers' Ass'n of New York City, 214 F.Supp. 521 (S.D.N.Y.1963), aff'd per curiam, 314 F. 2d 343 (2d Cir. 1963)*, the pressmen brought an action for injunctive relief and treble damages under the Sherman Antitrust Act against 10 New York City newspaper publishers. The pressmen were attacking the agreement among the publishers to shut down as a body if one newspaper was struck by any of the craft unions having a collective bargaining agreement with any of the member publishers. The pressmen asserted that the agreement constituted a violation of the antitrust laws.

Previously the same agreement has been the basis of a union attack before the National Labor Relations Board. The Board, however, concluded that the agreement did not constitute an unfair labor practice. See 139 N.L.R.B. No. 107 (1962).** Similarly, the district court

* Ed. Note: In *Scofield v. NLRB, 393 F.2d 49 (7th Cir. 1968)*, a divided court held that union disciplinary proceedings involving the assessment of fines for violation of union rules against overproduction did not constitute an unfair labor practice. Supreme Court review might have reopened the general question but the Supreme Court declined this invitation and affirmed the Court of Appeals. *Scofield v. NLRB*, 394 U.S. 423 (1969).

** Ed. Note: In *NLRB v. Brown, 380 U.S. 278 (1965)*, the Supreme Court held that a lock-out by all employers of a multi-employer bargaining unit is not an unfair labor prac-

declined to give relief to the printing pressmen on an antitrust theory. The district court held that the pressmen had not shown that they would succeed in showing that the publishers' agreement constituted a violation of the antitrust laws. The court observed that damages would lie if their claims for lost wages prevailed and that therefore there was no necessity to grant the pressmen's request for a mandatory injunction requiring the member publishers to publish those papers not struck by the typographer's union. The court intimated that the specific intent to effect a restraint of trade or to monopolize was, in its judgment, demonstrated by the publishers' agreement. A statement concerning the publishers' agreement by Walter Thayer of the now vanished *New York Herald Tribune* provides some of the background behind the logic of the agreement from a publishers' point of view. The statement is reported in *Clune v. Publisher's Ass'n of New York City, 214 F.Supp. 520 at 523 (D. C.N.Y.1963)*:

"On December 8, 1962, when the strike of the New York Typographical Union Number Six began, the pressmen refused to go to work at the struck newspapers. They were, however, willing to work at the non-struck papers.

"The reasons ascribed by defendants for the union's separate treatment of the newspapers and the publishers' reasons for their own reaction were set forth by Walter Thayer of the Herald Tribune before the 'Board of Accountability' on January 9, 1963, as follows:

'As we see it, there were three reasons the printers followed this pattern. First, a strike against four papers only would prevent a newspaper blackout, if the non-struck papers continued to publish.

'On the surface the selection looked like a fair choice. Two morning papers, one tabloid and one standard size, would publish; one afternoon paper would be in business. This seems rather commendable.

'Under the same heading, however, I would suspect that the printers concluded that as they intended this to be a long strike—they had said so—there would be less public demand and therefore less public pressure for a settlement if three papers were serving the newspaper requirements of New York rather than none.

'For example, perhaps the Mayor, the Governor, and the Secretary of Labor would not have become so interested if three papers were publishing, and perhaps even this Board might not have come into existence.

'The second reason, as we see it, is that the pressure to yield to unreasonable or onerous demands are geometrically increased if a union is in a position to negotiate with four papers which are closed while three of their competitors are publishing and reaping the benefits which accrue under these circumstances.

'The newspaper industry is a peculiar industry. One thing a newspaper or even four strong newspapers together cannot long withstand is to be out of business while their competitors are in business. Readers and advertisers are not fickle, but their demand is a constant one, a daily one and they are susceptible, and to each paper they are precious commodities.

'Therefore, if the Herald Tribune and the Mirror and the Post were to continue to publish while the other four papers were struck, the willingness of those four papers to accede to unreasonable or onerous demands would be very great, and we have no illusion whatsoever that we who published under these circumstances would not be subject to the same terms

tice. This would appear to strongly buttress the position of the NLRB with regard to the New York publishers' agreement.

after the others had settled or alternatively would be struck while they published.

'As recently as the Guild strike when the Daily News alone was struck, there was a public statement by an official of that union to the effect that when the News had settled, the same settlement and the same terms would be imposed on the other papers and that the order for that purpose had been established—a rather chilling prospect.

'There's a third reason we ascribe to this strategy by the union. It's not coincidence, I believe, that the non-struck papers, so to speak, the Tribune, the Mirror and the Post, are the papers which are popularly regarded as the ones least likely to survive a strike.' "

4. The complexity of labor-management relations and the potential for lock-outs are demonstrated in *News Union of Baltimore v. NLRB,* 393 F.2d 673 (D.C.Cir.1968). The Hearst Newspapers published the *Baltimore News American.* Abell published the *Baltimore Sun.* Hearst and Abell together constituted a multi-employer bargaining unit with the printer's union, but the editorial employees of each were represented by two different unions. When Abell was struck by the Newspaper Guild, representing the editorial employees, the printers honored the picket line, in violation of an agreement they had made with both Hearst and Abell not to strike. Because of the printers' action *Hearst* terminated publication and "locked out" all of its employees. The court held that such a retaliatory lock-out was not an unfair labor practice by Hearst.

5. Technological advances in the production of a newspaper raise two serious problems for labor unions. The first, as you have seen, centers around maintaining the total number of jobs. "Setting bogus" and "overmanning" represent two attempts to cope with this problem. One study points out that the prospect of losing jobs is extremely serious, not because present workers would be put out of work—an arrangement to preserve existing employees' jobs would be simple enough—but because the union's pension funds are built almost entirely on payments from working members. Unions therefore cannot afford to dwindle away and die, because their pension funds will die with them.

A solution to this problem might be to allow newspaper managements to stop replacing workers as they retire or quit, thus saving labor costs, upon the condition that management make payments to the union pension fund equivalent to the payments that would have been made by replacements. A similar solution seems to have been worked out by the New York papers. See generally H. Kelber & C. Schlesinger, Union Printers and Controlled Automation (1967). Could such a solution be called "featherbedding" and struck down as an unfair labor practice?

Technological advances also pose the problem of union jurisdiction. Recall that jurisdiction was one of the main concerns of the printers at the *Post.* The jurisdiction of the newspaper union is generally based upon the type of work done by the newspaper employees 50 years ago, when the unions were first organized. The jurisdictional lines of the newspaper union thus became increasingly anachronistic under the impact of the new technology.

The fragmentation of newspaper employees into many different unions along jurisdictional lines is illustrated, for example, by the situation in New York City where 10 unions take part in newspaper production. Two of these unions, the Electrical Workers and the Machinists, who keep machinery in order, are relatively peripheral, but the other eight are vital to the process of putting out a newspaper. Janitors, clerks in the advertising

and business departments, and reporters all belong to the American Newspaper Guild. The International Typographer's Union mans the composing room. The engravers, who cast photos into plates, have a separate union as do the stereotypers who make the curved printing plates. The pressmen run the presses and the paperhandlers have jurisdiction over the rolls of newsprint. The mailroom is the scene of continuous battle between the mailers and the deliverers, neither of whom have very much to do compared with their jobs in the 19th Century, and both of whom fight bitterly for every scrap of work available. See K. Roberts, *Antitrust Problems in the Newspaper Industry,* 82 Harv.L.Rev. 319 at 364, fn. 214 (1968).

6. Among the many causes that have been given for the decline in the total number of daily newspapers in the United States has been labor problems within the newspaper industry. An example of such tensions is the jurisdictional disputes among the various unions. Such a dispute between the Mailers Union and the Deliverers Union resulted in shutting down the *New York Times* in 1962 and is an example of labor stresses within the newspaper industry. See *McLeod For And On Behalf of N.L.R.B. v. Newspaper Mail Deliverers' Union of New York City And Vicinity,* 209 F.Supp. 434 (S.D.N.Y.1962).

7. Stuart Rothman, former General Counsel of the National Labor Relations Board, has suggested a four-step procedure to improve collective bargaining in the newspaper industry in order to avoid crippling strikes. First, he proposes a newspaper "industry joint conference" where national leaders of management and labor in the press would trade ideas. Secondly, he suggests the creation of an "industry joint board" consisting of union and management member organizations to which locals would bring their disputes for settlement. The "industry joint board" decisions, however, would have to be unanimous. Thirdly, he proposes a "joint study committee" of labor and management within the local newspaper unit. Finally, he suggests the establishment of an "industry joint board" for the determination of jurisdictional disputes.

In Rothman's view the adoption of all of these proposals is necessary to make any of them work. Mr. Rothman is not overly sanguine about his proposals. Traditionally, newspaper publishers have functioned very autonomously. Similarly, publishers' associations have no real control over individual publishers; this makes insuring compliance with all-industry boards problematic. Similarly, the large number of separate craft unions with which each publisher must deal makes concerted all-industry negotiation especially difficult in the newspaper industry. Nevertheless, an effort toward achieving some degree of all-industry communication and arbitration is vital for the health of the newspaper industry. See generally Rothman, *Avoiding Crippling Strikes in the Newspaper Industry,* 31 Notre Dame Lawyer 119 at 134–136 (1964).

## SECTION 6. THE LAW AND REGULATION OF ADVERTISING

### A. THE FRAMEWORK OF REGULATION

1. The regulation of advertising grew out of a generalized attack at the turn of the century on the excesses of laissez-faire capitalism and the cynical doctrine of *caveat emptor* (let the buyer beware). Dramatized by the writing of the muckrakers—for example, Samuel Hopkins Adams' series on patent medi-

cines, "The Great American Fraud," appearing in *Colliers* in 1906—the regulatory movement took root in the 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 laws and so in the FTC Act declared unfair methods of competition in commerce unlawful in the interest of promoting "the preservation of an environment which would foster the liberty to compete." In the early years of the Act, the courts used it to protect competitors against false and deceptive advertising claims; the protection of consumers was incidental.

In 1922, for example, Justice 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 per cent 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 * * * and since the business of its trade rivals who marked their goods truthfully was necessarily affected by that practice, the Commission was justified in its conclusion that the practice constituted an unfair method of competition; and it was authorized to order that the practice be discontinued." *Federal Trade Commission v. Winsted Hosiery Co., 258 U.S. 483 (1922).*

Justice Benjamin Cardozo, in a similar opinion 10 years later, upheld an FTC ruling ordering Pacific Coast lumber dealers to discontinue selling "Western Yellow Pine" under the trade name of "California White Pine," White Pine being a distinct and superior product. Again the incidental right of the consumer to get what he has ordered was acknowledged, but the Court went on to emphasize that "Dealers and manufacturers are prejudiced when orders that would have come to them if the lumber had been rightly named, are diverted to others whose methods are less scrupulous. * * * The careless and the unscrupulous must rise to the standards of the scrupulous and diligent. The Commission was not organized to drag the standards down." *Federal Trade Commission v. Algoma Lumber Co., 291 U.S. 67 (1933).*

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. *Federal Trade Commission v. Raladam Co., 283 U.S. 643 (1931).*

The Court repudiated *Raladam* in *FTC v. R. F. Keppel & Bro., Inc., 291 U.S. 304 (1934),* a case involving the deceptive use of a lottery in marketing candy to children, when it held:

"Neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories. The common law afforded a definition of unfair competition and, before the enactment of the Federal Trade Commission Act, the Sherman Act had laid its inhibition upon combinations to restrain or monopolize interstate commerce which the courts had construed to include restraints upon competition in interstate commerce. It would not have been a difficult feat of

draftsmanship to have restricted the operation of the Trade Commission Act to those methods of competition in interstate commerce which are forbidden at common law or which are likely to grow into violations of the Sherman Act, if that had been the purpose of the legislation."

After *Keppel,* unfair competitive practices were not limited to those likely to have anticompetitive consequences violative of the antitrust laws; nor were unfair practices in commerce confined simply to competitive behavior.

In 1937, Justice Black found another chink in the armor of *Raladam* when overruling an opinion by Judge Learned Hand of the Court of Appeals. Hand had struck down an FTC order against a deceptive sales practice in the peddling of encyclopediae.

"The fact that a false statement may be obviously false to those who are trained and experienced does not change its character," said Black, "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." *Federal Trade Commission v. Standard Education Soc'y,* 302 U.S. 112 (1937).

Congress legitimized this golden rule a year later by amending Sec. 5 of the FTC Act to add: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." And to Sec. 12 was added an explicit prohibition of "false advertisements" for the "purpose of inducing or which is likely to induce purchase of food, drugs, devices or cosmetics." Known as the Wheeler-Lea Amendments, 52 Stat. 111 (1938), as amended, 15 U.S.C.A. § 45(a)(1) (1952), 15 U.S.C.A. § 52 (1964), the "false" and "deceptive" notions of the amended law are now the keystones of the FTC's authority to regulate advertising and to protect consumers equally with competitors.

The House report on the Amendment summarized congressional thinking on the question: "This amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor." H.R.Rep.No. 1613, 75th Cong., 1st Sess., 3 (1937). An unfair trade practice need not be either deceptive or anticompetitive.

The United States Supreme Court dispelled any doubt concerning the validity of the latter proposition in a recent case involving the "Green Stamp" Company, although the FTC lost its suit against S&H on a technicality:

## FEDERAL TRADE COMMISSION v. THE SPERRY & HUTCHINSON CO.

405 U.S. 233, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972).

Mr. Justice WHITE delivered the opinion of the Court:

* * *

Thus, legislative and judicial authorities alike convince us 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.[5]

The general conclusion just enunciated requires us to hold that the Court of Appeals erred in its construction of § 5 of the Federal Trade Commission Act. Ordinarily we would simply reverse the judgment of the Court of Appeals insofar as it limited the unfair practices proscribed by § 5 to those contrary to the letter and spirit of the antitrust laws and we would remand the case for consideration of whether the challenged practices, though posing no threat to competition within the precepts of the antitrust laws, are nevertheless either (1) unfair methods of competition or (2) unfair or deceptive acts or practices.

What we deem to be proper concerns about the interaction of administrative agencies and the courts, however, counsels another course in this case. In this Court the Commission argues that, however correct the Court of Appeals may be in holding the challenged S&H practices beyond the reach of the letter or spirit of the antitrust laws, the Court of Appeals nevertheless erred in asserting that the FTC could measure and ban conduct only according to such narrow criteria. Proceeding from this premise, with which we agree, the Commission's major submission is that its order is sustainable as a proper exercise of its power to proscribe practices unfair to consumers. Its minor position is that it also properly found S&H's practices to be unfair competitive methods apart from their propriety under the antitrust laws.

The difficulty with the Commission's position is that we must look to its opinion, not to the arguments of its counsel, for the underpinnings of its order. "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." We cannot read the FTC opinion on which the challenged order rests as premised on anything other than the classic antitrust rationale of restraint of trade and injury to competition.

The Commission urges reversal of the Court of Appeals and approval of its own order because, in its words, "[t]he Act gives the Commission comprehensive power to prevent trade practices which are deceptive or unfair to consumers, regardless of whether they also are anticompetitive." It says the Court of Appeals was "wrong in two ways: you can have an anticompetitive impact that is not a violation of the antitrust laws and violate Section 5. You can also have an impact upon consumers without regard to competition and you can uphold a Section 5 violation on that ground." Though completely accurate, these statements cannot be squared with the Commission's holding that "[i]t is essential in this mat-

[5] The Commission has described the factors it considers in determining whether a practice that is neither in violation of the antitrust laws nor deceptive is nonetheless unfair:

"(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." 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).

S&H argues that a later portion of this statement commits the FTC to the view that misconduct in respect of the third of these criteria is not subject to constraint as "unfair" absent a concomitant showing of misconduct according to the first or second of these criteria. But all the FTC said in the statement referred to was that "[t]he wide variety of decisions interpreting the elusive concept of unfairness *at least* makes clear that a method of selling violates Section 5 if it is exploitive or inequitable and if, in addition to being morally objectionable, it is seriously detrimental to consumers or others." Ibid. (emphasis added).

ter, we believe, and as we have heretofore indicated, to determine whether or not there has been or may be an impairment of competition," Opinion of Commission, 1 App. 175; its conclusion that "[r]espondent * * * prevents * * * competitive reaction[s] and thereby it has restrained trade. We believe this is an unfair method of competition and an unfair act and practice in violation of Section 5 of the Federal Trade Commission Act and so hold," 1 App. 178; its observation that:

"Respondent's individual acts and its acts with others taken to suppress trading stamp exchanges and other stamp redemption activity are all part of a clearly defined restrictive policy pursued by the respondent. In the circumstances surrounding this particular practice it is difficult to wholly separate the individual acts from the collective acts for the purpose of making an analysis of the consequences under the antitrust laws." 1 App. 179,

and like statements throughout the opinion, see, e. g., 1 App. 176–178, *passim.*

There is no indication in the Commission's opinion that it found S&H's conduct to be unfair in its effect on competitors because of considerations other than those at the root of the antitrust laws. For its part, the theory that the FTC's decision is derived from its concern for consumers finds support in only one line of the Commission's opinion. The Commission's observation that S&H's conduct limited "stamp collecting consumers' * * * freedom of choice in the disposition of trading stamps," 1 App. 176, will not alone support a conclusion that the FTC has found S&H guilty of unfair practices because of damage to consumers.

Arguably, the Commission's findings, in contrast to its opinion, go beyond concern with competition and address themselves to noncompetitive and consumer injury as well. It may also be that such findings would have evidentiary support in the record. But even if the findings were considered to be adequate foundation for an opinion and order resting on unfair consequences to consumer interests, they still fail to sustain the Commission action; for the Commission has not rendered an opinion which, by the route suggested, links its findings and its conclusions. The opinion is barren of any attempt to rest the order on its assessment of particular competitive practices or considerations of consumer interests independent of possible or actual effects on competition. Nor were any standards for doing so referred to or developed.

* * *

In these circumstances, because the Court of Appeals' judgment that S&H's practices did not violate either the letter or the spirit of the antitrust laws was not attacked and remains undisturbed here, and because the Commission's order could not properly be sustained on other grounds, the judgment of the Court of Appeals setting aside the Commission's order is affirmed. The Court of Appeals erred, however, in its construction of § 5; had it entertained the proper view of the reach of the section, the preferable course would have been to remand the case to the Commission for further proceedings. Accordingly, the judgment of the Court of Appeals is modified to this extent and the case is remanded to the Court of Appeals with instructions to remand it to the Commission for such further proceedings, not inconsistent with this opinion, as may be appropriate.

Modified and remanded.

**NOTES**

1. In a no less definitive ruling, the Court of Appeals for the District of Columbia in late 1973 rejected a district court holding that the FTC lacked authority under its governing statute to rule

that failure to post octane rating numbers on gasoline pumps at service stations was an unfair method of competition and an unfair or deceptive act or practice. In reversing, the Court of Appeals declared that the FTC Act conferred on the agency the authority to promulgate trade regulation rules which have the effect of substantive law. The FTC, said the court, has a responsibility to protect the consumer from being misled by the governing conditions under which goods and services are advertised and sold. Aware that the FTC for a long time had a restrictive view of its power, Congress passed a series of laws granting limited substantive rule-making authority to the Commission. In this important ruling the Court of Appeals found and reaffirmed that the agency has had this rule-making power all along, that it was granted in the original FTC Act. *National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C.Cir. 1973).*

2. Courts tend to uphold FTC decisions unless it can be shown that the Commission acted arbitrarily, abused its discretion, or failed to make an allowable judgment in its choice of remedies. *Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946).*

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## B. FALSE, DECEPTIVE AND UNFAIR ADVERTISING

1. An increasing concern with consumer interests has put a public spotlight on false and deceptive advertising and the role of the Federal Trade Commission in regulating it. The agency's growing sensitivity to deceptive advertising is probably a function of changing technology, public pressure, and a number of broad yet incisive investigations of the FTC by private and governmental groups, notably Nader's Raiders and the American Bar Association. See Cox, Fellmuth and Schulz, *"The Nader Report" on the Federal Trade Commission.* New York: R. W. Baron, 1969. *The Report of the American Bar Association to Study the Federal Trade Commission,* 1969. See also Howard and Hulbert, *Advertising and the Public Interest, A Staff Report to the Federal Trade Commission,* 1973; *A New Regulatory Framework: Report on Selected Independent Regulatory Agencies; the President's Advisory Council on Executive Organization* (January, 1971); Kohlmeier, The Regulators, New York: Harper & Row, 1969; Note, *Developments in the Law: Deceptive Advertising,* 80 Harvard Law Review 1005–1163 (1967); *Symposium: FTC Regulation of Advertising,* 17 Kansas Law Review 551–650 (1969); and Kintner, A Primer on the Law of Deceptive Practices: A Guide for the Businessman (1971).

Evidence of the FTC's new found vigor, is to be found in its rulings on corrective advertising and mock-ups; and its intra-agency debates on substantiation programs, counter ads, children's advertising, and claims of uniqueness.

2. Historically the most potent remedy available to the Commission in an action against false or deceptive advertising has been a *cease and desist order,* appealable to a federal courts within 60 days. The problem is that an exhaustion of administrative and legal remedies may take many years: it took a less conscientious Commission 16 years to get the "Liver" out of Carter's Little Liver Pills. *Carter Products, Inc. v. Federal Trade Commission, 268 F.2d 461 (9th Cir. 1959), certiorari denied 361 U.S. 884 (1959).*

The *Geritol* case reflects the procedural and enforcement problems the FTC faces in regulating false and deceptive advertising. The Commission began its investigation of Geritol in 1959, issued a complaint in 1962, and a cease and desist

order in 1964, which was made final in 1965. In 1967, the U. S. Court of Appeals for the Sixth Circuit upheld the FTC. A year later the Commission, after a public hearing, reported that Geritol's commercials still did not comply with the Agency's 1967 order requiring affirmative disclosures. In 1969 that order continued to be violated and so the FTC turned the case over to the Department of Justice. On April 20, 1970, the Department of Justice filed a $1 million suit against the company and its advertising agency. The company and its agency were fined a total of $812,000 in January 1973; the defendants asked the Second Circuit Court of Appeals for a jury trial. In the intervening 14 years an estimated $60 million has been spent on television advertising for Geritol. Its sales for 1971 alone were estimated at $23 million, 90 per cent of the tonic market. A portion of the 1967 Court of Appeals ruling in this case follows:

## J. B. WILLIAMS COMPANY, INC. v. FEDERAL TRADE COMMISSION

381 F.2d 884 (6th Cir. 1967).

CELEBREZZE, Circuit Judge.

The question presented by this appeal is whether Petitioners' advertising of a product, Geritol, for the relief of iron deficiency anemia, is false and misleading so as to violate Sections 5 and 12 of the Federal Trade Commission Act.[1] At the conclusion of an administrative proceeding upon a complaint which charged Petitioners with engaging in unfair and deceptive acts, the Federal Trade Commission affirmed in part the findings of the Hearing Examiner that the Petitioners had violated Sections 5 and 12 of the Federal Trade Commission Act. Petitioners seek review to set aside the Order to cease and desist, issued by the Commission —Appendix, Table I.

The J. B. Williams Company, Inc. is a New York corporation engaged in the sale and distribution of two products known as Geritol liquid and Geritol tablets. Geritol liquid was first marketed in August, 1950; Geritol tablets in February, 1952. Geritol is sold throughout the United States and advertisements for Geritol have appeared in newspapers and on television in all the States of the United States.

Parkson Advertising Agency, Inc. has been the advertising agency for Williams since 1957. Most of the advertising money for Geritol is spent on television advertising. * * *

The Commission's Order requires that not only must the Geritol advertisements be expressly limited to those persons whose symptoms are due to an existing deficiency of one or more of the vitamins contained in the preparation, or due to an existing deficiency of iron, but also the Geritol advertisements must affirmatively disclose the negative fact that a great majority of persons who experience these symptoms do not experience them because they have a vitamin or iron deficiency; that for the great majority of

[1] Section 5(a)(1), 52 Stat. 111, 15 U.S.C. § 45 (a)(1):

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

"Section 12, 52 Stat. 114, 15 U.S.C. § 52:

"(a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 45 of this title."

people experiencing these symptoms, Geritol will be of no benefit. Closely related to this requirement is the further requirement of the Order that the Geritol advertisements refrain from representing that the symptoms are generally reliable indications of iron deficiency. * * *

An understanding of the function of iron in the human body and how it is lost is essential to an understanding of the issues in this case and the medical testimony relating to these issues. * * * The Commission's finding that the Geritol advertisements create a false and misleading impression on the public by taking common or universal symptoms and representing these symptoms as generally reliable indications of iron deficiency or iron deficiency anemia, is supported by substantial evidence. * * *

The main thrust of the Commission's Order is that the Geritol advertising must affirmatively disclose the negative fact that a great majority of persons who experience these symptoms do not experience them because there is a vitamin or iron deficiency. * * *

Since the symptoms of tiredness, loss of strength, nervousness or irritability are universal, non-specific complaints, there was naturally a disagreement as to whether these symptoms are usually due to iron deficiency anemia, or are present when a person has iron deficiency anemia. * * *

Not all of the approximate ten percent of the population who have iron deficiency anemia have moderate to severe anemia, and consequently exhibit mild or no symptoms. While there are no statistics available as to the number of people who are tired and run-down, or the number of people who are tired and run-down due to iron deficiency anemia, there is direct testimony that only a minority of people with these symptoms exhibit these symptoms because of iron deficiency anemia. Considering this evidence along with the fact that these symptoms are common and non-specific, the Commission could reasonably infer, and there was substantial evidence to support the finding, that the majority of the people who have these symptoms, have them because of causes other than iron deficiency anemia.

While the advertising does not make the affirmative representation that the majority of people who are tired and run-down are so because of iron deficiency anemia and the product Geritol will be an effective cure, there is substantial evidence to support the finding of the Commission that most tired people are not so because of iron deficiency anemia, and the failure to disclose this fact is false and misleading, because the advertisement creates the impression that the tired feeling is caused by something which Geritol can cure. See Ward Laboratories, Inc. v. Federal Trade Commission, 276 F.2d 952 (2d Cir. 1960).

* * *

Here the advertisements emphasize the fact that if you are often tired and run-down you will feel stronger fast by taking Geritol. The Commission, in looking at the overall impression created by the advertisements on the general public, could reasonably find these advertisements were false and misleading. The finding that the advertisements link common, non-specific symptoms with iron deficiency anemia, and thereby create a false impression because most people with these symptoms are not suffering from iron deficiency anemia, is both reasonable and supported by substantial evidence. The Commission is not bound to the literal meaning of the words, nor must the Commission take a random sample to determine the meaning and impact of the advertisements. * * *

Petitioners argue vigorously that the Commission does not have the legal power to require them to state the negative

fact that "in the great majority of persons who experience such symptoms these symptoms are not caused by a deficiency of one or more of the vitamins contained in the preparation or by iron deficiency or iron deficiency anemia;" and "for such persons the preparation will be of no benefit."

We believe the evidence is clear that Geritol is of no benefit in the treatment of tiredness except in those cases where tiredness has been caused by a deficiency of the ingredients contained in Geritol. The fact that the great majority of people who experience tiredness symptoms do not suffer from any deficiency of the ingredients in Geritol is a "material fact" under the meaning of that term as used in Section 15 [5] of the Federal Trade Commission Act and Petitioners' failure to reveal this fact in this day when the consumer is influenced by mass advertising utilizing highly developed arts of persuasion, renders it difficult for the typical consumer to know whether the product will in fact meet his needs unless he is told what the product will or will not do. This does not fall within the sphere of negative advertising, it merely presents to the consumer an opportunity to make an intelligent choice. * * *

Under the facts of this case, the disclosure requirement of 1(d)(1) is both proper and justified.

[5] 15 U.S.C.A. § 55. "(a)(1) The term 'false advertisement' means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. * * *"

The Commission also found that Petitioners' advertisements represent that Geritol is generally an effective cure for tiredness because of its iron and vitamin content. The Petitioners concede that their Geritol advertisements must be limited to those persons whose symptoms are due to iron deficiency anemia. Petitioners contend their advertisements are so limited.

The advertisements say that the condition of tiredness and run-down feeling may be caused by iron deficiency, and, if it is, Geritol will give fast relief. Geritol, then, is good for iron deficiency anemia. The Commission has found, and we have agreed, that the advertisements create the impression that iron deficiency anemia causes most tiredness. The Commission's conclusion is reasonable when it completed the syllogism by finding that the advertisements represent that Geritol is good for most tiredness. It is this representation that Geritol is good for most tiredness which is the inherent vice of the advertisements.

* * *

The Commission forbids the Petitioners' representation that the presence of iron deficiency anemia can be self-diagnosed or can be determined without a medical test. The danger to be remedied here has been fully and adequately taken care of in the other requirements of the Order. We can find no Congressional policy against self-medication on a trial and error basis where the consumer is fully informed and the product is safe as Geritol is conceded to be. In fact, Congressional policy is to encourage such self-help. In effect the Commission's Order 1(f) tends to place Geritol in the prescription drug field. We do not consider it within the power of the Federal Trade Commission to remove Geritol from the area of proprietary drugs and place it in the area of prescription drugs. This requirement of the Order will not be enforced. We also find this Order is

not unduly vague and fairly apprises the Petitioners of what is required of them. Petition denied and, except for 1(f) of the Commission's Order, enforcement of the Order will be granted.

## APPENDIX

### TABLE I

The pertinent parts of the final Order of the Commission provide, in part:

1. Disseminating or causing to be disseminated by means of the United State mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement:

(a) which represents directly or by implication and without qualification that the preparation is an effective remedy for tiredness, loss of strength, run-down feeling, nervousness or irritability;

(b) which represents directly or by implication that the preparation is a generally effective remedy for tiredness, loss of strength, run-down feeling, nervousness or irritability;

(c) which represents directly or by implication that the preparation is an effective remedy for tiredness, loss of strength, run-down feeling, nervousness or irritability in more than a small minority of persons experiencing such symptoms;

(d) which represents directly or by implication that the use of such preparation will be beneficial in the treatment or relief of tiredness, loss of strength, run-down feeling, nervousness, or irritability, unless such advertisement expressly limits the claim of effectiveness of the preparation to those persons whose symptoms are due to an existing deficiency of one or more of the vitamins contained in the preparation, or to an existing deficiency of iron or to iron deficiency anemia, and, further, unless the advertisement also discloses clearly and conspicuously that: (1) in the great majority of persons who experience such symptoms, these symptoms are not caused by a deficiency of one or more of the vitamins contained in the preparation or by iron deficiency or iron deficiency anemia; and (2) for such person the preparation will be of no benefit;

(e) which represents directly or by implication that tiredness, loss of strength, run-down feeling, nervousness or irritability are generally reliable indications of iron deficiency or iron deficiency anemia;

(f) which represents directly or by implication that the presence of iron deficiency or iron deficiency anemia can be self diagnosed or that either can generally be determined without a medical test conducted by or under the supervision of a physician;

(g) which represents directly or by implication that the use of such preparation will increase the strength or energy of any part of the body in any amount of time less than that in which the consumer may actually experience improvement;

(h) which represents directly or by implication that the use of such preparation will promote convalescence from a cold, flu, fever, virus infection, sore throat or any other winter illnesses;

(i) which represents directly or by implication that the vitamins supplied in such preparation are of any benefit in the treatment or relief of an existing deficiency of iron or iron deficiency anemia.

2. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is like-

ly to induce, directly or indirectly, the purchase of any such preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement, which contains any of the representations prohibited in, or which fails to comply with the affirmative requirements of, paragraph 1 hereof.

### NOTES AND QUESTIONS

1. One form of a cease and desist order is an *affirmative disclosure* order, calling an advertiser to account for what he doesn't say, for example that a scalp product is of no use in treating hereditary baldness—*Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F.2d 18 (5th Cir. 1960);* or that reprocessed material has been used in a product—*Kerran v. FTC, 265 F.2d 246 (10th Cir. 1959).*

As recently as 1950, a federal court ruled that the FTC may not exercise any "affirmative function of requiring, or encouraging, additional interesting, and perhaps useful, information which is not essential to prevent falsity." *Alberty v. FTC, 182 F.2d 36, 39 (D.C.Cir.), certiorari denied 340 U.S. 818 (1950).*

2. In less urgent situations the Commission may accept a company's statement of *voluntary compliance,* although they are difficult to monitor. (The FTC is inadequately funded. In 1967, for example, the agency spent nearly $7 million in efforts to control deceptive practices. This was almost half its total appropriation for that year. Anacin and Bayer spent more than that for their aspirin advertising in the first quarter of 1968. See Travers, *Symposium: Federal Trade Commission Regulation of Deceptive Advertising,* 17 Kansas Law Review 555 (1969). An agency with a total annual budget of approximately $21 million is expected to regulate an industry which bills in excess of $20 billion annually.)

3. Complaints involving false and deceptive advertising practices may be uncovered by the Commission's staff, or brought to its attention by other federal agencies, Better Business Bureaus, consumer organizations, individual consumers, or competitors.

In negotiating a settlement the FTC will first try to get voluntary compliance and avoid further litigation. If this is not possible or if it is clear that the FTC Act has been violated, a complaint is issued and the respondent has 10 days to decide whether or not he will agree to a *consent* order and another 30 days to negotiate the details of a consent agreement. No admission of guilt is required of a respondent up to this point, but a consent order is binding and violation may result in fines of up to $5,000 a day on each count. If a respondent prefers to contest an order, the original complaint becomes the focal point of a public hearing in which Commission attorneys have the burden of proving that the FTC Act has been violated. An FTC panel then deliberates and makes a quasi-judicial ruling which may result in a cease and desist order. This decision may be appealed to the full Commission and the administrative law judge who presided over the original hearing panel will be affirmed or reversed, or his initial decision will be modified or remanded.

The respondent then has 60 days to appeal the order to a United States Circuit Court, and during this period the challenged advertising practice may continue. If an appeal is brought, the court may enjoin the advertising practice pending final adjudication. If no appeal is taken, the order becomes final and noncompliance may result in substantial fines. A respondent, of course, may seek final review in the U. S. Supreme Court.

Where potentially harmful foods, drugs, cosmetics and medical devices are advertised, the Commission is empowered to seek a *temporary injunction* through a United States District Court pending final determination by the FTC and a sub-

sequent court review (15 U.S.C.A. § 53, 1970) although this has been considered a drastic alternative to letters of compliance, stipulations and consent orders. *FTC v. Rhodes Pharmacal Co., 191 F.2d 744 (7th Cir. 1951).*

Tacked on to the Alaska pipeline bill which President Nixon signed into law on Nov. 16, 1973 were amendments allowing the FTC to seek temporary injunctions to stop all forms of deceptive or unfair business practices while the merits are being debated; and to represent itself in court if the Justice Department has failed to act on the Agency's behalf within 10 days. The amendments also increase penalties and will make business information more readily available to the FTC and other regulatory agencies, moves which many businessmen opposed because they seemed to give new strength to the already bothersome agencies.

The Commission also has a mandate to take certain preventive measures in regulating the advertising industry. Courts have recommended a greater use by the FTC of advisory opinions, binding upon advertisers until revoked or rescinded by the Commission. *16 C.F.R. § 1.51–.54 (Cum.Supp.1966).* Courts have also encouraged the regeneration of industry-wide Trade Practice Conferences and the use of Industry Guides, which are interpretations of the FTC Act in regulating business practices. These sometimes result in the promulgation of Trade Practice Rules and have been developed for a wide range of products and services including audience ratings, cigarettes, guarantees, mail order insurance, tires, lubricating oil, sleeping bags, and television sets. Designed to stimulate self-regulation, the Rules do not have the force of law and no penalties attach to their violation, but they may serve as a basis for later FTC action where specific statutes have been infringed.

The FTC may also publish Trade Regulation Rules, formal statements as to what practices are considered unfair or deceptive.

4. In the meantime the Commission has complex questions to consider in protecting consumers. A key question is shall it apply a "reasonable man" standard or an "ignorant man" standard in evaluating advertising claims? See Preston, *Reasonable Consumer or Ignorant Consumer? How the FTC Decided,* (a paper presented at the annual convention of the American Council on Consumer Interests), Chicago, April, 1973. The Commission has applied both standards. Prior questions, perhaps, are the degree of public interest in a case or the number of people affected by a false or deceptive advertising claim; and these considerations generally seem to favor the "reasonable man" standard. Moreover, that standard is consistent with the common law and it tends to avoid broad assaults on the domain of the First Amendment. Of course, where intentional deception can be demonstrated, either standard would apply. But the line between discernible exaggeration and false impression is more likely the problem to be faced, and it is usually a difficult line to draw.

Preston demonstrates how, under the influence of Justice Black's opinion in *Standard Education,* the "ignorant man" principle came to dominate judicial thinking—especially in the Second Circuit where Judge Learned Hand had been overruled. See *Charles of the Ritz v. FTC, 143 F.2d 676 (2d Cir. 1944);* and *Gelb v. FTC, 144 F.2d 580 (2d Cir. 1944).* In *Parker Pen v. FTC, 159 F.2d 509 (7th Cir. 1946)* the FTC declared its role to be to "protect the casual, one might say the negligent, reader, as well as the vigilant and more intelligent. * * *" In the *Gelb* case, Clairol was forbidden to say that its dye would color

hair "permanently" even though nobody appeared to believe it.

And in *Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942)* the same court had said, "The law is not made for experts but to protect the public—the vast multitude of which includes the ignorant, the unthinking and the credulous, who in making purchases, do not stop to analyze but too often are governed by appearances and general impression. * * * If the Commission, having discretion to deal with these matters, thinks it is best to insist upon a form of advertising clear enough so that in the words of the prophet Isaiah 'wayfaring men, though fools, shall not err therein,' it is not for the courts to revise its judgments."

The "reasonable man" standard which legitimizes *puffery*—the exaggerated use of superlatives to describe goods or services—made a comeback in 1949 when the Seventh Circuit did a turnabout and held that a claim that Ayds candy mints would make weight reducing easy was nothing more than mere puffing. It was not misrepresentation. *Carlay v. FTC, 153 F.2d 493 (7th Cir. 1946).* Then in 1963 the Commission itself indicated that it no longer intended to protect the blithely ignorant in a ruling involving a supposedly invisible device to be worn under a swim suit to keep one afloat:

"True * * * the Commission's responsibility is to prevent deception of the gullible and credulous, as well as the cautious and knowledgeable. * * * This principle loses its validity, however, if it is applied uncritically or pushed to an absurd extreme. An advertiser cannot be charged with liability in respect of every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble-minded. * * * A representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." *Heinz W. Kirchner, 63 FTC 1282 (1963).*

Nevertheless, Preston believes that the FTC's present regulatory practices reflect more the "ignorant man" standard of the 1940s than the "reasonable man" standard of an earlier time.

5. Puffery—the best and the brightest, the most dependable, the greatest—remains an interesting regulatory and legal problem because it seldom can be challenged by any objective measure of truth, and perhaps the mass audience—or a large part of it—expects hyperbole in advertising. When wild overstatement seems to be meant to be taken seriously it moves into the realm of the forbidden. Or the FTC may call for *substantiation* as it did for General Electric's claim that its room air conditioner would provide "the clean freshness of clear, cool mountain air."

It is now a Commission precept that all claims made in advertisements imply that substantiation for them exists. But when is a claim serious and when is it mere froth? Is puffery simply the distinction between a fact and an opinion? As in malice, puffery requires the reading of a man's mind. A common law concept, puffery is not mentioned in the FTC Act; through court opinions and Commission permissiveness, however, it crept back into the legal lexicon. The appellate court in *Carlay,* for example, noted that "What was said 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."

And in a Bristol-Myers case the Commissioners decided that "the reference to beautification of the smile (Ipana's Smile of Beauty) was mere puffery, unlikely,

because of its generality and widely variant meanings, to deceive anyone factually." *In the Matter of Bristol-Myers Co., 46 FTC Decisions 162 (1949); aff'd, 185 F.2d 58 (1950).* In December 1973, however, the same company was ordered by an FTC law judge to stop television advertising which depicted an antiperspirant spray, Dri Ban, as being "dry" when in fact it was "wet, watery and runny."

Puffery has been held not to include representations which assign to products virtues they do not possess; misrepresentations of quality, such as statements that a particular cigarette is "milder," "soothing and relaxing," or "leaves no after taste;" misrepresentations designed to frighten people into buying; potentially dangerous misrepresentations, such as advertisements of alleged treatments and preventive measures for illness or disease.

Whether or not a more consumer-oriented Commission will be able to overcome the nonchalant tradition of puffery, and the legal precedents which support it, is discussed in Preston and Johnson, *Puffery—A Problem the FTC Didn't Want (and May Try to Eliminate),* 49 Journalism Quarterly 558 (Autumn 1972). The authors suggest methods for ascertaining the actual effects of overdrawn advertising claims, for obtaining empirical evidence on how consumers actually perceive and respond to advertising.

In the meantime, no proof of actual deception is required in a FTC proceeding and the Commission is under no obligation to survey public opinion or to hear evidence from a complainant. *Montgomery Ward & Co. v. FTC, 379 F.2d 666 (7th Cir. 1967).* Nevertheless the burden of proof appears to be misplaced: it is on the FTC, and indirectly on the consumer, rather than on the businessman.

6. Businessmen—corporate officers, salesmen, manufacturers, retailers—are held to a form of strict liability and an absence of an intent to deceive or lack of knowledge of falsity by the advertiser is irrelevant to the question of fault. An advertising agency is not held to as strict a standard of liability unless it is directly involved in the creation of the offending ad. A case involving Sucrets throat lozenges and their maker, Merck & Co., Inc., demonstrates this principle. In ordering the company to discontinue its false germ-killing and pain-relieving advertising claims, the Commission said:

"[T]he record in this case establishes that the agency was at least equally responsible with its principal for the deception found to be implicit in the advertising under consideration. Moreover, we believe that the agency should have been aware of the deceptive capacity of such advertising. Although the agency contends, in this connection, that it relied on information furnished by Merck, the deception found to exist stems not from the falsity of this information but from the use made of it by the agency. The advertising was based on two pieces of information, i. e., laboratory tests established that Sucrets and Children's Sucrets by virtue of their hexylresorcinol content would under certain conditions kill germs, including staphylococcal and streptococcal germs, on contact and that they would relieve the pain of minor sore throat. As used by the agency, these facts became at best half-truths and exaggerations. We refer particularly to the repeated use of the unqualified claims that the products 'kill even staph and strep germs' and 'help fight infection' in conjunction with the portrayal of a throat engulfed in flame and the prompt recovery of the user.

"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, * * * 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.'

* * *

"[T]he agency knew that the products were recommended only for the relief of minor sore throat pain, mouth and throat irritations. Despite this knowledge, it developed advertising, which by the use of exaggeration, innuendo, ambiguity and half truth conveyed the false impression that the products would cure or help cure existing throat infections and would be effective in relieving severe pain of sore throat. As found by the examiner, the falsity of such advertising should have been apparent to its creator.

"Nor is it a defense to the agency that the advertising was approved by Merck's legal and medical departments. The agency, more so than its principal, should have known whether the advertisements had the capacity to mislead or deceive the public. *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.*" (Emphasis added.) See FTC News Summary, Final Order (8635), April 27, 1966; *Merck & Co. v. FTC, 392 F.2d 921 (6th Cir. 1968).*

7. Since Sections 5 and 12 of the FTC Act have been interpreted to limit the authority of the FTC to "interstate commerce", national advertising is particularly vulnerable to federal regulation. A few businesses are exempt from the FTC's regulatory power because they are regulated by other federal agencies. Examples are banks, common carriers, airlines, meat packers, poultry dealers, and to some extent, insurance companies.

Publishers, radio and television broadcasters and advertising agencies are exempt from the criminal penalties of the FTC Act (Sec. 14b), if they agree to divulge the name of an advertiser when called upon. They are not exempt from the general jurisdiction of the Commission. The Food & Drug Administration regulates the advertising of prescription drugs; the FTC the advertising of over-the-counter remedies.

8. The test for FTC intervention is whether the advertisement *tends* to deceive or mislead so as to result in injury or prejudice to the public, or to contribute to the irrationality of the public's buying decisions. *Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944).* Deception need not be empirically established. Federal statute makes the Commission the finder of fact and the interpreter of the public interest, and the courts generally respect its expertise.

Advertisements literally correct but phrased to create erroneous suggestions, implications, double meanings, or serious ambiguities may be curbed by the Commission. See Kintner, *Federal Trade Commission Regulation of Advertising,* 64 Mich.L.Rev. 1269 (1969). An example of improper toying with the truth was the use made of a *Reader's Digest* article by a cigarette manufacturer. After laboratory tests, the magazine reported that "the differences between brands are, practically speaking, small, and no single brand is so superior to its competitors as to justify its selection on the ground that it is less harmful." Of seven brands tested, Old Gold appeared to have slightly less, but not significantly less, nicotine, tars, and resins.

That was all Old Gold needed to launch an advertising campaign based on "scientific tests by *Reader's Digest* showing Old Gold lowest in throat-irritating tars and resins." The FTC intervened and was upheld by the Court of Appeals, which said in part: "To tell less than the whole truth is a well known method of deception; and he who deceives by resorting to such method cannot excuse the de-

ception by relying upon the truthfulness per se of the partial truth by which it has been accomplished." *P. Lorillard Co. v. Federal Trade Commission, 186 F.2d 52, 58 (4th Cir. 1950).*

The accuracy of health remedy ads is of particular interest to the FTC: "Literalness and exactitude—and perhaps understatement—must be the earmarks of promotions connected with health remedies. Advertisers must be scrupulously careful not only as respects the literal truthfulness of the message but as respects all of the implications, innuendoes and suggestions which are conveyed in the advertising message." *Rodale Press, 71 FTC 1184, 1241 (1967), vacated on other grounds and remanded, 407 F.2d 1252 (D.C.Cir. 1968).*

In an opinion involving a Bristol-Myers Co. advertisement for Bufferin, the FTC warned that a standard of "full truthfulness" was required in ads for over-the-counter drugs. The Commission ruled that a Bufferin ad which purported to summarize the results of a clinical study published in the *Journal of the American Medical Assocation* was misleading in that it tended to encourage arthritics to engage in self-medication. It added that a consumer purchasing Bufferin over the counter and using it according to the directions on the label would not achieve the same results as were obtained in the clinical study in which the drug was administered in near-toxic doses. See *Code News* (National Association of Broadcasters), November, 1968, p. 2.

In advertising a stimulant called Vivarin, its maker failed to disclose that its primary ingredient was caffeine. Two cups of coffee would be just as effective in bringing about what the advertising promised—an improvement in one's personality, sex life and marriage and a solution to marital and other personal problems. *J. B. Williams, Co., Trade Reg. Rep. ¶ 19,671 at ¶ 21,720 (FTC 1971).*

Literal truthfulness is not a defense if an ad contains implicit misrepresentations. *Bockenstette v. FTC, 134 F.2d 369 (10th Cir. 1943); Reddi-Spred Corp. v. FTC, 299 F.2d 557 (3d Cir. 1956); Niresk, Inc. v. FTC, 278 F.2d 337 (7th Cir. 1960), certiorari denied 364 U.S. 883 (1960); FTC v. Sterling Drug Inc., 317 F.2d 669 (2d Cir. 1963).* Or serious omissions. *Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F.2d 18 (5th Cir. 1960).* Or a misleading impression as to where a product originates. *Waltham Watch Co. v. FTC, 318 F.2d 28 (7th Cir. 1963).*

The FTC may intervene where advertisements are capable of two meanings, one of which is false. *Rhodes Pharmacal Co. v. FTC, 208 F.2d 382 (7th Cir. 1953), reversed on other grounds 348 U.S. 940 (1955).* See also *Murray Space Shoe Corp. v. FTC, 304 F.2d 270 (2d Cir. 1962); Country Tweeds, Inc. v. FTC, 326 F.2d 144 (2d Cir. 1964).*

9. A classic case of misrepresentation having to do with television *mock-ups* began in the fall of 1959 when the Colgate-Palmolive Company and its advertising agency Ted Bates presented three 60-second TV commercials for Rapid Shave aerosol shave cream. The commercials showed a professional football player, over the voice of an announcer, with "a beard as tough as sandpaper * * * a beard that needs Palmolive Rapid Shave * * * supermoisturized for the fastest, smoothest shave possible." The Rapid Shave lather was then spread on sandpaper, and a hand appeared with a razor and shaved a clean path through the gritty surface. "To prove Rapid Shave's supermoisturizing power," the announcer concluded "we put it right from the can onto this tough dry sandpaper. It was apply * * * soak * * * and off in a stroke."

Viewers, indignant because they couldn't shave sandpaper with Rapid Shave the way the man was doing it on

television, complained to an FTC already sensitized by the TV quiz show scandals of 1959. A subsequent FTC complaint, part of a temporary "get tough" policy, was one of nine actions undertaken in 1959–60 against television deception. One category of cases had to do with demonstrations purporting to prove what in fact they did not prove.

In support of the cease and desist order against Colgate-Palmolive and Bates in the Rapid Shave case, and to counter arguments that the technical limitations of television "forced" a departure from the literal truth, FTC Commissioner Elman contended:

"The limitations of the medium may present a challenge to the creative ingenuity and resourcefulness of copywriters; but surely they could not constitute lawful justification for resort to falsehoods and deception of the public. The argument to the contrary would seem to be based on the wholly untenable assumption that the primary and dominant function of television is to sell goods, and that the Commission should not make any ruling which would impair the ability of sponsors to use television with maximum effectiveness as a sales or advertising medium.

"Stripped of polite verbiage, the argument boils down to this: where truth and television salesmanship collide, the former must give way to the latter. This is obviously an indefensible proposition. * * *

"But if, though we are inclined to doubt it, respondents do not believe they can effectively market their product in television within the legal requirements of truthful advertising, it does not follow that the Commission should relax those requirements * * * if respondents 'do not choose to advertise truthfully, they may, and should, discontinue advertising.' " *Colgate-Palmolive Co. and Ted Bates & Co., Inc., No. 7736, Opinion of the Commission, Dec. 29, 1961. 9 Trade Reg.Rep., ¶ 20,482, 59 F.T.C. 1452 at 1467–68 (1961).*

Bates objected to being included in the FTC order, since it had acted only as an agent. The Commission found this a "curious contention" in light of the fact that the agency had originated the idea of the sandpaper test in the first place. To the agency's claim that it did not know the advertisements were illegal the Commission answered that it was not required to prove intent to deceive or knowledge of deception.

Most objectionable to Colgate-Palmolive and Bates, however, was the scope of the order, the text of which instructed the respondents to cease and desist from *any* misrepresentation of *any* product on pain of a $5,000 per day fine for each offense. Commissioner Elman justified the unusually broad prohibition in the following words:

"The Commission's authority to ascertain and prevent violations of the statute extends beyond the unique facts of a given case to the more general and significant problem of the 'method' of competition or trade 'practice' involved. * * *

"The courts have given the Commission broad authority to tailor the remedy to the violation found. The language of the cases, like the statute, has always employed the generic term 'practices,' and it has frequently been made clear that the Commission's authority—indeed, its obligation—in framing an order extends to the prevention of unfair types or forms of conduct rather than merely isolated acts. * * *

"The problem of deceptive television advertising, although recent in origin, is making its appearance on the Commission's docket with increasing frequency. * * * It is a problem with which both respondents have had prior experi-

ence." See Id. at ¶ 20,485, 59 F.T.C. 1452 at 1467–68 (1961).

The Commission was taking preventive as well as punitive action.

Colgate and Bates appealed the ruling and the First Circuit Court of Appeals in Boston sent it back to the Commission for revision. Never intending to outlaw the use of mock-ups in television advertising, but only the misrepresentation of a product by test or demonstration, the Commission narrowed the scope of its original order—but ever so slightly.

Respondents again appealed, and for a second time the Court of Appeals disagreed with the Commission as to the nature of reality and sent the order back to the FTC. Judge Bailey Aldrich's opinion sought to limit the FTC order to the facts of the Rapid Shave case for "so far as deceit is concerned the buyer is interested in what he thinks he sees, and if what he buys can do and has done exactly what he thinks he sees it do, he has not been misled to any substantial degree." *Colgate-Palmolive Co. and Ted Bates & Co., Inc. v. Federal Trade Commission, 326 F.2d 517, 521–522 (1st Cir. 1963).*

In no mood to concede its position on the scope of the order, the Commission appealed to the United States Supreme Court. On April 5, 1965, three and one half years after the Commission had issued its initial order, the Supreme Court upheld the Commission by a 7–2 vote in its first ruling on deceptive television advertising.

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## FEDERAL TRADE COMMISSION v. COLGATE–PALMOLIVE CO.

380 U.S. 374, 85 S.Ct. 1035, 13 L.Ed.2d 967 (1965).

Mr. Chief Justice WARREN delivered the opinion of the Court.

The basic question before us is whether it is a deceptive trade practice, prohibited by § 5 of the Federal Trade Commission Act, to represent falsely that a televised test, experiment, or demonstration provides a viewer with visual proof of a product claim, regardless of whether the product claim is itself true. * * *

In reviewing the substantive issues in the case, it is well to remember the respective roles of the Commission and the courts in the administration of the Federal Trade Commission Act. When the Commission was created by Congress in 1914, it was directed by § 5 to prevent "[u]nfair methods of competition in commerce." Congress amended the Act in 1938 to extend the Commission's jurisdiction to include "unfair or deceptive acts or practices in commerce"—a significant amendment showing Congress' concern for consumers as well as for competitors. It is important to note the generality of these standards of illegality; the proscriptions in § 5 are flexible, "to be defined with particularity by the myriad of cases from the field of business." Federal Trade Comm. v. Motion Picture Advertising Service Co., 344 U.S. 392, 394.

This statutory scheme necessarily gives the Commission an influential role in interpreting § 5 and in applying it to the facts of particular cases arising out of unprecedented situations. Moreover, as an administrative agency which deals continually with cases in the area, the Commission is often in a better position than are courts to determine when a practice is "deceptive" within the meaning of the Act. This Court has frequently stated that the Commission's judgment is to be given great weight by reviewing courts. This admonition is especially true with respect to allegedly deceptive advertising since the finding of a § 5 violation in this field rests so heavily on inference and pragmatic judgment. Nevertheless, while informed judicial determination is dependent upon enlightenment gained from administrative experience, in the

last analysis the words "deceptive practices" set forth a legal standard and they must get their final meaning from judicial construction. Cf. Federal Trade Comm. v. R. F. Keppel & Bro., Inc., 291 U.S. 304.

We are not concerned in this case with the clear misrepresentation in the commercials concerning the speed with which Rapid Shave could shave sandpaper, since the Court of Appeals upheld the Commission's finding on that matter and the respondents have not challenged the finding here. We granted certiorari to consider the Commission's conclusion that even if an advertiser has himself conducted a test, experiment or demonstration which he honestly believes will prove a certain product claim, he may not convey to television viewers the false impression that they are seeing the test, experiment or demonstration for themselves, when they are not because of the undisclosed use of mock-ups.

We accept the Commission's determination that the commercials involved in this case contained three representations to the public: (1) that sandpaper could be shaved by Rapid Shave; (2) that an experiment had been conducted which verified this claim; and (3) that the viewer was seeing this experiment for himself. Respondents admit that the first two representations were made, but deny that the third was. The Commission, however, found to the contrary, and, since this is a matter of fact resting on an inference that could reasonably be drawn from the commercials themselves, the Commission's finding should be sustained. For the purposes of our review, we can assume that the first two representations were true; the focus of our consideration is on the third which was clearly false. The parties agree that § 5 prohibits the intentional misrepresentation of any fact which would constitute a material factor in a purchaser's decision whether to buy. They differ, however, in their conception of what "facts" constitute a "material factor" in a purchaser's decision to buy. Respondents submit, in effect, that the only material facts are those which deal with the substantive qualities of a product. The Commission, on the other hand, submits that the misrepresentation of *any* fact so long as it materially induces a purchaser's decision to buy is a deception prohibited by § 5.

The Commission's interpretation of what is a deceptive practice seems more in line with the decided cases than that of respondents. * * * It has long been considered a deceptive practice to state falsely that a product ordinarily sells for an inflated price but that it is being offered at a special reduced price, even if the offered price represents the actual value of the product and the purchaser is receiving his money's worth. Applying respondents' arguments to these cases, it would appear that so long as buyers paid no more than the product was actually worth and the product contained the qualities advertised, the misstatement of an inflated original price was immaterial. It has also been held a violation of § 5 for a seller to misrepresent to the public that he is in a certain line of business, even though the misstatement in no way affects the qualities of the product.

* * *

The courts of appeals have applied this reasoning to the merchandising of reprocessed products that are as good as new, without a disclosure that they are in fact reprocessed. And it has also been held that it is a deceptive practice to misappropriate the trade name of another.

Respondents claim that all these cases are irrelevant to our decision because they involve misrepresentations related to the product itself and not merely to the manner in which an advertising message is communicated. This distinction misses the mark for two reasons. In the first place, the present case is not concerned

with a mode of communication, but with a misrepresentation that viewers have objective proof of a seller's product claim over and above the seller's word. Secondly, all of the above cases, like the present case, deal with methods designed to get a consumer to purchase a product, not with whether the product, when purchased, will perform up to expectations. We find an especially strong similarity between the present case and those cases in which a seller induces the public to purchase an arguably good product by misrepresenting his line of business, by concealing the fact that the product is reprocessed, or by misappropriating another's trademark. In each the seller has used a misrepresentation to break down what he regards to be an annoying or irrational habit of the buying public—the preference for particular manufacturers or known brands regardless of a product's actual qualities, the prejudice against reprocessed goods, and the desire for verification of a product claim. In each case the seller reasons that when the habit is broken the buyer will be satisfied with the performance of the product he receives. Yet, a misrepresentation has been used to break the habit and, as was stated in Algoma Lumber, a misrepresentation for such an end is not permitted.

We need not limit ourselves to the cases already mentioned because there are other situations which also illustrate the correctness of the Commission's finding in the present case. It is generally accepted that it is a deceptive practice to state falsely that a product has received a testimonial from a respected source. In addition, the Commission has consistently acted to prevent sellers from falsely stating that their product claims have been "certified." We find these situations to be indistinguishable from the present case. We can assume that in each the underlying product claim is true and in each the seller actually conducted an experiment sufficient to prove to himself the truth of the claim. But in each the seller has told the public that it could rely on something other than his word concerning both the truth of the claim and the validity of his experiment. We find it an immaterial difference that in one case the viewer is told to rely on the word of a celebrity or authority he respects, in another on the word of a testing agency, and in the present case on his own perception of an undisclosed simulation.

Respondents again insist that the present case is not like any of the above, but is more like a case in which a celebrity or independent testing agency has in fact submitted a written verification of an experiment actually observed, but, because of the inability of the camera to transmit accurately an impression of the paper on which the testimonial is written, the seller reproduces it on another substance so that it can be seen by the viewing audience. This analogy ignores the finding of the Commission that in the present case the seller misrepresented to the public that it was being given objective proof of a product claim. In respondents' hypothetical the objective proof of the product claim that is offered, the word of the celebrity or agency that the experiment was actually conducted, does exist; while in the case before us the objective proof offered, the viewer's own perception of an actual experiment, does not exist. Thus, in respondents' hypothetical, unlike the present case, the use of the undisclosed mock-up does not conflict with the seller's claim that there is objective proof.

We agree with the Commission, therefore, 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 Commission's insistence that the public be not misinformed. If, however, it becomes impossible or impractical to show simulated demonstrations on television in a truthful manner, this indicates that television is not a medium that lends itself to this type of commercial, not that the commercial must survive at all costs.* (Emphasis added.) Similarly unpersuasive is respondents' objection that the Commission's decision discriminates against sellers whose product claims cannot be "verified" on television without the use of simulations. All methods of advertising do not equally favor every seller. If the inherent limitations of a method do not permit its use in the way a seller desires, the seller cannot by material misrepresentation compensate for those limitations.

* * * We believe that respondents will have no difficulty applying the Commission's order to the vast majority of their contemplated future commercials. If, however, a situation arises in which respondents are sincerely unable to determine whether a proposed course of action would violate the present order, they can, by complying with the Commission's rules, oblige the Commission to give them definitive advice as to whether their proposed action, if pursued, would constitute compliance with the order.

Finally, we find no defect in the provision of the order which prohibits respondents from engaging in similar practices with respect to "any product" they advertise. The propriety of a broad order depends upon the specific circumstances of the case, but the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist. In this case the respondents produced three different commercials which employed the same deceptive practice. This we believe gave the Commission a sufficient basis for believing that the respondents would be inclined to use similar commercials with respect to the other products they advertise. We think it reasonable for the Commission to frame its order broadly enough to prevent respondents from engaging in similarly illegal practices in future advertisements. * * *

The judgment of the Court of Appeals is reversed and the case remanded for the entry of a judgment enforcing the Commission's order.

Reversed and remanded.

### NOTES AND QUESTIONS

1. Colgate-Palmolive was also ordered to cease and desist from stating that Colgate Dental Cream created a "protective shield," and Bristol-Meyers was told, in effect, to prove that Bufferin was a faster pain reliever than plain aspirin. Lever Brothers and its advertising agency were rebuked for a Pepsodent toothpaste ad in which it was claimed that Pepsodent would remove tobacco stains from teeth. Alcoa got in trouble trying to prove that its foil was stronger than any other brand; and Schick razor blades were reprimanded for "proving" themselves safer than other blades in a test in which the competing blades were shown cutting the leather of a boxing glove.

2. Libbey-Owens-Ford Glass Co. and General Motors claimed minimum distortion for safety plate glass used in GM cars with pictures shot through an automobile window from which the glass had been removed. *Libbey-Owens-Ford Glass Co. v. FTC, 352 F.2d 415 (6th Cir. 1965).* Advertisements for Rise shave cream declared that Rise stayed moist longer then competing brands, and for visual evidence a soap mixture was used which dried rapidly.

The use of white-coated models to imply medical approval of a product is deceptive.

3. Although claims of uniqueness for standardized food products have not been a special target of FTC regulation in the past, it has long been the law that advertisers may not claim explicitly or implicitly that their products have *unique qualities* when in fact they do not. The *Wonder Bread* case brought this issue into focus, as did a palpably dishonest uniqueness claim involving *Amstar Corp. (Domino sugar), FTC Dkt. 8860.* It is false claims of superiority that the FTC is attempting to prohibit.

4. Tampering with competitive products in order to discredit them in commercials and the use of camera tricks to magnify the unfavorable characteristics of a competitor's product or to eliminate the unfavorable characteristics of your own are unfair. It is unfair to claim, unless true, that your product is more durable, more effective, safer, or in any other way superior to another's product, or that it is cheaper or less expensive to operate.

5. The Commission has concerned itself broadly with many forms of price information such as "sale," "clearance," and "special," and with the use of the word "free" to describe something that is conditioned on the prior sale of another product—although its rulings have not always been clear or consistent. See Alexander, Honesty and Competition (1967), 138–147. Bait advertising—offering to sell a product or service that the advertiser in truth does not intend or want to sell in order to gain prospective customers for some other (usually more expensive) product—is an unfair practice. There is a vast spectrum of questionable sales promotion schemes including referral sales and multi-level sales operations promising free products or exaggerated earnings.

6. The FTC has also been alert to product origin, import designations, testimonials, and truth in lending. Even humorous commercials may be considered deceptive where they exaggerate the capabilities of a product, for example a TV ad where water rises to the level of an actor's chin and when it recedes a stain has disappeared from his shirt due to the application of a detergent before immersion. *Affidavit of Discontinuance (Lever Bros. Co., 3–28–69).*

7. The Supreme Court ruling in the *S&H* case reinforces the rule that in addition to deceptive practices the FTC may also apply a standard of "unfairness" to advertising tactics. In a 1972 ruling involving Un-Burn ointment, the Commission held that "the making of an affirmative product claim in advertising is unfair to consumers unless there is a reasonable basis for making that claim." A drug company had falsely implied that it had done systematic research substantiating its product claims. The case is important because it establishes the principle that claims made in ads *do* imply that substantiation for them exists. *Pfizer, Inc., FTC Docket No. 8819 (July 11, 1972), slip opinion at 12.* The language and procedures of the Commission may be instructive at this point:

UNFAIR PRACTICES

[¶ 20,056] CCH. Trade Reg.Rep. Pfizer, Inc.—Final order to dismiss, Dkt. 8819, July 11, 1972.

Advertising claims that a sunburn ointment anesthetized nerves with local anesthetics used by doctors did not deceptively represent that the manufacturer possessed adequate and well-controlled scientific studies or tests that substantiated such claims. Such an implied representation could not reasonably be found in the advertising. Respondents contended that the total setting of the ad, the frivolous nature of the dialogue, the use of a bikinied model, and the general "aura of sex-

iness" prevented the ad from carrying scientific overtones.

* * *

It is clear that Pfizer's *safety* testing was not designed to, and did not in fact, support the affirmative *efficacy* representations made for the product. Respondent's pre-marketing tests consisting of *injections* of benzocaine could not indicate the probable anesthetic effect of a *topical* application of this substance. The tests for the product's *antiseptic* effects do not lend any support to the *anesthetic* effect claimed. Nor were the tests on guinea pigs sufficient to substantiate the efficacy of the product on human beings. The hearing examiner found, and the record amply supports his determination, that Pfizer did not conduct adequate and well-controlled scientific studies or tests *prior* to marketing Un-Burn to substantiate the efficacy claims for Un-Burn.

More generally, the record in this matter is clear that for a test, standing alone, to provide a reasonable basis for an affirmative product claim, the test should be an adequate and well-controlled scientific test. Such a test should be conducted on human beings, not on animals. A pre-existing test protocol is usually essential to an adequate test. The record also indicated the strong desirability of double-blind scientific tests.

Some time *after* the present proceeding was instituted, respondent did undertake to conduct an adequate and well-controlled test of Un-Burn's efficacy. This was the test conducted by Dr. Orentreich. While there was some argument as to whether this test actually met the standards of an adequate and well-controlled scientific test, it seems clear that it was designed to be such. The Orentreich test stands in marked comparison to the tests undertaken by respondents prior to marketing, and graphically demonstrates the insufficiency of such premarketing tests to support the efficacy claims made for the product. Even assuming that the Orentreich test did establish that Un-Burn actually anesthetizes nerves, the fact that this test was not conducted *prior* to making the affirmative product claims for Un-Burn precludes it from being considered as a defense to the violation charged in this complaint. In order to have had a reasonable basis, the tests must have been conducted prior to, and actually relied upon in connection with, the marketing of the product in question. Nor does the fact that the product subsequently performed as advertised indicate that there is a lack of public interest in the matter. The fundamental unfairness results from imposing on the consumer the unavoidable economic risk that the product may not perform as advertised; that is, at the time of sale, neither the consumer nor the vendor have a reasonable basis for belief in the affirmative product claims.

It is thus clear that the tests conducted by Pfizer did not provide a reasonable basis for the making of these performance claims. The tests were not adequate and well-controlled scientific tests conducted prior to the making of the efficacy representations.

* * *

**Editorial Note:**

At this point Commissioner Kirkpatrick took note of Pfizer's contention that controlled laboratory tests are not the only kind of evidence, and he moved to a discussion of the efficacy of comparisons with similarly constituted products, medical literature, wide usage, subjective evaluations, and, most important, clinical experience. The Commissioner also reviewed in-house laboratory tests made on the product to determine its antibacterial properties and its effects on guinea pigs; by this time the direction of Kirkpatrick's argument had shifted in favor of the drug company. On the matter of Pfiz-

er's testing of its own product, the Commissioner had an additional recommendation:

* * *

Inasmuch as complaint counsel's argument did not go directly to the reasonableness of these actions, we lack a sufficient basis for a finding in this regard. In future cases, we would be interested in both the qualifications of the medical and scientific advisors, and some showing that their judgments were rendered on an informed and unbiased basis. Also properly considered here would be the issue of whether reliance upon medical literature and clinical evidence as to the separate ingredients in Un-Burn is appropriate, or whether additional consideration must be given to (1) the combination of ingredients as they appear in the final product, and (2) the various conditions of use to which the product can reasonably be expected to be subjected, including variations as to skin types and degrees of sunburn. The Commission is not, moreover, convinced of the reasonableness of respondent's attempts to rely upon clinical experience as to the efficacy of benzocaine and menthol in general, to support the specific degree of efficacy ("anesthetizes" nerves, "stops" sunburn) claimed for Un-Burn.

Evidently respondent made no written report setting forth the actions which were taken to support the existence of a reasonable basis for its advertising claims. Such a report, if made in good faith prior to marketing, if reasonable in scope and approach, and if reasonably clear as to the evidentiary basis for the specific claims in question (be they scientific tests, specified medical references, or specific clinical evidence), would certainly have, in itself, gone a considerable distance in demonstrating the existence of a reasonable basis for their affirmative product claims.

V. *Remaining Issues.*

Respondent raises a number of collateral arguments which should be noted. First, respondent argues that "fairness" is an unconstitutionally vague standard upon which to base a Commission order. Second, a holding based on fairness would violate the First Amendment to the Constitution. Third, the Food, Drug, and Cosmetic Act implicitly limits the Commission's Section 5 jurisdiction in certain circumstances. Fourth, the "focusing of Congressional attention" on this proceeding was inconsistent with the Fifth Amendment. The Commission finds none of these arguments persuasive.

VI. *Conclusion.*

Having reviewed the record, initial decision, briefs and argument in this proceeding, the Commission has determined that the hearing examiner's dismissal of the complaint should be affirmed. The divergent approaches of complaint counsel and counsel for respondent, both to the appropriate legal standard and to the facts of this case, resulted in the issue simply not being satisfactorily joined.

While the Commission finds that respondent failed in its attempt to demonstrate affirmatively the existence of a reasonable basis for its Un-Burn advertising, the evidence is not sufficient to prove that respondent in fact *lacked* a reasonable basis for its advertising claims. The record evidence is simply inconclusive with regard to the adequacy of the medical literature and clinical experience relied upon by respondent, and with regard to the reasonableness of such reliance.

While this failure of proof might be cured by a remand, the Commission does not believe further proceedings are warranted in the public interest. The reformulation of the legal standard from "adequate and well-controlled scientific studies or tests" to "reasonable basis" might warrant an extensive trial *de novo,* and the advertising in question has already

long been discontinued. *The significance of this particular case lies, therefore, not so much in the entry of a cease and desist order against this individual respondent, but in the resolution of the general issue of whether the failure to possess a reasonable basis for affirmative product claims constitutes an unfair practice in violation of the Federal Trade Commission Act.* (Emphasis added) As to that issue, the foregoing opinion expresses the views of the Commission. In view of these circumstances, the Commission has determined to affirm the order and initial decision of the hearing examiner except to the extent inconsistent with this opinion.

Commissioner MacIntyre concurs as to the result reached by the Majority.

Commissioner Jones concurs in the statement of law applicable to this case as laid out in the opinion, but in light of the opinion and the record in this matter, dissents to the disposition of the case since it deprives respondent of an opportunity to seek a court review of the issues involved.

**NOTES**

1. The FTC's embryonic "advertising substantiation program" may serve as a deterrent to unsubstantiated claims which are clearly a form of deceptive, misleading and unfair advertising.

A narrower definition of reasonableness may be applied to measure unfairness in advertising for children, especially in the areas of nutritional value and the performance capabilities of toys. Wonder Bread, by depicting magical growth results in its consumers, exploited the emotional anxieties of children and their parents, said the FTC staff. *ITT Continental Baking Co., FTC Dkt. 8860.* The full Commission finally settled for a cease and desist order restricting nutritional claims and dropped earlier plans for corrective advertising. See *ITT Continental Baking Co. Inc., 3 Trade Reg. Rep. ¶ 20,182 (F.T.C. Dec. 27, 1972).* A demonstration in which a "Robot Commando" appeared to be moving in response to spoken commands, when in fact movements were controlled by moving knobs on a cable connecting the doll and speaker, was ruled unfair. *FTC Dkt. 8530.* See also *Topper, FTC Dkt. C–2073; Mattel, FTC Dkt. C–2071.*

2. Where any vulnerable segment of the audience is the target of an ad, the Commission will consider the probable reactions of that segment, for example, children, *Ideal Toy, FTC Dkt. C–1225 (1964)*; women who fear they might be pregnant, *Doris Savitch, 50 FTC 828 (1954), aff'd per curiam, 218 F.2d 817 (2d Cir. 1955);* or poor people, *S.S.S. Co. v. FTC, 416 F.2d 226 (6th Cir. 1969).* The argument that an audience may be more sophisticated and therefore less prone to deception than the average was rejected in *Book of the Month Club v. FTC, 202 F.2d 486 (2d Cir. 1953).*

Depictions of television reception on TV screens that are not actually in operation are unacceptable. *Affidavit of Discontinuance (RCA Corp., 11–10–69).*

"Small-print" or "subliminal" TV qualifications do not relieve the advertiser of his responsibility for honesty. *Giant Food v. FTC, 322 F.2d 977 (D. C.Cir. 1963), certiorari denied 372 U.S. 910.*

3. In a case involving a group of drug firms the Court of Appeals for the 6th circuit upheld convictions for conspiracy to withhold pertinent information on the "miracle drug" tetracycline from the U.S. Patent Office. On the basis of incomplete information with respect to the drug's unique effects, a patent was issued allowing the companies to gain enormous profit from their temporary cartel. The FTC had found the withholding of such information to be an unfair trade practice and had ordered the companies to issue a nondiscriminatory,

nonexclusive license for the manufacture of the drug to any party requesting it. The Commission order sought to deprive the drug firms of the fruits of their wrongdoing. *Charles Pfizer & Co. v. FTC, 401 F.2d 574 (6th Cir. 1968), certiorari denied 394 U.S. 920 (1969).*

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## C. CORRECTIVE ADVERTISING

1. In August, 1971 the FTC issued its first final corrective advertising order against Profile Bread which was touted as a weight-reducing food having fewer calories per slice. And it did have, but only because it was sliced thinner. The order required that:

"Respondents ITT Continental Baking Co., Inc., a corporation, and respondent Ted Bates & Co., a corporation, either jointly or individually, shall forthwith cease and desist for a period of 1 year from the date this order becomes final from disseminating or causing the dissemination of any advertisement by means of the U.S. mails or by any means in commerce, as 'commerce' is defined in the Federal Trade Commission Act, for any bread product designated by the trade name 'Profile,' unless not less than 25 percent of the expenditure (excluding production costs) for each media 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. In the case of radio and television advertising, such approved advertising is to be disseminated in the same time periods and during the same seasonal periods as other advertising of Profile bread; in the case of print advertising such advertising is to be disseminated in the same print media as other advertising of Profile bread." *ITT Continental Baking Co., 36 Fed. Reg. ¶ 18,522 (1971).*

A clear Commission mandate, the Baking Company agreed to devote 25 per cent of its advertising expenditure for one year to FTC-approved corrective ads. Its only alternative was not to advertise the product at all for a year. 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. The order may also remind consumers that a particular advertiser is a hard-core offender. Estimates of residual effects on the consumer of past advertising will require expert testimony. See Notes, *Corrective Advertising—the New Response to Consumer Deception,* 72 Columbia Law Review 415 (February 1972); *Corrective Advertising and the FTC,* 70 Michigan Law Review 374 (December 1971).

The Profile corrective ads, read by actress Julia Mead, were so well received by the public that the company contemplated spending more that the required 25 per cent of its ad budget on their presentation. The corrective 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.

Less than two weeks after the enforcement of its first corrective order against Profile Bread, the FTC ordered seven of the largest foreign and domestic automobile manufacturers to submit to the Commission documentation to support advertising claims concerning the safety, performance, quality and comparative prices of their advertised products. The order followed a June 1971 resolution requiring all advertisers to submit on demand documentation to support advertising

claims. *Resolution Requiring Submission of Special Reports Relating to Advertising Claims and Disclosure Thereof by the Commission in Connection with a Public Investigation adopted by the FTC on June 9, 1971, as amended July 7, 1971, 2 CCH. Trade Reg. Rep. 7573 (FTC 1971).*

It was in May 1970 that the Commission got the idea of corrective advertising from a group called SOUP (Students Opposing Unfair Practices) which had intervened in an action against the Campbell Soup Company reminiscent of the Colgate sandpaper case. Campbell had used marbles in its video advertising to make the soup appear thicker than it was. No order requiring corrective advertising was issued for lack of a significant public interest, but the Commission got the point. *Campbell Soup, FTC Dkt. C–1741, 3 Trade Reg. Rep. ¶ 19,261 (FTC May 25, 1970).*

The FTC first sought corrective advertising in September 1970 in actions charging Coca Cola with misrepresenting the nutritional value of Hi-C and Standard Oil Co. of California with falsely claiming that Chervon's F–310 gasoline reduced air pollution (balloons were shown releasing dirty and clean exhaust emissions). *Coca Cola Co., 3 Trade Reg. Rep. ¶ 19,-351 (1970 FTC); Standard Oil Company of California, 3 Trade Reg. Rep. ¶ 19,352 (1970 FTC).* The complaints were later dropped.

Although the FTC may not impose criminal penalties or award compensatory damages for past acts, it is charged primarily with preventing illegal practices in the future. *FTC v. Ruberoid Co., 343 U.S. 470 (1952).* Corrective advertising seems to be an effective means toward this end.

In a case involving a false claim that a brand of Firestone tires was capable of stopping a car 25 per cent quicker, the FTC staff asserted its authority to require corrective advertising but the Commission refused to issue the order here because: (1) there had been a considerable time lapse since the ad had appeared; (2) the tires advertised with the unsubstantiated claims would by now be so old that no owner would believe them safe; (3) the residual effect of the advertising would have been slight by the end of the year; and (4) competitors making the same claim had avoided cease and desist orders. *Firestone Tire and Rubber Co. 3 Trade Reg. Rep. ¶ 19,773 (1971 FTC).*

The staff then asserted its power to require corrective ads against Ocean Spray cranberry drink, Easy-Off window cleaner, Easy-On speed starch, Aerowax floor wax, Black Flag ant and roach killer, Wonder Bread and Hostess Cakes. Ocean Spray began running corrective ads in 1972.

The FTC also sought corrective advertising from the Sun Oil Company which claimed that "cars will operate at maximum power and performance only with Sunoco gasolines." In hearings before the Commission, the company had to counter empirical evidence of the effects of its advertising on a sample of the mass audience. The Sugar Association is being asked to correct the allegedly deceptive claim that "Sugar just might be the will power you need to curb your appetite," even though the Association would just as soon drop the whole advertising campaign to avoid having to present corrective advertising. The case is unusual in that the FTC has not given the trade association the option of corrections or no ads at all.

Unfortunately, the FTC has no power to require either full disclosure or to eliminate irrational choices in advertising. An omission is deceptive in terms of the FTC Act only if it is relevant to representations made in the ad itself or if it would have serious consequences in the use of the product. The corrective ad is meant to prevent future deceptions result-

ing from the residual effects of past deceptions. Disclosures must be long enough, loud enough and large enough to be seen and heard and in language that can be understood by the audience for whom the commercial is intended. *Advertising Disclosures—the FTC Policy, 5 Trade Reg. Rep. ¶ 50,293 (FTC 1970).* Of course advertisers in such circumstances may try to be as ineffective as possible.

## D. COUNTER ADVERTISING

1. In early 1972 the Federal Trade Commission in an unanimous brief filed with the Federal Communication Commission *(FTC Dkt. ¶ 19,260, Jan. 6, 1972)* urged broadcast support for the concept of counter advertising as "a suitable approach to some of the present failings of advertising which are beyond FTC's capacity." What the FTC apparently had in mind was an opportunity in either purchased or free time to reply to ads (1) asserting performance and characteristic claims that explicitly raise controversial issues of current public importance, for example, pollution or automobile safety, (2) stressing broad recurrent themes which affect purchasing decisions in a manner that raises controversial issues of public importance, for example the consequences of nutritional drug and detergent claims, (3) claims resting on controversial scientific statements, and (4) ads that are silent about possibly negative aspects of a product, for example, the comparative safety and pollution features of big as against small cars, a list which, in the opinion of irate broadcasters, could be added to endlessly.

The major precedent for this proposal may have been the anti-smoking campaign which, treating cigarettes as a unique product and their use a public issue, applied a fairness doctrine to broadcast advertising for the first time. *Banzhaf v. FCC, 405 F.2d 1082 (D.C.Cir. 1968).* See this text, p. 822. Two years later, automobile pollution was said to be a similarly controversial matter of public interest. *Friends of the Earth v. FCC, 449 F.2d 1164 (D.C.Cir. 1971).* See this text, p. 832.

Broadcasters and advertisers greeted the counter ad recommendation with horror, focusing their response on the economic chaos it would bring to the industry. The FTC seemed eager to enlist the FCC in its continuing effort to protect the consumer against the powerful effects of distorted and untruthful television advertising. Miles W. Kirkpatrick, former director of the ABA study of the FTC and by now the chairman of an invigorated Commission, said that he was "deeply concerned by the notion that the majority of advertisers are able or willing to play the game only if the rules free them from disagreement. * * * Why, in any event, should an advertiser have the right to monopolize the consumer's attention by trumpeting the virtues of his product when a consumer who learned of an aspect undesirable to him might not buy it if the attention monopoly were ended? * * * The TV viewer is a member of the advertiser's captive audience. (And antitrust laws prohibit monopoly) of ideas or of goods." *Broadcasting,* March 6, 1972.

The FTC felt the counter ad would go well beyond the corrective ad or the affirmative disclosure because it wouldn't be buried in the advertiser's own message and it would come from vigorous advocates of a converse point of view. Still the FCC would have substantial discretion in deciding which commercials require access for response and what time frames would be suitable. On the latter point, the FTC suggested five to 30 minute segments each week, preferably in

prime time, and it made recommendations governing free and commercial access.

The Consumer Federation of America urged the FCC to incorporate counter advertising in the Fairness Doctrine as a deterrent to exaggerated and untrue merchandising claims and as a stimulant to public dialogue on controversial issues. The Television Bureau of Advertising countered with the argument that the scheme would shrink discussion of controversial public issues because no one would risk counter attack, an argument that has been used frequently to fault the Fairness Doctrine itself. The Bureau sought to make *Banzhaf* a narrow precedent since cigarette smoking had become an "official" health hazard through legislative action.

What would be the effects of such a policy? *Advertising Age* (March 13, 1972) thought that counter ads might curtail the FTC's intervention in advertising. And it saw no reason why advertisements are less appropriate subjects for discussion on TV than other public matters. A month later (April 10, 1972) the trade magazine appeared to be seeking a showdown on the question when it urged advertisers to speak freely in the time and space they buy and predicted that the print media also would soon have to face the question of access for advertising rebuttal. The key problem, of course, would be to decide when an advertisement deals with a matter of genuine public interest and controversy. It would not always be as simple as distinguishing between requests to rebut ads for underarm deodorants and those for over-the-counter drugs.

The counter advertising proposal lost a great deal of momentum when the United States Supreme Court on May 29, 1973 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. The Democratic National Committee and Business Executives' Move for Vietnam Peace had been denied opportunities to buy broadcast time. The Court held that the FCC was justified in concluding that the public interest in having access to the marketplace of ideas and experiences would not be served by ordering a right of access to advertising time.

"There is substantial risk," said the Court, "that such a system would be monopolized by those who could and would pay the costs, that the effective operation of the Fairness Doctrine itself would be undermined, and that the public accountability which now rests with the broadcaster would be diluted." Moreover, case-by-case determination by the FCC of who should be heard, and when, would enlarge the involvement of the Government in broadcasting and limit journalistic discretion, said the Court. (It may be too late to worry about the system being monopolized by those able to pay the costs since by the FTC's own figures 75 per cent of all broadcast advertising is purchased by fewer than 100 firms, and 10 firms are responsible for 22 per cent of all broadcast advertising.)

Again the problem seemed to the Court to be that of deciding which editorial ad deserved to be aired. To whom would a constitutional right of access be extended, and upon what grounds? The Court affirmed that the individual licensee must continue to make such decisions based on his own journalistic judgments of priorities and newsworthiness, and in doing so it frequently cited § 326 of the FCC Act (47 U.S.C.) which denies the Commission any power of censorship over the broadcast media.

That conclusion, of course, is based on the notion of an editorially diverse broadcast system in which biases in one direction are balanced by biases in the other; and even if the system's multiformity is minimal, it is still better than any governmentally proscribed system which, it is

assumed, would ultimately stifle any real competition in ideas. The experience of other English-speaking broadcast systems, it must be noted, does not conform to this mental set.

As Justice Brennan emphasizes in a dissenting opinion in which he was joined by Justice Marshall, ownership and ultimate control of the broadcast media remain vested in the public—the government by definition *is* involved, even though the majority Justices will do whatever necessary to shore up the decisional authority of the already compromised private component of this dual system. "Here * * * we are confronted," said Brennan, "not with some minimal degree of regulation but rather, with an elaborate statutory scheme governing virtually all aspects of the broadcast industry. Indeed, federal agency review and guidance of broadcaster conduct is automatic, continuing and pervasive" * * * and here * * * "the Commission—and through it the Federal Government—has unequivocably given its imprimatur to the *absolute* ban on editorial advertising."

Brennan was persuaded that the Fairness Doctrine alone, given the broad discretion for its use accorded the broadcaster, would not provide the uninhibited, robust and wide-open exchange of views to which the public is constitutionally entitled. Broadcasters would avoid controversy for business reasons. The public, especially that part of it which might voice novel, unorthodox or unrepresentative views, has nothing to say about how the broadcast media are to be used; broadcasters will refuse to air views which they consider "scandalous," "crackpot," "insignificant," "trivial," "slight," "parochial," "inappropriate," or "beyond the bounds of normally accepted taste."

"Indeed, the availability of at least *some* opportunity for editorial advertising is imperative if we are ever to attain the 'free and general discussion of public matters (that) seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens'."

Commercial advertisers who seek to peddle their goods and services to the public—beer, soap, toothpaste—have instantaneous access in whatever format or time period they choose; but individuals seeking to discuss war, peace, pollution, or the suffering of the poor are denied a similar right to speak and instead are compelled to rely on the beneficence of a corporate "trustee" appointed by the Government to argue their case for them. *Columbia Broadcasting System, Inc. v. Democratic National Committee; Federal Communications Commission v. Business Executives' Move for Vietnam Peace; Post-Newsweek Stations, Capital Area, Inc. v. Business Executives' Move for Vietnam Peace; Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94 (1973). For the report of the case and discussion of its impact on a right of access to the electronic media, see this text, p. 852.

Another constraint to the development of a counter advertising program has been recent growth in the advertising industry's self-regulation mechanisms.

## E. SELF REGULATION

1. In recent years self regulation has played an increasingly important role in the advertising and communication industries. A working example of self-regulatory efforts is the monitoring activities of the National Advertising Division of the Council of Better Business Bureaus. NAD not only uncovers advertising abuses but acts on complaints and makes its own evaluation of the truth and accuracy of advertising.

When its recommendations are ignored it may appeal a complaint to an even more visible self-regulatory body, the National Advertising Review Board, consisting of 30 advertiser, 10 advertising agency, and 10 public members. If the Board in turn is ignored by the highest corporate officers, it gets in touch with the appropriate government agency.

Both bodies have been criticized for slowness and more emphatically for the evaluative criteria they use; but at least a beginning has been made.

The chief monitor of local advertising is the Better Business Bureaus which function within the complex framework of state regulation—unenforced, half-enforced, piecemeal state statutes. Many deal with legal, political and billboard advertising. Of some assistance in the state regulation of advertising has been the adoption by at least 45 states and the District of Columbia of the Printer's Ink Model Statute of 1911, or some variation of it.

"Any person, firm, corporation or association (or agent or employee thereof) who, with intent to sell, (purchase) or in any wise dispose of, (or to contract with reference to) merchandise, (real estate,) service, (employment) or anything offered by such person, firm, corporation or association, (or agent or employee thereof,) directly or indirectly, to the public for sale, (purchase,) distribution, (or the hire of personal services,) or with intent to increase the consumption of (or to contract with reference to any merchandise, real estate, securities, service, or employment,) or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, (or to make any loan,) makes, publishes, disseminates, circulates, or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, (magazine) or other publication, or in the form of a book, notice, circular, pamphlet, letter, handbill, poster, bill, (sign, placard, card, label, or over any radio or television station or other medium of wireless communication,) or in any other way (similar or dissimilar to the foregoing,) an advertisement, (announcement, or statement) of any sort regarding merchandise, securities, service, (employment,) or anything so offered (for use, purchase or sale, or the interest, terms or conditions upon which such loan will be made) to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive, or misleading, shall be guilty of a misdemeanor."

The material in parentheses was added to the Model Statute in 1945, but in most states, the earlier version remains intact or only partially amended.

The statute makes untrue, deceptive or misleading advertising a misdemeanor regardless of intent to deceive or knowledge of falsity. The advertiser is absolutely liable for what he says. For purposes of enforcement this is an improvement over common law remedies which required proof of intent to deceive. Furthermore, the common law relied on individual suits rather than state intervention.

Those states which have amended the Model Statute to require scienter (knowledge of the falsity of statements), or an intent to deceive, have seriously weakened the law's effectiveness and it has been used infrequently. Also, where criminal sanctions have been written into the statute, there has been a reluctance in enforcement. In many jurisdictions enforcement has been desultory in any case; in others it has been absent altogether. The law has been applied most successfully where its administration has been delegated to a special governmental agency.

Printer's Ink statutes are broad enough in their original form to reach most false or misleading advertisements, and they have consistently been held constitutional. And even where they are not enforced, they may have an inhibitory value.

2. Most state legislation is designed either to prohibit specific kinds of false advertising or to discourage the advertising of socially undesirable commodities. In the first category there are, for example, Blue Sky laws against the illicit sale of securities, insurance policies, and banking services. Many states have followed the federal practice of regulating the advertising of food, drugs, and cosmetics. And, of course, there are a vast number of laws dealing with specific products and their promotion.

Legislation in the second category frequently has moral overtones. Liquor advertising, advertising with sexual connotations, for example, contraceptives and the treatment of venereal diseases, the promotion of gambling or lotteries are, comparatively speaking, strictly regulated by most states.

In the absence of federal legislation, the states have been particularly aggressive in regulating occupational and professional advertising. Again, the power to revoke licenses serves to strengthen the enforcement of laws and administrative regulations which govern lawyers and medical practitioners as well as such occupational groups as hairdressers, barbers, real estate agents, and funeral directors. These laws and regulations, of course, must not be vague or unreasonable. *Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935).*

Questions of jurisdiction may become more frequent. State laws are generally meant to deal with in-state advertising; but ubiquitous television, radio, and direct mail advertising is certain to generate increasingly complex problems of deciding whether state or federal agencies are responsible for the supervision of various kinds of promotional activities.

As at the federal level, state regulation of advertising is hampered by a melange of uncoordinated laws and an even greater reluctance to enforce. A partial explanation for this may be the fact that state laws regulating advertising are often part of and secondary to laws designed to deal with broader social issues.

Wisconsin is one of the few states which have set up state agencies modeled after the FTC, with broad powers over deceptive advertising. At least four states, Hawaii, Missouri, New Jersey and Washington, have adopted model statutes prepared by the FTC, the Council of State Governments, and the National Conference of Commissioners on Uniform State Laws. These are consumer protection acts.

3. Efforts at self regulation in national advertising are also made by trade associations such as the American Advertising Federation, an association which includes advertising clubs, advertisers, advertising agencies and the media. The American Association of Advertising Agencies measures performance against an ethical code proscribing false and misleading statements, suggestions offensive to public decency, disparagement of competitors, misleading price claims, pseudoscientific advertising, and testimonials which fail to reflect the honest opinion of the testimonialist. The Association of National Advertisers, the Newspaper Advertising Executives Association, the Magazine Publishers Association, the Direct Mail Advertising Association, and the Advertising Research Foundation all play limited roles in self regulation.

The most active trade association in self regulation is the National Association of Broadcasters which includes in its membership 402 subscribers to its Television Standards Code. NAB standards discourage the advertising of some goods

and services, for example fortune-telling and hemorrhoid preparations, standards which are obviously ignored by many broadcasters. The standards also regulate advertising in other areas, for example gambling and liquor; and there are special standards for children's ads which have only been partially effective. Presubmission procedures are mandatory for subscribers in their advertising of toys, mood drugs and feminine hygiene products. There is also an NAB Radio Code.

4. Ever since E. W. Scripps made Robert F. Paine the advertising censor for all Scripps-McRae newspapers in 1903, individual media have developed their own advertising acceptability procedures. All three networks have Broadcast Standards Departments which review advertising and program material judging it against NAB standards and legal requirements. Although they have no positive duty to refuse objectionable advertising, media apparently have a legal right to refuse advertising which they define as false, misleading, or otherwise inconsistent with the public's or their own interests.

## F. ADVERTISING AND THE FIRST AMENDMENT

1. 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).* The Florida court relied on earlier rulings in Iowa, New York and Massachusetts which had essentially reached the same conclusion: *Shuck v. Carroll Daily Herald, 247 N.W. 813 (Iowa 1933); Poughkeepsie Buying Service, Inc. v. Poughkeepsie Newspapers, Inc. 131 N.Y.S.2d 515 (1954); Gordon v. Worcester Telegram Publishing Co., 177 N.E.2d 586 (Mass. 1961).*

See also *Chicago Joint Board, Amalgamated Clothing Workers of America, AFL-CIO v. Chicago Tribune Co., 307 F.Supp. 422 (N.D.Ill.1969), affirmed 435 F.2d 470 (7th Cir. 1970)* this text, pp. 582–588.

The only exceptions to this rule involve newspapers or periodicals which can be defined as state facilities. See this text, pp. 577–582, 591–593.

It should be noted emphatically that these cases deal with editorial rather than with commercial advertising. *New York Times v. Sullivan* (1964) drew a clear line between the two, extending First Amendment protection to editorial advertising, denying it to product or services advertising. That distinction is consistent with earlier holdings. *Valentine v. Chrestensen, 316 U.S. 52 (1942); Cammarano v. United States, 358 U.S. 498 (1959).* See this text, pp. 163, 167. And purely commercial newspapers providing specialized information to selective audiences do not have full constitutional protection. *Deltec, Inc. v. Dun & Bradstreet, Inc., 187 F.Supp. 788 (N.D.Ohio 1960); Securities and Exchange Commission v. Wall St. Transcript, Corp., 422 F.2d 1371 (2d Cir. 1970); Grove v.*

*Dun & Bradstreet, Inc., 438 F.2d 433 (C.A.Pa.1971); Kansas Electric Supply Co. v. Dun and Bradstreet, Inc., 448 F.* 2d 647 (10th Cir. 1971).

Commercial products and publications, then, do not enjoy constitutional protection, although Justice Douglas for one has never acknowledged the difference between commercial and non-commercial speech. The distinction does become considerably more vague when one considers the number of advertised products which suggest controversial issues of public significance. Fluoride toothpaste, drugs, detergents, beer and leaded gas are only a few of many examples.

In *Capital Broadcasting Co. v. Mitchell, 333 F.Supp. 582 (D.C.D.C.1971), affirmed per curiam 405 U.S. 1000 (1972),* an action to enjoin enforcement of the federal statute prohibiting cigarette advertising on television, the court gave only perfunctory attention to the First Amendment issue. See this text, p. 824.

One would expect the distinction between commercial and noncommercial speech to become even more blurred as the dialogue on ecology heats up. And, of course, the FTC has no power to prohibit a person from making statements concerning a business or a product in which he has no financial interest, for example, that aluminum cooking utensils are dangerous to health. Such are protected statements of opinion rather than unlawful misrepresentations of fact—no matter how outlandish. See *Scientific Mfg. Co., Inc. v. FTC (CA–3; 1941) 1940–1943 Trade Cases ¶ 56,172, 124 F.2d 640 (FTC Dkt. 3874).*

Although the broadcast media are under much more direct and stringent governmental supervision than other media, the Supreme Court in *CBS v. Democratic National Committee, 412 U.S. 94 (1973)* was unwilling to require a right of access based on the First Amendment to editorial advertising. And since editorial advertising has recently been afforded First Amendment protection, the possibility of counter commercial advertising being given any constitutional standing with respect to access or fairness appears remote. Product advertisers probably don't want constitutional status for their messages anyway since that would open them up to access demands and counter advertising claims, with resultant unwanted government regulation and potential revenue loss.

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## G. OTHER ADVERTISING REGULATORS

1. Although the FTC is the most effective and wide-ranging regulator of advertising, other federal agencies have statutory authority in the area.

The Food and Drug Administration is authorized to regulate the misbranding and mislabelling of foods, drugs and cosmetics. So is the FTC and the two agencies have attempted to define separate domains of supervision in these product areas.

Theoretically the Federal Communication Commission's licensing power gives it at least indirect control over misleading and deceptive broadcast advertising, although promises of reform are generally sufficient to overcome FCC objections at license renewal time.

The Securities and Exchange Commission supervises the sale and issuance of securities and their advertising through a variety of flexible and relatively effective sanctions.

Liquor advertising is regulated by the Alcohol and Tobacco Tax Division of the Internal Revenue Service. The Division formulates its own rules requiring, for example, the disclosure in advertisements of relevant information such as alcohol

content and age. Its licensing power helps to assure compliance.

The Civil Aeronautics Board, the Interstate Commerce Commission, and the Federal Power Commission can be added to the list of 20 or more federal bodies which regulate advertising in specifically defined areas.

The President's Office of Consumer Affairs has had some success in shaping federal consumer policy.

The Post Office has statutory authority to deny the mails to intentionally fraudulent products or schemes and material promoting them. The difficulty of proving intent has weakened these laws, especially in the absence of specific complaints and where a factual base against which to measure allegedly fraudulent statements is not available. Moreover, the United States Supreme Court has cautioned against the use of the relatively severe fraud order where actual fraud has not been clearly shown. *Reilly v. Pinkus, 338 U.S. 269 (1949).*

Nowhere is the threat of Postal power greater than in the area of lotteries.

## H. LOTTERIES

1. America is schizoid about lotteries, a form of gambling as old as man's recorded history. On the one hand, state lotteries have been legalized in New York, New Hampshire, New Jersey, Connecticut, Massachusetts, Michigan, Pennsylvania, Maryland, Illinois and Maine; on the other, the federal and most state governments forbid them constitutionally or by statute, deny the use of governmental services for their promotion, and attach severe penalties to violations.

"Experience has shown," said the United States Supreme Court in 1850, "that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community: it enters every dwelling; it resides in every class; it prays upon the hard earnings of the poor; it plunders the ignorant and simple." *Phalen v. Commonwealth of Virginia, 8 Haw. 163, 168, 12 L.D. 1030 (1850).* Times have changed, but the appeal of getting something for nothing has not.

Lotteries have and continue to be used for almost every social—and antisocial—benefit imaginable, and, as is true in most attempts to enforce modes of moral behavior, the citizenry is ambivalent about their observance.

Postal regulations, first passed by Congress in 1868, prohibit the use of the mails to advertise or promote lotteries and their violation can result in the loss of a publication's second-class mailing privileges (18 U.S.C.A. §§ 1304, 1306).* The law applies to both legal and illegal lotteries. Enforcement has not been uniform.

The FCC applies the same federal law to the broadcast media and violation may lead to a loss of license, fines and imprisonment.

Since the *Keppel* case of 1934 marketing schemes using lotteries or other forms of gambling have been considered illegal

* Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both. Each day's broadcasting shall constitute a separate offense.

unfair trade practices. *FTC v. R. F. Keppel & Bro., 291 U.S. 304 (1934); Calvene Cotton Mills, 51 F.T.C. 294 (1954).* Punch boards were added to the list in a 1966 case reinforcing *Keppel. Bear Sales Co. v. FTC, 362 F.2d 96 (7th Cir. 1966), certiorari denied 385 U.S. 933 (1966).* State courts have disagreed on whether the consideration element of a lottery requires a money payment, for example in service station games. Compare *Kroger v. Cook, 244 N.E.2d 790 (Ohio 1968)* and *Idea Research & Development Corp. v. Hultman, 131 N.W.2d 496 (Iowa 1964).* See also *Mobil Oil Corp. v. Danforth, 455 S.W.2d 505 (Mo.1970)*—consideration in that participant had to go to the gas station and this benefitted the station owner. The Supreme Court of Oregon said that consideration had to be pecuniary. *Cudd v. Aschenbrenner, 377 P.2d 150 (Or.1963).*

2. A lottery is a scheme in which there is a distribution of a *prize* by *chance* for a *consideration* or a price.

*Prize* has been defined as anything of value.

*Chance* is a condition of winning over which the participant has no control. The inability of a person to determine the size or value of a prize may also constitute chance. Other uncontrollable factors contributing to chance are the number of persons entering a contest, the number of store sales, the earliest postmarks, the earliest customers to arrive at a store, the random selection of contest entries, or the random drawing of names, even where subsequent questions require skill or knowledge. Chance is clearly present in raffles, bingo, bank nights, and in games which require one to forecast the outcome of a football game or to choose the "correct" word in a word game when there is no genuine basis in logic, grammar or sentence structure for choosing one word over another.

Even though the outcome of such a scheme is only partly dependent upon chance, the necessary element of chance is still present under the federal law. A trained mathematician, for example, might be able to make a fairly close estimate of the number of beans in a jar; but chance is still there.

*Consideration*, the third element of a lottery—and all three elements must be present for there to be a lottery—is much more difficult to define. It generally means an effort in time or money must be made by a participant. Some courts simply call consideration "price." The requirement of having to buy something to become eligible for a prize is the classic example of consideration. But it may have to be a less than minimal contribution of time or money. Box tops, labels, or other evidence of purchase may establish consideration; submission of a coupon from an advertisement may not.

In 1963 the Post Office relaxed its rule that consideration is present even though some play free while others pay by exempting from lottery regulation those schemes permitting entry by submission of nothing more than a plain piece of paper or a coupon from an ad with a person's name and the name of a product. Chief Justice Warren in an opinion for the Supreme Court defined consideration in a similarly permissive way in a case involving the three major networks and their give-away programs, "Stop the Music," "What's My Name," and "Sing It Again" and reversed a ruling of the FCC.

## FEDERAL COMMUNICATIONS COMMISSION v. AMERICAN BROADCASTING CO., INC.

## FEDERAL COMMUNICATIONS COMMISSION v. NATIONAL BROADCASTING CO., INC.

## FEDERAL COMMUNICATIONS COMMISSION v. COLUMBIA BROADCASTING SYSTEM, INC.

347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954).

Mr. Chief Justice WARREN delivered the opinion of The Court.

* * *

All the parties agree that there are three essential elements of a "lottery, gift enterprise, or similar scheme": (1) the distribution of prizes; (2) according to chance; (3) for a consideration. They also agree that prizes on the programs under review are distributed according to chance, but they fall out on the question of whether the home contestant furnishes the necessary consideration.

* * *

Section 1304 itself does not define the type of consideration needed for a "lottery, gift enterprise, or similar scheme". Nor do the postal lottery statutes from which this language was taken. The legislative history of § 1304 and the postal statutes is similarly unilluminating. For guidance, therefore, we must look primarily to American decisions, both judicial and administrative, construing comparable antilottery legislation.

* * *

The courts have defined consideration in various ways, but so far as we are aware none has ever held that a contestant's listening at home to a radio or television program satisfies the consideration requirement. Some courts—with vigorous protest from others—have held that the requirement is satisfied by a "raffle" scheme giving free chances to persons who go to a store to register in order to participate in the drawing of a prize, and similarly by a "bank night" scheme giving free chances to persons who gather in front of a motion picture theatre in order to participate in a drawing held for the primary benefit of the paid patrons of the theatre. But such cases differ substantially from the cases before us. To be eligible for a prize on the "give-away" programs involved here, 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.

We believe that it would be stretching the statute to the breaking point to give it an interpretation that would make such programs a crime. Particularly is this true when through the years the Post Office Department and the Department of Justice have consistently given the words "lottery, gift enterprise, or similar scheme" a contrary administrative interpretation. Thus the Solicitor of the Post Office Department has repeatedly ruled that the postal lottery laws do not preclude the mailing of circulars advertising the type of "give-away" program here under attack. Similarly, the Attorney General—charged directly with the enforcement of federal criminal laws—has refused to bring criminal action against broadcasters of such programs. And in this very action, it is noteworthy that the Department of Justice has not joined the Commission in appealing the decision below. * * *

It is apparent that these so-called "give-away" programs have long been a matter of concern to the Federal Communications Commission; that it believes these programs to be the old lottery evil under a new guise, and that they should be struck down as illegal devices appealing to cupidity and the gambling spirit. It unsuccessfully sought to have the De-

partment of Justice take criminal action against them. Likewise, without success, it urged Congress to amend the law to specifically prohibit them. The Commission now seeks to accomplish the same result through agency regulations. In doing so, the Commission has overstepped the boundaries of interpretation and hence has exceeded its rule-making power. Regardless of the doubts held by the Commission and others as to the social value of the programs here under consideration, such administrative expansion of § 1304 does not provide the remedy.

The judgments are Affirmed.

### NOTES AND QUESTIONS

1. The one dissent below to which Chief Justice Warren refers is that of Second Circuit Judge Charles E. Clark who in a lone dissent had defined consideration in a substantially different way and argued that § 316 of the Federal Communication Act (47 U.S.C. June, 1934) prohibited not only lotteries, but gift enterprises and "similar schemes" offering prizes dependent upon "chance;" and that the statute does not mention "consideration."

With regard to the meaning of consideration, Judge Clark declared in

AMERICAN BROADCASTING CO. v. UNITED STATES, 110 F.Supp. 374, 392–393 (S.D.N.Y.1953) as follows: "The time spent by a single listener may be quite brief. But the time spent by the whole country in hanging for an hour more or less breathlessly upon a nationwide broadcast which may (but probably will not) yield the listeners returns ranging from refrigerators, pianos, and trips to South America to good hard cash beyond their wildest dreams provide so stupendous an audience for the advertising message as hardly to be estimated. And I suspect that the time spent by any single listener is almost always considerable. A few fleeting moments will not be adequate to learn what the rules are, hear and guess the tune or answer the fateful telephonic inquiry. One is just impelled to hear the hour out, and, having gotten the hang of it, to come back the following week, and have the family listen as a part of the game until the announcer calls. * * * 'It is the value to the participant of what he gives that must be weighed' * * * It is what the operator receives—in terms of value to himself—which must necessarily mark the difference between a gift and a chance, between altruism and business. * * * To say that here we have pure donation, whereas we would have a lottery if the participant were required to deposit a penny in a collection plate * * * just does not make sense."

2. So incensed was a retired St. Louis judge, himself an authority on lottery law, by Warren's opinion that he devoted more than 25 pages in a book to an attack on the Chief Justice, demonstrating once again the propensity of moral questions to generate heat. See Williams, Lotteries, Laws and Morals 196–223 (1958).

3. A Washington state court ruled in 1972 that a football forecasting contest run by a newspaper was a prohibited lottery under state statutes and the state constitution. Consideration was defined as the time and attention that must be given to the contest and the necessary purchase by someone of at least one copy of the newspaper. Participants were required to do something that they might not otherwise do. Although not a game of pure chance, chance was the dominant factor since the odds of picking correct outcomes for 15 teams were 900 to one. Even the name of the contest, Guest-Guesser, implied chance, said the court. Under state law, which defines gambling as a wager of something of monetary value, the contest was not prohibited as a gambling game. *Seattle Times Co. v. Tielsch, 495 P.2d 1366 (Wash.1972).*

New Jersey is the only state which both by statute (N.J.S. 2A:121–1, N.J.S. A.) and by judicial precedent leaves out consideration as a necessary element of lottery. Long ago it accepted a definition of the term attributed to Dr. Samuel Johnson: Lottery is the distribution of a prize by chance. *State v. Shorts, 32 N.J. L. 398, 401 (Sup.Ct.1868).*

The FCC's definition of a lottery does include consideration and the agency has warned broadcasters about TV bingo, horse races, and games which encouraged purchases. In late 1964 the FCC actually fined a Mississippi radio station $350 for airing a commercial for an automobile dealer's jackpot drawing.

4. Newsworthiness is a defense against lottery law violations. The rags to riches story of a contestant who wins the New Hampshire lottery against fantastic odds or the legendary Irish Sweepstakes. Or the Black man who is denied a lottery prize because of his race. The close question of where to draw the line between lottery promotion and a genuine new story became sharply focused in the first states to adopt state lottery, notably New York. The New York State Broadcasters Association, joined by the City, the State, and Metromedia Inc., challenged the FCC rules generally on the issue of information about lotteries and was rebuffed on all counts except for "ordinary news reports concerning legislation authorizing the institution of a state lottery, or of public debate on the course state policy should take" * * * or "any good-faith coverage which is reasonably related to audiences' right and desire to know and be informed of the day-to-day happenings within the community."

An appeal was taken to the U.S. Court of Appeals in New York on the grounds that the people of New York were being denied access to news, opinions and other information in violation of their right to receive information, and, in addition, that the FCC ruling was vague. The Court of Appeals upheld the FCC and 70 years of judicial precedent, but it did send the question of whether specified types of broadcasts would violate the statute back to the agency for resolution.

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## NEW YORK STATE BROADCASTERS ASSOCIATION v. UNITED STATES

414 F.2d 990 (2d Cir. 1969).

FEINBERG, Circuit Judge.

* * *

Petitioners claim * * * that even though Congress has the power and intended to apply some controls on the broadcasting of lottery information, section 1304, the regulations and the Commission's declaratory ruling violate the first amendment and deprive them of property without due process of law. The Government responds that the constitutionality of section 1304 is well established.

Petitioners mount their attack in traditional free speech terms, citing well-known cases which protect freedom of expression. Thus, they stoutly maintain that there can be no "official government view" which bans lottery information since the market place of ideas must be free to those who support lotteries. See Red Lion Broadcasting Co. v. FCC, 395 U.S. at 389–392, 396–399. But the argument is basically misplaced. Petitioners admit, for example, that the first amendment does not protect freedom to swindle even though words may be used to accomplish that result, a concession compelled by the Supreme Court's observation that:

> [T]he constitutional guarantees of freedom of speech and freedom of the press [do not] include complete freedom, uncontrollable by Congress, to use the mails for perpetration of swindling schemes.

Donaldson v. Read Magazine, Inc., 333 U.S. at 191. Moreover, invoking the specter of an official government view does not dispose of the real issues before us. There is an "official" government view as to the sale of narcotics, see 21 U.S.C. §§ 173, 174, the offering of fraudulent securities, see 15 U.S.C. § 78j(b), the interstate transportation of wagering paraphernalia, see 18 U.S.C. § 1953, and the coercion of employees by employers, see 29 U.S.C. § 158(a)(1), to name only a few. And the view extends to communications which are designed to—and do—directly effectuate these unwanted results. Clearly an advertisement listing the names and addresses of sellers of narcotics or of fraudulent stock could constitutionally be banned. Of course, we do not suggest that lotteries are a swindle or that lotteries and uncontrolled sale of narcotics are equally deserving of condemnation, but Congress has the power to have a "view" as to these types of conduct and to take steps to inhibit each. Nor do we see a viable distinction here because there is legislative unanimity as to swindling or narcotics but a difference of opinion as to lotteries.

The real point here is that we are not primarily in the realm of ideas at all but are chiefly concerned with speech closely allied with the putting into effect of prohibited conduct. This is not to say that the statute under attack does not raise first amendment issues. Thus, petitioners contend that section 1304 is unconstitutional on its face, arguing that its broad terms improperly inhibit "lawful communication unconnected with the operating of a lottery." It is obvious that a literal reading of the statute would support petitioners' challenge, since by its terms it punishes the broadcasting of "any * * * information concerning any lottery." This could include, for example, an editorial for or against continuing the lottery experiment started by New York State in 1967. However, we do not believe—nor did the Commission—that such a broad construction of section 1304 is warranted. The section obviously prohibits a licensed broadcaster from conducting a lottery on the air. But that prohibition alone would be almost meaningless; by its very nature, a lottery could be promoted by broadcasting information about it with essentially the same effect as conducting it. It is certainly reasonable that Congress acted to prohibit this possibility—the broadcasting of advertisements and information that directly promotes a particular lottery—and we think that the section must be strictly construed to go no further. The language of section 1304 itself indicates that Congress did not intend that the phrase "information concerning any lottery" be literally construed; otherwise there would have been no need to make certain that lists of winners not be broadcast. Moreover, the words of section 1304 were patterned after the language of the mail statute which had long been narrowly construed. And when it enacted section 1304 Congress also directed the Commission to respect first amendment values. See 47 U.S.C. § 326. Finally, as the Supreme Court has reminded us, section 1304 "is a criminal statute" and as such "is to be strictly construed." FCC v. American Broadcasting Co., 347 U.S. at 296. For all of these reasons, we think that the phrase "information concerning any lottery" refers only to information that directly promotes a particular existing lottery. As we have construed it, section 1304 neither improperly restricts broadcasters to an official government view nor inhibits the free expression of ideas by reason of its overbreadth. Cf. American Broadcasting Co. v. United States, 110 F.Supp. at 389. Thus, petitioners' constitutional attacks must fail.

What remains is to consider the validity of the Commission's declaratory ruling in light of the above discussion. Peti-

tioners complain about the order's lack of specificity as well as the Commission's failure to rule on a number of the requests made to it. We think these concerns are to some extent justified. There have apparently never been any prosecutions for violations of section 1304, and we find no other judicial opinion explicitly interpreting the "information concerning" language of the statute. In view of this, and because of the great interest broadcasters have in not jeopardizing their licenses, we believe that the proper course is to set aside the Commission's declaratory ruling to allow it to reconsider petitioners' requests in light of this opinion.

A. *Advertisements and announcements.*

In their specific requests, petitioners sought rulings on whether broadcasts are permitted of (4) advertisements of the New York State Lottery or (3) "announcements (unpaid) of the places where Lottery tickets may be purchased, where, how and when winning tickets will be drawn, the amounts of the prizes, and how the proceeds of the sales of Lottery tickets are and will be distributed." The Commission answered no as to (4), but its ruling as to (3) is less clear. From the papers before us, we assume that the only difference between items (3) and (4) is that advertisements are paid for and announcements are unpaid. In its ruling, the Commission stated that the prohibition of "material which promotes lotteries" includes "any material, which, in the generally accepted sense of the terms, is intended to advertise, promote or encourage the successful conduct of a lottery." This appears to be broader than our construction of section 1304, which is that the statute is intended to reach only advertisements or information that directly promote a lottery. Thus, an announcement that a specified number of schools had been built with funds from the Lottery might generally "encourage" the conduct of the Lottery, but we would not think that it directly promotes it. However, the contrary would be true if there were coupled with the announcement a plea to buy tickets or information as to when and how to make a purchase. There is a difference between information directly promoting a lottery and information that is simply "news" of a lottery. If a "news" item has the incidental effect of promoting a lottery, it is not banned; but if a lottery advertisement or announcement contains "news," such as the amount a lottery realized for education, it would nonetheless be banned. We are aware that at times the line drawn may be thin, but this will be the unusual rather than the common case because advertisements and announcements will ordinarily be more direct and exhortative. We would expect the Commission to apply its expertise to the problem. In any event, although we think that even under our narrow construction of section 1304 the Commission's ruling as to item (4) would in almost every instance be correct, we believe that petitioners are entitled to more specific guidance as to (3) and the assurance that as to both items the Commission is applying the proper test.

Finally, petitioners complain that the Commission's ban on all advertisements cannot stand in the light of the Supreme Court's decision that paid advertisements "on behalf of a movement whose existence and objectives are matters of highest public interest and concern" are entitled to full constitutional protection. New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964). While we agree with that statement of the law, petitioners are incorrect in claiming that all Lottery advertisements qualify because they seek public participation in a venture affecting the welfare of New York residents. We believe that petitioners' requests as to items (3) and (4) and the Commission's ruling on them envisioned advertisements or announcements of the

usual Lottery promotion type. To the extent that information of public interest and concern was to be conveyed, it was wholly incidental and subordinate to the promotion and thus properly prohibited. See Valentine v. Chrestensen, 316 U.S. 52, 55 (1942). Of course, petitioners and others are free to request rulings on material that meets the *Sullivan* test; and, if they do, we believe and the Government agrees that nothing in section 1304 or the Commission's declaratory ruling prohibits such broadcasts.

B. *News broadcasts.*

In requests (1), (2), (5), (6), (7), (8), and (10), petitioners described general and specific types of news broadcasts. As far as we can tell, the Commission did not rule precisely on any of them although it did state that reports on legislation or public debate on "the institution of a State lottery" are not banned. While we agree as to those specific rulings, there exists a possible implication that other types of news reports are not equally outside the scope of section 1304. This is especially true in the light of a prior letter from the Commission's Secretary, casting doubt on the broadcast of "legitimate news" about the New Hampshire lottery and indicating that section 1304 permits only news which is "*incidentally* connected with a lottery." We believe that any such implication should be disclaimed by the Commission and that section 1304 prohibits only so-called news that directly promotes the Lottery, e. g., broadcasting lists of winners. As to these, Congress has already made the reasonable determination that such information would be direct promotion of the Lottery. On the other hand, an interview by a television reporter with an excited winner—the counterpart of a newspaper feature story—would seem to us to be legitimate news and an indirect promotion at best. In any event, broadcasters in all fairness should be informed of the scope of the prohibition as specifically as possible. The Commission apparently agrees since it has indicated doubts in another context about imposing liability on a licensee in the absence of prior Commission or judicial decisions. See 32 Fed.Reg. 10303, 10304 (1967). Because of this, we hope that the Commission will take the opportunity to rule specifically on all or most of petitioners' requests—including whether sample newspaper reports or stories submitted to it by petitioners would be permitted on radio and television—with whatever qualifications are appropriate in the light of this opinion.

C. *Editorials.*

The only one of petitioners' specific requests which remains to be discussed, number (9), referred to "editorial comment on the Lottery." Here too the ruling of the Commission specifically covered only editorials regarding a state's lottery policy. However, there should be no implication that other editorials by licensees are affected. In general, we do not believe that section 1304 was intended to reach fair editorial comment at all and should be read as a ban only if the editorial format is used as a sham to avoid the prohibition on direct promotion of the Lottery.

The declaratory ruling of the Commission is set aside and the case remanded to the Commission for reconsideration and decision in conformity with this opinion.

**NOTES**

1. Another federal court of appeals has ventured to disagree with the Second Circuit's decision in the *New York State Broadcasters* case. The Third Circuit has held that broadcasters may announce a winning number in the state lottery in a newscast. See *New Jersey State Lottery Commission v. FCC, United States Court of Appeals for the Third Circuit*, Civil Action No. 72–1878, en banc, January 2, 1974. The newscasters argued that an-

nouncement of a winning state lottery number was a public service. The FCC unsuccessfully argued against such announcements by relying on the *New York State Broadcasters* case to the effect that announcing lottery information was prohibited "which directly promoted the lottery."

The Third Circuit hinted that the Second Circuit had ignored the anticensorship provision of the Federal Communications Act. 47 U.S.C.A. § 326. See this text, pp. 775–796. The FCC has petitioned the Supreme Court for certiorari in the *New Jersey State Lottery Commission* case.

2. It seems reasonably clear that federal law forbids any publication advertising or promoting a lottery. Simple announcements of bingo games, for example, are prohibited, as are words or symbols intended to disguise a lottery. Churches, fraternal organizations and charitable groups are not exempt under the Postal laws, although state courts have disagreed as to whether state statutes permitting some lotteries for charitable organizations violate state constitutional bans on lotteries.

Since chance and consideration are sometimes difficult to define with precision, it is advisable for advertising managers and editors to refer doubtful schemes to the Office of the General Counsel, Mailability Division, Post Office Department, Washington, D. C. for a ruling.

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## I. RECOMMENDATIONS FOR REFORM

1. Recommendations for the reform of advertising regulation range all the way from greater coordination and uniformity of policy among regulating agencies [Note, *The Regulation of Advertising*, 56 Colum.L.Rev. 1055–57 (1956) ], to harsh and detailed indictments of the work of particular agencies. An example of the latter is the scathing 185-page report on the current FTC issued by Ralph Nader and a volunteer committee of law students in January, 1969.

"The FTC itself," said the report, "is one of the most serious and blatant perpetrators of deceptive advertising in America. It has avoided congressional or other investigation or review for a decade by * * * feeding and serving those who would or do threaten it." The report added that incompetence, indolence, political cronyism, fear of big business, delaying tactics, and the natural conservatism of agency personnel were responsible for a failure to monitor and detect violations and to check compliance with FTC rules and guidelines. Associated Press, January 6, 1969.

Focal point of this devastating attack was deceptive television advertising which, until recently, equated cigarette smoke with fresh air and cool mountain brooks; and still represents analgesics as having greater healing powers than identical competitors; promotes vacuum cleaners which purportedly have the power to suck a bowling ball up a plastic tube; permits Geritol ads which make claims in open defiance of an FTC order; and allows false toothpaste representations, diet claims, germ-proofing claims, tire mileage and safety claims, and myriad other falsehoods which have become the warp and woof of much television advertising.

In place of "endemic inaction and delay" in protecting consumer interests the Nader report called for FTC authority to use injunctions and criminal actions in certain consumer areas, and an FTC budget eight or nine times the present budget, in light of the size of the economy it must police. *Advertising Age*, 1, 70, January 6, 1969. Another hard line

would be to shift the burden of proof in advertising cases to the advertiser. A more moderate approach would be to prod advertisers to increase the amount and quality of information in the marketplace as in the FTC's ad substantiation and corrective advertising programs Howard and Hulbert in their staff report to the FTC (Advertising and the Public Interest, 1973, p. 84) note that the advertiser bears an especially heavy responsibility for making information about a brand available to the consumer because he has a type of monopoly on that information. It is difficult for one outside the company to acquire the information.

Both advertiser and consumer will ultimately benefit from truthful advertising; and Howard and Hulbert tend to agree with Preston that some or much of what has been called puffery, and appeals to the self-concepts or fantasies of the audience, are in fact deceptive. (p. 84) They recommend that the FTC's Bureau of Consumer Protection concern itself with the intelligibility of corrective ads; with the relevance of advertising messages to consumer needs, this to be determined by systematic research where appropriate; and with truthfulness and completeness, especially in children's advertising. They also recommend a much sharper distinction be made between program and advertisement in television designed for under-six children. And they propose staggered periods of ad-free network programming for the child audience.

Consumers must be better informed about the availability of grievance procedures within the self-regulatory structure of the advertising industry. And this would seem to be a task for the advertisers themselves, as well as for the Commission. A fundamental recommendation by Howard and Hulbert is the setting up of a behavioral research department within the Commission to deal with basic theoretical questions which have a bearing on the FTC's operations (p. 91), for example its regulation of deception.

In the meantime the consumer movement and its potential influence on legislation will be the cutting edge of concern in the marketplace. It has been said that if every consumer would become an active participant in one or more of the organized consumer groups in the country, there would be less need for regulatory intervention. Consumers remain unorganized, however, relative to their industry adversaries, although the Consumer Federation of America has given the movement some cohesiveness. But Ralph Nader cannot do it alone. Government, industry, media and consumer will have to cooperate in encouraging advertising that is consistent with developing theories of consumer behavior and with the public good.

## J. LEGAL OR PUBLIC NOTICE ADVERTISING

1. 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. 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.

"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).*

2. Another justification for the commercial newspaper has been the diversity of its subscribers rather than their number. *Eisenberg v. Wabash, 189 N.E. 301 (Ill.1934); Burak v. Ditson, 229 N.W. 227 (Iowa 1930).* Can this also be challenged on the grounds that the law should require wider and more general publicity than can be provided by any newspaper, whatever its form?

In the landmark case, it was held by the United States Supreme Court that notice by publication of a pending settlement proceeding to known beneficiaries of a common trust fund was a denial of due process. Out of this case emerges the doctrine that notice is adequate only if it is reasonably calculated to apprise interested parties of their right to appear and be heard. *Mullane v. Central Hanover Bank & Trust Co., Trustee, 339 U.S. 306 (1949).*

Since *Mullane*, the Supreme Court has generally held that something more than notice by publication is required. In 1953, Justice Black wrote that notice by publication is a poor and sometimes hopeless substitute for actual service of notice. *City of New York v. New York, N. H. & H. R. Co., 344 U.S. 293 (1953).* And in 1956, the Court held invalid a condemnation proceeding based upon notice by publication. *Walker v. City of Hutchinson, 352 U.S. 112 (1956).* "[N]otice by publication," said the Court in 1962, "is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." *Schroeder v. City of New York, 371 U.S. 211 (1962).*

3. *Mullane* points out that notice need not be communicated to every possible interested person, but rather that notice is sufficient if it is "reasonably certain to reach most of those interested in objecting." Would this statement sustain publication of notice in a small town newspaper, because, in that atmosphere, face-to-face communication may be quite highly developed and the community newspaper closely read? *Jones v. Village of Farnam, 119 N.W.2d 157 (Neb. 1963),* discussed in *Due Process—Sufficiency of Notice—Adequacy of Published Notice When Subsequent Proceeding Is To Be Held,* 49 Iowa L. Rev. 185 (1963). 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 (Mass.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).*

## SECTION 7. SELECTED LEGAL ASPECTS OF COPYRIGHT IN THE MASS MEDIA

### A. COPYRIGHT AND THE PRINT MEDIA

Article I, Sec. 8(8)
U. S. Constitution

"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; * * *"

#### (1) PROTECTION OF NEWS AND ADVERTISING COPY: *I. N. S. v. A. P.*

The protection of news as a "quasi-property" against unfair competition was recognized and affirmed 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 was not copyrighted. In the absence of any statutory protection, the AP relied on the common law doctrine of unfair competition.

The opinion for the Supreme Court raised three 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 news gatherer; and (3) whether INS's admitted course of conduct in appropriating for commercial use material taken from bulletins or early editions of Associated Press newspapers constitutes unfair competition in trade. The Court then proceeded to answer each of these questions in favor of the Associated Press.

## INTERNATIONAL NEWS SERVICE v. ASSOCIATED PRESS

248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211 (1918).

Mr. Justice PITNEY:

* * *

In considering the general question of property in news matter, it is necessary to recognize its dual character, distinguishing between the substance of the information and the particular form or collocation of words in which the writer has communicated it.

No doubt news articles often possess a literary quality, and are the subject of literary property at the common law; nor do we question that such an article, as a literary production, is the subject of copyright by the terms of the act as it now stands. In an early case at the circuit Mr. Justice Thompson held in effect that a newspaper was not within the protection of the copyright acts of 1790 and 1802 (Clayton v. Stone, 2 Paine, 382; 5 Fed.Cas.No.2872). But the present act is broader; it provides that the works for which copyright may be secured shall include "all the writings of an author," and specifically mentions "periodicals, including newspapers." Act of March 4, 1909, c. 320, §§ 4 and 5, 35 Stat. 1075, 1076. Evidently this admits to copyright a contribution to a newspaper, notwithstanding it also may convey news; and such is the practice of the copyright office, as the newspapers of the day bear witness.

But the news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day. It is not to be supposed that the framers of the Constitution, * * * intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it.

We need spend no time, however, upon the general question of property in news matter at common law, or the application of the copyright act, since it seems to us the case must turn upon the question of unfair competition in business. And, in our opinion, this does not depend upon any general right of property analogous to the common-law right of the proprietor of an unpublished work to prevent its publication without his consent; nor is it foreclosed by showing that the benefits of the copyright act have been waived. We are dealing here not with restrictions upon publication but with the very facilities and processes of publication. The peculiar value of news is in the spreading of it while it is fresh; and it is evident that a valuable property interest in the news, as news, cannot be maintained by keeping it secret. Besides, except for matters improperly disclosed, or published in breach of trust or confidence, or in violation of law, none of which is involved in this branch of the case, the news of current events may be regarded as common property. What we are concerned with is the business of making it known to the world, in which both parties to the present suit are engaged. That business consists in maintaining a prompt, sure, steady, and reliable service designed to place the daily events of the world at the breakfast table of the millions at a price that, while of trifling moment to each reader, is sufficient in the aggregate to afford compensation for the cost of gathering and distributing it, with the added profit so necessary as an incentive to effective action in the commercial world. The service thus performed for newspaper readers is not only innocent but extremely useful in itself, and indubitably constitutes a legitimate business. The parties are competitors in this field; and, on fundamental principles, applicable here as elsewhere, when the rights or privileges of the one are liable to conflict with those of the other, each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure that of the other.

Obviously, the question of what is unfair competition in business must be determined with particular reference to the character and circumstances of the business. The question here is not so much the rights of either party as against the public but their rights as between themselves. And although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves. For, to both of them alike, news matter, however, little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise. Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as *quasi* property, irrespective of the rights of either as against the public. * * *

Not only do the acquisition and transmission of news require elaborate organization and a large expenditure of money, skill, and effort; not only has it an exchange value to the gatherer, dependent chiefly upon its novelty and freshness, the regularity of the service, its reputed reliability and thoroughness, and its adaptability to the public needs; but also, as is evident, the news has an exchange value to one who can misappropriate it.

The peculiar features of the case arise from the fact that, while novelty and freshness form so important an element in the success of the business, the very

processes of distribution and publication necessarily occupy a good deal of time. Complainant's service, as well as defendant's, is a daily service to daily newspapers; most of the foreign news reaches this country at the Atlantic seaboard, principally at the City of New York, and because of this, and of time differentials due to the earth's rotation, the distribution of news matter throughout the country is principally from east to west; and, since in speed the telegraph and telephone easily outstrip the rotation of the earth, it is a simple matter for defendant to take complainant's news from bulletins or early editions of complainant's members in the eastern cities and at the mere cost of telegraphic transmission cause it to be published in western papers issued at least as early as those served by complainant. Besides this, and irrespective of time differentials, irregularities in telegraphic transmission on different lines, and the normal consumption of time in printing and distributing the newspaper, result in permitting pirated news to be placed in the hands of defendant's readers sometimes simultaneously with the service of competing Associated Press papers, occasionally even earlier.

Defendant insists that when, with the sanction and approval of complainant, and as the result of the use of its news for the very purpose for which it is distributed, a portion of complainant's members communicate it to the general public by posting it upon bulletin boards so that all may read, or by issuing it to newspapers and distributing it indiscriminately, complainant no longer has the right to control the use to be made of it; that when it thus reaches the light of day it becomes the common possession of all to whom it is accessible; and that any purchaser of a newspaper has the right to communicate the intelligence which it contains to anybody and for any purpose, even for the purpose of selling it for profit to newspapers published for profit in competition with complainant's members.

The fault in the reasoning lies in applying as a test the right of the complainant as against the public, instead of considering the rights of complainant and defendant, competitors in business, as between themselves. The right of the purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's right to make merchandise of it, may be admitted; but to transmit that news for commercial use, in competition with complainant—which is what defendant has done and seeks to justify—is a very different matter. In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown. Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself, and a court of equity ought not to hesitate long in characterizing it as unfair competition in business.

* * *

Besides the misappropriation, there are elements of imitation, of false pretense, in defendant's practices. The device of

rewriting complainant's news articles, frequently resorted to, carries its own comment. The habitual failure to give credit to complainant for that which is taken is significant. Indeed, the entire system of appropriating complainant's news and transmitting it as a commercial product to defendant's clients and patrons amounts to a false representation to them and to their newspaper readers that the news transmitted is the result of defendant's own investigation in the field. But these elements, although accentuating the wrong, are not the essence of it. It is something more than the advantage of celebrity of which complainant is being deprived. * * *

Affirmed.

### NOTES AND QUESTIONS

1. In a concurring opinion, Justice Holmes agreed that INS's activities constituted unfair competition; but he implied that, had INS cited the Associated Press as its source, he might have voted the other way.

Justice Brandeis, in a lone and lengthy dissent, recognized the wrong but doubted the rightness of the courts making laws in such cases. He questioned whether news should be considered property and noted that "The general rule of law is that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use."

2. The *INS* case is not itself a copyright case. Rather it is the basis for a doctrine of the misappropriation of ideas grounded in the state law of unfair competition. This doctrine has met with varying degrees of acceptance in the several states.

Fred Waring and his orchestra, "The Pennsylvanians", performed "live" on radio and made phonograph recordings. The records bore the label "Not licensed for radio broadcast." When a radio station purchased the recordings and broadcast them, Waring was granted an injunction against the station, based upon an *INS* theory of misappropriation of Waring's property rights in the product of his labor and talent. *Waring v. WDAS Broadcasting Station, Inc.*, 194 A. 631 (Pa.1937).

Another bandleader was not so successful. Recordings of the Paul Whiteman orchestra, manufactured by RCA, bore the legend "Not licensed for radio broadcast." As in the *Waring* case, a radio station bought the records and broadcast them. The Court of Appeals, speaking through Judge Learned Hand, declined to follow that case's *INS*-based reasoning. The court said: "Property is a historical concept; one may bestow much labor and ingenuity which inures only to the public benefit; 'ideas', for instance, though upon them all civilization is built, may never be 'owned.' The law does not protect them at all, but only their expression." Since the plaintiff was unable to come within the copyright laws, an injunction against the radio station was denied. *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940).

For a more complete consideration of the successes and failures of the misappropriation doctrine, see S. C. Oppenheim, Unfair Trade Practices, 164–193 (1968).

3. Protection under the law of unfair competition has also been applied to book titles, *Application of Cooper, 254 F.2d 611 (3d Cir. 1958)*; horse racing information, *Triangle Publications v. New England Newspaper Publishing Co., 46 F.Supp. 198 (D.Mass.1942)*; to motion pictures misappropriated by television, *Flamingo Telefilm Sales, Inc. v. United Artists, 141 U.S.P.Q. 461 (1964)*; and to wire or newspaper stories lifted for broadcast.

In *Associated Press v. KVOS, 80 F.2d 575 (9th Cir. 1935), reversed on other*

*grounds, 299 U.S. 269 (1935)*, the court ruled that appropriation of AP wire news for broadcast while the news was still "hot" was enjoinable. Another court said that the broadcasting of news stories from a newspaper in a competitive situation causes the newspaper to suffer irreparable and serious injury and the broadcaster to be unjustly enriched at the expense of the newspaper. The action was based on a state unfair competition law for an invasion of a property right in uncopyrighted news. *Pottstown Daily News Publishing Co. v. Pottstown Broadcasting Co., 192 A.2d 657 (Pa.1963).* In *Madison Publishing Co. Inc. v. Sound Broadcasters, Inc. (unreported 1966)*, a Kentucky circuit court decided that a defendant, who had without permission used as its own plaintiff's news stories from an afternoon paper 16 to 18 hours before those newspapers could be delivered to all their subscribers, could be prevented from using the news stories until 20 hours after publication.

In a case involving two business publications, defendant had appropriated information from the plaintiff's wire service and had thereby been able to publish bond market news contemporaneously with his competitor without expenditure of money or effort in newsgathering resources.

"It is no longer subject to question," said the 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 expediture of labor, skill and money." *Bond Buyer v. Dealers Digest Publishing Co., 25 App.Div. 2d 158, 267 N.Y.2d 944 (1966).*

When a Texas radio station used a telephone hookup with an agent who was listening to an Arizona radio station's broadcasts of automobile races, and added sound effects to recreate the races, a Texas court ruled that there had been no violation of the property rights of the Arizona station. *Loeb v. Turner et al., 257 S.W.2d 800 (1953).*

Feature stories, columns, editorials, series of articles, maps, cartoons, puzzles, and photographs may be copyrighted. Obviously the copyrighting of a large number of individual photographic prints would be cumbersome and expensive. Provision has been made for the bulk filing of photographs. This permits a group of prized photographs to be laid out, photographed and copyrighted as a single print.

4. Although news itself is in the public domain and uncopyrightable, news accounts *per se*, that is their particular literary arrangement, may be copyrighted, especially where they bear the mark of individual enterprise and literary style. When the Chicago *Herald* picked up and paraphrased a copyrighted story on submarine warfare from the New York *Tribune* even though it gave full credit, the *Tribune* was able to recover. *Chicago Record Herald Co. v. Tribune Association, 275 F. 797 (7th Cir. 1921).*

5. Copying from a government publication does not give a newspaper the protection of the copyright laws. *DuPuy v. Post Telegram Co., 210 F. 883 (3d Cir. 1914); Morse v. Fields, 127 F. Supp. 63 (S.D.N.Y.1954).*

*DuPuy* was case where a newspaper copied a proposal from a Bureau of Education publication; copyright protection was not granted to the newspaper because of the copying and also because government publications and reprints of them are not copyrightable.

And in a 1956 case involving the writing of a play from news stories, the Supreme Court of California reiterated Brandeis' dictum that "ideas are as free as the air," and a person can have no property rights in public domain facts. *Desney v. Wilder, 299 P.2d 257 (1956).*

6. Under a 1939 United States Supreme Court ruling, *Washingtonian Publishing Co. v. Pearson, 306 U.S. 30*, copyright protection without filing or fee, is afforded a photographer for at least 14 months, if his copyright notice is technically correct. It has been speculated that this informal copyright may extend for the full 28 years; but, if the Copyright Office should ask for deposit of the photograph and payment of fee, the photographer must comply or lose his protection.

It is the photograph alone which is protected, not the photographer's subject matter, although evasion of copyright laws by taking a separate and slightly different picture of the same subject has been discouraged by the courts. *Gross v. Seligman, 212 F. 930 (2d Cir. 1914)*. See generally Chernoff and Sarbin, Photography and the Law, 4th ed. (1971).

7. Each whole edition of a newspaper may be copyrighted with the understanding that some of its content may not be protected, *Tribune Co. of Chicago v. Associated Press, 116 F. 126 (N.D.Ill. 1900)*; and that what is copyrighted may serve as a tip to competitors to write their own stories. *New York Times Co. v. Sun Printing and Publishing Ass'n, 204 F. 586 (2d Cir. 1913)*.

The plaintiff's presenting his certificate of registration of the issue containing the copyrighted material establishes *prima facie* the validity of copyright. *Wihtol v. Wells, 231 F.2d 550 (7th Cir. 1956)*. The burden of proof is on the defendant to produce sufficient evidence to overcome the *prima facie* presumption of validity. *National Institute Inc. v. Nutt, 28 F.2d 132 (D.Conn.1928)*.

A newspaper has the protection of common law trade-mark in its name. In the absence of a trade mark registration for the name of a newspaper, after eight years of non-publication, a plaintiff was said to have no business or property, including goodwill, which could be damaged by another. *Duff v. Kansas City Star Co., 299 F.2d 320 (8th Cir. 1962)*.

8. Advertisements are seldom copyrighted. Where an advertising idea or technique has been imitated in the absence of a copyright, its creator may seek to prove deception of the public or a tendency to deceive under the doctrine of unfair competition. In some jurisdictions he may also have to show fraudulent intent and/or direct competition. But if unfair competition can be substantiated, a plaintiff may recover actual and punitive damages, or be given injunctive relief. This, however, does not seem to be a reliable means of protecting against ad piracy. *Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964)*.

In *Inter-City Press, Inc. v. Siegfried, 172 F.Supp. 37 (W.D.Missouri 1958)*, the publisher of a newspaper brought suit against the proprietor of a throwaway shopper for infringing the copyright protection of a news story, a cartoon, and 10 advertisements. The defendant had reproduced verbatim the news story, including printing discrepancies. The cartoon was credited to the newspaper, but without the newspaper's permission. The publisher recovered for the use of his news story and cartoon.

The ads, however, were not protected, since they had not been prepared by the newspaper alone, but by the advertiser and the newspaper together, without any prior agreement as to ownership. The advertisements, therefore, remained the property of the advertiser. *Brattleboro Publishing Co. v. Winmill Publishing Corp., 250 F.Supp. 215 (D.Vt.1966)*. The court noted that the advertiser and the newspaper's advertising salesman had not only cooperated in preparing the ads, but that the ads had run in different papers without any changes. So there was no copyright violation or unfair trade practice.

9. Copyright protection was first extended to advertising in *Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1902)*, a case involving a copyrighted circus poster.

10. Copyright protection of advertising was reinforced in *Ansehl v. Puritan Pharmaceutical Co., 61 F.2d 131 (8th Cir. 1932), certiorari denied 287 U.S. 666 (1932)*, a case in which the court, granting relief to the creator of a cosmetic advertisement, recognized protected property rights in the particular wording used and in the arrangement of the elements of the ad, beyond the more general consideration of artistic value.

"The defendants," said the court, "might appropriate the ideas and express them in their own pictures and in their own language, but they could not appropriate the plaintiff's advertisement by copying his arrangement of material, his illustrations and language, and thereby create substantially the same composition in substantially the same manner without subjecting themselves to liability for infringement." (Id. at 138).

11. Original advertising scripts for radio have been given copyright protection, *Uproar Co. v. National Broadcasting Co., 8 F.Supp. 358 (D.C.Mass.1934) certiorari denied 298 U.S. 670 (1936)*. Copyright protection has been extended to radio broadcasts generally, *Jerome H. Remick & Co. v. American Automobile Accessories Co., 5 F.2d 411 (6th Cir. 1925), certiorari denied 269 U.S. 556 (1925)*, and to motion pictures, the medium most analogous to television. *Patterson v. Century Productions, Inc., 93 F.2d 489 (2d Cir. 1937), certiorari denied 303 U.S. 655 (1938)*.

Advertising possessing any degree of artistic value and originality and meeting the notice and registration requirements of the copyright law is protected from imitation and misappropriation. Extremely little originality is essential for copyright. *Day-Bright Lighting, Inc. v. Sta-Brite Fluorescent Manufacturing Co., 308 F.2d 377 (5th Cir. 1962)*. Paraphrasing or rough copying may constitute infringement. *West Publishing Co. v. Edward Thompson Co., 176 F. 833 (2d Cir. 1910)*.

12. The following suggestions have been made by the general counsel of the American Newspaper Publishers Association to protect uncopyrighted newspaper ads against piracy:

A. Copyright the newspaper, including the advertising copy, which is created or composed solely by the newspaper or its employees.

B. Where advertising material is created partly by the newspaper and partly by the advertiser, or his agent, the newspaper should secure the copyright interest by a written contract.

C. Where ads are created solely by the advertiser, who is unwilling to relinquish the copyright to the newspaper, the newspaper could insert the copyright proprietor's notice of copyright when using the ad.

In those cases where the copyright in the ad belongs to the newspaper, the copyrightable contents of the newspaper may be protected by inserting the correct statutory copyright notice into the paper generally and into the advertisements as well. A newspaper may follow the registration and deposit procedure for each issue, or do it weekly or monthly, if prior arrangements for such filings are made with the Register of Copyrights. (ANPA General Bulletin, No. 14, March 31, 1965.)

Original jurisdiction rests with the federal district courts in copyright cases and with state courts in cases of unfair competition. See generally Colsey, *The Protection of Advertising and the Law of Copyright* in ASCAP, Copyright Law Symposium (No. 11, 1962). Where a claim of unfair competition is joined

with a substantial and related claim under the copyright, patent, or trade-mark laws, the federal district courts will have jurisdiction of the whole action. See 28 U.S.C.A. § 1338.

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## A NOTE ON "FAIR USE"

1. The judicially created doctrine of "fair use" is the principal defense to a charge of copyright infringement. The Copyright Act of 1909, still in effect, declares in absolute terms, that the copyright owner "shall have the exclusive right: (a) To print, reprint, publish, copy, and vend the copyrighted work; * * *." 17 U.S.C.A. 1 (1970). The question that courts must decide is when does physical copying become "copying" as that term appears in the statute. As one author has pointed out, the effect of a literal reading of the statute would be that "no one would be able to include a portion, however small, of a copyrighted work in a work that he was preparing." J. Gross, *Rosemont v. Random House and the Doctrine of Fair Use*, 50 Journalism Quarterly 227, 229 (1973). Such a result would clearly defeat the fundamental purpose of the constitutional grant of the copyright power, "to promote the progress of science and the useful arts." U.S.Const. art. 1, sec. 8.

To resolve the tension between the rights of the copyright owner and the public interest in the free flow of ideas and information, courts have developed the "fair use" doctrine. The "fair use" doctrine authorizes some use of copyrighted material (such as a quotation, for example) as a "fair use" even though the copyright owner is not compensated for that use:

"Precisely because a determination that a use is 'fair' or 'unfair' depends on an evaluation of the complex of individual and varying factors bearing upon a particular use, there has been no exact or detailed definition of the doctrine. The courts, congressional committees, and scholars have had to be content with a general listing of the main considerations —together with the example of specific instances ruled 'fair' or 'unfair.' These overall factors are now said to be: (a) the purpose and character of the use, (b) the nature of the copyrighted work, (c) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (d) the effect of the use on the copyright owner's potential market for and value of his work." *The Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct.Cl.1973).*

When first applied, the doctrine of fair use was given a narrow reading, based perhaps, upon the Constitution's emphasis on "science and the useful arts." Courts often stated that it was applied only to cases "involving scientific, medical and historical materials." *Holdredge v. Knight Publishing Corp.*, 214 F.Supp. 921 (D.C.1963). A distinction was drawn between commercial and scholarly works, with the doctrine being applied only to the latter group.

The important case of *Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966)*, represents an expansion of the fair use doctrine by the abrogation of the commercial-scholarly distinction. The case involved an attempt by associates of Howard Hughes to stop the publication by Random House of a biography of that famous recluse. Associates of Hughes had formed Rosemont and claimed that they had obtained for Rosemont the exclusive rights to Hughes' life story. Their request for an injunction rested principally on a claim of copyright infringement. Rosemont had become the copyright owner of certain articles written about Hughes in *Look* magazine. Rosemont complained that these copyrights had been infringed by the author of the Random House biography of Hughes, who, they alleged, had copied

and paraphrased several sentences from the *Look* articles in preparing the biography.

Rosemont obtained an injunction against publication of the Random House biography in the district court. *Rosemont Enterprises, Inc. v. Random House*, 256 F.Supp. 55 (S.D.N.Y.1966), reversed 366 F.2d 303 (2d Cir.). That court noted that the biography could scarcely be called a scholarly, scientific or educational work, and that the extent of borrowing permitted for books with a commercial purpose was severely limited. 256 F.Supp. 55, 66.

The Court of Appeals, in an expansive opinion by Judge Leonard B. Moore, reversed. *Rosemont Enterprises, Inc. v. Random House*, 366 F.2d 303 (2d Cir. 1966); certiorari denied 385 U.S. 1009 (1967). In discussing fair use, Judge Moore rejected any dichotomy based on whether the "use" was commercial or scholarly, saying "whether an author or publisher has a commercial motive or writes in a popular style is irrelevant to a determination of whether a particular use of copyrighted material in a work which offers some benefit to the public constitutes a fair use." Judge Moore noted that both commercial and non-commercial elements are involved in almost every work.

Judge Moore did not limit his discussion of the "fair use" doctrine to a rejection of the commercial-scholarly dichotomy. He also touched upon the question of "independent research" that often arises in the copyright infringement context. This crucial question concerns whether an author has relied too much upon previously published material, or whether he has done substantial independent work on his own. Judge Moore declared that "we * * * cannot subscribe to the view (accepted by the district court) that an author is absolutely precluded from saving time and effort by referring to and relying upon previously 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."

For a more comprehensive discussion of the *Rosemont* case and its implications for copyright law, see J. Gross, *Rosemont v. Random House and the Doctrine of Fair Use*, 50 Journalism Quarterly 227 (1973), an article which begins with the interesting suggestion that Clifford Irving should have read the *Rosemont* case and realized that the Hughes organization would not permit him to succeed with his monumental hoax.

2. Technology is placing great strains on the Copyright Act of 1909. The problems of applying the copyright laws in the context of cable television will be explored in the next section. But it is important to realize that problems of electronic media are not the only ones confronting the courts as they attempt to apply a turn of the century statute which could not have anticipated the modern world. The development of rapid and relatively inexpensive photocopying is a matter of great concern to the copyright owner. This new technology poses a potential threat to the copyright owner's exclusive and valuable rights of control, granted by the Act of 1909. The photocopy machine is a common sight in almost any library or office. Courts are being called upon to decide when the use of these machines constitutes copyright infringement. To make these decisions the courts must call upon the doctrine of "fair use."

In *Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct.Cl.1973)*, the United States Court of Claims was called upon to decide whether the photocopying of an entire article from a medical journal could be considered a "fair use." The National Institute of Health (NIH) and the National Library of Medicine (NLM), had adopted a

practice of providing photocopies of entire articles of medical and scientific journals free of charge, upon the request of medical and scientific researchers. NIH and NLM considered this practice to be part of their library loan programs, in lieu of the actual loan of a copy of the requested journal. Certain limitations were imposed upon the number of requests a particular researcher could make, and both libraries maintained a policy of not photocopying an entire issue of any journal in response to a single request.

The Williams & Wilkins Co., publisher of several medical journals, brought an action for damages for copyright infringement in the Court of Claims. The trial judge, whose opinion was incorporated into a dissent in the Court of Claims, found that the doctrine of fair use was inapplicable to this case of "wholesale copying" of the plaintiff's copyrighted works, and awarded damages to the publishing company. The Court of Claims reversed. The greatest part of the the court's opinion concerned the applicability of the "fair use" doctrine. The court found that the suggestion that the copying of an entire copyrighted work can never be a "fair use" was "an overbroad generalization, unsupported by the decisions and rejected by years of accepted practice." In support of this assertion the court noted that in addition to the handwritten or typed copy of an article for personal use: "[i]t is, of course, common for courts to be given photocopies of recent decisions with the publishing company's headnotes and arrangement, and sometimes its annotations." In summary, the court stated that there is "no inflexible rule excluding an entire copyrighted work from the area of 'fair use.' Instead, the extent of the copying is one important factor, but only one, to be taken into account, along with several others."

In holding that these practices by NLM and the NIH library did not constitute infringement, the Court of Claims relied upon three propositions: "First, plaintiff has not in our view shown, and there is inadequate reason to believe, that it is being or will be harmed substantially by these specific practices of NIH and NLM; second, we are convinced that medicine and medical research will be injured by holding these particular practices to be infringement; and, third, since the problem of accommodating the interests of science with those of the publishers (and authors) calls fundamentally for legislative solution or guidance, which has not yet been given, we should not, during the period before congressional action is forthcoming, place such a risk of harm upon science and medicine."

The court was very careful to give a narrow sweep to its holding, pointing out that no question of "vending" the works arose, and that the purpose of the copying was "scientific progress, untainted by any commercial gain." The libraries involved were government-sponsored institutions; their reproduction programs were carefully limited to prevent abuse. Concerning the apparently large number of articles copied (in 1970, NIH copied 85,744 and NLM 93,746 articles), the court pointed out that this was a reasonable amount of copying in view of the large holdings of the libraries and the large number of users. The court emphasized that its holding of a "fair use" depended upon all the particular circumstances of the case, and could not be said to rely only upon any single factor.

The Court of Claims found itself in somewhat of a dilemma. The *Williams* case represented the first suit for copyright infringement to reach that court. Yet it was called upon to decide a most complex question of modern copyright law for which the current federal statutes give little or no guidance. The different views on the various issues of this case, represented by the Court of Claims majority on one side, and the trial judge and

Court of Claims dissent on the other, provide a rich source of material for reflection about this problem. What the Court of Claims called a "fair use", the trial judge termed "wholesale copying." Where the trial judge found that the NIH and NLM practices supplanted the need for the original journal thus decreasing the value of the copyrighted works, the Court of Claims found that the practices were in lieu of library loan and did not represent a threat to subscription or reprint sales. The Court of Claims stated that "we feel sure" that a "flat proscription" on library copying would harm scientific and medical research, while the trial judge found that an award of damages would not result in any "flat proscription" of copying and the payment of damages would be a small price for protection of the rights of the copyright owner.

One alternative which the Court of Claims felt was not open to it under the federal statute would have been to impose a system of compulsory licensing with reasonable royalties upon the photocopying process. Under such a system the copyright owner would be required to grant a license for purposes of photocopying copyrighted material and would receive a reasonable royalty from libraries and other institutions that maintained a photocopy service. The court was unwilling to impose this sytem on copyright owners who might not want it. But such a system would appear to leave copyright owners in a better position than the one they now occupy under this decision.

The question of actual harm to the copyright owner remains unresolved. Do you think it would have made a difference to the outcome of this case if the copyright owners had been authors rather than publishers? Typically, the author of a work in a scholarly journal neither seeks nor receives financial reward for his initial publication.

The issues remain unsettled. The *Williams* decision could be used by other courts to grant damages for photocopying by other persons or institutions of non-scientific copyrighted material for commercial purposes or it could be used to grant these other uses the same protection granted the practices of NIH and NLM. At most, the Court of Claims was unwilling to submit scientific research to at least a possible impediment without congressional guidance. All sides agreed upon the need for new copyright legislation. The Court of Claims opinion contains a discussion of bills introduced in Congress and hearings held on the subject of modernizing the copyright laws.

As this book goes to press, Congress still has failed to revise the Copyright Act of 1909. Both journalists and lawyers must await congressional developments in this area, since it would appear that the courts are unwilling to stretch the Copyright Act of 1909 much farther on their own.* In the meantime, the Supreme Court has announced its intention to review the Court of Claims decision in *Williams & Wilkins Co.*

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## B. COPYRIGHT AND THE ELECTRONIC MEDIA: THE CATV (CABLE TELEVISION) PROBLEM

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### Introduction

In the previous materials we dealt with some highlights of copyright law as it bears on the print media. Reference was also made to extensions of copyright protection to non-print media such as motion pictures and broadcasting. One of the

* For a discussion of some of the new copyright proposals, see Cox, *The Impact of the Proposed Copyright Law Upon Scholars and Custodians*, 29 The American Archivist 217 (1966).

most significant contemporary questions in determining whether copyright liability should be extended to each new advance in media technology is in the interstitial area between copyright and television broadcasting represented by community antenna or cable television (CATV). A CATV system receives a TV broadcast from a standard TV station by means of a special antenna. The broadcast impulses from this antenna are carried by means of cables strung on utility poles to the homes of subscribers. What is the relationship of the federal copyright statute to community antenna television? Does CATV as it presently operates constitute a copyright infringement? These questions were raised and decided in a Supreme Court case, *Fortnightly Corp. v. United Artists*. Prior to the decision of *Fortnightly Corp. v. United Artists*, a bill had been introduced in the Senate which would immunize CATV from copyright coverage in some areas and expose it to coverage in others. Despite the pendency of proposals for congressional legislation, the Court decided to resolve the issue of the copyright statute's applicability to CATV judicially.

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## FORTNIGHTLY CORPORATION v. UNITED ARTISTS TELEVISION, INC.

392 U.S. 390, 88 S.Ct. 2084, 20 L.Ed.2d 1176 (1968).

Mr. Justice STEWART delivered the opinion of the Court.

The petitioner, Fortnightly Corporation, owns and operates community antenna television (CATV) systems in Clarksburg and Fairmont, West Virginia. There were no local television broadcasting stations in that immediate area until 1957. Now there are two, but, because of hilly terrain, most residents of the area cannot receive the broadcasts of any additional stations by ordinary rooftop antennas. Some of the residents have joined in erecting larger cooperative antennas in order to receive more distant stations, but a majority of the householders in both communities have solved the problem by becoming customers of the petitioner's CATV service.

The petitioner's systems consist of antennas located on hills above each city, with connecting coaxial cables, strung on utility poles, to carry the signals received by the antennas to the home television sets of individual subscribers. The systems contain equipment to amplify and modulate the signals received, and to convert them to different frequencies, in order to transmit the signals efficiently, while maintaining and improving their strength.

During 1960, when this proceeding began, the petitioner's systems provided customers with signals of five television broadcasting stations, three located in Pittsburgh, Pennsylvania, one in Steubenville, Ohio, and one in Wheeling, West Virginia. The distance between those cities and Clarksburg and Fairmont ranges from 52 to 82 miles. The systems carried all the programming of each of the five stations, and a customer could choose any of the five programs he wished to view by simply turning the knob on his own television set. The petitioner neither edited the programs received nor originated any programs of its own. The petitioner's customers were charged a flat monthly rate regardless of the amount of time that their television sets were in use.

The respondent, United Artists Television, Inc., holds copyrights on several motion pictures. During the period in suit, the respondent (or its predecessor) granted various licenses to each of the five television stations in question to broadcast certain of these copyrighted motion pictures. Broadcasts made under these licenses were received by the petitioner's Clarksburg and Fairmont CATV

systems and carried to its customers. At no time did the petitioner (or its predecessors) obtain a license under the copyrights from the respondent or from any of the five television stations. The licenses granted by the respondent to the five stations did not authorize carriage of the broadcasts by CATV systems, and in several instances the licenses specifically prohibited such carriage.

The respondent sued the petitioner for copyright infringement in a federal court, asking damages and injunctive relief. The issue of infringement was separately tried, and the court ruled in favor of the respondent. 255 F.Supp. 177. On interlocutory appeal under 28 U.S.C. § 1292(b), the Court of Appeals for the Second Circuit affirmed. 377 F.2d 872. We granted certiorari, 389 U.S. 969, to consider an important question under the Copyright Act of 1909, 35 Stat. 1075, as amended, 17 U.S.C. § 1 et seq.

The Copyright Act does not give a copyright holder control over all uses of his copyrighted work. Instead, § 1 of the Act enumerates several "rights" that are made "exclusive" to the holder of the copyright. If a person, without authorization from a copyright holder, puts a copyrighted work to a use within the scope of one of these "exclusive rights," he infringes the copyright. If he puts the work to a use not enumerated in § 1, he does not infringe. The respondent's contention is that the petitioner's CATV systems infringed the respondent's § 1(c) exclusive right to "perform * * * in public for profit" (nondramatic literary works) and its § 1(d) exclusive right to "perform * * * publicly" (dramatic works). The petitioner maintains that its CATV systems did not "perform" the copyrighted works at all.

At the outset it is clear that the petitioner's systems did not "perform" the respondent's copyrighted works in any conventional sense of that term, or in any manner envisaged by the Congress that enacted the law in 1909. But our inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here. * * *

The Court of Appeals thought that the controlling question in deciding whether the petitioner's CATV systems "performed" the copyrighted works was: "[H]ow much did the [petitioner] do to bring about the viewing and hearing of a copyrighted work?" 377 F.2d, at 877. Applying this test, the court found that the petitioner did "perform" the programs carried by its systems. But mere quantitative contribution cannot be the proper test to determine copyright liability in the context of television broadcasting. It if were, many people who make large contributions to television viewing might find themselves liable for copyright infringement—not only the apartment house owner who erects a common antenna for his tenants, but the shopkeeper who sells or rents television sets, and, indeed, every television set manufacturer. Rather, resolution of the issue before us depends upon a determination of the function that CATV plays in the total process of television broadcasting and reception.

Television viewing results from combined activity by broadcasters and viewers. Both play active and indispensable roles in the process; neither is wholly passive. The broadcaster selects and procures the program to be viewed. He may produce it himself, whether "live" or with film or tape, or he may obtain it from a network or some other source. He then converts the visible images and audible sounds of the program into electronic signals, and broadcasts the signals at radio frequency for public reception. Members of the public, by means of television sets and antennas that they themselves provide, receive the broadcaster's signals and reconvert them into the visi-

ble images and audible sounds of the program. The effective range of the broadcast is determined by the combined contribution of the equipment employed by the broadcaster and that supplied by the viewer.

The television broadcaster in one sense does less than the exhibitor of a motion picture or stage play; he supplies his audience not with visible images but only with electronic signals. The viewer conversely does more than a member of a theater audience; he provides the equipment to convert electronic signals into audible sound and visible images. Despite these deviations from the conventional situation contemplated by the framers of the Copyright Act, broadcasters have been judicially treated as exhibitors, and viewers as members of a theater audience. Broadcasters perform.[23] Viewers do not perform.[24] Thus, while both broadcaster and viewer play crucial roles in the total television process, a line is drawn between them. One is treated as active performer; the other, as passive beneficiary.

When CATV is considered in this framework, we conclude that it falls on the viewer's side of the line. 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. It is true that a CATV system plays an "active" role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house,. and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users, but by an entrepreneur.

The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry.

* * *

The judgment of the Court of Appeals is reversed.

Reversed.

Mr. Justice DOUGLAS and Mr. Justice MARSHALL took no part in the consideration or decision of this case.

[23] Jerome H. Remick & Co. v. American Automobile Accessories Co., 6 Cir., 5 F.2d 411 (radio broadcast); Associated Music Publishers v. Debs Memorial Radio Fund, 2 Cir., 141 F.2d 852 (radio broadcast of recorded program); Select Theatres Corp. v. Ronzoni Macaroni Co., 59 U.S.P.Q. 288 (D.C.S.D.N.Y.) (radio broadcast of program received from network). Congress in effect validated these decisions in 1952 when it added to § 1(c) a special damages provision for "infringement by broadcast." 66 Stat. 752.

[24] "One who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not 'perform' within the meaning of the Copyright Law." Buck v. DeBaum, 9 Cir., 40 F. 2d 734, 735.

"[T]hose who listen do not perform * * *." Jerome H. Remick & Co. v. General Electric Co., 2 Cir., 16 F.2d 829.

Mr. Justice HARLAN took no part in the decision of this case.

Mr. Justice FORTAS, dissenting.

### NOTES AND QUESTIONS

1. It should be recognized that a considerable measure of protection had been extended to television copyright proprietors prior to the *Fortnightly* case and this protection is unaffected by the *Fortnightly* case. To be sure, this protection flows from regulatory action by the FCC rather than by an extended interpretation of the present federal copyright statute. In order to minimize the loss of potential royalties by television copyright holders as a result of CATV operations in "and unexploited market," the FCC in 1966 issued a regulation preventing CATV from extending distant signals in the top hundred television markets. These markets constitute 90 per cent of the total television audience. See Note, 36 Geo.Wash. L.Rev. 672 at 677 (1968); *Second Report and Order, Community Antenna Television Systems*, 2 F.C.C.2d 725 (1966). For newer developments with regard to importation of distant signals by cable operators, see this text, p. 952.

2. The Supreme Court's decision in the *Fortnightly* case must be viewed together with the Court's decision in *United States v. Southwestern Cable Co., 392 U.S. 157 (1968)*. In the *Southwestern* case, reprinted in this text, Ch. IX, infra, p. 938, the Court agreed with the Federal Communications Commission that the latter had jurisdiction under the Federal Communications Act of 1934 to regulate CATV. See also *United States v. Midwest Video*, 406 U.S. 649 (1972), text, p. 943. (A discussion of CATV problems is found in Ch. IX, p. 938). One commentator has pointed out that "blanket imposition of copyright liability" on CATV carriage would upset the congressional intention that technological advances in broadcasting reflect a flexible approach toward questions of authority by the FCC to the end that there be a "unitary and comprehensive regulatory system for the industry" under the aegis of a single agency, the FCC. See *The Supreme Court, 1967 Term*, 82 Harv.L.Rev. 63 at 275 (1968). The Harvard Law Review also defends the *Fortnightly* decision on the ground that if CATV was subject to copyright liability many householders would have to pay twice for the service: once through the additional cost of goods which results from television advertising connected with the initial broadcast and twice as a result of the increase in CATV subscription rates which follow the imposition of copyright liability in the CATV system.

3. Unlike the Supreme Court, the United States Court of Appeals for the Second Circuit, *United Artists Television, Inc. v. Fortnightly Corp., 377 F.2d 872 (2d Cir. 1967)* had held retransmission of a licensed television broadcasting station's program was a public performance within the meaning of the copyright act. 17 U.S.C.A. § 1(d) (1964). Significantly, that decision was criticized, on the ground that CATV was characterized by considerable diffusion of ownership while there were only a dozen producers of copyrighted material for television. As a result, it was suggested that the bargaining advantage would lie very heavily with the producers. See Note, 36 Geo. Wash.L.Rev. 672 at 675–676 (1968). If copyright liability was extended to CATV, presumably the producers of copyrighted material for television would be able to ask the CATV operators for such high royalty fees that the present CATV operators would be driven out of the field and be replaced by the networks. From the point of view of assuring diversity of opinion in television, is any particular advantage secured by the diffusion of present ownership in CATV? If the CATV operator has no

control over the programming his cables retransmit, then how is diversity of opinion encouraged? Does the multiplicity of channels to which CATV affords partial retransmission provide part of the answer to these questions?

4. One of the crucial questions in the *Fortnightly* case is whether a CATV system does "perform * * * in public" when it carries programs to its subscribers which are retransmitted from standard stations. The Court concluded that the CATV system was more like a viewer than a broadcaster, and therefore that its retransmission was not a public performance. *Fortnightly* had argued to the Court that it had no control over the programs which its subscribers received. Is this the reason the court concluded that the CATV system was basically a "viewer"? What is the significance for determining whether cable should be subject to copyright liability in the fact that CATV has no control over the programs it emits?

5. Is the copyright liability of CATV a problem more of copyright interpretation or of broadcasting regulatory policy?

### *Fortnightly*—Re-Examined

The question of copyright liability for cable television has continued to simmer, and the failure to resolve it satisfactorily for all the parties concerned has undoubtedly served to retard the development of the full potential of cable. But the continued exploitation of valuable copyright programming properties by cable operators, permitted by *Fortnightly*, has provoked a new legal fight to reconsider the copyright question in cable. In *CBS v. Teleprompter*, the case which follows, the creators and producers of intercepted television programs brought suit for copyright infringement against owners and operators of community antenna television systems. Relying on *Fortnightly* the federal district court dismissed. See *CBS, Inc. v. Teleprompter Corp., 355 F.Supp. 618 (S.D.N.Y.)*. The Court of Appeals, however, reversed and held that when community antenna television systems distributed signals that were beyond the range of local antenna, the action of the cable system was functionally equivalent to service performed by a broadcaster. Since the broadcaster would be liable for copyright infringement in the circumstances described in the case the cable operator should also. The Court of Appeals in *TelePrompTer* held that the cable systems operators had "performed" the programming distributed to subscribers on the imported signals within the meaning of the Copyright Act.

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## COLUMBIA BROADCASTING SYSTEM, INC. v. TELEPROMPTER CORP.

476 F.2d 338 (2d Cir. 1973).

Before LUMBARD, KAUFMAN and MANSFIELD, Circuit Judges.

LUMBARD, Circuit Judge:

Plaintiffs-appellants, Columbia Broadcasting System, Inc. (CBS), Calvada Productions, Jack Chertok Television, Inc., and Dena Pictures, Incorporated appeal from a final judgment entered after trial in the Southern District. Appellants commenced this copyright infringement action [1] against defendants-appellees, Teleprompter Corporation (Teleprompter) and its subsidiary Conley Electronics Corporation, who own and operate numerous Community Antenna Television

[1] The original action was commenced on December 11, 1964. Attempts to consolidate this action with United Artists Television v. Fortnightly, 255 F.Supp. 177 (S.D.N.Y.1966), aff'd 377 F.2d 872 (2d Cir. 1967), rev'd 392 U.S. 390, 88 S.Ct. 2084, 20 L.Ed.2d 1176 (1968), in the district court were unsuccessful. The parties voluntarily stayed proceedings in this case while *Fortnightly* was on appeal. After the *Fortnightly* decision, supplemental complaints were filed on December 15, 1969 and May 17, 1971.

(CATV) systems throughout the country. Appellants are creators and producers of television programs that were protected by statutory copyrights and that were licensed to television stations affiliated with the CBS Television Network, a division of CBS, and to several independent television stations. The complaint alleged that the Teleprompter cable systems intercepted the signals of television stations broadcasting appellants' copyrighted works and then channeled these programs to their paying subscribers without authorization or license, thereby infringing appellants' copyrights.[2] After trial, the district court, holding that the reception of telecasts of appellants' copyrighted programs by Teleprompter's CATV systems and the distribution of these programs to CATV subscribers did not infringe appellants' copyrights, entered judgment dismissing the complaint. From that judgment, appellants have taken this appeal.

The pertinent facts were the subject of two lengthy stipulations and are basically undisputed. The legal issue concerns the proper interpretation to be given to § 1(c) and (d) of the Copyright Act of 1909, 17 U.S.C. § 1(c) and (d). This provision gives the copyright holder the exclusive right, *inter alia,* to perform the copyrighted work. The issue here, therefore, is whether Teleprompter's CATV systems "performed" the copyrighted works within the meaning of this provision. In resolving this question, we are not writing on a clean slate, for the Supreme Court, on somewhat different facts, considered the meaning of "perform" in this provision in Fortnightly Corp. v. United Artists, Inc., 392 U.S. 390 (1968). Relying on *Fortnightly,* the district court held that the CATV systems here did not "perform" the copyrighted works.

The allegations of infringement were limited to an illustrative group of copyrighted programs. Similarly, the complaints charged five specific and illustrative CATV systems with having infringed appellants' copyrights, although presumably other CATV systems owned by Teleprompter conducted similar activities. As a result, the copyright claims at issue involve, and are limited to, the operations of Teleprompter's CATV systems in five cities at stated periods: Elmira, New York in November 1964;

[2] Appellants claim to have been injured because Teleprompter's CATV systems distributed signals of stations carrying the copyrighted programs to viewers who could not otherwise have received them. When a CATV system brings a program into its market from a more distant television market, appellants assert that this has a serious adverse impact on the copyright holder's ability to license that program for later presentation in the importing market.

We have been informed by one of the *amici* that a copyright holder usually licenses his programs first to a network and later to local stations for broadcast. The larger markets are ordinarily licensed first because of the greater demand caused by competition among the more numerous broadcast stations in those markets. We are told that if a CATV system brings into the smaller markets programs that are broadcast by network or independent stations in the larger markets, it reduces the potential audience for that program when it is later licensed for exhibition by a local station. As a result, the fee that the station in the smaller market is willing to pay for the right to broadcast the program will diminish, appellants assert, to the injury of the copyright holder.

Teleprompter has argued that the copyright holder can demand a greater fee from the broadcast station in the larger market in light of the greater audience that will now view the programs as a result of CATV. However, appellants have responded, and we must agree, that the amount that a broadcast station is willing to pay for the privilege of exhibiting a copyrighted program is economically tied more to the fees that advertisers are willing to pay to sponsor the program than to some projected audience size. No evidence was presented in the court below to show that regional or local advertisers would be willing to pay greater fees because the sponsored program will be exhibited in some distant market, or that national advertisers would pay more for the relatively minor increase in audience size that CATV carriage would yield for a network program. Indeed, economics and common sense would impel one to an opposite conclusion.

Farmington, New Mexico in November 1964, June 1969, and March 1971; Rawlins, Wyoming in June 1969; Great Falls, Montana in June 1969; and New York City in June 1969 and March 1971. * * *

### *I. Fortnightly Corp. v. United Artists, Inc.*

The starting point in our analysis of appellants' copyright-infringement claims must, of course, be the Supreme Court's decision in Fortnightly Corp. v. United Artists Television, Inc., in deciding whether the Fortnightly CATV system "performed," within the meaning of the Copyright Act, the programming that it provided to subscribers, the Court applied a functional test and held that the CATV system there involved was functionally related more to the television viewer, who does not "perform," than to the television broadcaster, who does "perform."

* * *

The question before us is whether the character of CATV is so changed by the additional services that the cable systems here have undertaken that their total operation, including the reception service, under the *Fortnightly* functional test, have become functionally equivalent to those of a broadcaster, and thus these systems should be deemed to "perform" the broadcast programming that they distribute. The additional operations undertaken by these CATV systems, which appellants contend distinguish this case from *Fortnightly* and bring about this asserted metamorphosis in the character of CATV, are the following: 1) origination of programming on non-broadcast channels, and the sale of commercial time on such non-broadcast programming; 2) interconnection with neighboring CATV systems; 3) use of microwave links in bringing broadcast programming to subscribers; and 4) the importation of distant broadcast signals from outside the area served by the CATV system. We shall consider in order the effect of each of these operations on the application of the *Fortnightly* doctrine to the CATV systems involved.

### *II. Non-broadcast Program Origination*

At the outset, we reiterate that what is involved here is the origination of programming on channels not used for the distribution of broadcast signals and the sale of commercials on such non-broadcast channels. We do not have before us, and thus do not consider, the question of what the effect would be on the *Fortnightly* doctrine if programs originated by the CATV system were used to replace selected broadcast programming received from network or independent stations that would otherwise have been distributed without alteration to subscribers on broadcast channels. Similarly, we do not have before us a CATV system that sold commercials on broadcast programming to replace the commercials sold and transmitted by the broadcast station.

Although the Supreme Court noted in *Fortnightly* that it was not dealing with a CATV system that originated non-broadcast programming, we fail to see why a system's program origination on channels other than those on which it relays broadcast programming should alter the result in *Fortnightly*. Obviously, the system "performs" those programs that it originates for distribution to its subscribers. However, we do not see the logic in appellants' contention that this program origination serves to convert the CATV system into a "performer" of those programs that it distributes to its subscribers on broadcast channels. Even though the origination service and the reception service are sold as a package to the subscribers, they remain separate and different operations, and we cannot sensibly say that the system becomes a "performer" of the broadcast programming when it of-

fers both origination and reception services, but remains a nonperformer when it offers only the latter.

In support of their contention, appellants point to Associated Music Publishers, Inc. v. Debs Memorial Radio Fund, Inc., 141 F.2d 852 (2d Cir.), cert. denied, 323 U.S. 766 (1944). In that case, the defendants had argued that they should not be subject to copyright liability for programs that they broadcast without advertising support but merely as a service to their listeners. This court rejected that contention, noting that the programs, even without advertising, served to increase the total number of station listeners and thus helped to maintain the station as a successful financial entity. Appellants argue that *Debs* supports their position that the various functions of the CATV systems should be considered as a whole to determine whether the system is functionally equivalent to a broadcaster, in which event it should be deemed a "performer" with regard to all programming it relays to its subscribers. This argument is but a general statement of appellants' particular contention that non-broadcast program origination converts the system into a "performer" with regard to broadcast programming distributed to subscribers.

*Debs,* however, does not support either proposition. The issue there was not whether the programs had been "performed"—indeed, having broadcast the programs, the station could hardly contend it was not a "performer"—but whether the programs had been performed "*for profit*"; and one can readily see that indirect "profit" accrued to the station in *Debs* as a result of its unadvertised broadcast of these programs. That decision is not authority for appellants' broad proposition that the operations of a CATV system must be viewed and evaluated for copyright purposes as a whole; and, thus, neither can it support the contention that a system's non-broadcast program origination converts it into a "performer" of broadcast programs distributed to subscribers by its reception service.

Therefore, we hold that the fact that certain of the CATV systems involved here originated programming on non-broadcast channels did not make them "performers," for copyright purposes, of broadcast programming distributed to subscribers. A contrary approach would be unnecessarily wooden and mechanical in its application of copyright law to CATV.[13]

With regard to the sale of commercial time on non-broadcast programming, although this is another step bringing cable origination programming in competition to some extent with broadcast programming, again, we do not agree with appellants' position that there is some sort of "spill-over" effect by which the system becomes a "performer" with regard to its reception service.

### III. *Interconnection*

As noted earlier, Teleprompter's New York CATV system has occasionally interconnected its facility with those of the two other CATV systems operating in the New York area. Appellants analogize this activity to the networking that is common among broadcast stations, and they point to this as another factor making the New York system functionally equivalent to a broadcaster. However, the only interconnection with which we are concernred occurred in two instances of sporting events that the system origi-

[13] The Federal Communications Commission has adopted rules, which appear in 47 C.F.R. § 76.201, requiring CATV systems with more than 3,500 subscribers to commence program origination, which is known in industry parlance as "cablecasting." These rules were suspended pending judicial review of the FCC's CATV rules. Although FCC authority over CATV was sustained in United States v. Midwest Video, 406 U.S. 649 (1972), the FCC has not yet reinstated the rules.

nated on non-broadcast channels. There was no interconnection here relating to the reception of any telecast of appellants' copyrighted programs, or indeed of any broadcast programming, received by the system and distributed to subscribers. Therefore, we are not presently in a position to evaluate what effect interconnection may have on CATV copyright liability if and when it ever reaches the point at which it is equivalent to a network of CATV systems. In light of the minimal interconnection we have before us, we must agree with the district court that "[w]hatever this brief interconnection may portend for the future, it [did] not transform [Teleprompter's] present CATV system into a broadcasting network as [appellants] suggest."

### IV. *Microwave*

A relatively recent development in CATV technology that was not before the Court in *Fortnightly* is the use of microwave to transmit a broadcast signal from the point of its reception off-the-air to the point from which it is distributed by cable to the homes of subscribers. Typically, microwave is used to import distant signals into the CATV community, an activity the effect of which on the issue before us we shall consider below.[14] However, the use of microwave is not necessarily limited to this activity.

Appellants contend that the use of microwave, in and of itself, is sufficient to make a CATV system functionally equivalent to a broadcaster and thus subject to copyright liability for all the programming it receives and distributes to its subscribers. We are unconvinced by this contention. Neither do we believe that the use of microwave makes the system a "performer" only of that programming with respect to which the microwave is used. Microwave utilizes point-to-point communication and is merely an alternative, more economical in some circumstances, to cable in transmitting a broadcast signal from one point in a CATV system to another. Hence, we see no reason to attach legal significance, in terms of copyright liability, to the decision to utilize microwave links.

### V. *Importation of Distant Signals*

Appellants' final and, in the end, most persuasive contention relates to the fact that certain of the CATV systems involved here distributed to their subscribers signals from broadcast stations located many miles from the communities served by the systems. In CATV parlance, this is known as the importation of distant signals. This activity was not before the Supreme Court in *Fortnightly,* and appellants contend that that decision did not signify that a CATV system does not "perform" a copyrighted television program when it brings the signal in from another community, often from another television market, and distributes that signal to subscribers.

The CATV system in *Fortnightly* brought television signals to viewers who could not otherwise have received them. However, these signals were already in the community and were not imported by the CATV system from another community, as is evidenced by the fact that the system received them from an antenna located in or directly adjacent to the CATV community. It was only because of topographical conditions in and around the community that residents could not receive the signals on their receivers. Thus, it was the office of the CATV system in *Fortnightly* to use its advanced an-

[14] Although we consider them separately, the use of microwave and the importation of distant signals are often very closely connected, in the sense that microwave links are the usual means by which a CATV system imports distant signals. As is evident from the experience of the New York system, however, it is possible for microwave to be used apart from distant signal importation, and it is in this sense that we consider in this section of the opinion the effect of microwave on the application of *Fortnightly* to CATV systems.

tenna technology and equipment to overcome these adverse conditions and thereby to bring the signals to members of the community. The Supreme Court held that, in performing this function, the CATV system did not "perform," within the meaning of the Copyright Act, the programming carried on those signals. However, in United States v. Southwestern Cable Co., 392 U.S. 157 (1968), decided just one week before *Fortnightly,* the Court explicitly recognized that this was only one of two major services that CATV systems render to the communities they serve. In this regard, Mr. Justice Harlan, speaking for the Court, stated at p. 163:

> CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae.

When a CATV system is performing this second function of distributing signals that are beyond the range of local antennas, we believe that, to this extent, it is functionally equivalent to a broadcaster and thus should be deemed to "perform" the programming distributed to subscribers on these imported signals. See Select Theatres Corp. v. Ronzoni Macaroni Co., 59 U.S.P.Q. 288 (S.D.N.Y., 1943), cited in *Fortnightly,* 392 U.S. at 398, n. 23 for the proposition that "broadcasters perform." The system's function in this regard is no longer merely to enhance the subscriber's ability to receive signals that are in the area; it is now acting to bring signals into the community that would not otherwise be receivable on an antenna, even a large community antenna, erected in that area.

In *Fortnightly,* the CATV system distributed the programs to an audience to which they would not otherwise have been presented. But the Court did not find this fact significant for copyright purposes. The Court found that the CATV system made these programs available to this new audience by providing it with the services of an advanced antenna. It then reasoned that, since a television viewer was privileged to view whatever programs he could receive using any available antenna, a CATV system should not be deemed a "performer" for copyright purposes when it provided this antenna service as a commercial venture. When a distant signal is involved, CATV is again distributing television programming to a new audience that could not otherwise have viewed it. However, in 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 the 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 viewer's ability to receive the signal is no longer a product solely of improved antenna technology; rather, it results from the system's importation of the signal into the CATV community from a separate, distant community.

As a result, we no longer have a system that "no more than enhances the viewer's capacity to receive the broadcaster's signals." *Fortnightly,* p. 399. We hold that when a CATV system imports distant signals, it is no longer within the ambit of the *Fortnightly* doctrine, and there is then no reason to treat it differently from any other person who, without license, displays a copyrighted work to an audience who would not otherwise receive it. For this reason, we conclude that the CATV system is a "performer" of whatever programs from these distant

signals that it distributes to its subscribers.

There remains, however, the difficult problem of defining what is a distant signal. The range of a television signal is a function of many factors, including the current state of broadcast and reception technology. Some of these factors, such as topography, are unchanging in a particular area. But broadcast and reception technology are in a constant state of flux. Moreover, in determining the range of a broadcast signal, it may not be enough to say that the signal is or is not receivable in the community served by the CATV system. The fact that the signal can be received may not be meaningful unless it can project an image that is acceptable according to industry norms.

Thus, it seems clear that a precise judicial definition of a distant signal is not possible. The FCC, for purposes of the CATV signal-carriage requirements, at one time categorized signals as "distant" and "local" in terms of their ability to be received a substantial portion of the time by a substantial portion of the homes in the area by means of home antennas.[15] However, we find this definition unsuitable for copyright purposes because we believe that any definition phrased in terms of what can be received in area homes using rooftop antennas would fly in the face of the mandate of *Fortnightly*. Thus, in the absence of legislation on this matter, we must undertake to establish some standard for determining what is a distant signal for copyright purposes.

Any determination that a particular television signal is "distant" must, of course, be made with respect to its proximity to a specific local area, which we have termed the CATV community, served by the CATV system and designated in a franchise issued to it by a state or local government body or regulatory authority.[16] To say that a particular signal is already in the community, which is to say there is no need to import it through a relay or retransmittal device (such as microwave, cable, satellite, or

[15] This was phrased in terms of the Grade B contour, which marks the boundary along which acceptable reception of the signal is expected to be available 90 percent of the time at the best 50 percent of the locations. See 47 C.F.R. §§ 73.683 and 73.684. With respect to locations outside its Grade B contour, a signal was considered a "distant signal" by the FCC. Recently the FCC has promulgated regulations that give a broader definition of distant and local signals for purposes of the signal-carriage requirements of CATV systems. 47 C.F.C. §§ 76.59, 76.61, and 76.63. See 37 Fed.Reg. 3263 (Feb. 12, 1972).

[16] The franchise represents a grant to the CATV system of authority to run its cables through the public streets and facilities of a city, town, or county to the homes of its subscribers.

Almost 5,000 such franchises have already been granted, with the number continuing to increase. See Barnett, State, Federal and Local Regulation of Cable Television, 47 Notre Dame Lawyer 681, 702 (1972). Although the franchises have for the most part been issued by local authorities such as cities and towns, at least five states (Connecticut, Nevada, Rhode Island, Vermont, and Hawaii) have in effect laws subjecting CATV to state regulation, and more appear to be in the process of enacting such state regulatory schemes (e. g., Massachusetts, Illinois, New York and New Jersey), probably because of the disadvantages associated with local as compared with state regulation, id. at 698–708. Hence it may be anticipated that some state agencies may, as part of their new regulatory schemes, create local franchise areas or regions within the state based upon community of interest and population concentrations, as has been done by Connecticut. Id. 701–702.

As used by us, the term "CATV community" is limited strictly to the specifically designated local area for which the franchise is granted by the state or local authority, which may not be expanded or enlarged by interconnection, merger of two or more franchised areas, or other means. We do not have before us, and thus do not consider, the hypothetical case in which the area for which the franchise is granted is not local, but state-wide or comprising a broad region. We are aware of no such franchises presently granted or under consideration. For the moment, we can say that the "CATV community" we envision is essentially a local entity, the parts of which share substantial common interests.

the like), is to indicate that it can be received in the community during a substantial portion of the time by means of an antenna, such as a large community antenna or other receiving device, that is available under current technology. Thus, the meaning of "distant signal" must be determined in light of the current broadcasting and receiving technology. In this regard, we find that it is easier to state what is not a distant signal than to state what is a distant signal. Accordingly, we have concluded that any signal capable of projecting, without relay or retransmittal,[17] an acceptable image that a CATV system receives off-the-air during a substantial portion of the time by means of an antenna erected in or adjacent to the CATV community is not a distant signal. This seems to us to be required by *Fortnightly*.

When the community from which the signal originates, which we term the originating community, and the CATV community are different, and when the signal is initially received by the system at a location in or near the originating community and then transmitted to the CATV community by microwave or cable, a strong presumption arises that it is a distant signal. The alleged infringer is then under a heavy burden to show that the signal is not a distant signal—that is, that it would be equally receivable off-the-air in the first instance and would project an image of similar quality, if there were substantially similar receiving equipment located in or adjacent to the CATV community. Unless this burden is met, the signal should be deemed a distant signal, and the CATV system would not be within the ambit of *Fortnightly* with respect to that signal.

Similarly, when the signal is initially received by the CATV system on an antenna or other receiving device located between the originating community and the CATV community, the signal should be deemed a distant signal in the absence of a contrary showing by the CATV system. We do not necessarily mean that the antenna or receiving device on which the signal is initially received cannot in any case be located outside the city limits of the community that has franchised the CATV system. We can envision various legitimate circumstances, such as the desire to take advantage of a tall building, hill, or other topographical feature, that might cause the system to desire to locate its antenna or receiving device in an area closely neighboring the community that it serves. Such an antenna placement is not motivated by the desire to be closer to the signal's point of origin in order to receive it before its strength is dissipated and then to transmit to another location—presumably the motive that ordinarily underlies a system's decision to locate its antenna outside the community that it serves. Therefore, we would treat such a case in the same manner as those in which the antenna is located within the CATV community. However, we wish to make clear that the distances we envision here are small, and that any system that locates its antenna more than a few miles from the CATV community should bear the burden of showing that the signals it receives and distributes are not in fact distant signals.[18]

[17] By "relay or retransmittal," we do not mean the authorized rebroadcast of the signal by a translator station, or the like. See note 19, *infra*, and accompanying text, where we indicate that the mere use of a translator does not, without more, make the signal a "distant signal," as that term is used in this opinion. It should be noted that microwave transmission, in the context of CATV distant-signal importation, does not constitute a broadcast or a rebroadcast. "Broadcasting" is defined at 47 U.S.C. § 153(*o*) as "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations."

[18] Teleprompter has argued that it is insulated from copyright liability by a license implied in law. This court explicitly rejected this argument in our *Fortnightly* decision. United Artists, Inc. v. Fortnightly Corp., 377 F.2d 872, 880–884 (2d Cir. 1967), rev'd, 392

VI. *Conclusion*

* * *

Accordingly, in light of our disposition of the issues on this appeal, we affirm the district court's holding that Teleprompter's Elmira and New York City CATV systems did not infringe appellants' copyrights; we reverse the district court's decision with regard to Teleprompter's Rawlins, Great Falls, and Farmington CATV systems, without prejudice, however, to Teleprompter to proceed in the district court within a reasonable time to show that any of these systems did not in fact import distant signals; and we remand to the district court for further proceedings, including the determination of damages, as are not inconsistent with this opinion.

The complex problems presented by the issues in this case are not readily amenable to judicial resolution. As the Supreme Court said in *Fortnightly*, "[w]e [must] take the Copyright Act of 1909 as we find it," and do the best we can. We hope that the Congress will in due course legislate a fuller and more flexible accommodation of competing copyright, anti-trust, and communications policy considerations, consistent with the challenges of modern CATV technology.

Affirmed in part and reversed and remanded in part.

U.S. 390 (1968). The Supreme Court in *Fortnightly* refused to embrace this argument when it rejected the Solicitor General's proposed compromise resolution of that case, although it did not necessarily reject this line or reasoning. See 392 U.S. 401–402. Teleprompter argues that the terms of our decision on this issue in *Fortnightly* would not necessarily apply to the facts presented by three of the five CATV systems involved here—Elmira, New York City, and Farmington. In light of our resolution of this case, we need not deal with this contention with regard to the Elmira and New York City systems. As to the Farmington system, our decision with regard to the Albuquerque stations obviates the necessity to consider the license-implied-in-law issue. *See* Part IV, infra. On the matter of the Durango station, see note 20, infra. In other respects, we decline to re-examine our prior decision on this issue in *Fortnightly*.

## NOTES AND QUESTIONS

1. The lack of resolution of the copyright question, and the *TelePrompTer* litigation in particular has had enormous impact on all other regulatory developments in cable. The following account in former Chairman Burch's concurring opinion in the FCC's 1972 *Cable Television Report and Order, 36 FCC2d 141* (See this text, p. 955.) describes the impact of the uncertainty that the cable copyright question has had on both the formation of the Consensus Agreement (See this text, p. 952.) between the broadcasters and the cable operators as well as the substance of the FCC's 1972 cable rules. 37 Fed.Reg. 3251 (See this text, p. 953.) Note that Commissioner Burch, unlike Commissioner Johnson, is not very optimistic concerning Congressional resolution of the copyright liability question in cable:

"But (Commissioner Johnson) he is very nearly silent on the issue that has long been at the core of the controversy over cable's future—and that is cable's standing outside the competitive market for television programming. Commissioner Johnson acknowledges (p. 6) that copyright owners 'should be compensated for the use of their product by cable systems' but argues that regulations to implement their ownership rights 'need not take the form of exclusivity.' Rather, they 'could simply require the automatic payment of fees to copyright holders.'

"The question is, *what* regulations? Not this Commission's, to be sure, because we have no power to legislate copyright payments (and Commissioner Johnson agrees on this point). Regulation by the Congress then? But for reasons that I'll turn to in due course, and as Commissioner Johnson knows perfectly well,

Congress has been unable to pass cable copyright legislation—and even assuming such legislation were passed, it clearly would take the form of exclusivity protection, not simply compulsory licenses, in the major television markets. The House bill did so (H.R. 2512, 90th Cong.) and so did S. 543 (91st Cong.) and S. 644 (92nd Cong.). There simply is no realistic prospect for the kind of Congressional regulation that Commissioner Johnson banks on—and he knows it.

"In that case, how about the courts? But, to the courts, the issue is not one of fashioning an appropriate regulatory approach. The Supreme Court in *Fortnightly* (392 U.S. at 401–402) made it clear that only Congress can do that. The Court's job was to say whether signal carriage by cable is or is not a 'performance' within the meaning of the 1909 Copyright Law, and it held that carriage of off-the-air signals (Grade B contour and just beyond), is not. The still open question—in *CBS v. TelePrompTer,* S.D.N.Y.—* is whether cable carriage of distant signals via microwave comes within the 1909 Law. A difficult question indeed. But my point here is that Commissioner Johnson's 'market place' model rests foursquare on the contingency that cable, not CBS, will win the TelePrompTer case. If cable should lose, the model collapses. Even if cable wins, he will not have satisfied his own objective—which is that copyright owners be fairly compensated for the use of their product.

"Commissioner Johnson is simply trying to slide past one of the gut issues of the cable controversy: that cable remains an uneasy outsider with respect to the programming market. And only when it is brought within that market, when its right to the use of its basic product is secure and regularized, only then will its future be unclouded. It is this issue that the Federal Communications Commission can neither resolve nor avoid. For this among many reasons, our August 5 Letter of Intent to the Congress was not and is not sufficient unto itself as a way to end the freeze and get cable moving.

*The Consensus Agreement*

"The ultimate answer must finally be found in legislation, as the Supreme Court made clear in *Fortnightly*. But the obstacle to legislation has long been the ability of any or all the contending industries—cable, broadcasting, copyright—to block any particular legislative approach with which they might take issue. Congressional leaders have repeatedly called on the industries to reach some fair and reasonable accommodation. The Commission has also urged them to compromise their differences and pave the way for legislation, most recently in the August 5 Letter. All these efforts have been unavailing.

"After we outlined our regulatory program in the August 5 Letter, it seemed to me that the time was right for another try. Broadcasters were understandably nervous that this program would go into effect and the *TelePrompTer* case might go against them; cable was equally concerned about the outcome of litigation and the need to put itself on a solid base; and copyright owners were anxious to protect their major source of revenue in the top television markets. Then, too, the Office of Telecommunications Policy had a cable study under way, and all the principals were pressing their viewpoints in that forum. I joined OTP, therefore, in an effort to secure a consensus among the industries that would lead to resolution of the cable/copyright issue, de-escalate the level of violence, and thus greatly

* Commissioner Burch is referring to the lower federal district court decision in *TelePrompTer,* the decision which was reversed in part by the court of appeals.

serve the public interest. There was no great secret about any of these developments. They were widely reported in the trade press. I would only point out, from my perspective as Chairman of the Commission, the practical difficulties of inviting a seven-member Commission to sit around the bargaining table or to take part in conference calls with the various parties."

2. The decision in *TelePrompTer* in the Court of Appeals certainly went far to extend copyright liability to cable system operators with respect to distant signals. The heart of the decision is as follows:

> "When the community from which the signal originates, which we term the originating community, and the CATV community are different, and when the signal is initially received by the system at a location in or near the originating community and then transmitted to the CATV community by microwave or cable, a strong presumption arises that it is a distant signal. The alleged infringer is then under a heavy burden to show that the signal is not a distant signal—that is, that it would be equally receivable off-the-air in the first instance and would project an image of similar quality, if there were substantially similar receiving equipment located in or adjacent to the CATV community. Unless this burden is met, the signal should be deemed a distant signal, and the CATV system would not be within the ambit of *Fortnightly,* with respect to that signal."
> 476 F.2d 338 at 351.

3. Another important aspect of *TelePrompTer* is the appeals court's determination that a microwave link is not broadcasting. Still another important aspect of the court of appeals decision in *TelePrompTer* is the holding that interconnection of cable systems for origination of programs on nonbroadcast channels did not transform CATV systems into broadcast networks for purposes of copyright liability for reception of copyrighted programs.

4. It is obvious from the foregoing that the Court of Appeals decision in *TelePrompTer* severely narrowed the scope of the relief from copyright liability which *Fortnightly* extended to cable system operators. The holdings pinpointed above were controversial and in the opinion of the cable industry would have retarded the industry's growth. The Supreme Court granted certiorari in the *TelePrompTer* case. *CBS v. TelePrompTer, 414 U.S. 817 (1973).*

On March 4, 1974, the Supreme Court, 6–3, affirmed in part and reversed in part the judgment of the Court of Appeals in *Teleprompter. Teleprompter Corp. v. Columbia Broadcasting System, Inc., 94 S.Ct. 1129 (1974).* The Supreme Court per Mr. Justice Stewart held that the Court of Appeals in *TelePrompTer* was correct in holding that 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" subjecting the CATV operation to copyright infringement liability.

The Supreme Court further held that the Court of Appeals in *TelePrompTer* was incorrect in holding that importation of "distant" signals from one community into another constitutes a "performance" under the Copyright Act. On this latter point, the Supreme Court said as follows: "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. * * * 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."

Does the *TelePrompTer* decision of the Supreme Court greatly stimulate the further penetration of cable into television markets? Would such a decision be fair to the owners of the copyrighted material? After all, broadcasters must unquestionably pay a fee for use of copyrighted material. Is the solution for Congress by statute to imply a license which would authorize cable systems to carry copyrighted material but which would also impose some royalty payment by the cable system operator as compensation for the license implied in law?

If the competing pressures of the cable and broadcast industry continue to paralyze Congressional ability to solve the copyright question in cable, should the Court take yet further action? Under the circumstances, judicial action really constitutes amending rather than interpreting the Copyright Act as well as the Federal Communication Act. Ideally who is in the best position in terms of the broadest knowledge of the problems involved to solve the copyright question in cable, the FCC, the Congress, or the Supreme Court?

# Chapter IX

# THE REGULATION OF RADIO AND TELEVISION BROADCASTING: SOME PROBLEMS OF LAW, TECHNOLOGY, AND POLICY

## SECTION 1. INTRODUCTION: THE RATIONALE OF BROADCAST REGULATION

One of the startling legal realities of the law of broadcasting as compared with the law of the press is that the legal framework of broadcasting is altogether different from that of the press. As Judge 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. Under the provisions of this Act licenses for broadcasting stations are granted only for a period of three years. 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)(1964). At the expiration of the three-year 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) (1964).

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" criterion of § 307 of the Act?

A major case in the law of broadcasting involving this problem was *National Broadcasting Co. v. United States, 319 U.S. 190 (1943).* Both the majority and the dissenting opinions are characterized by divergent responses to a basic question: does licensing in the "public interest" give the Federal Communications Commission supervisory authority over the broadcasting industry? It was argued in the NBC case that the FCC's authority was limited solely to removing the technical and engineering impediments which obstruct effective broadcasting. Otherwise, the argument ran, the FCC has no authority to make any particular qualitative demands of broadcast licensees.

### QUESTIONS

In reading the *NBC* case, the student should watch for and reflect on the following questions:

1. 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?

2. If some supervision over the business relationships and the programming content of licensees is inherent in the "public interest" concept, what criteria should be used as guidelines for such a supervisory role?

3. Assume that the FCC has authority to establish substantive standards which licensees must meet if they are to win licenses. Assume further that the FCC has authority to establish substantive standards for broadcast programming which the licensee must implement if his license is to be renewed. Do such substantive standards violate the First Amendment as restraints on the freedom of expression of the licensee?

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## NATIONAL BROADCASTING CO. v. UNITED STATES

## COLUMBIA BROADCASTING SYSTEM, INC. v. UNITED STATES

319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943).

Mr. 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.

These suits were brought on October 30, 1941, to enjoin the enforcement of the Chain Broadcasting Regulations promulgated by the Federal Communications Commission on May 2, 1941, and amended on October 11, 1941.

On March 18, 1938, the Commission undertook a comprehensive investigation to determine whether special regulations applicable to radio stations engaged in chain broadcasting [1] were required in the "public interest, convenience, or necessity".

[1] Chain broadcasting is defined in § 3(p) of the Communications Act of 1934, 47 U.S.C.A. § 153(p), as the "simultaneous broadcasting of an identical program by two or more connected stations". In actual practice, programs are transmitted by wire, usually leased telephone lines, from their point of origination to each station in the network for simultaneous broadcast over the air.

On May 2, 1941, the Commission issued its Report on Chain Broadcasting, setting forth its findings and conclusions upon the matters explored in the investigation, together with an order adopting the Regulations here assailed. Two of the seven members of the Commission dissented from this action. * * *

The Regulations, * * * are addressed in terms 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. 135 stations were affiliated exclusively with the National Broadcasting Company, Inc., known in the industry as NBC, which operated two national networks, the "Red" and the "Blue". NBC was also the licensee of 10 stations, including 7 which operated on so-called clear channels with the maximum power available, 50 kilowatts; in addition, NBC operated 5 other stations, 4 of which had power of 50 kilowatts, under management contracts with their licensees. 102 stations were affiliated exclusively with the Columbia Broadcasting System, Inc., which was also the licensee of 8 stations, 7 of which were clear-channel stations operating with power of 50 kilowatts. 74 stations were under exclusive affiliation with the Mutual Broadcasting System, Inc. In addition, 25 stations were affiliated with both NBC and Mutual, and 5 with both CBS and Mutual. These figures, the Commission noted, did not accurately reflect the relative prominence of the three companies, since the stations affiliated with Mutual

were, generally speaking, less desirable in frequency, power, and coverage. 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." (Report, p. 4.)

The Commission found * * * (certain) network abuses were amenable 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 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." (Report, p. 59.) * * *

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 right 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." (Report, p. 62.)
* * *

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". For CBS affiliates "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 everincreasing 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. * * *"

* * *

Regulation 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. * * *

The Secretary of Commerce was powerless to deal with the situation. It had been held that he could not deny a license to an otherwise legally qualified applicant on the ground that the proposed station would interfere with existing private or Government stations. Hoover v. Intercity Radio Co., 52 App. D.C. 339, 286 F. 1003. And on April 16, 1926, an Illinois district court held that the Secretary had no power to impose restrictions as to frequency, power, and hours of operation, and that a station's use of a frequency not assigned to it was not a violation of the Radio Act of 1912. United States v. Zenith Radio Corp., D.C., 12 F.2d 614. This was followed on July 8, 1926, by an opinion of Acting Attorney General Donovan that the Secretary of Commerce had no power, under the Radio Act of 1912, to regulate the power, frequency or hours of operation of stations. 35 Op.Atty.Gen. 126. The next day the Secretary of Commerce issued a statement abandoning all his efforts to regulate radio and urging that the stations undertake self-regulation.

But the plea of the Secretary went unheeded. From July, 1926, to February 23, 1927, when Congress enacted the Ra-

dio 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 communication—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 interfering 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, 48 Stat. 1064, 47 U.S.C. § 151 et seq., 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. In addition, § 307(b) directs the Commission that "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

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 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. * * *

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 can-

not be left to wasteful use without detriment to the public interest. "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." Federal Communications Comm. v. Sanders Bros. Radio Station, 309 U.S. 470, 475, 642. The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no 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". See Federal Communications Comm. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 n. 2.

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 succintly 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." (Report, pp. 81, 82.)

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).

Generalities unrelated to the living problems of radio communication of course cannot justify exercises of power by the Commission. Equally so, generalities empty of all concrete considerations of the actual bearing of regulations promulgated by the Commission to the subject-matter entrusted to it, cannot strike down exercises of power by the Commission. While Congress did not give the Commission unfettered 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 of the Commission to specific 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 ref-

erence 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 exericse 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.

Mr. Justice BLACK and Mr. Justice RUTLEDGE took no part in the consideration or decision of these cases.

Mr. 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, rivalling 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 instrument 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.

The Communications Act of 1934 does not in terms give the Commission power

to regulate the contractual relations between the stations and the networks. Columbia Broadcasting System v. United States, 316 U.S. 407, 416. * * * Nevertheless, in specifying with some degree of particularity the kind of information to be included in an application for a license, the Congress has indicated what general conditions and considerations are to govern the granting and withholding of station licenses. Thus an applicant is required by § 308(b) to submit information bearing upon his citizenship, character, and technical, financial and other qualifications to operate the proposed station, as well as data relating to the ownership and location of the proposed station, the power and frequencies desired, operating periods, intended use, and such other information as the Commission may require. Licenses, frequencies, hours of operation and power are to be fairly distributed among the several States and communities to provide efficient service to each. § 307(b). Explicit provision is made for dealing with applicants and licensees who are found guilty, or who are under the control of persons found guilty of violating the federal anti-trust laws. §§ 311 and 313. Subject to the limitations defined in the Act, the Commission is required to grant a station license to any applicant "if public convenience, interest, or necessity will be served thereby". § 307(a). Nothing is said, in any of these sections, about network contracts, affiliations, or business arrangements.

The power to control network contracts and affiliations by means of the Commission's licensing powers cannot be derived from implication out of the standard of "public convenience, interest, or necessity". We have held that: "the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel." Federal Communications Comm. v. Sanders Bros. Radio Station, 309 U.S. 470, 475, 642. The criterion of "public convenience, interest, or necessity" is not an indefinite standard, but one to be "interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services, * * *." Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co., 289 U. S. 266, 285, 89 A.L.R. 406. Nothing in the context of which the standard is a part refers to network contracts. * * * In the present case, however, the Commission has reversed the order of things. Its real objective is to regulate the business practices of the major networks, thus bringing within the range of its regulatory power the chain broadcasting industry as a whole. 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.

Again I do not question the need of regulation in this field, or the authority of the Congress to enact legislation that would vest in the Commission such pow-

er as it requires to deal with the problem, which it has defined and analyzed in its report with admirable lucidity. It is possible that the remedy indicated by the proposed regulations is the appropriate one, whatever its effect may be on the sustaining programs, advertising contracts, and other characteristics of chain broadcasting as it is now conducted in this country. I do not believe, however, that the Commission was justified in claiming the responsibility and authority it has assumed to exercise without a clear mandate from the Congress.

* * *

Mr. Justice ROBERTS agrees with these views.

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### SOME REFLECTIONS ON NBC

1. Apparently the rationale of broadcast regulation is based on the assumption that broadcasting is a limited access medium. The theory is that, since the spectrum is finite and frequencies are not available to all who might like them, some regulation is necessary. But is the limited access medium rationale the only plausible basis for broadcast regulation? In his dissent in *NBC* Mr. Justice Murphy points out that radio "may be a weapon of authority and misrepresentation instead of a means of entertainment and enlightenment." Of course, Mr. Justice Murphy makes this observation to underscore the gravity of permitting the exercise of comprehensive control of broadcasting by government without explicit statutory authority. But these observations also offer the basis for another rationale for government regulation of broadcasting. In other words, do the new opportunities to capture the opinion process which the electronic media offer to their private managers establish the case for public control of broadcasting in a more profound way than a theory which relies primarily on the physical limitations of the spectrum?

2. The Chain Broadcasting Regulations reveal 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 licensee, the parties regulated by the Act, were becoming conduits for the networks. Note that Justice Frankfurter states for the Court in the *NBC* case that stations affiliated with the national networks utilized more than 97% of the total night-time broadcasting power of the stations in the country. As with radio in 1943, at the present time television programming in the evening or "prime time" hours originates largely with the networks.

The extent to which the television station licensee has become a receptacle for network originated programming is made clear in House Comm. on Interstate and Foreign Commerce, *Report on Television Network Program Procurement*, H.R. Doc.No.281, 88th Cong., 1st Sess. (1963). The report states at p. 340:

"The representative of a large multiple owner of television stations testified that between 70 and 75 per cent of the programming on stations in the hours between 7 p. m. and 10:30 p. m. is network originated."

The practical consequence for the licensee of network origination of programming is described in the report at p. 339:

"It was testified that the station owner does not know the detail of the vast majority of network programs until he views them on his monitor. In other words, the station and its audience first see such programs at the same time. This being the case, there obviously is no opportunity for the licensee to exercise his program responsibility before the fact with regard to the great bulk of network programs."

Do you see any problem with the requirement of the Federal Communications Act that licensees serve the "public interest" in the light of the realities of the television industry as revealed by the *Report on Television Network Program Procurement?* Does the majority opinion in the *NBC* case suggest any solutions for the problem?

3. 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 really governed 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, supra, pp. 915, 916. Not surprisingly therefore their outlets are found in the largest and most important markets. Would the objective of insisting that some authoritative and identifiable source be actually accountable for the programming emitted by broadcast be enhanced if networks were prohibited from owning any broadcasting stations at all?

Should networks be placed under direct regulation?

Should lack of licensee control over programming be a negative factor even if there is no competing applicant?

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.

### THE PROBLEM OF SECURING LICENSEE CONTROL AND RESPONSIBILITY OVER PROGRAMMING

The *NBC* case grappled with a fundamental problem of broadcast regulation which was true for radio in 1943 and which is true for VHF television today: The broadcast networks produce the bulk of prime time programming but yet are not directly subject to FCC regulation under the Federal Communications Act of 1934. One of the thrusts of the Chain Broadcast regulations under review in the *NBC* case was to make the reality of broadcasting conform to the regulatory theory which was that licensees are and should be ultimately and actually responsible for broadcast programming. But the recent case of *Yale Broadcasting Co. v. FCC, 478 F.2d 594 (D.C.Cir. 1973),* illustrates that actually securing licensee responsibility is a problem even when the network factor is not present. It also illustrates that the public interest standard of the Federal Communications Act gives the FCC authority to require prescreening by the broadcast licensee.

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## YALE BROADCASTING COMPANY v F. C C

478 F.2d 594 (D.C.Cir. 1973), certiorari denied 414 U.S. 914 (1973).

WILKEY, J.: The source of this controversy is a Notice issued by the Federal Communications Commission regarding "drug oriented" music allegedly played by some radio stations. This Notice and a subsequent Order, the stated purposes of which were to remind broadcasters of a pre-existing duty, required licensees to have knowledge of the content of their programming and on the basis of this knowledge to evaluate the desirability of broadcasting music dealing with drug use. Appellant, a radio station licensee, argues first that the Notice and the Order are an unconstitutional infringement of

its First Amendment right to free speech. In the alternative, appellant contends that they impose new duties on licensees and must, therefore, be the subject of rule-making procedures. Finally, it is argued that the statements' requirements are impermissibly vague and that the FCC has abused its discretion in refusing to clarify its position. Finding none of these arguments of the licensee valid, we affirm the action of the FCC.

* * *

## II. Interpretation of the Definitive Order

Many of appellant's fears and arguments stem from the apparent inconsistencies between the Notice and the subsequent Order. It is quite clear, however, that the Order "constitutes the Commission's definitive statement" regarding broadcaster responsibility. To the extent that the two are inconsistent or confused, we treat the Notice, as we believe the Commission intends, as superseded by the Order. Reference to the Commission's requirements is to those established by the Order.

Once the Order is taken as definitive, it becomes fairly simple to understand what the FCC asks of its licensees. The Order recognizes the gravity of the drug abuse problem in our society. From this basis, the Order proceeds to remind broadcasters that they may not remain indifferent to this severe problem and must consider the impact that drug oriented music may have on the audience. The Commission then makes the common sense observation that in order to make this considered judgment a broadcaster must "know" what it is broadcasting.

The Commission went to great lengths to illustrate what it meant by saying that a broadcaster must "know" what is being broadcast. The Order emphasizes that it is not requiring the unreasonable and that the Commission was "not calling for an extensive investigation of each * * * record" that dealt with drugs. It also made clear that there was no general requirement to pre-screen records.

The Commission in its Order was obviously not asking broadcasters to decipher every syllable, settle every ambiguity, or satisfy every conceivable objection prior to airing a composition. A broadcaster must know what he can reasonably be expected to know in light of the nature of the music being broadcast. It may, for example, be quite simple for a broadcaster to determine that an instrumental piece has little relevance to drugs. Conversely, it may be extremely difficult to determine what thought, if any, some popular lyrics are attempting to convey. In either case, only what can reasonably be understood is demanded of the broadcaster.

Despite all its attempts to assuage broadcasters' fears, the Commission realized that if an Order can be misunderstood, it will be misunderstood—at least by some licensees. To remove any excuse for misunderstanding, the Commission specified examples of how a broadcaster could obtain the requisite knowledge. A licensee could fulfill its obligation through (1) pre-screening by a responsible station employee, (2) monitoring selections while they were being played, or (3) considering and responding to complaints made by members of the public. The Order made clear that these procedures were merely suggestions, and were not to be regarded as either absolute requirements or the exclusive means for fulfilling a station's public interest obligation.

Having made clear our understanding of what the Commission has done, we now take up appellant's arguments seriatim.

## III. An Unconstitutional Burden on Freedom of Speech

Appellant's first argument is that the Commission's action imposes an unconsti-

tutional burden on a broadcaster's freedom of speech. This contention rests primarily on the Supreme Court's opinion in Smith v. California [361 U.S. 147 (1959)], in which a bookseller was convicted of possessing and selling obscene literature. The Supreme Court reversed the conviction. Although the State had a legitimate purpose in seeking to ban the distribution of obscene materials, it could not accomplish this goal by placing on the bookseller the procedural burden of examining every book in his store. To make a bookseller criminally liable for all the books sold would necessarily "tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. * * *"

Appellant compares its own situation to that of the bookseller in *Smith* and argues that the Order imposes an unconstitutional burden on a broadcaster's freedom of speech. The two situations are easily distinguishable.

Most obviously, a radio station can only broadcast for a finite period of twenty-four hours each day; at any one time a bookstore may contain thousands of hours' worth of readable material. Even if the Commission had ordered that stations pre-screen all materials broadcast, the burden would not be nearly so great as the burden imposed on the bookseller in *Smith*. As it is, broadcasters are not even required to pre-screen their maximum of twenty-four hours of daily programming. Broadcasters have specifically been told that they may gain "knowledge" of what they broadcast in other ways.

A more subtle but no less compelling answer to appellant's argument rests upon *why* knowledge of drug oriented music is required by the Commission. In *Smith*, knowledge was imputed to the purveyor in order that a criminal sanction might be imposed and the dissemination halted. Here the goal is to assure the broadcaster has adequate knowledge. Knowledge is required in order that the broadcaster can make a judgment about the wisdom of its programming. It is beyond dispute that the Commission requires stations to broadcast in the public interest. In order for a broadcaster to determine whether it is acting in the public interest, knowledge of its own programming is required. The Order issued by the Commission has merely reminded the industry of this fundamental metaphysical observation—in order to make a judgment about the value of programming one must have knowledge of that programming.

* * *

IV. The Requirement of Rulemaking

We turn next to appellant's contention that the Commission in its Order has imposed a new duty on the broadcasting industry. If the FCC were indeed imposing a new duty on its licensees, its action should be subject to the public debate and scrutiny of rulemaking proceedings. If the Commission is simply reminding broadcasters of an already existing duty, rulemaking is not required. We conclude that the stated purpose and the actual result of the Commission's Notice and Order was to remind the industry of a pre-existing duty.

The basis for this pre-existing duty has existed since the early days of government regulation of the airways. The most thorough articulation of this duty was given in the Commission's 1960 Program Policy Statement wherein it said:

> Broadcast licensees must assume responsibility for all material which is broadcast through their facilities. This includes all programs and advertising material which they present to the public. * * * This duty is personal to the licensee and may not be delegated. He is obligated to bring

> his positive responsibility affirmatively to bear upon all who have a hand in providing broadcast material for transmission through his facilities so as to assure the discharge of his duty to provide acceptable program schedule consonant with operating in the public interest in his community.

This 1960 Statement and the Order challenged here are remarkably similar. Both require the broadcaster to assume responsibility for what is broadcast, that the broadcaster actively exercise his judgment in pursuit of this responsibility, and that this exercise of judgment result in programming that is in the public interest. The only real difference between the 1960 Statement and the Order under attack is that the Order (1) deals with programming as it relates to drugs rather than programming generally, and (2) specifically states that a broadcaster must have "knowledge" of what he is programming.

There is a long-standing Commission policy of reminding licensees of their responsibility in a particular area whenever there appears to be licensee indifference. A notice quite similar to the one challenged here was issued with respect to foreign language broadcasting. * * *

It is entirely reasonable for the Commission to issue "reminders" referring to specific areas when such problems exist. The Commission need not content itself with repeating general policy statements when the general policy is being violated in a very specific way. It is much more logical for the Commission to point out the specific problem and then illustrate how the general policy applies in the particular situation.

It is likewise irrelevant that the current Order requires broadcasters to "know" what they are programming. Such a requirement imposes no new burden upon the broadcasting industry. Indeed, the requirement that the licensees broadcast in the public interest necessitates some sort of knowledge on their part. Undoubtedly, the only reason the Commission stressed the point in the Order was because of certain broadcasters' absurd contention that they either did not or could not know what they were broadcasting. As we noted in Part III, it cannot be argued that no knowledge has ever been required of broadcasters.

In its less extreme form appellant's contention seems to be that, although some form of knowledge has always been required, the Notice and Order impose a much greater burden of knowledge on the broadcasting industry than has previously existed. This argument is baseless. The requisite degree of knowledge is not absolute but, rather, is quite liberal. Indeed, a licensee could not do less than is asked and still fulfill its obligation to broadcast in the public interest. In sum, the main thrust of the Commission's earlier Notice and of its later Order is that whether a song presents the banal observations of a moon-struck adolescent, resembles two enraged alley cats fighting in a garbage can, or contains the subtle reflections of a master poet, a licensee may not broadcast ignorant of the content of his programming.

### V. Asserted Vagueness

Perhaps the most strenuously urged and least meritorious of appellant's arguments are based upon the contention that the Commission's Order is impermissibly vague. * * *

It is indisputable that generally the Government may not draw a line between permissible and impermissible speech in such an unclear and imprecise manner that "men of common intelligence must necessarily guess at its meaning and differ as to its application." We shall assume for the moment that this standard applies with full force to the broadcast industry. Even under this

standard the Commission's order is not unconstitutionally vague. In fact, the Commission has done an admirable job of explaining the nature and degree of knowledge expected of broadcasters. As illustrated in Part II of this opinion, this court has no difficulty understanding what the Commission expects of its licensees.

* * *

In spite of the horrendous forebodings which brought appellant into court the fact is that appellant has recently had its license renewed. Likewise, there has been no showing or suggestion that the standard enunciated in the Order has been employed to deny any license to a broadcaster. If such a denial does occur and can be shown to be unfair or due to a misapplication of the Commission's own guidelines (as described in Part II of our opinion), then redress may be sought in the courts. Until that time, appellant might commit its energies to the simple task of understanding what the Commission has already clearly said, rather than instituting more colorful but far less fruitful actions before already heavily burdened federal courts.

For the reasons given above, the action of the Federal Communications Commission is affirmed.

### NOTES AND QUESTIONS

1. In *Yale Broadcasting* the courts and the FCC once again demonstrated that the legal standards which may be adequate for the print media are not adequate for the broadcast media. Notice that the nature of broadcasting, the finite character of the broadcast day, was relied on to affirm an FCC order requiring that broadcasters have knowledge of their own programming. It is not a burden for a broadcaster to monitor what transpires in his programming during what can be at most only a twenty-four hour broadcast day.

Why must a broadcaster have knowledge of his own programming? The Court says the broadcaster must have such knowledge because it is required to broadcast in the public interest: "In order for a broadcaster to determine whether it is acting in the public interest, knowledge of its own programming is required."

2. In *Yale Broadcasting Co. v. FCC*, an FCC order requiring radio licensees to pre-screen "drug oriented music" was held a valid exercise of the FCC's regulatory authority under the Federal Communications Act.

The student should note that the FCC did not mandate any single form of pre-screening. Three modes of pre-screening were suggested: (1) Pre-screening by a responsible station employee, (2) monitoring selections while they were being played, or (3) considering and responding to complaints made by members of the public.

Which of these suggestions may be challenged as not a form of pre-screening at all? From a production, free speech, and spontaneity point of view, which form of pre-screening, of the three suggested, do you think most meritorious?

3. The Supreme Court denied certiorari in *Yale Broadcasting*, Mr. Justice Douglas vigorously dissented to this refusal to review the case. See *Yale Broadcasting Co. v. FCC*, 414 U.S. 914 *(1973)*.

4. The *NBC* and *Yale Broadcasting Co.* cases raise in quite different ways the problem of assuring that ultimate responsibility for programming should lie somewhere. How can such licensee responsibility be enforced? Licensee accountability for programming can be insisted on by making it a critical factor in the comparative hearing context at renewal time. See text pp. 933–938. If a present licensee's inability to secure conformance to its own programming guidelines by its

employees is sufficiently demonstrated, perhaps this should be viewed as a negative factor by the FCC in determining whether or not a license renewal should be granted. Would making demonstrated violation of one's own guidelines a demerit in renewal proceedings be an effective way of blending voluntary or self-imposed regulation with mandatory or legal regulation?

## SECTION 2. THE FCC AND THE PROGRAMMING RESPONSIBILITY OF THE LICENSEE: THE CONCEPT OF "BALANCED" PROGRAMMING

### NOTE, *REGULATION OF PROGRAM CONTENT BY THE FCC*

77 Harv.Law Rev. 701, 702–704–706 (1963).


Far more important than * * * explicit provisions (of the Federal Communications Act) is the Commission's broad mandate to allocate frequencies on the basis of the "public convenience, interest, or necessity." The lion's share of FCC regulation of content is derived from this broad delegation, and the vagueness of the standard has perhaps contributed to the great rancor that most FCC attempts to regulate content have encountered from representatives of the broadcasting industry. This Note will examine the methods, problems, and limitations of content regulation under the public-interest standard.

#### I. METHODS OF REGULATION

The initial grant of broadcasting licenses provides what is perhaps the most significant avenue of FCC content regulation. Even when there is only one applicant for a particular frequency who has satisfied the minimum technical requirements, the FCC may refuse to grant him a license if it finds his program proposals unsatisfactory. When there is more than one applicant for an open channel, the Commission conducts a comparative hearing to evaluate the relative merits of the various extensive proposals submitted to it. While the FCC gives detailed consideration to other matters as well, the comparison of program proposals is considered the essence of the comparative hearing.

The comparative procedure has been criticized as excessively costly for both the Commission and the applicants, and as administratively unwieldy. The technique's effectiveness in selecting the applicant who will present the best programs may also be questioned. When an applicant has no previous broadcasting experience, the examiner and the Commission must rely on vague schedule descriptions to ascertain the nature of his proposed programming; and programming plans, while ostensibly based on surveys of the needs of the area to be served, are often designed to fit the broadcaster's idea of what the FCC will find appealing. Furthermore, the actual broadcaster is frequently not the original licensee, but a transferee, whose proposals will not be subjected to comparative evaluation.

It has been suggested that the comparative hearing be abolished and that frequencies be allocated to the highest bidder meeting certain minimum requirements; yet there are several advantages in retaining the comparative procedure. The extensive preparations required of applicants may stimulate the development of program plans geared to serve the public interest, and the hearings bring the Commission into close contact with community representatives and broadcasters, keeping it abreast of audience needs and industry policies. Moreover, when applicants present plans based on local

needs, the FCC can take account of the different requirements of different areas; this could not be done if the only standard were a national minimum. Finally, the hearings provide the Commission with continual opportunities to interpret the broad public-interest standard's application to specific programming situations. Most of the problems involved in attempts to regulate programming stem not so much from the procedure used for licensing as from the inherent difficulty of administering any standards based on examination of program content.

## II. Areas of Concern

### *A. Balanced Programming*

Most of the FCC's regulation of content is directed at general categories of programs rather than at specific program material. The basic categories to which the Commission looks are religion, education, public affairs, agriculture, news, sports, and entertainment. The agency is also concerned with the amount of time spent on local self-expression, local talent, children's programs, political broadcasting, and service to minority groups. License applicants are asked to submit proposals showing the percentage of planned programming in the various categories, and licensees are required to maintain program logs from which they prepare a "composite week" of broadcasting to be submitted with their renewal applications.

The standard of balance is a flexible one, but it is event that certain classifications are looked upon with more approval than others. The FCC has often emphasized the general importance of local programming, seemingly without distinguishing between the need for discussion programs on local issues and the need for local entertainment and educational programs, which is less vital where network performances are of a significantly higher standard. The practical result of the application of an ideal of balance has been to encourage educational, religious, agricultural, and discussion programs and to discourage entertainment. Broadcasters have complained that the concept of balance has generally been used "to coerce stations into carrying relatively unpopular programs at the expense of relatively popular programs." But in the enforcement of any balanced schedule, no station will need governmental pressure to broadcast popular shows.

There appear to be two justifications for the Commission's balance concept. Because broadcasting frequencies are limited and broadcasters are commercially motivated to maximize their audiences in each time period of the day, normal competitive forces will not produce a varied schedule. Regulation is thus felt necessary to ensure service to minority interests in the community and to "the less dominant needs and tastes which most listeners have from time to time." This argument accounts for such requirements as children's programs and agricultural reports. In addition, because of each station's great potential influence, it is felt that broadcasters have a responsibility to instruct and enlighten their audiences. This explains such requirements as news, public service, and educational features.

Although the goal of balance has been accepted in general, the usefulness of comparing the percentages of the time devoted to certain categories is open to serious question. Percentages alone reveal nothing about the precise timing of any program; five per cent of discussion in prime time may reach more people than ten per cent at less desirable times. A requirement that the reports show what percentages in the different categories were broadcast in prime time would make the analysis more meaningful. Even so, the percentage analysis may be somewhat misleading, since a single

broadcast can often be counted under more than one general heading. A more fundamental criticism may be directed toward the value of any category analysis at all. Although occasionally the FCC minutely examines the substance of a particular program, it has generally been reluctant to make judgments on the basis of a program-by-program study, believing that a "detailed comparison of individual programs would necessarily have the ultimate effect of substituting the commission's administrative for management's operating judgment." Critics contend that a category analysis is too uncertain a means of evaluating the nature and quality of program content. Nevertheless, by working with percentages and broad categories, the Commission may maintain at least a minimal degree of program control while avoiding the difficult value judgments involved in closer qualitative content regulation. Since "what seems to one to be trash may have for others fleeting or even enduring values," it would probably not be administratively feasible for the FCC to weigh qualitatively the merits of individual programs. However, a refinement of certain of the broad program categories—notably entertainment—would be practical. A narrower breakdown of programs into drama, light comedy, variety, classical music, and popular music, for example, might make the data on program balance more meaningful than they are now.

The demand that each station present a balanced selection of programs seems to have been more compelling in the early days of radio and television than in an age when listeners may choose among a large number of AM, FM, VHF, and UHF broadcasts. The relevance of the increase in broadcasting facilities was recognized by the FCC in its acceptance of specialized stations in metropolitan areas where overall balance can be achieved through the complementary program schedules of a number of stations. This policy decision may be a harbinger of a new direction in programming regulation. An accurate judgment of proper broadcasting may come to require a study, not of the programming policy of one station, but rather of that station's proposals in relation to the programming policies of all the stations serving that particular area. This may well mean that the existence of an educational station in an area releases commercial stations from the obligation to provide educational programs.

Another factor which should enter into a realistic scheme of programming regulation is the increasing development of a division of functions between the radio and television media. Because of the nature of their relative competitive markets, radio tends to facilitate station specialization—with emphasis on music, news, and special-interest programs—while television is considered better suited to present a broader format. To date, the Commission has not formally recognized any difference between the programming responsibilities of radio and television; yet it seems appropriate that different criteria be established for judging the two media and that their complementary relationship in a broadcasting area be recognized as an aspect of balanced listener service. As these factors are taken account of, the rationale for program balance subtly shifts from the concept of broadcaster responsibility to that of audience opportunity.

### NOTES AND QUESTIONS

1. Do you agree with the Harvard Law note editors that the proliferation of the electronic media, the rise of television particularly, make the balanced programming concept unnecessary? Should the broadcasters be freed from any legally imposed programming responsibilities? Is "audience opportunity" that abundant?

2. Cf. Barron, *In Defense of "Fairness": A First Amendment Rationale for*

*Broadcasting's "Fairness" Doctrine*, 37 U.Colo.L.Rev. 32, 39–41 (1964).*

"It is now contended that if physical limitation on frequency allocation is the rationale permitting government regulation which would not be tolerated with regard to the press, then the rationale is not supportable because there are far more commercial broadcasting stations operating (5415) than there are daily newspapers (1761). Are the premises of Frankfurter's opinion in *National Broadcasting Co. v. United States* no longer serviceable in defense of a constitutional basis for government regulation of broadcasting? Broadcasting facilities, it is suggested in essence, are no longer in Frankfurter's phrase "limited and therefore precious." However, before changes in judicial attitude toward government regulation of broadcasting are thought warranted, some pertinent questions should be asked. What, after all, in terms of facilities, whatever the media, is the meaning of abundance or scarcity? Can it be assessed in numerical terms alone? How many commercial stations of the over 5000 now broadcasting remain after the "top forty" stations, and the stations almost exclusively serving as conduits for rock and roll are excluded? Furthermore, although there are now three times as many commercial stations as daily newspapers, are these two media in any sense meaningfully comparable? Since the television stations secure the bulk of their programming from networks, can they be compared as communications media to daily newspapers having the impress of individuality possessed by the *New York Herald-Tribune*, the *New York Times* or the *St. Louis Post-Dispatch*?

"Such imponderables aside, however, the most weighty objections to a conclusion that broadcasting is no longer a limited access medium come in the form of new developments in the industry itself. The rise of community antenna television (CATV), which makes available to subscribers in rural and non-metropolitan area signals transmitted by broadcast stations in major cities, strongly suggests that viewers will abandon the single stations existing in their communities for the multi-channel offerings that CATV makes possible. The effect of this development has not been lost on the industry which is, rather ironically, trying to fashion for CATV a regulatory yoke. CATV, it is said, will so diminish existing television audiences in small one-channel communities as to make their continued service impossible. Furthermore, it is asserted that there is a degradation of the picture of the local channel if the viewer's television set is connected to a CATV system. Whatever the merits of the CATV controversy are, the success of CATV may very likely result in a considerable reduction in the number of operating broadcast facilities.

"As a result of recent legislation, newly manufactured receivers are now being equipped to receive ultra-high frequency (UHF) signals. This, theoretically, could expand the number of broadcast facilities because there are many unused frequency allocations available on the UHF band. However, UHF has failed to prosper and indeed has, if anything, declined. When it is remembered that by far the largest number of the leading metropolitan stations are very-high frequency (VHF) stations, and that these stations as a result of CATV promise to have a rapidly growing audience, it seems unrealistic to expect much from UHF, particularly since no one expects the new legislation to have any impact for at least five years. In *National Broadcasting Co. v. United States*, government regulation of broadcasting was found to be constitutionally justifiable because government was the inevitable regulator of a limited

access medium. From the various industry happenings set forth above, the writer concludes that for a number of interconnected technical and economic reasons broadcasting is still, and is likely to remain, a limited access medium."

3. Even after the enactment of the statute requiring new television sets to be equipped to receive (UHF) signals, 47 U.S.C.A. § 303(s), the scarcity situation remains in television. The frequency problem in television has been described as follows:

"The paucity of stations has resulted from the concentration of broadcasting within the narrow confines of the very-high frequency (VHF) band (channels 2–13) and the failure to make extensive use of the ultra high frequency (UHF) band (channels 14–83)." Note, *The Darkened Channels: UHF Television and the FCC*, 75 Harv.L.Rev. 1578 (1962). A new dimension for the scarcity problem is found in the rise of cable televisison. See text, p. 842.

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## SIMMONS v. FEDERAL COMMUNICATIONS COMMISSION

83 U.S.App.D.C. 262, 169 F.2d 670 (1948).

Before EDGERTON, CLARK and WILBUR K. MILLER, Associate Justices.

EDGERTON, Associate Justice. This appeal is from a decision and order of the Federal Communications Commission made in April, 1947. The Commission (1) denied an application of appellant Allen T. Simmons to increase the power of station WADC at Akron, Ohio, from 5 kw to 50 kw and to change the station's frequency from 1350 kc to 1220 kc; and (2) granted the mutually exclusive application of intervenor WGAR Broadcasting Company to increase the power of station WGAR at Cleveland which operates on 1220 kc, from 5 kw to 50 kw.

The Commission found (14) that "In the event the instant application is granted, WADC proposes to broadcast all programs, commercial and sustaining, offered by the CBS network." * * *

The Commission said in its Conclusions (4) that "The application of WADC thus raises squarely the issue of whether the public interest, convenience and necessity would be served by a station which during by far the largest and most important part of the broadcast day, 'plugs' into the network line and, thereafter, acts as a mere relay station of program material piped in from outside the community. We are of the opinion that such a program policy which makes no effort whatsoever to tailor the programs offered by the national network organization to the particular needs of the community served by the radio station does not meet the public service responsibilities of a radio broadcast licensee. We do not mean to indicate that the daily program service of the Columbia Broadcasting System or any other network does not include many programs of a high calibre, and it may even be that the applicant's proposed policy of carrying all Columbia programs, commercial or sustaining, might result in making available to its listening audience for the first time certain valuable programs of a sustaining nature, or concerning some vital public issue, which would otherwise be eliminated in favor of some local commercial program. But applicant's proposed program policy is not only tantamount to a voluntary abdication to the network of the duty and responsibility of a broadcast station licensee to determine for itself the nature and character of a program service which will best meet the needs of listeners in its area, but is an abdication to an organization which makes no pretense to scheduling its programs with the particular needs and desires of any one service area in

mind. A national network affiliation can be of great assistance to a particular station's service to its listeners as the source of a quantity of high calibre programs of general interest not otherwise available locally, to supplement, rather than to supersede, the locally originated programs of the station. It is not equipped, however, to take over the entire programming of any station; even the stations which are wholly owned by the national networks maintain extensive local program staffs which integrate the network's service into a daily program best calculated to serve local interests. And the same considerations of public policy which led us, in our Chain Broadcast Regulations, upheld by the Supreme Court in National Broadcasting Company v. United States, 319 U.S. 190 to make it impossible for a network to restrict the opportunity of one of its affiliates to substitute programs of local interest and derivation whenever the station determined that such programs would best serve the interests of its particular audience, lead us to conclude, here, that the voluntary adoption of a similar policy by a licensee cannot serve the public interest. In either case the local interests of the listening community are needlessly sacrificed * * *"

* * *

* * * The denial of appellant's application is affirmed.

WILBUR K. MILLER, Associate Justice (concurring).

### NOTE ON THE SIMMONS CASE

Why does the Commission insist on local interest, or as it is sometimes called, local service programming? Is this a component of the "public convenience, interest and necessity"? Judge Wilbur Miller's concurrence stressed that the licensee would be compelled by the station's listeners to provide programming adapted to the interests of the local community. Is this view borne out by what this case and the *NBC* case reveal about the economics of broadcasting?

Although the *Simmons* case might be viewed as permitting FCC control of programming and therefore as a precedent for control of program content in broadcasting generally, it should be emphasized that what is being evaluated is "the total performance of stations." The Commission does not determine "which *individual* programs best suit the local needs of each community." Note, *FCC Control of Radio Programming*, 2 Vand. L.Rev. 464 at 465 (1949). Does this distinction between total evaluation of the licensee's performance rather than review of "individual" programs satisfy the requirements of § 326 of the Federal Communications Act. See text, infra, fn. 4, p. 784.

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## JOHNSTON BROADCASTING CO. v. FEDERAL COMMUNICATIONS COMMISSION

85 U.S.App.D.C. 40, 175 F.2d 351 (1949).

Before CLARK, PRETTYMAN and PROCTOR, Circuit Judges.

PRETTYMAN, Circuit Judge. Two applications, one for a permit to construct a new radio broadcasting station and the other for changes in the frequency and power of an existing station, were presented to the Commission, one by Johnston Broadcasting Company and the other by Thomas N. Beach. The applications were mutually exclusive, both being for operation on the same frequency. The Commission set them for a comparative hearing.

* * *

A choice between two applicants involves more than the bare qualifications of each applicant. It involves a comparison of characteristics. Both A and B may be qualified, but if a choice must be made, the question is which is the better

qualified. Both might be ready, able and willing to serve the public interest. But in choosing between them, the inquiry must reveal which would better serve that interest. So the nature of the material, the findings and the bases for conclusion differ when (1) the inquiry is merely whether an applicant is qualified and (2) when the purpose is to make a proper choice between two qualified applicants. To illustrate, local residence may not be an essential to qualification. But as between two applicants otherwise equally able, local residence might be a decisive factor.

In the present case, the Commission easily found both applicants to be qualified for a permit. The question then was which should receive it. Comparative qualities and not mere positive characteristics must then be considered.

* * *

In sum, we think that there are no established criteria by which a choice between the applicants must be made. In this respect, a comparative determination differs from the determination of each applicant's qualifications for a permit. A choice can properly be made upon those differences advanced by the parties as reasons for the choice. To illustrate, if neither applicant presents as a material factor the relative financial resources of himself and his adversary, the Commission need not require testimony upon the point or make a finding in respect to it, beyond the requisite ability for bare qualification. It may assume that there is no material difference between the applicants upon that point.

* * *

In the case at bar, there were five points of difference urged by the contesting applicants as pertinent to a choice between them, (1) residence, (2) broadcasting experience, (3) proposed participation in the operation of the station, (4) program proposals, and (5) quality of staff.

The basis for the conclusion of the Commission is clearly stated. In its Memorandum Opinion and Order, it said succinctly:

"Our opinion to favor the Beach application on its merits over that of the Johnston application was based on our finding that while there were no sharp distinctions between the applicants in terms of residence, broadcasting experience, or proposed participation in the operation of the facilities applied for, there was a sharp distinction in favor of the applicant Beach in matters of program proposals and planned staff operations."

* * *

As to the program proposals, the difference which the Commission found is spelled out in detail in its findings. It found nothing in the record to indicate that Johnston had made or would make an affirmative effort to encourage broadcasts on controversial issues or topics of current interest to the community, such as education, labor, and civic enterprises. On the other hand, it found that Beach has had and proposes to have a program of positive action to encourage such broadcasts, and of complete cooperation with civic interests. The Commission concluded that Beach would provide greater opportunity for local expression than would Johnston. The findings are based upon evidence in the record, and the conclusion seems to us to be within the permissible bounds of the Commission's discretion.

The difference between the staffs of the applicants is succinctly stated. The Commission found, as the evidence indicated, that the proposed positions and duties of the Beach staff promise a much more effective provision for program preparation and presentation than do those of the Johnston staff.

As to appellant's contention that the Commission's consideration of the proposed programs was a form of censor-

ship, it is true that the Commission cannot choose on the basis of political, economic or social views of an applicant. But in a comparative consideration, it is well recognized that comparative service to the listening public is the vital element, and programs are the essence of that service. So, while the Commission cannot prescribe any type of program (except for prohibitions against obscenity, profanity, etc.), it can make a comparison on the basis of public interest and, therefore, of public service. Such a comparison of proposals is not a form of censorship within the meaning of the statute. As we read the Commission's findings, the nature of the views of the applicants was no part of the consideration. The nature of the programs was.

We cannot say that the Commission acted arbitrarily or capriciously in making its conclusive choice between these two applicants.

However, pursuant to the conclusion stated in the first half of this opinion, the case must be and is

Reversed and remanded.

**Editorial Note:**

Although the Commission was reversed on grounds that do not concern us, the Commission's estimate of the applicants based on a comparative evaluation of their programming proposals *was* upheld.

### NOTES AND QUESTIONS

1. One of the most influential guides to balanced programming was set forth in the famous "Blue Book" where the Commission stated that on a renewal application it would make an inquiry to determine whether the station's previous performance had been in the "public interest." The "Blue Book" required licensees to broadcast (1) sustaining programs (unsponsored non-commercial public interest programming), (2) local live programming, (3) programs devoted to the discussion of public issues and (4) to eliminate advertising excesses. FCC, *Public Service Responsibility of Broadcast Licensees* (1946).

The student will note that the *Johnston* case is not really a renewal case. But it provides a good illustration of the consequences to license *applicants* of failing to propose local service, sustaining and public affairs programming in accordance with "Blue Book" standards. No licensee on renewal, however, has ever been denied a license for failing, during his previous license period, to broadcast the proper balanced programming mix. Why this leniency by the Commission on license renewal as opposed to the original license application? Is such leniency defensible?

Finally, the student should note that the cases in this section all arise out of the United States Court of Appeals for the District of Columbia. This is because, under § 402(a) and (b) of the Federal Communications Act, that court is the designated court of appeal for judicial review of FCC actions concerning licensing and renewal. Of course, other federal courts also have had occasion to interpret the Federal Communications Act but the most important judicial body for the origination and development of broadcasting law is the United States Court of Appeals for the District of Columbia. Why do you think Congress selected that court for such a role? Review of that court's decisions to the Supreme Court of the United States by writ of certiorari is specifically permitted by § 402(j) of the Act. 47 U.S.C.A. § 402.

## HENRY v. FEDERAL COMMUNICATIONS COMMISSION

112 U.S.App.D.C. 247, 302 F.2d 191 (1962).

Before BAZELON, BASTIAN and BURGER, Circuit Judges.

BAZELON, Circuit Judge. Appellants, doing business as Suburban Broadcasters, filed the sole application for a permit to construct the first commercial F.M. station in Elizabeth, New Jersey. Although the Federal Communications Commission found Suburban legally, technically and financially qualified, it designated the application for hearing on the issues raised by the claim of Metropolitan Broadcasting Company, the licensee of WNEW in New York, that a grant would result in objectionable interference. At Metropolitan's request, the Commission subsequently added another issue for hearing:

> To determine whether the program proposals of Suburban Broadcasters are designed to and would be expected to serve the needs of the proposed service area.

Upon hearing, the trial examiner found for Suburban on both issues. The Commission affirmed on the issue of objectionable interference but reversed on the issue relating to the program proposals and denied the application. Suburban appeals.

These are the pertinent facts disclosed by the record. None of Suburban's principals were residents of Elizabeth. They made no inquiry into the characteristics or programming needs of that community and offered no evidence thereon. Suburban's program proposals were identical with those submitted in its application for an F.M. facility in Berwyn, Illinois, and in the application of two of its principals for an F.M. facility in Alameda, California.

Although the trial examiner resolved the program planning issue in favor of Suburban, he noted that its approach might be characterized as "cavalier" or little more than a "quick shrug." He also referred to the "Program Policy Statement," released by the Commission July 29, 1960, to the effect that the broadcaster's programming responsibility is measured by the statutory standard of "public interest, convenience or necessity," and that in meeting such standard the broadcaster is "obligated to make a positive, diligent and continuing effort, in good faith, to determine the tastes, needs and desires of the public in his community and to provide programming to meet those needs and interests." But the examiner stated that these standards were intended for existing licensees, rather than applicants for new stations, and were therefore inapplicable here.

In reversing the examiner, the Commission (with one Commissioner absent and two dissenting) stated:

> We agree [with the examiner] that Elizabeth has a presumptive need for a first local FM transmission service. We have generally presumed that an applicant for such a community would satisfy its programming needs, assuming that the applicant had at least a rudimentary knowledge of such needs. However, we cannot indulge in that presumption where the validity of the underlying assumption is questioned, a specific issue is added, and it is demonstrated that the applicant has taken no steps to familiarize himself with the community or its needs. It is not sufficient that the applicant will bring a first transmission service to the community—it must in fact provide a first local outlet for community self-expression. Communities may differ, and so may their needs; an applicant has the responsibility of ascertaining his community's needs and of programming to meet those needs. As found by the Examiner, Suburban's principals made no inquiry into the characteristics of

Elizabeth or its particular programming needs. The instant program proposals were drawn up on the basis of the principals' apparent belief—unsubstantiated by inquiry, insofar as the record shows—that Elizabeth's needs duplicated those of Alameda, California, and Berwyn, Illinois, or, in the words of the Examiner, could "be served in the same manner that such 'needs' are served by FM broadcasters generally."

The Commission found that the "program proposals were not 'designed' to serve the needs of Elizabeth"; and that it could not determine whether the proposals "would be expected" to serve these needs, since no evidence of these needs was offered. "In essence," said the Commission, "we are asked to grant an application prepared by individuals totally without knowledge of the area they seek to serve. We feel the public deserves something more in the way of preparation for the responsibilities sought by applicant than was demonstrated on this record." Accordingly, the Commission held that "it cannot be concluded that a grant * * * would serve the public interest, convenience and necessity."

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. Moreover, appellants urge that consideration of such matters is precluded by the statute's proscription of censorship [4] and the constitutional guarantee of free speech.

We think these broad contentions are beside the narrow point at issue upon this record. It may be that a licensee must have freedom to broadcast light opera even if the community likes rock and roll music, although that question is not uncomplicated. Even more complicated is the question whether he may feed a diet of rock and roll music to a community which hungers for opera. These are questions, however, that we need not here decide. As we see it, the question presented on the instant record is simply whether the Commission may require that an applicant demonstrate an earnest interest in serving a local community by evidencing a familiarity with its particular needs and an effort to meet them.

* * * We think it clear that the Commission's action in the instant case reflects 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.

Affirmed.

### COMMENT ON THE HENRY CASE

1. 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 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 Court of Appeals in *Henry* show any recognition of this

[4] "Nothing in this Act 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." Communications Act of 1934, § 326, 48 Stat. 1091, 47 U.S.C.A. § 326 (1958).

dilemma? Does it at least impliedly offer any alternative theory of broadcast regulation? If so, what is it?

2. You will note that Judge Bazelon's opinion refers to the "Program Policy Statement" issued by the FCC on July 29, 1960. This "Statement" is a kind of updating of the "Blue-Book." The *"Statement", 20 P. & F. Radio Reg. 1901 (1960)* states as follows:

"The major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located as developed by the industry, and recognized by the Commission have 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) Editorializing by Licensees, (8) Political Broadcasts, (9) Agricultural Programs, (10) News Programs, (11) Weather and Market Reports, (12) Sports Programs, (13) Service to Minority Groups, (14) Entertainment Programming."

What differences do you discern between the programming guides of the "Blue Book", as set forth on p. 782, supra, and those set forth in the 1960 "Program Policy Statement"? For comment on the FCC Program Policy Statement of 1965, see text, p. 927.

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## STONE v. FCC: THE CONTEMPORARY LICENSING PROCESS IN MICROCOSM

*Stone v. FCC* is a case which is a microcosm of the whole range of issues which now confront the incumbent broadcast licensee at renewal time. It raises in a fundamental way many of the problems faced by contemporary television broadcasters in terms of how they ascertain the programming needs of the communities as well as how they should be judged in meeting those needs. Among the issues considered were defining the broadcaster's area of service, the fair employment practices obligation of the broadcaster, the manner in which the broadcaster's obligation to ascertain community needs should be met, as well as the question of whether there was continuing significance in the objective of diversification of ownership as a communications policy.

*Stone v. FCC*, or as it is more popularly known, the *WMAL* case, involved an assault by Black community groups and leaders in Washington D. C. on the renewal application of WMAL-TV which was owned by the Evening Star Broadcasting Co. Evening Star Broadcasting Co. also owned two Washington radio stations. The Evening Star Broadcasting Co. was in turn owned by the publishers of the *Washington Evening Star.* A basic issue raised in the *WMAL* case will be encountered in *Hale v. FCC*, text, p. 907. How can a citizen group obtain the evidentiary hearing which alone can make the new rights of standing conferred in the *United Church of Christ* (see text, p. 915) cases meaningful?

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## STONE v. FCC

466 F.2d 316 (D.C.Cir. 1972).

WILKEY, Circuit Judge: The essential issue raised by this appeal is whether the Federal Communications Commission could reasonably find that the plaintiffs had not raised substantial and material questions of fact which would show *prima facie* that Commission renewal of WMAL-TV's license would not serve the public interest. For the reasons stated hereafter, we hold that the Commission could so find, and therefore affirm the Commission's approval of WMAL-TV's license renewal application and dismissal of the plaintiffs' Petition to Deny the Re-

newal Application for a Television License.

I. *Background*

Plaintiffs, sixteen Washington, D. C., community leaders, challenge the Commission's dismissal of their Petition to Deny the Renewal Application for a Television License, filed with the FCC 2 September, 1969, and grant of the renewal application of the licensee-intervenor, the Evening Star Broadcasting Company, for a regular three-year term from 1 October 1969 to 1 October 1972. In their Petition to Deny plaintiffs requested the Commission to refuse the licensee-intervenor's renewal request on the following grounds:

(1) That the licensee-intervenor's station WMAL-TV did not adequately survey the black community in its efforts to ascertain the needs of the Washington, D. C., area;

(2) That it misrepresented facts to the Commission;

(3) That its programming did not serve the public interest, specifically in that it did not meet the needs of the Washington, D. C., black community;

(4) That its employment practices were discrminatory against blacks; and

(5) That renewal of its license would lead to excessive concentration in the Washington, D. C., communications media.

On receiving this Petition to Deny, the Commission delayed renewal of WMAL-TV's license until it had decided whether to hold a hearing on WMAL-TV's application. This in turn depended on whether substantial and material questions of fact were present and whether plaintiffs had made a *prima facie* case for denial of the license.

The licensee-intervenor filed an Opposition to the Petition to Deny with the Commission 3 October 1969, seeking to rebut plaintiffs' contentions. Plaintiffs filed a Reply to the licensee's Opposition, responding to the licensee's arguments. While the FCC was considering these issues, the licensee amended its renewal application to include a new survey of the needs of the residents of Washington, D. C., and the surrounding area. Plaintiffs responded with a Motion to Strike and Remove the amendment from consideration by the Commission. This motion was denied by the FCC 14 August 1970 on the grounds that any application can be amended as a matter of right prior to its designation for hearing, and that the Commission's rules require applicants to amend in the event of significant changes in the information contained in their applications. The Commission also refused to strike material in the licensee's amendment pertaining to events transpiring after 30 September 1969, the expiration date of WMAL-TV's previous license, but permitted plaintiffs to sift through this material to specify precisely what they did not want the Commission to consider. Plaintiffs filed these comments 4 September 1970, and the licensee answered a week later.

On 3 February 1971 the Commission issued its decision which forms the basis for this appeal, finding no remaining substantial or material questions of fact and granting WMAL-TV's license renewal request. The FCC specifically stated:

(1) That, taking into account the licensee's amendment as well as the original application, it found the licensee's survey met the Commission's ascertainment requirements;

(2) That the record demonstrated that the licensee had not intentionally misrepresented facts submitted to the Commission concerning contacts between the licensee and certain Washington, D. C., community leaders;

(3) That plaintiffs had failed to make a *prima facie* case that WMAL-TV was

unresponsive to community, especially black community, needs, since the station's programming came within the discretion afforded licensees with respect to program content;

(4) That grant of the renewal application would not result in excessive concentration in the communications media and that, in any event, this was a subject for rulemaking, then under progress; and

(5) That no substantial question of fact remained with respect to the licensee's uncontroverted employment statistics and that plaintiffs had not made a *prima facie* showing of discriminatory employment practices on the part of the licensee.

Plaintiffs thereupon brought this appeal.

II. *Standards for Judicial Review*

It is important at the outset to delineate the standards under which the FCC operates, which thereby become the focal point for our review of the agency's decision.

The standards applicable to FCC conduct with respect to broadcast license applications are contained in Section 309(d) of the Communications Act of 1934. Section 309(d) provides for granting such applications where the Commission finds, after full consideration of all pleadings submitted, that there "are no substantial and material questions of fact and that a grant of the application would be consistent with [the public interest]." In those instances where a petition to deny such an application is filed by a party, it must "contain specific allegations of fact sufficient to show * * * that a grant of the application would be *prima facie* inconsistent with [the public interest]." Where the Commission finds that such a showing has not been made, it may refuse the petition to deny on the basis of "a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by this petition."

The legislative history accompanying the 1960 amendment of Section 309(d) indicates Congress' intent that petitions to deny filed under the amended Section 309(d) should make

> a substantially stronger showing of greater probative value than is now necessary in the case of a post grant [of initial license] protest. The allegation of ultimate, conclusionary facts or more general allegations on information and belief, supported by general affidavits, as is now possible with protests, are not sufficient.

In the event, then, that a petition to deny does not make 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, the petition may be denied without hearing on the basis of a concise statement of the Commission's reasons for denial.

* * *

Aside from the sufficiency of a petition to deny, the FCC is not required to hold a hearing where it finds, on the basis of the application and other pleadings submitted, no substantial and material questions of fact to exist and that granting the application would serve the public interest. Nor is a hearing required to resolve undisputed facts. And, where the facts required to resolve a question are not disputed and the "disposition of [an appellant's] claims [turn] not on determination of facts but inferences to be drawn from facts already known and the legal conclusions to be drawn from those facts," the Commission need not hold a hearing. Finally, a hearing is not required to resolve issues which the Commission finds are either not "substantial" or "material," regardless of whether the facts involved are in dispute.

We now turn to plaintiffs' specific objections, in order to determine whether the Commission was correct in dismissing plaintiffs' Petition to Deny and granting WMAL-TV's license renewal application without a hearing.

III. *Plaintiffs' Specific Objections*

A. *WMAL-TV's Ascertainment Efforts*

It is important to recognize the sequence of events pertaining to WMAL-TV's efforts to ascertain community needs and interests, before determining whether any substantial and material questions of fact were raised as to the adequacy of those efforts. On 7 August 1969 WMAL-TV filed its application for renewal of its broadcast license; on 2 September 1969 plaintiffs filed their Petition to Deny. In December 1969 a Notice of Inquiry was issued by the Commission proposing a primer on the ascertainment of community needs by broadcast applicants. The FCC stated that this primer was intended to clarify the Commission's requirements regarding ascertainment and that applicants whose ascertainment showings were deficient under the interim guidelines set forth in the Notice of Inquiry "can amend as a matter of right prior to designation for hearing."

On 12 May 1970 WMAL-TV amended Part I, Section IV–B of its renewal application, which deals with ascertainment of community needs.

Plaintiffs challenge the adequacy of WMAL-TV's ascertainment efforts on three grounds: (1) that WMAL-TV's initial ascertainment efforts, as reflected in their application for renewal filed 7 August 1969, failed to meet the required standards of representativeness; (2) that the FCC's admission and use of WMAL-TV's "amendment" filed 12 May 1970 was improper in view of prior Commission and judicial practice; and (3) that the ascertainment efforts reported in this "amendment" failed to comply with Commission requirements.

It may be true that WMAL-TV's initial ascertainment procedures failed to meet the required standards of representativeness. This initial failure, however, is not dispositive of the case. If the FCC's admission and use of the "amendment" is found to be proper, it is not enough for the plaintiffs to establish the existence of substantial and material questions of fact regarding the first ascertainment. If the amendment is permitted, the plaintiffs must show instead that even after the amendment a substantial and material question of fact still existed.

With respect to the second objection, plaintiffs assert first that WMAL-TV's "amendment" was actually a supplemental pleading whose admissibility was barred by the FCC's Rules and, second, that Commission acceptance of the "amendment" violated its own policy against "upgrading." As for the first ground, that WMAL-TV's "amendment" qualified as a supplemental pleading and should have been barred in the absence of FCC approval of its being filed as such, plaintiffs' assertion overlooks the fact that the Commission was not required to make such a determination. Section 1.522(a) of the Commission's Rules states that "any application may be amended *as a matter of right* prior to the adoption date of an order designating such application for hearing * * *" and that "[i]f a petition to deny * * * has been filed, the amendment shall be served on the petitioner."

Clearly then, Section 1.522(a) is intended to apply to an application against which a petition to deny has been filed. And, as the Commission indicated in its Notice of Inquiry proposing a new primer on the ascertainment of community needs by broadcast applicants, "[a]pplicants whose showings [with respect to ascertainment] are deficient can amend as a matter of right prior to desig-

nation for hearing. * * *" When the FCC subsequently adopted the final version of its Primer on Ascertainment of Community Problems by Broadcast Applicants, it specifically permitted applicants in hearing to amend their applications "* * * if deemed necessary in view of our action here. * * *" Prior and subsequent Commission practice accords with this interpretation. The Commission has even requested this court to remand several cases in which the applicants were contesting adverse FCC decisions regarding ascertainment showings, in order to afford those applicants an opportunity to amend their community surveys.

As for plaintiffs' assertion that Commission acceptance of WMAL-TV's amendment violated its own policy against "upgrading," the FCC's policy against last-minute upgrading pertains to programming performance, not ascertainment. The ascertainment of community needs and interests is prospective in orientation; it is directed at proposals for future programming, not past programming. There is thus a reasonable distinction between allowing last-minute upgrading of ascertainment performance, as opposed to last-minute improvements in programming; the Commission's rule in favor of amendments to ascertainment findings works no harm to the public interest.

Plaintiffs' third objection — that WMAL-TV's ascertainment efforts as amended failed to comply with Commission requirements—relates both to the content and manner of WMAL-TV's ascertainment efforts. As for the former, plaintiffs emphasize WMAL-TV's obligation to serve the needs and interests of the community of license, primarily in their view Washington, D. C., and secondarily the surrounding communities within WMAL-TV's Grade A contour. While the proper obligation in this respect is treated in detail below, it is not necessary to reach it here, as it is clear that WMAL-TV did in fact primarily survey Washington, D. C. Of 104 community leaders contacted in the amended survey by the Evening Star Broadcasting Company, 49 represented the District of Columbia, 34 nearby Maryland counties, and 21 nearby Virginia counties. These figures reflect each area's percentage of the metropolitan area population, except for Washington, D. C. As the Commission noted, "Since Washington, D. C., is WMAL-TV's city of license, WMAL-TV doubled the number * * * of community leaders to be interviewed in Washington."

As for plaintiffs' other objections with respect to the content of WMAL-TV's ascertainment efforts, none raise substantial and material questions of fact making a *prima facie* case for FCC denial of WMAL-TV's license renewal application. The combination of the scientific statistical survey of Washington area residents, the Fisher survey (focusing on interviews with inner city residents) and the emphasis placed by WMAL-TV on interviewing Washington, D. C., community leaders—in relation to population nearly double the number (49) of those interviewed from suburban Maryland (34) and Virginia (21)—demonstrate that plaintiffs' objections are unavailing in this regard.

With respect to the methods employed by WMAL-TV to fulfill its ascertainment obligations, plaintiffs complain first of WMAL-TV's use of preprinted forms for consulting both community leaders and the general public. However, this neglects the fact that the questionnaires were used in lieu of, but in conjunction with, personal interviews, as a means of compiling and digesting the variety of information collected. The FCC's *Primer*, as finally adopted, provides that "[a] questionnaire [or preprinted form] may serve as a useful guide for consultations with community

leaders, but cannot be used in lieu of personal consultations." Furthermore, it was permissible, indeed desirable, to use the same forms to summarize interviews with the general public as well as with community leaders. While the purpose of consulting members of the general public is "to further ascertain community problems which may not have been revealed by consultations with community leaders," a random sample of the general public is sufficient to meet this requirement and the use of different forms is not required. In addition, both the proposed and final *Primers* also state that it is not necessary that the information elicited from a community leader be set forth after his name, but simply that "the information can be set forth in a general list of community problems."

B. *WMAL-TV's Alleged Misrepresentation of Fact*

Plaintiffs allege that WMAL-TV misrepresented the extent of its contact with black Washington, D. C., community leaders in regard to the station's ascertainment of community needs. In Exhibit C of its original application, WMAL-TV used the words "close personal association" and "daily and continuing activity" to describe this contact. Plaintiffs submitted affidavits from eight of the leaders listed in Exhibit C to the effect that WMAL-TV did not maintain "close personal associations" with *each* of them individually on a *daily or continuing* basis. WMAL-TV responded to these allegations by presenting affidavits from its staff members detailing their contacts with these and community leaders in general.

The Commission concluded on the basis of these statements that the use of the words "close personal association" and "daily and continuing activity" did not raise a substantial question of a deliberate attempt on the part of WMAL-TV to deceive the Commission. In the context of the application as a whole and on the basis of the affidavits submitted by WMAL-TV in its Opposition, the FCC concluded that the station's contact with Washington, D. C., community leaders, including black community leaders, was sufficiently regular to qualify as "continuing." Nor was it reasonable to interpret the word "daily" as meaning that the licensee claimed to keep contact *daily* with *each* of the community leaders. While use of these words was perhaps careless on the part of WMAL-TV, the only issue is whether the licensee intended to mislead the FCC. It was well within the discretion of the Commission to decide that there was no intent on the part of the station to deceive. * * *

C. *Responsiveness of WMAL-TV's Programming*

The determination of whether WMAL-TV's programming raises a substantial and material question of fact with respect to its responsiveness to community needs and interests requires first delineating the station's service area obligations. In the situation presented by the case at bar, WMAL-TV's service area consists of its city of license, Washington, D. C., and the surrounding areas of Maryland and Virginia. While plaintiffs argue that WMAL-TV has a primary obligation to serve the needs and interests of its city of license, with its 70% black population, and that the station's programming should therefore be commensurate with this figure, it is not necessary for us to resolve this issue. In the first place, the Commission in the case at bar recognized "* * * the fact that the problems of most cities are particularly complex and pressing and require great efforts on the part of the licensee to fulfill its responsibilities."

The FCC further stated:

> Petitioners assert * * * that the special problems of the District of Columbia (problems enumerated in the

Petition to Deny) give rise to a need for specific programming designed to meet the needs and interests of the community. With this contention there is no dispute, but we are of the opinion that the licensee has, by the programming noted in the foregoing paragraphs and in its Opposition, clearly shown that it has broadcast numerous programs which are of particular interest to the District of Columbia's majority Black population.

In the second place, it is clear that a broadcast licensee has an obligation to meet the needs and interests of its entire area of service. This is particularly the case with respect to television stations, in view of the limited number of stations. Suburban and other outlying areas are not cities of license, although their needs and interests must be met by television stations licensed to central cities.

How a broadcast licensee responds to what may be conflicting and competing needs of regional or minority groups remains largely within its discretion. It may not flatly ignore a strongly expressed need; on the other hand, there is no requirement that a station devote twenty percent of its broadcast time to meet the need expressed by twenty percent of its viewing public. Until this problem is addressed in a rule-making procedure, the scope of FCC review remains whether or not the licensee has reasonably exercised its discretion.

The Commission, after considering plaintiffs' objections in regard to the alleged lack of WMAL-TV responsiveness to community, particularly black community, needs and interests, found that they did not raise questions of fact of such a material and substantial nature to require a hearing. What the Commission found to be in dispute were not the facts, but rather the conclusions to be drawn as to whether the renewal of WMAL-TV's license would be contrary to the public interests. For example, in the record there is a one-month sample news program of WMAL-TV, which arguably shows a concentration on the District of Columbia proper. The Commission found that this programming was responsive to community needs. There was no challenge to the fact that these programs were broadcast. The plaintiffs made the argument before the FCC that this programming was inadequate, and this argument was rejected. We fail to see that a full-scale hearing would have added anything for either the Commission or this court to consider.

The Commission found, and we agree, that plaintiffs' objections here lack the requisite specificity. They are largely conclusory and in most instances are not tied to specific programming deficiencies. Where they are so tied, they fail to indicate whether non-blacks are accorded different, more positive treatment. For plaintiffs simply to object to the quality of WMAL-TV's programming in general and conclusory terms offers the Commission little assistance in terms of the guidelines which it requires to implement policy changes. Furthermore, such generalized criticisms run the risk of turning the FCC into a censorship board, a goal clearly not in the public interest. Of course, there must exist in this area a delicate balance between the maintenance of a free competitive broadcast system and reasonable restrictions on such freedom in the public interest, in view of the scarcity of airwaves for broadcasting. In the absence of a competing broadcast application situation, where a hearing is required, plaintiffs bear a substantial burden of specificity, a burden they have not met in the case at bar. The Commission's interpretation of its policies not being arbitrary or unsupported by substantial evidence, must be permitted to stand.

Plaintiffs' specific objections as to the number of blacks who have appeared on WMAL-TV religious programming are

not borne out in view of the following: First, of the 55 needs and problems suggested by 104 community leaders in WMAL-TV's amended ascertainment showings, and of the 21 needs suggested by the random sampling of 200 private citizens, none related to religious programming. At least some doubt is thus shed on plaintiffs' conclusory statements as to the relative importance of religion for members of the black community.

Secondly, a number of black clergymen and laymen did in fact participate in WMAL-TV's religious programming, as well as in a wide variety of other public affairs programming. This participation was of a sufficiently high order to remove the FCC's findings from the category of arbitrary or capricious.

A more fundamental objection made by plaintiffs—to the quality of television programming in general, both with respect to black and all citizens' needs and interests—is more suitable for rulemaking, where all viewpoints may be aired.

### D. *WMAL-TV's Employment Policies and Practices*

As the figures with respect to minority group employment submitted by WMAL-TV in its Opposition to the Petition to Deny were not controverted by plaintiffs and no specific instances of refusal by WMAL-TV to hire on racial grounds were alleged, the sole question before the Commission in this regard was whether the aggregate picture presented by WMAL-TV's employment policies and practices made a *prima facie* case for refusing to renew the station's license. Under Section 73.680 of the Commission's Rules, television licensees are prohibited from discriminating on the basis of, *inter alia*, race in employment policies and practices. However, as the Commission noted in an earlier case, "Simply indicating the number of Blacks employed by the licensee, without citing instances of discrimination or describing a conscious policy of exclusion, is not sufficient to require an evidentiary exploration."

In that case, as in the one at bar, the affidavits of the licensee regarding recruitment of minority group members and their placement in a variety of positions, not simply menial jobs, were sufficient to rebut any allegations of discrimination in that respect.

### E. *Concentration in the Washington Area Communications Media*

While plaintiffs allege no specific abuses resulting from the fact that the Evening Star Broadcasting Company, the licensee of WMAL-TV, also owns two radio stations in Washington, D. C., and is in turn owned by the publishers of *The Evening Star*, one of the city's daily newspapers, they contend that these facts in themselves warrant a hearing on the question of undue concentration in the communications media.

Commission renewal of WMAL-TV's broadcast license, initially awarded in 1946, is in accord with its present multiple ownership rules.[52] These rules do

[52] 47 C.F.R. §§ 73.35, 73.240, and 73.636. These rules were initially adopted in 1953, Multiple Ownership of AM, FM and TV Stations, 18 F.C.C. 288 (1953), and sustained in United States v. Storer Broadcasting Co., 351 U.S. 192 (1956). They have been amended several times since then; as of the time of plaintiffs' filing their Petition to Deny, see note 1, *supra*, the FCC's Rules provided that a licensee could own other broadcast interests in the same area if they were in different services (i. e., AM, FM, TV). The most recent amendment of these rules prohibits "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 F.C.C.2d 306 (1970). Simultaneously the Commission exempted existing AM, FM, and TV combinations, partly because of the disruptive effects of requiring divestiture at that time. *Id.*, at 323. Also at the same time the Commission issued a Further Notice of Proposed Rulemaking, Multiple Ownership of Standard, FM & TV Broadcast Stations,

provide that the facts of each case are to be considered in terms of the number of people served and the extent of competition, in order to determine whether there is a concentration detrimental to the public interest. This has been interpreted by the FCC to mean that hearings are appropriate where specific abuses are alleged to have resulted from the nature of the ownership structure.

In the absence of allegations of specific abuses arising from the Evening Star Broadcasting Company's ownership of WMAL-TV, and since the situation presented by the case at bar falls within the scope of the Commission's present multiple ownership rules, concentration of ownership of the communications media is not a proper basis for disapproving a license renewal request.

What plaintiffs are actually challenging is the wisdom of the Commission's multiple ownership rules. However, as noted above, the FCC is currently investigating—in the context of a rulemaking proceeding—whether it should adopt rules which would require divestiture by newspapers or other multiple owners in a given market. And, as this court has stated, rulemaking proceedings are the most appropriate forum for Commission consideration of basic changes in policy.[56]

IV. *Conclusion*

For the reasons discussed above, the action of the Commission approving WMAL-TV's license renewal application and dismissing plaintiffs' Petition to Deny is accordingly

Affirmed.

## ON APPELLANTS' PETITION FOR REHEARING

### ORDER

On consideration of appellants' petition for rehearing, it is

Ordered by the Court that appellants' aforesaid petition is denied.

* * *

### NOTES AND QUESTIONS

1. In the *Stone* or *WMAL* case the Court of Appeals said plaintiffs' reliance on *United Church of Christ I*, text, p. 890, was misplaced. The Court said the citizen group's standing was not being challenged in *WMAL*. Moreover, the Court said there was no long history of complaints, nor pattern of facts showing racial discrimination. Also, the FCC did not in *Stone v. FCC* grant WMAL-TV a short term renewal while at the same time finding that a three year renewal would not be justified as had been done in *United Church of Christ*. Here, moreover, a full renewal of WMAL-TV's license was found justified by the FCC.

2. In *Stone v. FCC*, WMAL-TV ascertainment procedures failed to meet the

22 F.C.C.2d 339 (1970), in order to consider whether it would be in the public interest to require divestiture by newspapers or multiple owners in a given market. This rulemaking proceeding is still outstanding.

56 *See* note 52, *supra*, Hale v. FCC, 138 U.S.App.D.C., at 129, 425 F.2d, at 560. Our decision does not sanction the last minute upgrading of a licensee's obligation to ascertain community tastes, needs and interests *during its license period*. The standards of ascertainment on which WMAL may have fallen short prior to its amendment were among those which the FCC has articulated in defining a duty to ascertain *prospectively*—at the very close of a license period, immediately prior to a license transfer, or immediately prior to a construction application. *See, e. g.*, Suburban Broadcasters, 30 F.C.C. 1021 (1961); Higson-Frank Radio Enterprises, 36 F.C.C. 1391 (1964); Minshall Broadcasting Co., 11 F.C.C.2d 796 (1968); Sioux Empire Broadcasting Co., 16 F.C.C.2d 995 (1969); City of Camden, 18 F.C.C.2d 412 (1969).

The FCC has specifically defined the *ongoing* duty of a licensee to ascertain during its license period only in broader terms: "licensees are expected to remain conversant with, and attentive to, community problems throughout the license period. * * *" Primer on Ascertainment of Community Problems, 20 F.C.C.2d 880, 883 (1969).

required standards of representativeness. But the FCC held that an "amendment" to the application was permissible. Upgrading of programming can not be taken into account, but last minute improvements in ascertainment procedures are permissible. Why? "Upgrading" designed to improve an unsatisfactory record of programming in an effort to obtain renewal is improper because the issue in such a situation is past performance: How has the licensee actually performed during the license period? Last minute upgrading is irrelevant to that issue. But ascertainment procedures are directed at "proposals for future programming."

A fundamental issue in terms of satisfying both the FCC's programming and ascertainment of community needs standards was raised in WMAL: is the television licensee to be judged at renewal time by the needs of the area of service actually reached by his television signal or by the community needs of the city of license?

One commentator has summarized this problem, in the context of the WMAL case as follows:

> As set forth in § 73.30 of the FCC rules, the primary responsibility of a licensee is to "serve a particular city, town, political sub-division, or community which (is) specified in its station license." The further obligation to serve its entire source area may not be used as justification to ignore the licensee's primary responsibility or to mislead a station's audience as to its licensed location. Amendment to Part 73 of the Commission's Rules and Regulations, 10 FCC2d 399, 401, 11 RR2d 1607 (1967).

See Joe Beck, *Ascertainment: A New Approach to Access and Diversity Under the 1934 Communications Act*, Unpublished thesis, George Washington University Law Library, fn. 113.

Mr. Beck believes that *WMAL* posed a heavy challenge to the primary-secondary theory:

> Petitioners (in *WMAL*) noted that only 12% of the persons surveyed from the general public were from inner city areas, that only 16% of the leaders consulted were Black, despite the fact that 70% of the "city of license" was Black; and that only a small fraction of the licensee's public affairs programming was, according to the licensee's own figures, addressed to the needs of the city.
>
> Beck, supra, p. 114

Both the FCC and the Court of Appeals did not resolve the issue of whether or not the primary obligation of the licensee is to the city of license. The Court of Appeals decision in *WMAL* does appear to incline to the view that the licensee has an obligation to the entire area of service.

*Cf. Primer on Ascertainment of Community Needs, 27 FCC2d 650 (1971)* in which the FCC had stated: "Since an applicant's primary obligation is to his city of license, his obligation to other areas is, of course, secondary."

Beck suggested the following solution to the problem of ascertaining a community's needs when television audiences in an area consisted of a Black inner city and a white suburban metropolitan area:

> As an alternative, it is proposed that the Commission consider dividing television station assignments between central cities and suburbs. For example, in Washington the Commission could assign one station to serve primarily the needs and interests of the overwhelmingly Black section of the city east of Rock Creek Park; another to serve primarily the entire city; a third to Maryland; and the fourth to Virginia. Each station should have a required secondary duty to serve the needs of the entire metropolitan area

receiving the Grade A signal. It should be noted that no station's physical location would be moved; all could remain in the city but each would emphasize the needs of a separate part of the metropolitan area. Nor would any station have to increase its transmitter size since each now transmits a grade A signal throughout the metropolitan area.

Beck, supra, pp. 40–41.

3. On the diversification issue, the Court of Appeals refused to find that mere allegation of the fact of concentration of ownership in a petition to deny raised a sufficiently substantial issue of fact to justify setting the license renewal application for hearing. The court said concentration of ownership might be a factor in a comparative proceeding but since petitioners in *WMAL* were not themselves seeking a license it was not a relevant consideration here. The court said that the multiple ownership rules should be dealt with, across the board, by the FCC in new rules rather than in case-by-case adjudication. Yet *WHDH* (see, text, p. 922) was a case where the FCC used an adjudication to state a preference for the applicant who had no other media affiliation in the community to be served. It should be noted also that the court in *WMAL* did not even mention the *WHDH* case. See text, p. 785. Do you think that omission was justified?

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## A NOTE ON ASCERTAINMENT AND CHANGES IN PROGRAMMING FORMAT

1. In *Citizens Committee To Preserve the Present Programming of the "Voice of the Arts" In Atlanta on WGKA–FM and AM v. FCC, 436 F.2d 263 (D.C.Cir. 1970)*, the Court of Appeals first recognized that "the public has an interest in diversity of entertainment formats and therefore that format changes can be detrimental to the public interest. Consequently, in compliance with its statutory mandate to approve only those assignment (of license) applications which it finds to serve the public interest, convenience and necessity, * * * the Commission must consider format changes and their effect upon desired diversity." The *Citizens Committee (WGKA–FM)* case concerned the efforts of a group of Atlanta citizens who were fighting to retain the "classical music" format of radio station WGKA against an assignment of the station's license to a group of broadcasters who wanted to change to a popular and light classical format. The court reversed the FCC order approving the transfer and the program format change, stating that a significant minority of Atlanta listeners had voiced opposition to the change, and that WGKA was the only station in Atlanta that programmed classical music.

2. Two recent cases, *Lakewood Broadcasting Service, Inc. v. FCC, 478 F.2d 919 (D.C.Cir. 1973)*; and *Citizens Committee to Keep Progressive Rock v. FCC, 478 F.2d 926 (D.C.Cir. 1973)*, issued the same day, provided the United States Court of Appeals for the District of Columbia with an opportunity to consider further the relationship between format changes and the public interest. In *Lakewood*, the proposed change was from an "all news" format to "country and western" music; in *Progressive Rock*, from a "progressive rock" to a "middle of the road" musical format. In both cases the citizen groups had filed petitions to deny the assignments, and the FCC had denied the petitions, finding that no substantial issue of material fact was in issue that would require the evidentiary hearings requested by both groups. The court's decisions in these two cases turned upon the evidence presented by the citizens groups. In *Lakewood*, the court agreed with the Commission that no substantial issue of

material fact had been raised, and that the Commission could make a determination that the format change was in the public interest without the need for an evidentiary hearing. For example, the citizen group in *Lakewood* challenged the "ascertainment of community needs" survey conducted by the assignee, for not stating the program format preferences of the civic leaders interviewed; but the court agreed with the Commission that the purpose of the survey was to ascertain needs, *not* program preferences. Thus, the allegation did not present a substantial question of fact. But in *Progressive Rock* the court disagreed, and reversed the Commission, holding that the petitioners had raised substantial questions of fact and that a hearing was required.

The cases are, on one level, difficult to reconcile. Program format was recognized in both as an element of the "public interest." But in one, the FCC could consider the question on its own, while in the other, a hearing on the issues raised by the petition to deny was required. Perhaps the only way to distinguish the two cases is by pointing out that, in *Lakewood,* other stations would remain that offered an "all news" format if this transfer were approved, while in *Progressive Rock,* the change would result in the loss to the community of the only station broadcasting a "progressive rock" format, and nothing would be gained by granting the change since other stations were already providing a "middle of the road" format. In any event, the cases seem to recognize that unity comes not from the lowest common denominator, but from "the interplay among diverse and authentically expressed views." See Barron, Freedom of the Press for Whom? at 237, 238 (1973); and Note, *The Public Interest in Balanced Programming Content: The Case for FCC Regulation of Broadcaster's Format Changes,* 40 Geo.Wash.L.Rev. 933(1972).

## SECTION 3. BROADCASTING AND POLITICAL DEBATE: § 315 AND THE "EQUAL TIME" REQUIREMENT

1. The most celebrated provision of the Federal Communications Act is certainly § 315, the "equal time" provision. Although disliked by many broadcasters, it has become a vital part of the political process. It prevents broadcasters from favoring one candidate and ignoring all others. The statute operates as a guaranty that broadcasting will be responsive to the dependency of the political process on the mass media.

The statute, 47 U.S.C.A. § 315 (1964) states:

§ 315. Candidates for public office; facilities; rules

(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 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. Appearance by a 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 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) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

2. The essence of the statute is in the term "equal time" itself. It has been pointed out that what is secured by § 315 is not in fact equality. "Equal opportunity" is what is required not actual equality of access to broadcasting. If one candidate is sold time, and his opponent cannot afford time, the station is not required to allow the impecunious opponent to speak free. For an article discussing the workings of the statute, see Friedenthal and Medalie, *The Impact of Federal Regulation of Political Broadcasting: § 315 of the Communications Act,* 72 Harv.L.Rev. 445 at 447 (1959). What advantages do you see in a requirement that all candidates in political contests be given free time? Might such a provision increase the number of candidates?

3. The famous John F. Kennedy-Richard M. Nixon television debates of 1960, which many think led to the election of John F. Kennedy, was made possible by an amendment to § 315 which suspended the operation of § 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 § 315 was in effect, would the broadcasters have had to provide time?

4. 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 at 449. Is the way to deal with the problem a statute which simply repeals § 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?

5. The simple operational rule of § 315 is that if one candidate is allowed to purchase prime time then all his "legally qualified" opponents must be allowed to purchase prime time. Who is a "legally qualified" candidate is a question which has not been very flexibly approached in the past by the FCC. Obviously an inquiry into the meaning of the phrase is basic to an understanding of the statute.

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## McCARTHY v. FEDERAL COMMUNICATIONS COMMISSION

390 F.2d 471 (D.C.Cir. 1968).

Before FAHY, Senior Circuit Judge, and WRIGHT and McGOWAN, Circuit Judges.

PER CURIAM: Following a practice that began in 1962 with a year-end interview with President Kennedy, the three major television networks, on December 19, 1967, carried a joint hour-long interview with President Johnson. Senator Eugene J. McCarthy, who had prior to that broadcast announced his own candidacy for the Democratic Party's presidential nomination, requested "equal time" on the ground that President Johnson was a legally qualified candidate for the

same nomination within the intent of Section 315 of the Communications Act.

The Federal Communications Commission denied the Senator's request. The ruling was based on the Commission's regulation interpreting Section 315 as applying only to legally qualified persons who had, among other things, publicly announced their candidacies.[3] There being no question that President Johnson had not announced his candidacy, the Commission refused also to give Senator McCarthy the opportunity to prove that President Johnson was acting as a candidate in fact. Senator McCarthy petitioned this court under 47 U.S.C. § 402(a) to review the Commission's ruling and, in view of the rapidly approaching state primaries, moved for summary reversal. For reasons which follow, we deny this motion.

The purpose of Section 315 is to require a broadcaster to give equal treatment to all candidates for a particular office or nomination once the broadcaster's facilities have been made available to any one of the candidates. Petitioner does not contend that it is unreasonable to require, as a condition precedent to invoking the benefit of the statute, that the claimant to equal treatment announce his candidacy. Petitioner argues, however, that it is another matter if a candidate deprives his opponents of the benefit of the statute simply by withholding an announcement of his own candidacy.

Since Congress has delegated to the Commission the duty to implement Section 315, our review is limited to determining whether the Commission's longstanding regulation is unreasonable or in contravention of the statutory purpose. In making this determination, "This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers." This is particularly true where the Commission has been assigned a responsibility of the kind here involved.

The obvious difficulty in determining whether a likely public figure is a candidate within the intent of the statute justifies the Commission in promulgating a more or less absolute rule. If the application of such a rule more often than not produces a result which accords with political reality, its rational basis is established. But no rule in this sensitive area can be applied mechanically without, in some instances at least, resulting in unfairness and possible constitutional complications.

As we read the Commission's rulings, if the President had announced his candidacy prior to the December 19 program, petitioner would be entitled to equal time irrespective of the content of that program. But program content, and perhaps other criteria, may provide a guide to reality where a public figure allowed television or radio time has not announced for public office.

Considering the content and the timeing of the not unprecedented year-end interview with the President, we cannot say that the application of the Commission's rule in this case without the requested hearing produced an unreasonable result.

Affirmed.

[3] The current regulations, which are identical in relevant part with regulations first promulgated in 1941, 6 Fed.Reg. 6087, are found in 47 C.F.R. §§ 73.120 (AM), 73.290 (FM), 73.590 (noncommercial FM), and 73.657 (TV) (Supp.1967). These regulations provide: "A 'legally qualified candidate' means any person who has publicly announced that he is a candidate for nomination by a convention of a political party or for nomination or election in a primary, special, or general election, municipal, county, state or national * * *."

### QUESTIONS ON THE McCARTHY CASE

(1) What is the present technical definition of a "legally qualified" candidate?

(2) Is the Court of Appeals suggesting that the FCC ought to give one in the position of Senator McCarthy an opportunity to show that President Johnson was acting as a candidate in fact?

(3) Assume that an incumbent President did not announce until his Party's national convention. Would § 315 be unavailable to provide opportunity to announced candidates in the President's party for "equal time" to answer the incumbent President's "non-political" speeches? What of the rights of opposition candidates? Does the President have too much instant access to television? See Minow, Martin and Mitchell, Presidential Television (1973).

(4) Is there an implicit constitutional issue in the *McCarthy* case? In the *McCarthy* case the Court of Appeals says that a mechanical approach to the question of who is a "legally qualified" candidate could lead to "possible constitutional complications." Perhaps what the court fears is that the use of governmentally licensed facilities to aid an incumbent President may lead to a kind of media-government alliance. If the central meaning of the First Amendment is to permit unabashed criticism of government, then unimpeded praise of government or the Chief Executive would seem itself to present a First Amendment problem.

### OTHER ASPECTS OF § 315

1. Notice that § 315 excludes from the "equal time" obligation candidates who appear on bona fide newscasts, news interviews, news documentaries, and on-the-spot coverage of bona fide news events. What is the reason for this exclusion? Do you think such an exclusion is to the advantage of dissent and debate? Does it benefit or hinder third party candidates?

2. It should be emphasized that the statute, § 315, forbids the station to censor the material broadcast under the provisions of this section. The issue of whether the station licensee will be granted immunity from liability for defamation, since he has no control over the content of the § 315 political broadcast, is dealt with in Chapter II, in a discussion of *Farmers Educational and Cooperative Union of America, North Dakota Division v. WDAY, 360 U.S. 525 (1959).* The inability of the station licensee to censor the political broadcast is sometimes defended on the ground that the licensee is not required to provide broadcast time to political candidates. It is only when time is extended to one candidate that the "equal time" rule is set in motion. If the station need not, according to the strict language of § 315, give anyone political broadcast time, would a lawyer be giving wise counsel if he advised his broadcaster clients simply to make no political broadcast time available at all? What does an examination of the following excerpt from the WDAY case contribute to the resolution of this question? (The facts and opinion of the WDAY case are set forth in the text, Chapter II, pp. 230, 231.)

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## FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, NORTH DAKOTA DIVISION v. WDAY, INC.

360 U.S. 525, 79 S.Ct. 1302, 3 L.Ed.2d 1407 (1959).

Mr. Justice BLACK delivered the opinion of the Court:

* * *

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.

* * *

Affirmed.

Mr. Justice FRANKFURTER, whom Mr. Justice HARLAN, Mr. Justice WHITTAKER, and Mr. Justice STEWART join, dissenting.

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3. In 1972 the Federal Communications Commission denied appeals by candidates for President and Vice-President nominated by the Socialist Workers Party, for "equal time" to respond to broadcast appearances by the Democratic Party candidates. At the time the Socialist Workers' presidential candidate was 31 years old; its vice-presidential candidate, 21 years old. The Commission found that since the Constitution states that a person under the age of thirty-five is ineligible to hold the office of President, U.S.Const. Art. II, § 1, cl. 4, and that no person ineligible for the office of President is eligible for the office of Vice-President, U.S.Const. Art. XII, neither Socialist Workers' candidate was eligible to serve, and therefore, neither was a "legally qualified candidate" entitled to demand equal time from a broadcast licensee. The Commission noted that "In general, a legally qualified candidate must be determined by reference to the law of the state in which the election is being held. * * * A candidate is legally qualified under Section 315 (the equal time provision of the Act) if he can be voted for in the state or district in which the election is being held, and, if elected, is eligible to serve in the office in question."

Commissioner Johnson dissented, noting, first, that "the Commission majority (has plunged) headlong into the decision of issues which would give our greatest jurists considerable pause." He complained that the Commission's decision attempted to give its procedural rules a substantive validity, and noted that since the twentieth amendment provides for a process of succession in the event that a "President elect shall have failed to qualify", U.S.Const. Amend. XX, § 3, the rights of the Socialist Workers Party candidates to be elected to the offices of President and Vice-President are constitutionally protected, regardless of the nature of their inability to serve. See *Letter to Mr. Larry Seigle, FCC 72–924 (1972).*

## SECTION 4. THE "FAIRNESS" DOCTRINE AND ACCESS TO BROADCASTING

### A. THE "FAIRNESS" DOCTRINE

## THE FEDERAL COMMUNICATIONS COMMISSION'S FAIRNESS DOCTRINE: AN EVALUATION

Jerome A. Barron
30 Geo.Wash.L.Rev. 1 (1961).


### THE FAIRNESS DOCTRINE: ITS EVOLUTION

Since the early days of radio, government regulation of the broadcasting industry has been associated with an effort to secure a reasonably complete, many-faceted picture of public issues. The Radio Act of 1927 required that stations allot equal portions of time to opposing political candidates for campaign purposes. * * *

*The FCC Report on Editorializing by Broadcast Licensees*

The most important official statement of the Commission's ideas concerning the fairness doctrine is found in its report regarding editorializing by broadcast licensees.[14] In its Report, the Commission upheld the right of licensees to editorialize provided they be mindful of their underlying obligation to present all sides of opinion in the discussion of public issues. It is written in the spirit of an insistence on programming balance. But the Report sought from licensees something more than a willingness to broadcast opposing views when a demand is made. The majority declared that licensees operated under an affirmative duty which placed the initiative on them to achieve fair and adequate treatment on controversial issues.

The Report further declared that "overt licensee editorialization within reasonable limits and subject to the general requirements of fairness detailed, is not contrary to the public interest." It dissmissed the argument that a licensee having taken an open stand on behalf of one position in a given controversy was not likely to give a fair break to the opposition. This criticism, the Report asserted, was unsound because it did not give just weight to the scope of the fairness doctrine. Indeed, the Report declared that if there were no duty to present all sides of controversial issues, overt editorialization would present grave dangers.

* * *

### THE FAIRNESS DOCTRINE AND ITS EVASION

If stations and networks refuse to discuss an issue which is of public importance, does the affirmative obligation of the fairness doctrine come into play? The fairness doctrine has not yet been sufficiently developed to cope with this problem. It is fairly well accepted by the industry that if station licensees editorialize, they must seek out representatives of the opposing view. However, suppose a network forbids its stations to editorialize on certain issues? In such circumstances it is reasonable to assume that the ban might extend to prohibiting discussion programs on the forbidden issues. Such an enforced silence obviously would be directly in conflict wth the purpose of the fairness doctrine. For this reason, it has been pointed out that the most serious deficiency in the fairness doctrine is that a licensee need not involve himself at all in an effort to comply with the difficult

[14] FCC Report in the Matter of Editorializing by Broadcast Licensees, 1 P & F Radio Reg. 91: 201 (1949) (Broadcast ed.) [hereinafter cited in text and footnotes as Report, or Report on Editorializing].

affirmative responsibility imposed on him by the "seek out" rule. * * *

## THE FAIRNESS DOCTRINE: RECENT TRENDS IN ITS DEVELOPMENT AND ITS OPERATION

### *A. The Impact of Revised Section 315(a)*

The decade that has passed since the Commission's formal pronouncement of fairness as a programming policy in its Report on Editorializing has seen the fairness principle integrated directly into the Federal Communications Act. Section 315(a) of the Act was amended by Congress in 1959 to include the words:

> 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 Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

The import of this new language is much disputed. The Commission in a recent letter rebuking a licensee for a fairness rule violation referred to the above-quoted language as a statutory indorsement of the Commission's "fair presentation" policy. A former Chairman of the FCC, John Doerfer, who had previously expressed deep misgivings concerning the Commission's legal authority to impose proper programming standards, declared that amended section 315(a) supplied the necessary statutory authorization for imposing standards in the fairness area in programming. Doerfer interpreted the above-quoted provision as a requirement that broadcasters give time to all political partisans who desire to voice opposition to anything said on radio and television. If Chairman Doerfer's interpretation is correct, the amendment to section 315 represents a fascinating illustration of the transformation of an administrative policy into a statutory mandate.

* * *

#### *The Fairness Doctrine and Section 315*

Since the revision of section 315, it is now difficult to determine whether the fairness doctrine can be properly considered as functioning independently of that statute. Section 315 requires that broadcast licensees who permit their facilities to be utilized by a legally qualified candidate for public office provide "equal opportunities" to opposing candidates if such time is requested. A station may allow one candidate to speak if his opponent does not wish to speak. Section 315 does not prohibit one-sidedness where the one-sidedness arises by default; it merely creates a legal basis whereby equal time can be secured if it is desired.

On the other hand, in the context of controversial issues in which the fairness doctrine comes into play, the licensee has an affirmative duty to seek out a representative opposing voice. The fairness doctrine is specifically intended to prevent the one-sided presentation of issues. Therefore in comparison to the affirmative duty which the fairness doctrine's "seek out" rule imposes on broadcast licensees, the section 315 equal time rule is less stringent.

An interesting distinction between the equal time rule and the fairness doctrine is that candidates who are given equal opportunities are authorized to determine for themselves the programs which they desire. In the fairness doctrine area, however, broadcast licensees are permitted to set forth the type of program which shall be the vehicle for expression of the opposing view. * * *

### *B. The Fairness Doctrine in Perspective: A Summary*

To those for whom the significance which attaches to a legal rule is to be

measured by the effectiveness of the sanction which will be invoked if the rule is violated, the FCC's fairness principle will be regarded as relatively unimportant.

However, evaluating the fairness doctrine from the point of view of a case-count which inquires only as to whether violations have ever actually been punished, rather than merely rebuked by a Commission letter, does not present a clear picture of the actual effect the doctrine has had on broadcast programming. It has been aptly noted that the persuasive influence of the fairness requirement on network programming may be considerable. Indeed, there appears to be no hostility in the broadcast industry to the principle of the fairness doctrine. Surveys that have been undertaken demonstrate that broadcast licensees prefer a programming standard which states a broad policy, leaving licensees generally free to make determinations as to implementation of the policy. For example, a poll taken of broadcast licensees indicate their preference for a fairness doctrine approach to the problem of broadcast opportunities for rival political candidates rather than the present "equal-time" requirement.

Of course, this satisfaction on the part of broadcast licensees with the fairness doctrine's approach to broadcast regulation may be just another indication of its general ineffectiveness. Informed and thoughtful students of broadcasting regulation have stressed the importance of developing criteria to provide licensees with "guidelines" by which they can make a determination as to what programming decisions will comply most creatively with the fairness principle.

The basic need in the functioning of the fairness doctrine is systematic analysis of program content to assure the meaningful implementation of its objectives. In addition, on the basis of the data drawn from program content analysis, criteria must be set forth which will help in making well-considered and critical evaluations of recurring fairness problems: What is a controversial issue? What constitutes a reasonable opportunity in giving an opposing viewpoint broadcast time? How does one determine when issue-aversion is taking place?

As it is presently constituted, the fairness doctrine is operative in some middle region between sanction and self-regulation. The Commission has informed broadcast licensees that they are under an affirmative duty to effectuate a well-balanced treatment of controversial matters. As Commissioner Ford remarked, the duty of the Commission is to inform the public and the industry "through appropriate orders or reports of the criteria * * * [the Commission expects] to apply in advance of action against an individual broadcaster." Until the fairness doctrine is given more precise articulation by the Commission, the development of sanctions for its infraction will necessarily be incapable of achieving effective enforcement.

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## IN DEFENSE OF "FAIRNESS": A FIRST AMENDMENT RATIONALE FOR BROADCASTING'S "FAIRNESS" DOCTRINE

Jerome A. Barron *
37 U. of Colo.L.Rev. 31, 46–48 (1964).


* * *

The ultimate constitutional status of the "fairness" doctrine must wait for the day, in Commissioner Cox's phrase, when "we [can] get a licensee to put his license on the line" and thereby invite, for the first time, judicial consideration of the "fairness" doctrine's relationship to the first amendment. Until that definitional moment arrives, however, it would appear from the foregoing that whichev-

er theory is used—whether the licensee is viewed as a "private" or a "governmental" actor—the "fairness" doctrine is completely consistent with first amendment goals and responsive to the competing interests which it protects.

The power to control programming is lodged essentially with the particular segments of the broadcast industry. Programming is in truth only mildly affected by the "fairness" doctrine, which is only an over-all programming guide. Therefore, it should be of great consequence, in constructing a first amendment theory adequate to meet the needs of broadcasting, that the most common restraints on free expression on broadcasting are industry rather than government inflicted. Individual instances of the industry acting as censor are fairly common and are found particularly in regard to programming considered to be "entertainment" but which nevertheless serves an important function in shaping community attitudes.[68] Indeed, there are indications, past and present, which suggest that the industry itself exercises a more pervasive censoring function than does any existing governmental programming standard.[69]

In conclusion, it is suggested that the "fairness" doctrine serves a useful if limited purpose but that its functioning may have much to offer by way of creative analogy both for the older media and for related problems of broadcasting. The doctrine represents a modest attempt to affirmatively structure at least one communications medium so that the first amendment mandate is not allowed to become, due to rapid economic and technological change, irrelevant to its fundamental postulate that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. * * *"

[68] The industry itself sometimes acts as censor and makes programming decisions of great consequence on the basis of slight adverse public criticism. House Comm. on Interstate and Foreign Commerce, *Report on Television Network Procurement*, H.R. Rep.No.281, 88th Cong. 1st Sess. 370 (1963) concluded as to the role, for example, of sponsor censorship of television programming:

> Even a few letters of criticism will cause an advertiser to question the subject matter of his program. As the senior vice president in charge of radio and television for a large agency put it:
>
> "But we just don't like letters of criticism. No client does, and as a result of this, Madison Avenue is accused of being a little hypercritical or perhaps going overboard in finding fault, but when you are representing a client and his investment, we have to bend backwards to be sure that you don't get these areas—even if there are five letters we find our clients become very sensitive to them and would rather not have any, and, of course, our problem today is in assuring a lot of our clients that there just are no shows that do not get letters of criticism once in a while."

[69] Thus, George Scott, one of the actors in *East Side—West Side*, a television series, much praised by the critics, which has been canceled for next year by the network, has asserted in connection with alleged network censorship:

> There was constant blue-penciling of material by the Program Practices Department of CBS. * * * In a segment called "No Hiding Place," a story about blockbusting by unscrupulous real-estate operators, there was a scene in which I was to ask a colored woman—played by Ruby Dee, who is herself a marvelously bright woman—to dance. The scene was edited out of the script by CBS. I insisted that it be put back in. It was, and we shot it. *Then* it was cut out of the footage by the network. TV Guide, Jan. 18, 1964, pp. 18, 21.

A famous, and hopefully atypical, example of successful censorship was the celebrated firing of Drew Pearson by his radio sponsor because the sponsor disagreed with the political views and opinions expressed by Pearson. Davies, The Urge to Persecute 133 (1953).

These examples are intended to be illustrative of an industry problem, having immense implications for the vitality of the democratic process, but which, as yet, are remarkably immune from sanction.

## RED LION BROADCASTING CO. v. FEDERAL COMMUNICATIONS COMMISSION

127 U.S.App.D.C. 129, 381 F.2d 908 (1967).

**Editor's statement of the facts:**

The long-sought case squarely raising the constitutionality of the "fairness" doctrine finally came. In *Red Lion Broadcasting,* a federal court finally considered the issue. The facts of the case were as follows. 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.*

Hargis made the following statements concerning Fred J. Cook, the book's author: "Now who is Cook? Cook was fired from the New York World-Telegram after he made a false charge publicly on television against an unnamed official of the New York City government. New York publishers and Newsweek magazine for December 7, 1959, showed that Fred Cook and his pal Eugene Gleason had made up the whole story and this confession was made to the District Attorney, Frank Hogan. After losing his job, Cook went to work for the left-wing publication, *The Nation* * * *. Now among other things Fred Cook wrote for *The Nation* was an article absolving Alger Hiss of any wrongdoing * * * there was a 208 page attack on the FBI and J. Edgar Hoover; another attack by Mr. Cook was on the Central Intelligence agency * * * now this is the man who wrote the book to smear and destroy Barry Goldwater called *Barry Goldwater—Extremist Of The Right.*"

The 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. (What is the "equal time" rule on this point?)

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. The Court in its decision recited the history of the personal attack rules. On July 1, 1964, the FCC had issued a Public Notice entitled *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* 29 Fed.Reg. 19415 (1964). This document, sometimes called the Fairness Primer, states that fairness complaints would continue to be dealt with on an ad hoc basis. The FCC stated further that broadcast licensees would be af-

forded an opportunity to take action or to comment upon complaints made against them to the FCC prior to action thereon by the FCC. In the same document, the personal attack principle was dealt with in detail and the rules implementing this principle were specified. (The text of the personal attack rules is set forth in the Supreme Court's decision in the *Red Lion* case which follows this note.)

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.

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## RED LION IN THE SUPREME COURT

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 orders 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 Court declared:

> In view of the vagueness of the Commission's rules, the burden they impose on licensees, and the possibility they raise of both Commission censorship and licensee self-censorship, we conclude that the personal attack and political editorial rules would contravene the first amendment.

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 Court had decied 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 appeal.

To the professed amazement of the broadcast industry, the Supreme Court affirmed the *Red Lion* decision and reversed the *RTNDA* decision. The fairness doctrine and the personal attack rules were upheld as consistent with the First Amendment by a unanimous Supreme Court consisting of all the seven justices who participated in the case. Not only did the Court decision speak warmly of fairness, it spoke equally warmly of a newer doctrine, access. The *Red Lion* decision in the Supreme Court opened up a new affirmative approach to First Amendment theory at least as applied to the broadcast media. See generally Barron, Freedom of the Press for Whom? The Right of Access to Mass Media 137–149 (1973).

## RED LION BROADCASTING CO., INC. v. FEDERAL COMMUNICATIONS COMMISSION

## UNITED STATES v. RADIO TELEVISION NEWS DIRECTORS ASSOCIATION

395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969).

Mr. 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 of 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. After considering written comments supporting and opposing the rules, the FCC adopted them substantially as proposed, 32 Fed.Reg. 10303. Twice amended, 32 Fed.Reg. 11531, 33 Fed.Reg. 5362, the rules were held unconstitutional in the *RTNDA* litigation by the Court of Appeals for the Seventh Circuit on review of the rule-making proceeding as abridging the freedoms of speech and press. 400 F.2d 1002 (1968).

As they now stand amended, the regulations read as follows:

"Personal attacks; political editorials.

"(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

"(b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including

commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee).

"NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed.Reg. 10415. The categories listed in (iii) are the same as those specified in Section 315(a) of the Act.

"(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion." 47 CFR §§ 73.123, 73.300, 73.598, 73.-679 (all identical).

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.

Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard. Consequently, the Federal Radio Commission was established to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest, or necessity."

Very shortly thereafter the Commission expressed its view that the "public interest requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies * * * to all discussions of issues of importance to the public." Great Lakes Broadcasting Co., 3 F.R.C. Ann.Rep. 32, 33 (1929), rev'd on other grounds, 37 F.2d 993, cert. dismissed, 281 U.S. 706 (1930). This doctrine was applied through denial of license renewals or construction permits, both by the FRC, Trinity Methodist Church, South v. FRC, 62 F.2d 850 (C.A.D.C.Cir.1932), cert. denied, 288 U.S. 599 (1933), and its successor FCC, Young People's Association for the Propagation of the Gospel, 6 F.C.C. 178 (1938). 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 F.C.C. 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 F.C.C. 1246 (1949). The broadcaster must give adequate coverage to public issues, United Broadcasting Co., 10 F.C.C. 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. § 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. §§ 307(a), 309(a); renewing them, 47 U.S.C. § 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. § 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. § 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.

The legislative history reinforces this view of the effect of the 1959 amendment. Even before the language relevant here was added, the Senate report on amending § 315 noted that "broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust. Every licensee who is fortunate in obtaining a license is mandated to operate in the public interest and has assumed the obligation of presenting important public questions fairly and without bias." S.Rep.No.562, 86th Cong., 1st Sess. 8–9 (1959). See also, specifically adverting to Federal Communications Commission doctrine, id., at 13.

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 Chairman 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. In explaining the language to the Senate after the committee changes, Senator Pastore said: "We insisted that

the provision remain in the bill, to be a continuing reminder and admonition to the Federal Communications Commission and to the broadcasters alike, that we were not abandoning the philosophy that gave birth to section 315, in giving the people the right to have a full and complete disclosure of conflicting views on news of interest to the people of the country." 105 Cong.Rec. 17830. Senator Scott, another Senate manager, added that "It is intended to encompass all legitimate areas of public importance which are controversial," not just politics. 105 Cong.Rec. 17831.

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:

> "In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as * * * whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist." 13 F.C.C., at 1251–1252.

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, 503 (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 Communications 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 has 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 monopoly 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.[17] 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.

[17] This has not prevented vigorous argument from developing on the constitutionality of the ancillary FCC doctrines. Compare Barrow, The Equal Opportunities and Fairness Doctrine in Broadcasting: Pillars in the Forum of Democracy, 37 U.Cin.L.Rev. 447 (1968), with Robinson, The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation, 52 Minn. L.Rev. 67 (1967), and Sullivan, Editorials and Controversy: The Broadcaster's Dilemma, 32 Geo.Wash.L.Rev. 719 (1964).

[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 (R. McCallum ed. 1947).

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.

* * *

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.[28] 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.

Not having heard oral argument in these cases, Mr. Justice DOUGLAS took no part in the Court's decision.

### NOTES AND QUESTIONS

1. Note the Supreme Court's response to the industry position espoused by the Court in the *RTNDA* case that the fairness doctrine serves as a depressant rather than as an aphrodisiac to debate. The end result of the fairness doctrine, under this view, is blandness rather than any offering of contentious and vigorous debate. The Court suggested that the FCC licensing process could be conditioned on the willingness of broadcast licensees to present representative community views on controversial public issues. Mr. Justice White stated for the Court: "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." 395 U.S. 367 at 394 (1969). White is suggesting that debate will not be excluded by the fairness doctrine because broadcasters will not be permitted to avoid the problem of fairness doctrine compliance simply by avoiding debate altogether.

A particular incident where the interests of free debate were not served by a broadcaster's performance will rarely warrant denial of the broadcaster's license renewal application. How can fairness be enforced in a particular case assuming the drastic remedy of license denial at renewal time is not thought appropriate?

2. The Court did not concede any property rights to broadcasters with regard to their licenses despite the fact that the vast majority of broadcast licenses are routinely renewed every three years. Mr. Justice White underscored the temporary quality of the broadcaster's interest in his franchise:

> Licenses to broadcast do not confer ownership of designated frequencies but only the temporary privilege of using them. 47 U.S.C. § 301. Unless renewed, they expire within three years.

Indeed Justice White made the rather remarkable observation for the Court in *Red Lion* that "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." *395 U.S. 367 at 390–391 (1969).*

[28] We need not deal with the argument that even if there is no longer a technological scarcity of frequencies limiting the number of broadcasters, there nevertheless is an economic scarcity in the sense that the Commission could or does limit entry to the broadcasting market on economic grounds and license no more stations than the market will support. Hence, it is said the fairness doctrine or its equivalent is essential to satisfy the claims of those excluded and of the public generally. A related argument, which we also put aside, is that quite apart from scarcity of frequencies, technological or economic, Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public. Cf. Citizens Publishing Co. v. United States, 394 U.S. 131 (1969).

The Court suggested that the reason the air waves were franchised was because it was the most convenient way to share a frequency with the public at large. The Court linked public ownership of the airwaves with the propriety and validity of the fairness and personal attack rules. The broadcast licensee was enabled to share his licensed frequencies with the public by rules such as the fairness doctrine and the personal attack rules which required the broadcast licensee "to conduct himself as a proxy or fiduciary with obligations to present those views and voices which would otherwise, by necessity, be barred from the airwaves." *395 U.S. 367 at 389 (1969).*

3. 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.

It should be noted that 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's* rights as follows in the *Democratic National Committee Case:*

> This last point—the application of *Cullman*—merits further discussion. The *Cullman* principle was developed to deal with the situation where the broadcaster has sold time to one side to present its views, has not presented or made plans to present the contrasting viewpoints, and rejects programming which he deems suitable to present those viewpoints, unless the party offering such programming will pay for its presentation. We held that the licensee could not properly insist upon payment in such circumstances. 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 approval 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 FCC2d 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.

4. 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 not substitute as a justification for broadcast regulation limitations on access for ideas for the older rationalization of limited access to the spectrum?

Another element in the Supreme Court decision which has been remarked on is the idea that regulatory provision for access for ideas may not only be consistent with the First Amendment but may in fact be required by the First Amendment.

On these issues, consider the following:

## ACCESS—THE ONLY CHOICE FOR THE MEDIA?

Jerome A. Barron
48 Texas L.Rev. 766, 768–774 (1970).


* * *

The prelude to the Supreme Court decision in *Red Lion* was dramatic. CBS and NBC had intervened with *amicus curiae* briefs bearing the names of distinguished lawyers, many of them academics with reputations as civil libertarians. The Supreme Court had never dealt directly with the constitutionality of the fairness doctrine. But broader issues were raised. What was the impact of a new technology on traditional first amendment theory? Is the first amendment to be interpreted as just a prohibition on governmental restraints on expression or as a command imposing affirmative obligations to ensure the interchange of opposing viewpoints? If such a command exists, does it apply to the print media as well as to the broadcast media?

Broadcast industry expectations with regard to the Court's ultimate decision in *Red Lion* were ambivalent. On the one hand, the broadcasters and the networks had become accustomed to the fairness doctrine during the past twenty years of its existence. On the other hand, the broadcasting industry wanted to believe its aging rhetoric that the imposition of affirmative obligations on broadcasters with regard to programming was a violation of freedom of speech and press. Rather than protecting the right of listeners or viewers, freedom in broadcasting in this view, was the freedom of the broadcaster. To anyone who knew the realities of broadcasting the rhetoric was fantastic. The vaunted freedom of the licensee consists mainly of his "opportunity" to become a network-affiliate and consign, he hoped, his most lucrative prime-time hours to network-originated programming. Similarly, the vaunted freedom of the press in many American communities permits newspaper chains to operate newspapers in distant cities on a policy of heavy reliance on wire service news and canned editorials and features. Nevertheless, it was, and still is, good box office for publishers to talk as broadcasters still do about freedom of the press. Yet freedom of the press in real terms too often means the property rights of the only newspaper in the community, which more often than not is owned by a newspaper chain.

Freedom of expression should no longer be defined by the legal immunities of publishers or broadcasters. Mr. Justice White in *Red Lion* makes it very clear that the imposition of duties on broadcasters accomplished by the FCC's fairness doctrine and personal attack rules "enhance[s] rather than abridge[s] the freedom of speech and press protected by the First Amendment."

*Red Lion* launches the Supreme Court on the path of an affirmative approach to freedom of expression that emphasizes the positive dimension of the first amendment. In fact, the access-for-ideas rationale practically replaces the original legal justification for broadcast regulation—that broadcasting is a limited-access medium. This older view proceeded on the theory that since there were only so many frequencies to go around, some substantive criteria had to be improvised in order to have a rational allocation policy. This philosophy of broadcast regulation had been set down by Mr. Justice Frankfurter in the most important case on broadcasting policy prior to *Red Lion*, NBC v. United States, a case decided more than a quarter of a century ago.

*Red Lion* reveals an interplay between the older technical limited-access theory, which was justified on the basis of limitations in the spectrum, and the new first amendment-based theory of access, which attempts to provide mechanisms for the interchange of ideas in the dominant media.

On its respectable or conventional level, the Supreme Court in *Red Lion* relied on the limitation-of-the-spectrum argument for its result. And it is that older face that the Court apparently prefers to put forward. On the other hand, the opinion is studded with observations that give it a radical undertone throughout and that display the constant tension in the opinion, and perhaps in the Court, between a rationale for broadcast regulation based on limitation of the spectrum and one based on maximizing opportunities for expression.

Essentially, the *Red Lion* case appears to challenge the future of the limitation-of-the-spectrum rationale. The broadcasters had argued that the frequencies were no longer limited and that therefore there was no need to insist that those holding views different from licensees should have direct access to broadcast facilities. The Court, of course, denied that the scarcity problem had disappeared. But the Court also stressed the advantage that the prestige or established media have in terms of status within the opinion process. The Court implied that this advantage required some counterbalance in order to equalize the opportunity for opposing viewpoints within the dominant broadcast media.

The Supreme Court noted that a new technology had replaced "atomized, relatively informal communication with mass media as a source of national cohesion." Freedom of expression in the context of the mass media in the third quarter of the twentieth century requires a more polycentric approach to freedom of expression than a theory that exalts the controller of the media and ignores all other participants in the communication process. The Supreme Court has responded to the need for more sensitive and subtle analysis of media problems to stimulate opportunities for intense and representative debate. The *Red Lion* case therefore finds the law of freedom of expression in mid-passage. Old and new theories of broadcast regulation walk into each other in the case.

Mr. Justice White says in *Red Lion* that it is not a first amendment purpose to countenance monopolization of the marketplace of ideas. For this proposition he cites a string of cases, many of them involving print media, particularly newspapers. My point is that *Red Lion* is not just a broadcast case. It is a media case. It represents a look at the first amendment in the light of new social realities of concentration of ownership and control in a few hands that has been produced by the twin developments of media oligopoly and technological change. It is in the background of these realities that the new first amendment right of access spoken of by Mr. Justice White should be understood. There is a remarkable sentence in *Red Lion*. It marks the recognition by the Supreme Court of a new constitutional right: "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."

* * * In the *Red Lion* case, Mr. Justice White, speaking for the Warren Court, showed a remarkable sensitivity about and displeasure with what the Court itself called "private censorship." * * *

### The Press and the Broadcast Media: The Legal Contrast

I have pointed to the existence of a dual theme in *Red Lion*: the conventional limitation-of-the-spectrum theme and the theme of access played by the Court in the minor key. Access is a theme des-

tined to gather much greater importance in the years ahead. Moreover, the Court, in an intriguing finale, makes it very clear that it recognizes the possibilities of an access-oriented approach to the press as well. In the American press, the number of dailies has steadily dwindled. Today less than 1,800 daily newspapers are published in this country. The economic cost of establishing a new newspaper is a financial challenge that even the most well-heeled dare not assume. The problem is technological as well. The technology that has bred the broadcast media has revolutionized the print media as well. The price of this new technology has been high.

In *Red Lion,* in a footnote at the very end of the case, the Court makes a comment that asks us to think beyond media problems presented by technological or even economic scarcity. The Court says there is another argument which remains to be considered:

> Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public.

This observation to me appears to constitute awareness by the Supreme Court that freedom of the press is something that can be provided for by legislation. It is a recognition that the meaning of freedom of the press is not exhausted by its undoubted and traditional function as the guarantor against government censorship and restraint. The Court declared that it put this argument aside. But the decision to defer is full of implication for the press.

Much more familiarity is needed with existing machinery for access in broadcasting by the public. Much more sympathy is needed for these mechanisms on the part of the Federal Communications Commission and the Broadcasting industry. But the point is that this machinery exists and that it has been given a new constitutional benediction by the Supreme Court. * * * How starkly different is the situation in the press. The American press may attack whom they choose no matter how unfairly or how persistently. Unlike broadcasters, newspaper publishers in most American jurisdictions are totally without any legal obligation to afford opportunity for reply even in a libel context. In 1964, in *New York Times v. Sullivan* the Supreme Court, in the interests of "uninhibited, robust, and wide-open" debate, made it far more difficult for newspapermen to be sued for libel. As a result, the press are the beneficiaries of a new and wider freedom to libel than they have ever enjoyed. All this was done in the interests of a debate that no one bothered to secure.

In broadcasting, both the fairness doctrine and the right of reply to groups and individuals attacked by the broadcast media have been held constitutionally authorized. Clearly, as a matter of law, more social responsibility is presently demanded from the broadcast media than is demanded from the press. Since there are *more* broadcast outlets than newspapers, I find it hard to be persuaded by the traditional rationale that radio and television, unlike the daily press, are limited-access media.

It was the essential philosophy of *New York Times v. Sullivan* that a free press, engaged in public debate, should not have to live in fear of prohibitive libel judgments. But what is the purpose of free debate? It is free so that there shall really be free debate within the nation. If that is true, then a necessary step to securing debate should have been to require newspapers to provide the subjects of their attacks with an opportunity for reply. This would have been a fair price

to extract for the new relative freedom from libel judgments. In many cases the same corporations or families own both television stations and newspapers, yet the responsibilities of these same people in the newspaper field are far less. Does not *Red Lion* present a sharp contrast to *New York Times v. Sullivan*? In reason, does it not seem absurd that both decisions could be correct? One of them, since it fails to provide the vital supplement of right to reply, is in error, and that one is *New York Times v. Sullivan*. * * *

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## SOME ADDITIONAL FAIRNESS DOCTRINE PROBLEMS

1. Suppose a dramatic presentation on television offends a particular group? Does the "fairness" doctrine apply? In Barron, *In Defense of "Fairness": A First Amendment Rationale For Broadcasting's "Fairness" Doctrine*, 37 Univ. of Colorado Law Review 31 at 35, fn. 17 (1964), the point is discussed:

"This is not to say that the "fairness" doctrine has not engendered some programming problems even for that large segment of the industry which has never sought to resist the doctrine but only to understand it. An example of this situation is rather graphically illustrated by the reaction to a program called 'The Exploiters' which was presented on the Dr. Kildare show on the NBC network on October 31, 1963. The program dealt with an unethical funeral director. A complaint was then made by the Los Angeles County Funeral Directors Association with the FCC. The morticians claimed that the Kildare show had damaged their professional reputations and the morticians asked that they be given equivalent time so that they could present a 'contrasting view.' Broadcasting, Jan. 13, 1964, p. 71. The Association complained that the program portrayed morticians as 'ruthless, cunning, greedy, cutthroat, fraudulent, vulturous, deceitful, overbearing hucksters of grief.'

"The novelty of this situation was that for the first time the Commission was being asked to extend the 'fairness' doctrine to dramatic programs. The morticians were merely asking that their side of the story be presented. A more disquieting development, arising out of the same problem, was the response of the National Association of Claimants Counsel of America which criticized 'Smashup,' a program appearing on the Armstrong Circle Theatre serial. The program dealt with fraudulent auto injury litigation. NACCA claimed that the program would prejudice juries against tort claimants. NACCA, however, didn't want equal time: 'It simply asked that the Commission keep such programs off the air.'

"The FCC has not yet taken a formal position on whether the 'fairness' doctrine embraces dramatic presentation. Reportedly, a majority of the Commissioners passing on the Armstrong Circle Theatre incident were inclined to believe that in a propaganda context 'fairness' doctrine coverage would extend to drama. NBC has contended that the application of the 'fairness' doctrine to dramatic production would result in the avoidance of 'any but the most tepid subjects in dramatic series.' Broadcasting, Jan. 20, 1964, p. 62. Whatever solution to this problem the Commission reaches, it is somewhat instructive that the 'fairness' doctrine would be a potential weapon available to balance the use of broadcasting for doctrinaire purposes under the guise of entertainment."

2. Although the "fairness" doctrine requirement of balanced presentation of controversial issues of public importance has been given new vitality by the *Red Lion* case, it should not be thought that the "fairness" doctrine restricts station li-

censees from declaring where they stand on issues by editorializing. Editorializing is permitted and encouraged. This was not always the case. See *Mayflower Broadcasting Co., 8 F.C.C. 333 (1941).* Even editorializing which the FCC considers offensive to prevailing community attitudes (*i. e.*, a defense of homosexuality) is permitted. See *Pacifica Foundation, 1 P. & F. Radio Reg.2d 747 (1964).**

At what points do the right to editorialize and the "fairness" doctrine intersect? The controversiality quotient of editorials in broadcasting is sometimes found deficient. Might this be a consequence of the intersection between editorializing and the "fairness" doctrine?

3. A citizens group calling itself "Accuracy in Media" (AIM) has recently been active in seeking enforcement of the obligations imposed upon broadcasters by the fairness doctrine.

AIM has alleged that the NBC Television Network has not met its fairness obligations in the presentation of a documentary program, "Pensions: The Broken Promise." This probing study of the problems and failures of private pension plans was characterized as "investigative journalism" by NBC. AIM preferred the term "advocacy journalism" and argued that the program had presented only one side of a controversial issue of public importance. The Commission agreed with AIM and ruled that NBC had an obligation to present contrasting views on this issue, in the course of its regular programming. The FCC was quick to point out that NBC was not required to air a documentary on "happy pensioners", and the network was free to choose appropriate spokesmen within the bounds of reasonableness and good faith, and that absolute equality of presentation was not required. See *Accuracy in Media, 28 P. & F. Radio Reg.2d 1373 (1973).* (The FCC's opinion is particularly interesting because it quotes at length from the transcript of the program).

NBC could, of course, simply broadcast the opposing views, as the Commission has required. It has chosen instead to appeal the ruling to the United States Court of Appeals, arguing not only that this particular application of the fairness doctrine is violative of the Constitutional guarantees of freedom of speech and the press, but also that the Commission's order threatens the future of investigative journalism in broadcasting and the "uninhibited, robust, and wide-open" debate on public issues that the fairness doctrine demands. See Wicker, *"What is Fairness on TV?", New York Times,* Sunday, December 23, 1973, at E 11.

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## B. CIGARETTE ADVERTISING IN BROADCASTING: FROM "FAIRNESS" TO PROHIBITION?

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### The *Banzhaf* Case

1. In December 1966, a young lawyer, John W. Banzhaf, asked WCBS-TV in New York for reply time to respond to cigarette commercials. The request raised a familiar fairness doctrine problem: were advertisements subject to the fairness doctrine? (In the past, the FCC had said the fairness doctrine would extend to a controversy which concerned advertising. *Petition of Sam Morris, 11 FCC 197 (1946).*). WCBS-TV rejected the Banzhaf proposal. But on complaint to the FCC, the FCC held that time should be provided for reply to cigarette advertisements because, among other reasons, the question of whether or not ciga-

* P. & F. Radio Reg. is the abbreviation for *Pike & Fischer Radio Regulation* which is a commercial publishing service which reprints all major FCC decisions, rule-making reports, press releases and policy statements. The service can be utilized at most university law libraries.

rettes were a threat to health was a controversial issue. *WCBS-TV, 8 FCC2d 381 (1967); aff'd, Applicability of the Fairness Doctrine to Cigarette Advertising, 9 FCC2d 921 (1967).*

The United States Court of Appeals, per Bazelon, Chief Judge, sustained the FCC decision ordering reply time to cigarette advertising. *Banzhaf v. FCC, 405 F.2d 1082 (D.C.Cir. 1968).*

The Court made a valiant effort in *Banzhaf* to confine its decision ordering reply time to cigarette advertising alone. But is the cigarette advertising situation truly unique?

2. The Court in *Banzhaf* sustained the application of the fairness doctrine to cigarette advertising. But the fairness doctrine was not the only ground which the Court relied on for its decision. The FCC's obligation to define and enforce the public interest in broadcasting was another and independent ground for the Court's decision in *Banzhaf*. The public interest in warning the public against the danger that cigarette smoking presented to health had been manifested in publications, actions and policies of many federal government instrumentalities including the Surgeon General's Advisory Committee, the Department of Health, Education and Welfare, the Federal Trade Commission and the Senate Commerce Committee. This interest was also reflected in the enactment of the Cigarette Labelling Act of 1965, which requires that each pack of cigarettes be imprinted with the warning "Caution: Cigarette Smoking May Be Hazardous to Your Health." The existence of a massively demonstrable federal policy to discourage cigarette smoking appeared to the Court to avoid the danger that reliance on the interest standard by the FCC might be used in the future as a precedent to censor broadcast content. Similarly, the uniqueness of the public interest and public health factors were emphasized by Judge Bazelon for the Court in *Banzhaf* in an effort to thwart any implication that reply time to product advertisements could be ordered by the FCC under either the fairness doctrine or the public interest standard as a general proposition.

3. In *Banzhaf*, Judge Bazelon suggests for the Court that First Amendment protection may contain an affirmative dimension. The Court implies that the marketplace of ideas in broadcasting may not be self-corrective. A debate between cigarette advertisers whose ads consisted of a sizable fraction of all broadcast revenues and opponents of cigarette smoking with no such "financial clout" may be no debate at all. In such circumstances the provision of free television reply time to cigarette ads appeared to the Court to be entirely appropriate: "We do not think the principle of free speech stands as a barrier to required broadcasting of facts and information vital to an informed decision to smoke or not to smoke."

In summary, the Court of Appeals in *Banzhaf* affirmed the FCC decision ordering reply time to counter cigarette advertising on three separate grounds: (1) the fairness doctrine, (2) a definition of the public interest standard (reply time is appropriate in light of extraordinary and unique circumstances and when consistent with a demonstrably clear federal policy), and (3) the First Amendment (on a theory that governmental intervention in the form of compulsory reply time is permissible where necessary to serve as a "countervailing" force where meaningful broadcast debate would otherwise be impossible.) The latter two of these three bases of decision in *Banzhaf* were at least as important as the fairness doctrine in shaping the Court's decision.

4. In its effort to make the ruling of reply time for cigarette advertisements unique and to keep it from being extended to other product advertisements, the Court remarks that "the danger cigarettes may pose to health is, among others, a danger to life itself." Did this very sen-

tence, which was designed to confine the scope of the *Banzhaf* ruling, in fact serve to expand or contract it? See *Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. 1971)*, text, supra, p. 832.

5. The *Banzhaf* case held that cigarette advertising had to be counter-balanced by expression devoted to pointing out the hazards of cigarette smoking and affirmed the FCC ruling that the "fairness" doctrine applied to cigarette advertising. The case had stressed that cigarette smoking was a controversial issue of great gravity which demanded balanced presentation. Yet on February 5, 1969, the FCC issued a notice of proposed rule-making directed to prohibiting cigarette advertising on radio and television altogether. *In the Matter of Amendment of Part 73 of the Federal Communications Commission Rules with regard to the advertisement of cigarettes, 16 FCC 2d 284 (1969).*

6. The Cigarette Labelling and Advertising Act of 1965 had prevented any prohibition of cigarette advertising on television prior to July 1, 1969. The FCC's proposed ban would have prohibited such advertising after July 1, 1969. In the Public Health Cigarette Smoking Act of 1969 Congress foreclosed the matter. Advertising of cigarettes (but not cigarillos!) is now banned in broadcasting. The new statute, 15 U.S.C.A. § 1335 states:

> After January 1, 1971, it shall be unlawful to advertise cigarettes in any medium of electronic communication subject to the jurisdiction of the FCC.

## CAPITAL BROADCASTING CO. v. MITCHELL

7. Is a Congressional prohibition against advertisements of a particular product, no matter what the content of the ads, a violation of the First Amendment?

The issue was resolved in *Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.C.D.C.1971)* where the federal court held that enforcement of 15 U.S.C.A. § 1335 did not offend due process nor did it violate the First Amendment rights of broadcasters. The Supreme Court affirmed without opinion. *Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972).* The federal court sustained the statute on a number of grounds. First, product advertising is less vigorously protected by the First Amendment than other kinds of expression. Second, "(t)he unique characteristics of electronic communication make it especially subject to regulation in the public interest." Third, Congress, whether in its supervisory role over the federal administrative process or under its constitutional power to regulate interstate commerce, "has the power to prohibit the advertising of cigarettes in any media."

On the First Amendment issue, the Court said that the statute did impose a loss of revenue on broadcasters but did not prohibit them from disseminating information about cigarettes.

Broadcasters contended that the cigarette advertising ban law violated due process because the print media were not prohibited from carrying cigarette ads. Only the electronic media were so restricted. Broadcasters said that such a distinction was "arbitrary and invidious." The court pointed out that the legislature can regulate one evil at a time. The test is whether there is a rational basis for regulating one medium of communication but not another. The court ruled that Congress had acted on the basis of information which indicated that such a distinction was reasonably justified:

> Substantial evidence showed that the most persuasive advertising was being conducted on radio and television, and that these broadcasts were particularly

effective in reaching a very large audience of young people.

* * *

A pre-school or early elementary school age child can hear and understand a radio commercial or see, hear, and understand a television commercial, while at the same time be substantially unaffected by an advertisement printed in a newspaper, magazine or appearing on a billboard.

Judge Wright dissented in *Capital Broadcasting* and provided some of the background behind the controversy. As a result of the *Banzhaf* case, "exceedingly effective anti-smoking commercials" had resulted in a "sustained trend toward lesser cigarette consumption." Judge Wright said that the cigarette industry itself had asked the Congress to bar cigarette advertising:

The *Banzhaf* ruling had clearly made electronic media advertising a losing proposition for the industry, and a voluntary withdrawal would have saved the companies approximately $250,000,000 in advertising costs, relieved political pressure for FCC action, and removed most anti-smoking messages from the air.

In Wright's view, the cigarette advertising ban law resulted in the transfer by tobacco companies of their advertising budgets to the print media "where there was no fairness doctrine to require a response." The *Banzhaf* decision had increased the information flow but said Judge Wright, "the 1969 Act cut off the flow of information altogether." Judge Wright did not believe that the mere fact that the law prohibiting cigarette advertising on broadcasting regulated advertising or commercial speech should be sufficient to still all First Amendment objection to the law: "(I)t does not follow from their general validity that the words 'product advertising' are a magical incantation which, when piously uttered, will automatically decide cases without the benefit of further thought." Judge Wright also expanded on one of the underpinnings of Judge Bazelon's decision for the court in the *Banzhaf* case. This was the concept that the demonstrated public interest in the health threat presented by cigarette smoking advertising authorized the provision by the FCC of right of reply time to express the anti-cigarette smoking position. But Judge Wright pointed out in *Capital Broadcasting Co.* that this demonstrated public interest, exemplified by the official position of the Surgeon General of the United States that smoking endangers health, should not serve to silence or monopolize debate. For Judge Wright, there is a fundamental contradiction between the *Banzhaf* case and the law banning cigarette advertising on radio and television:

The only interest which might conceivably justify such a total ban is the state's interest in preventing people from being convinced by what they hear—the very sort of paternalistic interest which the First Amendment precludes the state from asserting. Even if this interest were sufficient in the purely commercial context, the *Banzhaf* decision makes clear that cigarette messages are not ordinary product advertising but rather speech on a controversial issue of public importance—*viz*, the desirability of cigarette smoking. The government simply cannot have it both ways. Either this is controversial speech in the public arena or it is not. If it is such speech, then Section 6 of the Public Health Cigarette Smoking Act is unconstitutional; *if it is not, then Banzhaf* was wrongly decided.

8. In *Larus & Brother Co. v. FCC, 447 F.2d 876 (4th Cir. 1971)*, the federal court of appeals upheld an FCC ruling that the fairness doctrine did not require the provision of reply time to announcements carried by broadcasters discourag-

ing cigarette smoking as a health hazard. In the light of reports of the United States Department of Health, Education and Welfare with regard to the adverse consequences of smoking, the FCC was held to be justified in concluding that broadcast licensees had been reasonable in determining that detrimental effects of cigarette smoking or health was beyond controversy so that the fairness doctrine was not applicable.

Doesn't this ruling constitute a repudiation of the *Banzhaf* case? After all, in *Banzhaf* the court had predicated its decision on the premise that cigarette advertisements presented a controversial idea, the merits of cigarette smoking. The court's response in *Larus* to this contention appears to be that new developments have made clearer the danger that cigarette smoking presents to health, and therefore the issue is no longer controversial. The Court, like the FCC, weaseled on the controversiality point. The court said with evident approval:

> However, knowledge of the effect of smoking is not static, and many aspects of this subject may still generate controversy. As to them, the Commission ruled the public is entitled to hear various points of view, including the tobacco industry's.

Since when, from a First Amendment point of view, does the statistical data that a particular position can command have anything to do with whether the idea is or is not still controversial?

9. Judge Wright made the following critique of the *Larus* case in his dissent in *Capital Broadcasting*:

> The recent case of *Larus & Brother Co., Inc. v. F.C.C., 4 Cir., 447 F.2d 876 (decided August 20, 1971)*, is not opposed to this view. In a fairness doctrine context that case held that it was rational for the Commission to conclude that the health hazard posed by cigarette smoking was no longer a controversial issue. In contrast, we are called upon here to determine de novo whether there is actually sufficient controversy surrounding cigarette smoking to bring it within the core protection of the First Amendment. Many believe that cigarette smoking does not justify the health risk involved. But the millions of smokers who continue to use cigarettes despite their knowledge of the health hazard have apparently reached precisely the opposite conclusion. Under the circumstances to suggest, as the majority apparently does, that no controversy exists concerning cigarette smoking is to blink reality. What *Larus & Brother Co.* actually demonstrates is that the Public Health Cigarette Smoking Act of 1969 has so succeeded in suppressing ventilation of the cigarette smoking controversy on radio and television that the controversy has disappeared from the electronic media. Thus while the functioning of the First Amendment as to this controversy has been frustrated on the nation's most pervasive information outlets, the controversy itself has in no sense ended. Rather, it has merely been shifted to other communications media where the fairness doctrine is not applicable and cigarette foes have no right of reply.

10. The public interest standard in the Federal Communications Act was used in *Banzhaf*, in part at least, to foster a rule providing reply time as an antidote to cigarette advertising. The evolution of the public interest standard in this area finally culminated in the abolition of cigarette advertising altogether. Thus, we have moved from fostering debate to counter cigarette advertising to a rule of no debate and suppression of cigarette advertising.

Do these developments suggest that it is wise, or unwise, to lodge a right of reply in broadcasting in the public interest standard rather than the fairness

doctrine? In other words, if the *Banzhaf* case had been based exclusively on the fairness doctrine, perhaps Judge Wright's views, as expressed in dissent in *Capital Broadcasting*, might have been more widely understood. The public interest standard, particularly when it is hinged to an expressed government policy in an area, appears to pose a greater capacity for censorship purposes than does the fairness doctrine. *But cf. Brandywine-Main Line Radio*, text, *supra*, p. 836. Or is that still a different situation? Cf. also *Yale Broadcasting*, text, supra, p. 770.

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## C. FAIRNESS, ACCESS AND BROADCAST ADVERTISING

An illustration that the *Banzhaf* case has a dynamic which cannot be quarantined merely to the area of cigarette advertising is the *WREO* case. There the United States Court of Appeals for the District of Columbia held that a radio station could not carry the ads of one side of a labor dispute while refusing to sell ads to the union to enable it to explain its side of the controversy. *Retail Store Employees Union, Local 880, Retail Clerks International Ass'n, AFL–CIO v. Federal Communications Commission, 436 F.2d 248 (D.C.Cir. 1970)*. In *WREO*, Judge Bazelon, for the Court, made the test of whether reply time should be afforded to advertising dependent on whether the advertising carries no "implicit" message. Doesn't this position open up all advertising to requests for reply time? The *WREO* case is perhaps not as precise as it could be on whether the need for reply time for the union is based on the public interest criterion or on the fairness doctrine. What difference would it make?

The Hill department store in Ashtabula, Ohio was an advertiser on radio station WREO in that city. The store's ads on the radio station extolled in customary fashion the value and the variety of the goods offered for sale. All was not roses at Hill's department store, however. Retail Store Employees Local 880 was on strike against Hill's Ashtabula store. The union organized a boycott of Hill's stores in Ashtabula and other Ohio towns. The union sought to publicize its side of the labor dispute with one minute spot announcements. The one minute spots announced the strike against the Ashtabula store and urged the public to respect the picket line. More than 300 such announcements were carried by WREO between February 16 and April 17, 1966. Gradually, however, the union had more and more difficulty in purchasing radio time for its ads.

Judge Bazelon hinted that the reason WREO may have stopped selling ads to the union was because the store put economic pressure on the station. Bazelon, in any event, thought the possibility required further inquiry and that the record did not justify renewing WREO's license in the absence of a hearing.

On the question of the validity of selling time to carry the ads of one side of a labor dispute while refusing to sell time to the other, Judge Bazelon engaged in a ground-breaking analysis. In his view, the public interest was violated when a radio station allowed a store to buy ads urging the public to patronize while refusing the store's striking employees "any remotely comparable opportunity to urge the public to join their side of the strife and boycott the employer."

The key concept in Bazelon's opinion in the *WREO* case was "public interest." Just as the requirement that licensees broadcast in the public interest was used in the *Banzhaf* case to justify giving reply time to the case against cigarette smoking, it was used in *WREO* to offer a basis for reply time in a labor dispute. In addition Judge Bazelon suggested that

the fairness doctrine and the public interest concept could both serve as independent bases for a right to purchase reply time to answer broadcast advertisements in some circumstances.

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## RETAIL STORE EMPLOYEES UNION, LOCAL 880, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL–CIO v. FEDERAL COMMUNICATIONS COMMISSION

436 F.2d 248 (D.C.Cir. 1970).

Before BAZELON, Chief Judge, and ROBINSON and ROBB, Circuit Judges.

BAZELON, Chief Judge. * * *

But the Supreme Court, this court, and the Commission itself have all recognized that the fairness doctrine is not an island whole unto itself. It is merely one aspect of the Commission's implementation of the requirement that broadcast stations serve the public "interest, convenience, and necessity." Accordingly, although as a general matter equal time is not required so long as a reasonable opportunity is afforded for the presentation of opposing viewpoints, the Commission has upon occasion recognized that time, rather than information, is of the essence. Thus, in regard to broadcast spot announcements soliciting campaign contributions, the Commission has recognized that at least with regard to two major party candidates, "fairness would obviously require that these two be treated roughly the same with respect to the announcements." Presumably, the additional *information* presented to the public by repeated announcements would be minimal; the value of repetition would be solely in the additional coverage obtained. Similarly, in Times-Mirror, a station had aired more than 20 broadcasts by commentators favoring one major-party candidate for governor, and 2 broadcasts by commentators favoring his opponent. Summarizing its ruling, the Commission stated that "[t]he continuous, repetitive opportunity afforded for the expression of the commentators' viewpoints on the gubernatorial campaign, in contrast to the minimal opportunity afforded to opposing viewpoints, violated the right of the public to a fair presentation of views." Most recently, in the Commission's landmark ruling on cigarette advertising, the Commission stated:

> We think that the frequency of the presentation of one side of the controversy is a factor appropriately to be considered in our administration of the Fairness Doctrine. * * * For, while the Fairness Doctrine does not contemplate "equal time", if the presentation of one side of the issue is on a regular continual basis, fairness and the right of the public adequately to be informed compels the conclusion that there must be some regularity in the presentation of the other side of the issue.

In the present case, it seems clear to us that the strike and the Union boycott were controversial issues of substantial public importance within Ashtabula, the locality primarily served by WREO. The ultimate issue with regard to the boycott was simple: whether or not the public should patronize Hill's Ashtabula. From April through December, Hill's broadcast over WREO more than a thousand spot announcements and more than a hundred sponsored programs explaining why, in its opinion, the public should patronize its store. During that same period, the Union was denied any opportunity beyond a single roundtable broadcast to explain why, in its opinion, the public should not patronize the store. We need not now decide whether, as the Union would have us hold, these facts make out a *per se* claim of a violation of the fairness doctrine. We do believe, however, that the question deserves fuller analysis than the Commission has seen fit to give it.

Central to the Union's argument on this point is the proposition that, in urging listeners to patronize Hill's Ashtabula Department Store, Hill's advertisements presented one side of a controversial issue of public importance. Hill's copy, of course, made no mention of the strike or boycott, or of the unresolved issues between the Union and the store. But the advertisements did urge the listening public to take one of the two competing sides on the boycott question—they urged the public to patronize the store, i. e., not to boycott it. It seems to us an inadequate answer to this argument merely to point out that Hill's copy made no specific mention of the boycott. In dealing with cigarette advertising, the Commission has recognized that a position represented by an advertisement may be implicit rather than explicit. And although the Commission repeatedly emphasized that its holding in that case—that stations broadcasting cigarette advertisements must regularly provide free time if necessary for the presentation of arguments opposing cigarette smoking—was limited to cigarette advertising, the reasons advanced by the Commission to support that limitation seem to us not to imply that other advertisements may not carry an implicit as well as an explicit message, but rather that the implicit and explicit messages normally carried by advertising do not concern controversial issues of public importance.

The Commission's ruling with regard to cigarette advertising relied heavily upon the judgment of other branches of government that, in light of the possible dangers of smoking "to the health of millions of persons," the question whether or not to smoke cigarettes was one of substantial importance to the public. In its regulation of labor-management relations, Congress has indicated substantial concern with equalizing the bargaining power of employees and their employers. Stripped to its essentials, this dispute is one facet of the economic warfare that is a recognized part of labor-management relations: the Union, in urging a boycott of Hill's Department Stores, was seeking to put economic pressure upon management to accede to its demands; management, on the other hand, was seeking to resist the Union's pressure by continuing profitable operations. Part of the Union's campaign was publicity for its boycott; part of management's arsenal was advertising to persuade the public to patronize its stores.

If viewed in this light, it could well be argued that the traditional purposes of the fairness doctrine are not substantially served by presentation of advertisements intended less to inform than to serve merely as a weapon in a labor-management dispute. But the fairness doctrine, as we have pointed out, is only one aspect of the F.C.C.'s implementation of the statutory requirement that broadcast stations operate to serve the public interest. The public policy of the United States has been declared by Congress as favoring the equalization of economic bargaining power between workers and their employers. It is at the very least a fair question whether a radio station properly serves the public interest by making available to an employer broadcast time for the purpose of urging the public to patronize his store, while denying the employees any remotely comparable opportunity to urge the public to join their side of the strife and boycott the employer. If the Union's claim is to be rejected, we believe this question should be dealt with by the Commission.

In summary, we believe that the Union's evidence of denial of access to radio air time raised questions regarding possible improper influence by Hill's that were not adequately answered by Hill's bare denial and the station's letter of denial and explanation. With regard to the Union's fairness question, we recognize the primary responsibility of the F.

C.C. in assuring that radio broadcasters operate their stations in the public interest. We have not here attempted a full canvass of the issues raised by even a good-faith denial to the Union of access to broadcast time; we have merely sought to indicate some of the questions that must be answered. We do believe, however, that these issues deserve far more comprehensive treatment than was afforded them by the F.C.C. Accordingly, we remand the case to the Commission for further proceedings consistent with this opinion.

So ordered.

ROBB, Circuit Judge (dissenting).

* * *

### NOTES AND QUESTIONS

1. Is the public interest concept here being used to do the work of the fairness doctrine and the access concept? Is this a desirable development? Judge Bazelon's thesis appears to be that where Congress makes clear that there is a public interest in a certain subject, that view cannot be excluded from broadcasting, at least where broadcast time has been sold aiding and abetting an opposing view.

2. WREO's use of the fairness doctrine to win a right of response for a specific point of view by a specific group to counter broadcast advertising did not establish any extensive or far-reaching principle. This was illustrated by *Green v. Federal Communications Commission, 447 F.2d 323 (D.C.Cir. 1971),* in which two peace groups failed to win free time to counter recruiting spots advertising military service. Two peace organizations, a Quaker and a serviceman's group, asked stations in Washington, D. C. and San Francisco respectively to donate time to them to inform the public of alternatives to military service. The peace groups contended that the fairness doctrine demanded an allocation of time to them since both stations had carried recruiting spots advertising military service in the United States Armed forces.

The FCC rejected the request that the stations be ordered to donate time to the petitioners and the United States Court of Appeals for the District of Columbia affirmed that determination.

Like *WREO*, the *Green* case involved an effort to extend the fairness doctrine to broadcast advertising, an area where traditionally it has been considered inapplicable. Unlike *WREO,* the *Green* case involved the question of whether there was any right to counter broadcast advertising when the group seeking to counter the offending broadcast advertisement has no money. Specifically, is there any right to free counter-commercials?

The Court of Appeals, per Judge Wilkey, said that the fairness doctrine was concerned with informing the public about controversial issues of public importance and unconcerned with giving particular advocates or groups any specific rights of reply or presentation. In the Court's opinion the draft issue and the Vietnam war, although individually of "overwhelming importance", were also undeniably issues which "have been ventilated *in extenso* for years on (probably) every television and radio station in the land."

The *Green* case is a vivid example of the current struggle to push out from the fairness doctrine into recognition of an access principle. The federal appeals panel which rendered the *Green* decision was unimpressed by the access principle: "* * * no individual member of the public has the right of access to the air."

3. Notice the difficulty which the Commission and the courts are having in keeping the *Banzhaf* decision from expanding to other areas. In *Banzhaf*, the FCC held that a unique allocation of free time to present one side of a controversial public issue was required in order to counteract commercial advertising of cig-

arettes. Are you persuaded by the effort of the Court of Appeals in *Green* to argue that military recruitment advertisements are so entirely distinguishable that they require no equivalent antidote?

4. Hard on the heels of the *Green* decision, the FCC, in response to a complaint by environmental groups, held that where institutional advertising undertaken by an oil company involves controversial issues, the network carrying the ads had to afford opportunity for presentation of views contrasting with those raised in the commercials. Esso had contended in its ads that Alaskan oil reserves must be quickly developed. In an effort to hush environmentalist concern, the ads contended that oil could be transported by an Alaskan pipeline and without ecological damage. These contentions were held to be controversial issues. Insisting that the fairness doctrine still did not apply to product advertising, the FCC claimed that the institutional advertising in this case was different. Is the difference between the *Green* case and the *Esso* case that the case against an Alaskan pipeline is an underrepresented issue in broadcasting? How will this FCC opinion affect the application of the fairness doctrine to product advertising generally? Is the institutional advertising in the *Esso* case the kind of thing Judge Bazelon was referring to in WREO when he spoke of advertisements which carried "implicit" messages?

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## IN RE WILDERNESS SOCIETY AND FRIENDS OF THE EARTH

30 F.C.C.2d 643 (1971).

* * *

Complainants state that institutional-type advertising may present one side of a controversial issue of public importance and is not immune from the fairness doctrine because it also creates good will for the advertiser.

* * *

The first question to be decided is whether the fairness doctrine applies to the advertisements cited in the complaint. In several recent cases including Letter to Friends of the Earth, 24 FCC2d 743 (1970), and NBC *et al.*, (Chevron Decision) FCC 71–526 (Mimeo No. 63075), dated May 12, 1971, we declined to extend the fairness doctrine to general product advertisements such as those making claims regarding a product's efficacy or social utility. However, in footnote 6 of the Chevron decision we stated:

"This is not to say that a product commercial cannot argue a controversial issue raising fairness responsibilities. For example, if an announcement sponsored by a coal-mining company asserted that strip mining had no harmful ecological results, the sponsor would be engaging directly in debate on a controversial issue, and fairness obligations would ensue. Or, if a community were in dispute over closing a factory emitting noxious fumes and an advertisement for a product made in the factory argued that question, fairness would also come into play."

We have reviewed a transcript of the advertisements submitted by complainants, the contents of which are not challenged by you. We believe that these commercials are similar to the examples cited in footnote 6 and constitute the discussion of one side of a controversial issue of public importance.

* * *

Therefore you are requested to submit within ten days a statement indicating what additional material you have broadcast or intend to broadcast in the near future which will afford opportunity for presentation of views contrasting with those raised in the commercials concerning the need to develop Alaskan oil reserves and the ability of oil companies to develop and transport oil without environmental damage.

## COUNTER-COMMERCIALS FOR AUTOMOBILE ADS: FRIENDS OF THE EARTH v. FCC

Still another effort by a citizen group, relying on the *Banzhaf* case, to win time for counter-commercials in an environmental context occurred when the Friends of the Earth asked the FCC to direct WNBC-TV in New York City to make free time available for anti-pollution groups to reply to automobile advertisements which it had carried. The FCC refused. But the Court of Appeals reversed and told the FCC to reconsider the request of the Friends of the Earth for counter-commercials to point out the air pollution threat by ads for Ford's Mustang and General Motors' Impala.

Of course, the *Banzhaf* case had insisted that a grant of free time to rebut cigarette smoking advertisements was uniquely permissible in that instance only because of the public interest in reducing the threat to life itself posed by cigarette smoking. But ads for cigarette smoking are not the only advertisements extolling a product that may endanger life. Judge McGowan for the United States Court of Appeals for the District of Columbia said that pollution for the asthmatic in Manhattan is what cigarette smoking is to the lung cancer victim. See *Friends of the Earth v. FCC*, 449 F.2d 1164 (D.C.Cir. 1971).

On the basis of *Friends of the Earth* and *Banzhaf*, is the *Green* case out of line? Shouldn't a Quaker argument that ads legitimizing war by urging military service, no less than ads extolling cigarette smoking or big cars which burn large amounts of gasoline, extol a product which is a risk to life? Is the distinction that Congress has made manifest by legislation the public interest in halting smoking and in reducing air pollutants but has indicated no such policy with regard to military service or war?

### *The Fairness Doctrine Under Scrutiny: The 1971 FCC Inquiry*

The increased tempo of access petitions to the FCC, the uncertainty about the applicability of the fairness doctrine to access problems, and the general status and function of the fairness doctrine in the wake of the movement by groups and individuals for a right of access to television underscored for the FCC the need for re-thinking the fairness doctrine. Pointing out that the fairness doctrine had been in effect for more than twenty years, since the issuance of the *Report on Editorializing By Broadcast Licensees* in 1948, the FCC announced that an overview of the fairness doctrine was in order. Therefore, on June 9, 1971, the FCC announced a "broad-ranging inquiry" into the fairness doctrine in light of the new demands for access to broadcasting.

In its Notice of Inquiry, the FCC invited comment on a whole range of fairness and access problems, promising that new rules would be implemented if deemed reasonable. The FCC statement accompanying the notice provided a valuable account of cases like *Retail Store Employees* and the flurry of requests for time to answer armed service recruitment ads (exemplified by the *David Green* case).

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## IN THE MATTER OF THE HANDLING OF PUBLIC ISSUES UNDER THE FAIRNESS DOCTRINE AND THE PUBLIC INTEREST STANDARDS OF THE COMMUNICATIONS ACT

30 F.C.C.2d 26 (1971).

### NOTICE OF INQUIRY

#### I. *Introduction*

The purpose of this Notice is to institute a broad-ranging inquiry into the

efficacy of the fairness doctrine and other Commission public interest policies, in the light of current demands for access to the broadcast media to consider issues of public concern. It is important to stress that we are not hereby disparaging any of the *ad hoc* rulings that we have made in these areas. Rather, we feel the time has come for an overview to determine whether the policies derived largely from these rulings should be retained intact or, in lesser or greater degree, modified. We have divided the inquiry into four parts: (i) the fairness doctrine generally; (ii) access to broadcast media as a result of the presentation of product commercials; (iii) access generally for discussion of public issues; and (iv) application of the fairness doctrine to political broadcasts. Obviously, these parts overlap. Indeed, each is an aspect of the underlying problem of access. Interested parties may address any or all these aspects, or they may structure their comments in accordance with their own definition of the problem. * * *

Concurring Opinion of Commissioner Nicholas Johnson

It is becoming increasingly clear that the Fairness Doctrine, rather than serving as a means of satisfying legitimate demands for access, is increasingly functioning as an "Unfairness Doctrine" by legitimizing broadcaster frustration of those demands. * * * Indeed, there is not a scintilla of hope in this discouraging line of cases that the FCC majority has the slightest intention of ever opening up the public's airwaves to the public under any set of circumstances. It has denied access to United States Senators, 14 Senators, 25 F.C.C.2d 283, 305 (1970), businessmen prepared to pay for commercial spot time that was available, BEM, 25 F. C.C.2d 242 (1970), and citizen groups attempting to reply under the fairness doctrine to "commercials" that *do* argue "controversial issues of public importance" *Chevron F–310*, (which the Commission once said *could* raise fairness obligations, *Friends of the Earth*). It is hard to imagine any more appealing set of cases than these.

Moreover, given the timing of this "Notice of Inquiry," one cannot help but wonder whether the majority is not trying to affect the outcome of currently pending cases. Several of the cases mentioned above are now on appeal before the U. S. Court of Appeals. * * *

One can only hope that the Commission will not represent—and that the Courts will not accept—this hollow gesture of a "Notice of Inquiry" as the basis for altering or postponing the Court's decisions in these cases. (1) There is no reason whatsoever to believe the Commission majority is likely to change a position that has been so forcefully and repeatedly stated in such extreme cases. (2) I am fearful that this "Inquiry" may well have the serious national consequences—whether intended or not—of leaving the law in its current state of uncertainty and inequity through the 1972 Presidential election. (3) Those who now have cases on appeal, or who may be coming before the Commission in the near future, are entitled to the prompt rendition of justice on their complaints.

Needless to say, the law couldn't be any worse than it now is; it is unlikely the Inquiry will do much more harm. On the assumption that it will not affect the case-by-case resolution of these conflicts by the Commission and the Courts, therefore, I concur in the issuance of this Notice of Inquiry.

Concurring Statement of Commissioner Wells

With some reservations I concur in today's action. While I recognize that acting on an overall legislative basis is a perfectly legitimate alternative to our past

practice of evolving the fairness doctrine on a case by case basis, I believe that the latter is the best way to proceed in this sensitive area. Our practice of reviewing the licensee's judgment for reasonableness in concrete factual situations has been effective. It is difficult to try to legislate fairness for all situations, and I doubt that we can define with significantly more precision the position that has emerged from our several recent decisions. But because of the majority's desire to review the entire doctrine after this long passage of time, I concur in this inquiry.

Commissioner Johnson's concurring statement requires some comment. Unlike Commissioner Johnson, I do not disparage the recent cases which he finds so objectionable. I believe that they are correct and reflect sound policy. I am particularly concerned by the implication in his statement that today's action is not seriously undertaken, but is some kind of tactical maneuver designed to influence pending appeals of Commission decisions.

* * *

### NOTES AND QUESTIONS

1. *Broadcasting* magazine, an industry trade journal, urged broadcasters to participate actively in the FCC Notice of Inquiry on the Fairness Doctrine. *Broadcasting* urged industry participation in the proceeding in order to help to free broadcasters from the yoke of the fairness doctrine. Could the FCC abandon the doctrine if it wanted to?

2. Does the *Green* case argue against recognition of a general right of access to television by the courts or was *Green* a special case?

3. If you were to respond to the request for comments in the FCC's Notice of Inquiry, what suggestions for new rules to harmonize and implement fairness and access would you make?

## D. ENFORCING THE FAIRNESS DOCTRINE: A CASE HISTORY

On July 1, 1970, 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. *Brandywine Main Line Radio, Inc., 24 FCC 2218 (1970).*

The operator of the station, Brandywine Main Line Radio, Inc., was wholly owned by the Faith Theological Seminary, presided over by right-wing radio preacher, Carl McIntire.

In 1965, McIntire's group applied for transfer of control of WXUR to them from its owners. Community groups fought this application. The FCC approved the transfer only after the McIntire group pledged that they would provide opportunity for the expression of opposing viewpoints on controversial public issues.

At renewal time citizen groups in the community contended that the McIntire staff had not honored their pledge. The renewal hearing determined that Thomas Livezy, moderator of a WXUR call-in program, "Freedom of Speech," was finally removed by the station management because of his encouragement and apparent approval of the remarks of some of the program's anti-Semitic callers.

Persons attacked on WXUR included New Left celebrities Eugene Genovese, Staughton Lynd, Harvard Law Professor Adam Yarmolinsky, the Black Deacons for Defense, and the Flushing Branch of the Women's International League for Peace and Freedom. Under the personal attack rules, WXUR was required to furnish the attack victims notice of the attacks, copies of the transcript, or lacking that, tapes and summaries of an offer of

an opportunity to reply. WXUR, however, had established no procedures for providing notice and response.

Objections to WXUR's performance differed from a situation like *Red Lion* where someone had sought reply time and was denied it. WXUR's critics said the station had failed to make a sufficient effort to provide truly credible and convincing spokesmen to counteract its own conservative and right-wing programming. In other words, WXUR was accused of having fallen afoul of the fairness doctrine's seek out rule: it had not made sufficient effort to seek out opposing points of view.

The result in the *Brandywine Main Line Radio* case was the product of two of the most influential communications law cases of the nineteen sixties, *Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)* and *Office of Communications of United Church of Christ v. FCC, 359 F.2d 994 (D.C.Cir. 1960)*. As a result of *Red Lion*, the fairness doctrine's constitutional status at long last was resolved squarely in its favor. As a result, vigorous enforcement of the fairness doctrine was now possible. As a result of the *United Church of Christ* decision, citizen groups now had standing to seek and obtain a hearing before the FCC where the actual performance of the broadcaster seeking renewal could be developed. See this text p. ——. No competing broadcaster was seeking WXUR's license. If citizen groups had not been conferred sufficient standing to compel a hearing, license renewal would have been *pro forma*. Citizen groups had precipitated the first denial of a broadcaster's application for license renewal on the basis of the fairness doctrine in the whole history of broadcast regulation.

The *Brandywine Main Line Radio* case can be viewed as a vindication of the rights of the broadcast audience and as a much needed admonition to broadcasters that the FCC and the courts are serious about enforcements of the fairness doctrine. The case nevertheless gives broadcast journalists, lawyers, and critics considerable pause. The Philadelphia chapter of the American Civil Liberties Union has expressed concern that the result in the case constituted the suppression of unpopular opinion. Was WXUR silenced because of the non-conformist right wing political and fundamentalist views advocated on it? Others have suggested that the *Brandywine Main Line Radio* case was not a fairness doctrine case but a group defamation case which the FCC preferred not to recognize as such. See Barron, Freedom of the Press for Whom? The Right of Access to Mass Media 194–208 (1973).

As you read the decision of the federal court of appeals, affirming the FCC decision denying a license renewal to WXUR, and the dissent of Judge Bazelon, criticizing that affirmance, reflect on the issues raised above. Is the *Brandywine Main Line Radio* case a victory or a defeat for the fairness doctrine?

Judge Wright specifically concurred on the ground that WXUR "misrepresented" its program plans and thus consciously deceived the Commission. Can it be argued therefore that only one of the three judges filing opinions in the court of appeals decision actually premised his opinion on the fairness doctrine? If this is true, is it accurate to conclude that the *Brandywine Main Line Radio* decision in the court of appeals was neither a fairness doctrine case nor proof that the end result of the fairness doctrine is to suppress rather than to encourage the expression of unpopular opinion controversial viewpoints?

## BRANDYWINE–MAIN LINE RADIO, INC. v. FEDERAL COMMUNICATIONS COMMISSION

473 F.2d 16 (D.C. Cir. 1972).

TAMM, Circuit Judge * * *

*The Fairness Doctrine*

The fairness doctrine was, in the Commission's view, the central aspect of the litigation. The reason for this is axiomatic—prior to issuing Brandywine's initial license a tremendous amount of concern was expressed to the Commission by numerous parties, each fearing that WXUR would fail to comply with the doctrine. Brandywine's response to these fears was clear and apparently forthright —it had promised at the time of the transfer application to fully comply with the doctrine. In point of fact, the decision of the Commission had "reiterated the necessity that a licensee serve the public interest by adherence to the Fairness Doctrine, including the personal attack principle."

The Commission proceeded to review the record, including fifteen days of monitored broadcasts, and concluded "that Brandywine under its new ownership did not make reasonable efforts to comply with the Fairness Doctrine during the license period." The Commission discovered, as a result of studying the submissions based on the monitored periods, that WXUR had failed to comply in a number of instances in which one side of an issue was broadcast

> during these periods without presenting any opposing viewpoints on any but one of these issues, and with an insignificant presentation on that issue, despite the fact that such controversial issue programming was a substantial part of WXUR's total programming.

Additionally, the Commission found that WXUR had failed to affirmatively come forth with the requisite responsive evidence necessary to illustrate Brandywine's efforts to assure compliance with both the fairness doctrine and the personal attack principles, as promised in the initial transfer application. The Commission found that:

> Brandywine failed to establish any regular procedure for previewing, monitoring or reviewing its broadcasts, and thus did not regularly know what views were being presented on controversial issues of public importance. Despite the *prima facie* evidence presented by the other parties on this issue, Brandywine did not respond with any further review of its treatment of such controversial issues, either for the full license period or any smaller reasonable segment of time. Furthermore it made no showing of public announcements inviting the presentation of contrasting views at the times the issues in Appendix A (or others) were discussed, nor of any other adequate action to encourage the presentation of contrasting viewpoints on these issues. Brandywine relies upon certain call-in and interview programs as meeting its fairness obligations. However, our review of the record shows that these programs were inadequate to this purpose because they either were not directed at obtaining opposing views on the issues (*i. e.*, speakers were not secured or presented in connection with these issues), or were so conducted as to discourage the presentation of views not shared by their moderators.

WXUR contended that Rev. McIntire had undertaken substantive efforts to assure compliance with the fairness doctrine. This submission took the form of letters which evidenced unaccepted invitations to appear on the *20th Century Reformation Hour*. The Commission rejected this would-be indicia of compliance since "these were not invitations by the licensee and, more important, they do not constitute adequate invitations to

present contrasting views on the issues set forth in Appendix A." Similarly, the Commission rejected the suggestion that the licensee's fairness obligations could be met by the existence of a daily one-hour call-in program, entitled *Freedom of Speech*, on which a listener could comment briefly on any topic he wished. "On the contrary," the Commission stated, "its operation demonstrates a failure to provide a fair forum by a licensee specifically on notice of its responsibilities in the fairness area." * * *

The Commission closed its 23-page opinion by stating:

> We conclude upon an evaluation of all the relevant and material evidence contained in the hearing record, that renewals of the WXUR and WXUR–FM licenses should not be granted. The record demonstrates that Brandywine failed to provide reasonable opportunities for the presentation of contrasting views on controversial issues of public importance, that it ignored the personal attack principle of the Fairness Doctrine, that the applicant's representations as to the manner in which the station would be operated were not adhered to, that no adequate efforts were made to keep the station attuned to the community's or area's needs and interests, and that no showing has been made that it was, in fact, so attuned. *Any one of these violations would alone be sufficient to require denying the renewals here, and the violations are rendered even more serious by the fact that we carefully drew the Seminary's attention to a licensee's responsibilities before we approved transfer of the stations to its ownership and control.*
>
> * * *

### BRANDYWINE'S PROGRAM REPRESENTATIONS

This aspect of the case, while not the most troublesome, is clearly the most disturbing to the court. * * *

The changes which took place on WXUR within the very first days following the transfer show a common design on the part of the licensee to engage in deceit and trickery in obtaining a broadcast license. Within nine days a totally unexpected group of seven programs, each of a nature different than those on the typical program schedule, were on the air. These programs, * * * characterized as the "Hate Clubs of the Air," replaced programs which were predominantly entertainment oriented. The speed with which these changes took place can lead the court to one conclusion, and one conclusion only—Brandywine intended to place these controversial programs on the air from the first but feared to so inform the Commission lest the transfer application be denied. This approach was foolish. * * *

### FIRST AMENDMENT CONSIDERATIONS

* * *

Journalists and broadcasters have no monopoly over concern with censorship. The courts, and indeed the American public as a whole, have a tremendous stake in a free press and an informed citizenry. Yet, how can the citizenry remain informed if broadcasters are permitted to espouse their own views only without attempting to fully inform the public? This is the issue of good faith which, unfortunately, a small number of broadcasters refuse to exercise.

#### *Brandywine and the First Amendment*

* * * The Commission has made no attempt to influence WXUR's programming or censor its programming in general or specifically. Had the licensee met the obligations required of it we have no reason to believe that Brandywine would have met with any difficulty. The law places requirements on licensees as fiduciaries. Failure to live up to the trust placed in the hands of the fiduciary requires that a more responsible trustee

be found. This is not the public's attempt to silence the trustee—it is the trustee's attempt to silence the public. This is not the public censoring the trustee—it is the trustee censoring the public. Attempting to impose the blame on the Commission for its own shortcomings can only be likened to the spoiled child's tantrum at being refused a request by an otherwise overly-benevolent parent.

As in the *Red Lion* case, we note that other questions in this area could pose more serious first amendment problems. Since such questions are not at issue here there is no need to hypothecate upon them.

### SANCTIONS

In light of the extensive violations found by the Commission in the areas of the fairness doctrine, the personal attack rules, and misrepresentation of program plans, the Commission refused to renew Brandywine's license. * * *

### CONCLUSION

* * *

Brandywine was given every opportunity to succeed in the broadcast endeavor on which it set out. The Commission fulfilled its duty in granting the initial license although it may have proven more popular and expedient to bow to the protestations of Brandywine's detractors. The Commission forewarned Brandywine about its fairness doctrine and its personal attack rules and made every effort to explain them. Despite the Commission's sanguine outlook it was soon evident that Brandywine refused to comply with those requirements, which are designed to serve the public interest and the broadcast audience. Commission good faith was interpreted as an act of weakness.

The first amendment was never intended to protect the few while providing them with a sacrosanct sword and shield with which they could injure the many. Censorship and press inhibition do not sit well with this court when engaged in by either the Commission or by a defiant licensee. The most serious wrong in this case was the denial of an open and free airwave to the people of Philadelphia and its environs.

Consequently, the opinion of the Federal Communications Commission is

Affirmed.

WRIGHT, Circuit Judge, concurring: Judge Tamm's opinion contains a careful articulation of the facts of this case and an excellent exposition of the applicable law. While I am not necessarily in agreement with all his appraisals of the actions of the people concerned with this litigation, including counsel and the hearing examiner, I concur in his decision affirming the Commission on the ground that substantial evidence supports the Commission's finding that appellant misrepresented its program plans and thus consciously deceived the Commission. This finding was a separate ground for denial of renewal by the Commission.

If this case did not involve an unpopular fundamentalist preacher, for me it would be an easy one indeed. The application to transfer the WXUR license was granted on specific representations of appellant as to programming and with a special warning that appellant must comply with its responsibilities under the law as a public licensee. The Commission felt that a special warning was required because opponents of the transfer, representing a substantial segment of the public served by the license, strongly argued that appellant, if granted the license, would not comply with the law. In spite of the warning and the circumstances surrounding the transfer generally, appellant proceeded to treat its public license as though it were its private property unencumbered by public obligations. It not only deceived the Commission as to its programming, but it ignored the Com-

mission's warning with respect to fairness in the operation of the station. In effect it simply defied the Commission. Under the circumstances the Commission's action unquestionably has substantial support in the record. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951).

But because the Commission's ruling has the possible effect of suppressing the ventilation of views with which there might be substantial disagreement, its action in denying renewal of the license requires particularly careful scrutiny. As Judge Tamm's opinion makes clear, in such a case it is not enough simply to find that substantial evidence in the record taken as a whole supports the Commission and there was no abuse of discretion. In these circumstances the court itself should make its own evaluation of the evidence to insure that First Amendment freedoms of the licensee and the public are fully and fairly taken into account in the decision making process. So doing, I cannot say that the Commission erred in denying the renewal application in this case.

BAZELON, Chief Judge, dissenting: In this case I am faced with a *prima facie* violation of the First Amendment. The Federal Communications Commission has subjected Brandywine to the supreme penalty: it may no longer operate as a radio broadcast station. In silencing WXUR, the Commission has dealt a death blow to the licensee's freedoms of speech and press. Furthermore, it has denied the listening public access to the expression of many controversial views. Yet, the Commission would have us approve this action in the name of the fairness doctrine, the constitutional validity of which is premised on the argument that its enforcement will *enhance* public access to a marketplace of ideas without serious infringement of the First Amendment rights of individual broadcasters.

This paradoxical result is sustained only by a faith in the argument that, despite some short-term casualties along the way, long-term enforcement of the fairness doctrine's obligations is the only means to achieve the marketplace ideal. But if we are to go after gnats with a sledgehammer like the fairness doctrine, we ought at least to look at what else is smashed beneath our blow.

Our perception of the need for broadcasting regulation has not, in Judge Tamm's words, "seriously been questioned in over fifty years." A re-examination of the value, purposes and effects of the fairness doctrine raises for me such serious doubts about the constitutionality of its application here that I am compelled to withhold my affirmance.

Instead, I would remand to the FCC for a searching inquiry into the factual issues and alternative policies raised within the constitutional framework outlined below, before we can even begin to answer the question: does silencing WXUR in the name of the fairness doctrine violate the First Amendment?

The entire field of governmental regulation of broadcast communication is so fraught with competing interests and uncertain results, and the shifting balance of First Amendment freedoms offers so few definite guidelines in this area, that there is no easy answer to this question. My Brother Tamm has written a lengthy, detailed opinion which carefully applies Commission regulations to the facts of this case; there was perhaps a time when I could concur fully with his conclusions. But I fear that ancient assumptions and crystallized rules have blinded all of us to the depth of the First Amendment issues involved here. In affirming the Commission, Judge Tamm relied on its application of the fairness doctrine and the Supreme Court's decision in *WOKO*. Judge Wright, on the other hand, relied only on *WOKO*. But I must dissent on both counts. My purpose in writing a separate opinion is to try to come to grips with the conceptual underpinnings which

have led the Commission to such ironic consequences in the case before me.

* * *

Only because *private* rights of access to the air had to be limited, was it feared that the *public's* right of access to a robust marketplace of ideas would be endangered. Congress authorized the newly-created Commission to insure that broadcasters operate "in the public interest"—a duty which had never been imposed on the printed media. But Congress did "not license the Commission to scan the airwaves for offensive material with no more discriminating a lens than the 'public interest'." Each new form of regulation which departed from the strict "hands-off" policy ordered by the First Amendment required a careful balancing of private vs. public rights in light of the paramount goal of a marketplace of ideas.

* * * Certainly government might claim ownership of the airwaves, just as it has claimed ownership of parks and streets and postal facilities, for the public good. But it cannot, unlike a private owner, place restraints upon the First Amendment rights of those who use this property simply by declaring "I own it." The very fact of public ownership or control brings into play the First Amendment, which requires that governmental authority may not be used in and of itself to justify deprivation of freedoms of speech and press.[22] Were it otherwise, these constitutional protections would fall to the caprice of governments.

There is some usefulness in the "public trust" terminology only if it is understood to be derived from technical scarcity in the broadcast industry. To the extent that government can and must impose restrictions upon licensees in order to deal with the problems posed by scarcity, a broadcast licensee is a trustee. But the scope of the trust duties cannot be extended beyond what is required to preserve the marketplace of ideas from the dangers which scarcity may threaten. Thus the term "public trust" expresses the result of a complicated process of constitutional reasoning by a deceptively simple formula. It is a conclusory label dangerously applied without reference to its history or derivation, and has no constitutional weight of its own.

* * *

Brandywine's First Amendment complaints require that the fairness doctrine be subjected to constitutional scrutiny far more searching than either the Commission or my Brother Tamm provides. The FCC, fresh from its vindication in *Red Lion,* focused only on whether WXUR had in fact violated certain fairness obligations. Judge Tamm also relied on *Red Lion* to set the constitutional balance in favor of a fairness doctrine: if fairness obligations *could* constitutionally be imposed, the imposition *must* be constitutional in this case.

[22] Banzhaf v. F.C.C., supra note 19, 132 U.S.App.D.C. at 42, 405 F.2d at 1100.

It has often been argued that the government *could have* assumed total control of the broadcasting medium, but this theory

> fails to come to grips with the real issues. It could equally well be said that the public "owns" the streets and parks, and that consequently individuals have no right to use them for purposes of expression except on the government's own terms. Moreover, the problem is not solved simply by bringing into the picture the doctrine of unconstitutional conditions—that if the government extends the privilege of using the airways to private individuals or groups it cannot attach conditions that violate the First Amendment. Surely the affirmative power of the First Amendment demands that the government make available for general use, as a constitutional right, the most significant medium in our whole system of freedom of expression. The government cannot maintain a monopoly of the airways any more than it can maintain a monopoly of the streets, or of printing presses. Starting from this point, then, the First Amendment issues begin to grow far more complex than the "public ownership" theory envisages.

Emerson at 660–61.

But the facts cry out otherwise. WXUR was no doubt devoted to a particular religious and political philosophy; but it was also a radio station devoted to speaking out and stirring debate on controversial issues. The station was purchased by Faith Theological Seminary to propagate a viewpoint which was not being heard in the greater Philadelphia area. The record is clear that through its interview and call-in shows it *did* offer a variety of opinions on a broad range of public issues; and that it never refused to lend its broadcast facilities to spokesmen of conflicting viewpoints.

The Commission's strict rendering of fairness requirements, as developed in its decision, has removed WXUR from the air. This has deprived the listening public not only of a viewpoint but also of robust debate on innumerable controversial issues. It is beyond dispute that the public has *lost* access to information and ideas. This is not a loss to be taken lightly, however unpopular or disruptive we might judge these ideas to be.

Furthermore, even if WXUR had not been removed from the air but simply ordered to comply with the FCC's ruling, the effect would have been strangulation. There was testimony that the monitoring procedures which the FCC required for identification of controversial issues are beyond the capacity of a small staff, or a shoestring operation.[29] The ratio of "reply time" required for every issue discussed would have forced WXUR to censor its views—to decrease the number of issues it discussed, or to decrease the intensity of its presentation. The ramifications of this chilling effect will be felt by every broadcaster who simply has a lot to say. Thus the result in this case, and the rules it establishes, seem to move us a step backwards, away from the First Amendment's marketplace ideal, in the name of the fairness doctrine.

When we see what is being lost as the result of a single blow of this doctrinal sledgehammer, I can only assume that the FCC must be relying on the assumption that the public interest will be served in the *long run* through strict enforcement of the doctrine.

What troubles me most is that the FCC and Judge Tamm apparently see no need to question this underlying assumption. The FCC is perhaps too busy applying and enforcing what it sees to be the necessities of the fairness doctrine theory. But I think the time is overripe to take our blinders off and look further toward First Amendment goals than the next regulatory step which the FCC urges us to take in the name of fairness. Ease of administration is of no weight in this field where precious constitutional freedoms hang in the balance.

Nor can we simply hang our hats on *Red Lion* and relax. The Supreme Court deliberately withheld its approval of all other aspects of the fairness doctrine, and even of further applications of the very rules it was in general approving. The constitutional validity of each and every application of the doctrine must be tested on its own, on a case-by-case basis. We must not be guilty of pouring concrete around foundation of a doctrine which enhances the public's right of access in some circumstances but abridges that right in others.

The theory of the fairness doctrine—that the paramount right of the public under the First Amendment can only be achieved by limiting the rights of individuals so that everybody talks about everything from every point of view—has rested for so long on so many assumptions that any alternative is now hard to imagine. But the logic which alone can justify silencing WXUR requires that this theory be re-examined in light of the

[29] If shoestring operations cannot afford to operate under FCC rules, we face very critical First Amendment questions indeed.

narrow constitutional test outlined * * * above.

The fairness doctrine is a venerable FCC policy which originated in an era when our fears about the effects of scarcity on the public's right of access far outweighed what we understood would be the doctrine's *minimal* encroachment on private First Amendment freedoms. In fact, our belief that government could beneficiently regulate a communications medium within the confines of the First Amendment can only be understood in its historical context.

* * *

* * * Broadcast journalists have grown up. They see it as in their interest to be guided by the same professional standards of "fairness" as the printed press. There is no factual basis for continuing to distinguish the printed from the electronic press as the true news media.

* * *

Today, our fears of a broadcasting monopoly seem dated. The number of commercial broadcasting stations on the air as of September, 1972, was 7,458. As of January 1, 1971, daily newspapers totaled only 1,749. Nearly every American city receives a number of different television and radio signals. Radio licensees represent diverse ownership; UHF, local and public broadcasting offer contrast to the three competing networks; neither broadcasting spectrum is completely filled. But out of 1,400 newspaper cities, there are only fifteen left with face-to-face competition.

This is not to say that scarcity is only a problem of the past. In *Red Lion,* the Supreme Court premised its analysis on the reality of the existing limitations of the resource. There are also a variety of new arguments being raised about the lack of access for minority groups which have not yet been dealt with by the Court. But *Red Lion* cannot be read as the final word on scarcity: the cable technology of the future was not even mentioned in the Court's decision.

* * *

Thus, even now we possess the know-how to do away with technical scarcity through CATV.[55] The costs of laying cable may at *some point* be prohibitive, but this is to say no more than that there may be severe economic limitations to obtaining a cable station—economic limitations which affect the printed media equally severely. Is it not a little ironic that we still adhere to our fears of monopoly and limited access? Ought we not instead focus our attention on how we can make the cable medium economically accessible to those who assert a right to use it?

Scarcity raised still another fear in the early days of broadcasting—that of broadcasters, licensed by a Commission of political appointees, who would propagandize political viewpoints and privately censor all opposition. The spur of the fairness doctrine was thus justified as encouraging "fair" discussion of public issues, and the Commission was seen as the even-handed arbiter of "fairness."

Yet we are told today, by highly respected members of the newspaper and broadcasting corps, that governmental regulation of broadcasting has been more pernicious than any group of private censors. Some of the "chilling" effects of the threat of FCC intervention, which the broadcasters say have operated to suppress discussion of controversial views and ambitious journalism, remain hidden

[55] "If more channels are wanted, a second cable can be laid, and a third, and a fourth * * *" Sinith, The Wired Nation 7 (1972). See also Botein, *Access to Cable Television,* 57 Corn.L.Rev. 419, 424 (1972); 22 P. & F. Radio Reg.2d 1759, 1761–65 (1971), (Letter from Dean Burch, Chairman, F.C.C., to Subcomm. on Communication of the Senate Comm. on Commerce, p. 1771, August 5, 1971).

from the public eye. *Red Lion* dismissed this issue as speculative, but this cannot be the final word. Facts can change, and so can our perception of them.

Some chilling effects have become quite obvious. In the past years, networks have come under repeated attacks from government spokesmen who did not like the way television reported a variety of hot public issues.[62] These attacks did not focus on inaccuracies, but on the "bias" or lack of "fairness" in the presentation. The history of the FCC is itself replete with examples, including Brandywine itself, of the controversial viewpoint being screened out in favor of the dreary blandness of a more acceptable opinion. In the context of broadcasting today, our democratic reliance on a truly informed American public is threatened if the overall effect of the fairness doctrine is the very censorship of controversy which it was promulgated to overcome.

A final word on the crucial impact of the broadcasting media. Early in the history of regulation the fear was expressed that broadcasting might be dangerous because of its unique potential for influence and control. And Judge Tamm seems to warn that because we are "shifting our emphasis from the printed media to the electronic media" the need for governmental regulation has grown greater. Often it is difficult to unravel this argument from fear of monopoly control. But we must be careful to meet it head-on, for rightly or wrongly it has become an unexamined prescription for all sorts of government regulation.

There is no doubt about the unique impact of radio and television. But this fact alone does not justify governmental regulation. In fact, quite the contrary. We should recall that the printed press was the *only* medium of mass communication in the early days of the Republic —and yet this did not deter our predecessors from passing the First Amendment to prohibit abridgment of its freedoms. If, as has been suggested, we are to focus on the newly acquired role of broadcasting as the 20th century version of the 18th century town meeting or political pamphlet, we must be all the more careful to preserve a "free press" in the broadcast media. To argue that a more effective press requires a more regulated press flies in the face of what history has taught us about the values and purposes of protecting the individual's freedom of speech.

We once stated that "[i]f the fairness doctrine cannot withstand First Amendment scrutiny, the reason is that to insure a *balanced* presentation of controversial issues may be to insure no presentation, or no vigorous presentation, at all." An examination of the facts of this case and the history of regulation which has brought us here raise for me serious doubts about the correctness of continuing to rely primarily on the fairness doctrine as the proper means of insuring First Amendment goals. The plain truth is that to uphold the Commission's fairness ruling, not only must we bless again the road we have travelled in the past, we must go farther; for this will be the first time that the FCC has denied a license renewal because of fairness doctrine obligations.

62 * * * Professor Emerson clearly expresses the potentially harmful effects of trying to solve the problems of scarcity and access through governmental policies like the fairness doctrine:

> [A]ny effort to solve the broader problems of a monopoly press by forcing newspapers to cover all "newsworthy" events and print all viewpoints, under the watchful eyes of petty public officials, is likely to undermine such independence as the press now shows without achieving any real diversity.

Emerson at 671.

His conclusion that such efforts will or *can* work vis a vis radio and television is based solely on the argument of tradition —that government is involved with radio and TV so it must be all right. *Id.* at 665, 668. With all respect to Professor Emerson, this is a distinction without a difference.

Whether in this case the Commission has simply taken the doctrine too far or applied it too rigidly, or whether the trouble lies deeper, cannot be determined without a remand. Even now the FCC has begun a long inquiry into a question we face here: Do fairness policies truly promote a marketplace of uninhibited, wide and robust debate? It is proper that this court urge the Commission to reconsider this case in light of its fairness hearings; that we encourage the Commission to draw back and consider whether time and technology have so eroded the necessity for governmental imposition of fairness obligations that the doctrine has come to defeat its purposes in a variety of circumstances; that we ask whether an alternative does not suggest itself—whether, as with printed press, more freedom for the individual broadcaster would enhance, rather than retard, the public's right to a marketplace of ideas.

I originally authorized issuance of the opinions of the court with my concurrence resting on the narrow ledge of Brandywine's misrepresentations under the Supreme Court's ruling in F.C.C. v. WOKO, Inc. But it is abundantly clear that the fairness doctrine is the "central aspect" of this case which even touches the core of the applicability of *WOKO*. I have therefore concluded that the great weight of First Amendment considerations cannot rest on so narrow a ledge.

The point to be made is simply that I had originally thought that the alleged misrepresentation could be considered separately from the other issues in the case. But upon closer consideration, it became clear to me that the subject matter of the so-called "deception" is inextricably bound up in the considerations underlying the fairness doctrine. The Commission found one misrepresentation explicitly concerned Brandywine's efforts to comply with the fairness doctrine. The Commission also found that Brandywine "failed to adhere to its program proposals in other respects which are relevant to the fairness questions in this case." Furthermore, in light of my discussion of the changing relationship between the First Amendment and broadcasting, there is some question as to what the FCC may constitutionally ask of applicants with respect to programming plans and adherence to fairness obligations. Thus the application of *WOKO* raises constitutional questions which cannot be neatly separated, as I had originally thought. * * *

I would remand the entire case to be reviewed in light of the matters discussed in this opinion.

WRIGHT, Circuit Judge, with whom Circuit Judge Tamm concurs, *responding*: Since Judge Bazelon's dissent seems to be an attack on the fairness doctrine, in fairness to the reader he should make clear at the outset of his opinion that the court's judgment in this case is not based on the fairness doctrine.

When this court's judgment affirming the Commission in this case came down September 25, 1972, Judge Bazelon joined in that judgment. Now he would dissent from that judgment, apparently because he questions the Commission's reliance on the fairness doctrine in reaching its decision. But the Commission's decision was based on two grounds: (1) alleged violations of the fairness doctrine by the licensee, and (2) deception and misrepresentations made to the Commission by the licensee in obtaining the license. Judge Bazelon states in his dissent that he originally concurred in affirming the Commission because of appellant's deception and misrepresentations in obtaining the license in the first place. Now he dismisses that ground as too "narrow a ledge" to rest affirmance of the Commission's action.

As shown in my separate opinion, I rested my concurrence in the court's judg-

ment *solely* on the deception ground. Since Judge Tamm would affirm the Commission on that ground also, that ground, and that ground alone, forms the basis of our judgment. I do not agree that it is too "narrow a ledge." Elementary contract principles teach that when a licensee obtains his license by fraud and deception, that license may be voided by the grantor like any other contract may be set at naught for the same reason. I do not believe that a contract is less voidable for deception in its inception simply because the Government is the party deceived. Indeed, since the public is the loser when the Government is deceived, courts should be more, not less, alert in enforcing primary contracting concepts, particularly those based on simple honesty.

By resting the court's judgment in this case on the narrow contract ground, we avoid plunging into the constitutional "thicket" that is the fairness doctrine. The fairness doctrine is a tortured constitutional area of the law that, as Judge Bazelon recognizes, is under comprehensive study in rule-making proceedings now being conducted by the Commission. Because of the pendency of this study and because courts should not reach out to decide difficult constitutional issues when a narrow nonconstitutional ground is available for decision, I voted to affirm the Commission's action in this case without reaching the constitutional issues involved in an application of the fairness doctrine. I do not think that deception in obtaining a Government license is too narrow a ledge for voiding that license. The Supreme Court flatly so held in F. C.C. v. WOKO, Inc., 329 U.S. 223 (1946), and there are no cases holding otherwise.

### NOTES AND QUESTIONS

1. Judge Bazelon raises as many questions about fairness doctrine procedure as he does about the theoretical First Amendment justification for the fairness doctrine. He suggests, for example, that FCC requirements that a "regular procedure for previewing, monitoring, or reviewing its broadcasts" may be too costly for low budget radio stations. The FCC requirements, he suggests, may themselves raise "critical First Amendment questions." Judge Bazelon's suggestion apparently is that rules issued by a government agency which hit hardest at essentially non-commercial stations like WXUR whose reason for existence is to "propagate a viewpoint * * * not being heard in the greater Philadelphia area" may itself constitute a governmental restraint on popularly disapproved expression which is prohibited by the First Amendment.

2. Judge Bazelon makes the point that the fairness doctrine in *principle* was what was upheld in *Red Lion;* FCC applications of the fairness doctrine, on the other hand, were not necessarily upheld. This is, of course, an important, and one should have thought, an obvious distinction. Is this a distinction that gets sufficient attention in Judge Tamm's opinion for the Court in *Brandywine?*

From a broader perspective, however, Judge Bazelon's dissent can also be viewed as second thoughts on the wisdom as a First Amendment matter of upholding the fairness doctrine even as a principle.

In Francois, *Media Access: Romance and Reality,* America, p. 186 at 188, September 22, 1973, Prof. William Francois makes the following penetrating remarks:

> The trend in the FCC and among a majority of the U.S. Supreme Court seems to have taken a turn toward making the broadcaster into a journalist (at least in theory), with the journalist's traditional First Amendment right to determine what he will or will not print a broadcast. Instead of *Red Lion* being applied as an access case to

the print medium, as Prof. Barron believed might happen, it now is beginning to look as if the tradition of print journalism is going to be applied to broadcasting (much to the delight of broadcasters).

Isn't Judge Bazelon in *Brandywine* trying to apply the "tradition of print journalism" to broadcasting? It is in this sense, perhaps, where his dissent conflicts with the Supreme Court decision in *Red Lion*.

A paradoxical aspect of this view, however, is that Judge Bazelon in dissent in *Brandywine* suggests in footnote 51 that, while recognition of a limited right of access time to broadcast advertising might be consistent with the First Amendment, the fairness doctrine may raise constitutional questions. Advertising is not strictly speaking broadcaster time while in the case of "news and documentary presentation, for example, the broadcaster's own interests in free speech are very, very strong." In taking this view, Judge Bazelon relied on Judge Wright's opinion in the *CBS* case, *Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C.Cir.1971)*. This decision was overruled in the Supreme Court, *CBS v. Democratic National Committee,* text, p. 852. Yet in *CBS,* the Supreme Court vigorously affirmed the continuing First Amendment validity of the fairness doctrine but saw no difficulty in sustaining complete broadcaster discretion over advertising time.

Judge Bazelon says in footnote 62 that the real reason First Amendment scholars like Professor Emerson support governmental policies like the fairness doctrine is based "solely on the argument of tradition—that government is involved with radio and TV so it must be all right." Judge Bazelon says that "(w)ith all respect to Professor Emerson, this is a distinction without a difference."

Some rejoinder is perhaps in order to this criticism. First, Professor Emerson justifies broadcast regulation more on the limitation of the spectrum rationale. Judge Bazelon, relying on new developments in fields like cable, belittles the significance of this argument. Second, the fact of government involvement could cause involuntary censorship to be viewed as governmental and thus subject to First Amendment obligation. Finally, doesn't the sheer impact of radio and television affect the legal approach used with regard to them as compared with the print media? As NBC newsman Bill Monroe says, as quoted in footnote 44 of Judge Bazelon's dissent: "Radio and television are at bottom, instantaneous, warm-blooded press." One of the implicit or unarticulated bases for broadcast regulation may well be the greater comparative impact and immediacy on the popular mind of the electronic as compared with the print media. In other words, there are other rationalizations for broadcast regulation besides either the limitation of the spectrum rationale or the access for ideas rationale.

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## E. FAIRNESS, GROUP DEFAMATION AND BROADCASTING

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3. Indeed, the impact of radio on a small community has more than a little to do with the fact that WXUR became one of the rare examples in broadcast regulation of a licensee which lost its license at renewal time. Continual racial slurs against Jews and Negroes, and occasionally Catholics, on some WXUR programs were the basic factors in generating the extraordinary unpopularity of WXUR in Media, Pennsylvania. WXUR, on its own notion, finally removed Thomas Livezy, moderator of a WXUR call-in program, "Freedom of Speech," because

of his encouragement on the program of anti-Semitic callers. A complaint was brought before the Media, Pennsylvania borough council in 1965 on the ground that the program promoted "hate and division by attacking minority groups." As a result of this view of WXUR's programming, eight civil liberties and religious groups intervened in the renewal proceeding and a resolution of the Pennsylvania legislature condemned the programming practices of Dr. McIntire.

If the FCC had chosen to do so, the decision in the *Brandywine* case might well have been based on the issue of group defamation. The FCC could have based its decision not to renew WXUR's license on the ground that it was not in the public interest to grant renewal to a broadcaster who lent his facilities to continual attacks on racial and religious minorities. The FCC chose, however, not to confront group defamation problem directly but viewed the group defamation aspect of WXUR's programming as a fairness doctrine problem.

Group defamation, however, is a separate problem in communications policy. If group defamation is prohibited on broadcasting, such a restraint on broadcast content presents a serious challenge to freedom of expression. Since group defamation involves controversial issues, it also presents a serious challenge to the fairness doctrine. It is by no means clear that group libel is responsive to resolution through enforcement of the fairness doctrine.

The renewal hearing in the *WXUR* case is illustrative. Offending programs on WXUR had offered time to spokesmen for the racial and religious groups attacked. But these invitations were declined because the groups involved did not wish to further reply to the libels or to dignify them with a response. The disinclination of minority groups to accept reply time as redress for group libel on broadcasting is hardly without precedent. Thus, when a California radio sought renewal, the Anti-Defamation League of the B'nai B'rith opposed renewal on the ground that the station carried a program by a commentator, Richard Cotten, who had identified Judaism with socialism. The station had offered the ADL equal free time to respond. The ADL told the FCC that it did not want to reply. The FCC permitted the California station, KTYM, to keep its license, and the federal court of appeals affirmed. *Anti-Defamation League of B'Nai B'Rith, Pacific Southwest Regional Office v. FCC, 403 F.2d 169 (D.C.Cir. 1968).*

Judge Burger, now Chief Justice Burger, spoke for the Court in the *ADL* case and he relied heavily on the concurring opinion in the FCC decision of Commissioner Lee Loevinger. Loevinger sharply disagreed with the *ADL* position that group libel should be classified along with hard-core obscenity as unprotected speech. *Cf. Beauharnais v. Illinois, 343 U.S. 250 (1950).* See text, *supra*, p. 201.

Such a classification, Loevinger said, would constitute censorship. In a concurring opinion in the court of appeals, Judge Wright said that cancellation of a station's license for libeling an individual would not be censorship, but that group libel was a different matter. Furthermore, Judge Wright questioned the capacity of the fairness doctrine to meet the problem of group libel:

> However, as this case illustrates, there is a substantial flaw in the theory of the fairness doctrine. Not surprisingly, the Anti-Defamation League refused to dignify or exacerbate the attack by replying. It is likely that other groups would similarly refuse to reply. Under such circumstances, the Commission may decide to require a licensee to seek with reasonable diligence exponents of other views when it presents one side of a controversial is-

sue in which a group or class is attacked.

403 F.2d 166 at 174 (D.C.Cir. 1968).

Wright also suggested that a way for broadcasters to handle group libel could be learned from the FCC's position on rigged quiz shows on television: "a broadcast station is expected to exercise reasonable care * * * to assure that no matter is broadcast which will deceive or mislead the public * * *." 20 Pike & Fischer R.R. 1901, 1904 (1960). Also, Judge Wright pointed out that in the 1964 policy statement on the fairness doctrine the FCC had said that, except for equal time broadcasts under § 315, the broadcaster "is fully responsible for all matter which is broadcast over his station." *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* 29 Fed.Reg. 10415, 10421 (1964).

4. Still another group defamation problem in broadcasting was the so-called *WBAI* case. In December 1968 and January 1969, WBAI–FM, a Pacifica radio station in New York City, carried two programs with anti-Semitic subject matter. The programs were symptomatic of the bitter dispute over "community control" of schools that arose in Brooklyn, New York at that time between the black community and the teachers union, The United Teachers Federation (UTF), much of whose membership was Jewish. The UFT asked the FCC to make an investigation of WBAI–FM because of two programs carried on the black-oriented *Julius Lester* show. On one program, a poem was read, the first line of which stated: "You pale faced Jew boy—I wish you were dead." On the other program, a guest made a number of anti-Semitic remarks, one of which was as follows: "As far as I am concerned more power to Hitler. Hitler didn't make enough lampshades out of them." The FCC declined to make any investigation. The FCC said it was satisfied that WBAI had afforded reasonable opportunity for the presentation of conflicting viewpoints. The FCC did concede, however, that there were occasions when speech was so enmeshed with "burgeoning violence" that FCC intervention would not be appropriate. See *In re Complaint of United Federation of Teachers, New York, N.Y., 17 FCC 2d 204 (1969).*

If group libel is handled as a fairness doctrine problem, the ultimate remedy for group defamation will be to require the broadcaster to make sure that group libel does not go unanswered. Unfortunately, as Judge Wright, who suggested this solution in *ADL,* knows all too well such reply time is understandably regarded as unwelcome by minority groups who regard the reply as merely helping to publicize the attack and to add to the intragroup conflict which the original attack was designed to provoke.

5. On the basis of footnote 29 and elsewhere in 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).*

6. *Brandywine-Main Line Radio* is by no means the only situation where a federal court of appeals or the FCC has shied away from resolving the difficult First Amendment questions in cases which call for enunciation of substantive programming policies in areas such as group defamation. An example of a similar avoidance in the area of obscenity in broadcast programming is *Robinson v. FCC, 334 F.2d 534 (D.C.Cir. 1964)*, text, p. 884.

In *Robinson,* the Court relied on evidence of misrepresentation as a ground for denial of a license renewal application and thereby avoided having to define under what circumstances, if any, programming practices should be considered obscene, indecent, or profane. The issue, therefore, of whether the FCC can define the public interest in such a manner as to make evidence of a pattern of group defamation or obscenity in programming a basis for denial of a license at renewal time is still an open one.

Thus, we have two cases, *Robinson* and *Brandywine,* where the rare and drastic sanction of denial of the license renewal application has occurred. In both cases, the need for resolution of difficult problems of substantive programming policy was essentially disguised by placing the non-renewal decision on a non-controversial ground such as misrepresentation by the licensee. (Incidentally, what was the nature of the misrepresentation in *Brandywine?*)

Do courts by avoiding the enunciation of substantive programming policies in the area of "hate" or obscene broadcasts serve or thwart First Amendment ends? If such broadcasts are the real basis for license denial at renewal time, but the formal reason for decision is ascribed to some more neutral ground such as misrepresentation, the guidance necessary for broadcast journalists to be able to identify the kind of programming which would not offend the public interest would appear to be lacking. A premium is, therefore, given to "safe" rather than innovative or creative programming decisions, even though some borderline decisions on controversial programming matter might well be upheld by the courts.

7. Dr. Carl McIntire, despite his loss in the *Brandywine-Main Line Radio* case, has continued his battle against the "fairness" doctrine on several fronts. First, he has had a private bill (H.R.19976, 93d Cong. 1st sess. 1973) introduced in Congress that would reinstate his licenses to operate the Media, Pennsylvania, radio stations. Second, he has begun a petition drive, seeking support for an investigation of the FCC for "repression of free speech" and for the abandonment of "fairness." But perhaps Dr. McIntire's most innovative counterattack was his attempt to set up a floating radio station, on a ship placed beyond the three-mile limit.

*Broadcasting* magazine reported on his efforts and quoted him as saying "We have the ship, * * * We're working frantically to get the station on the air." But *Broadcasting* also noted that the FCC had pointed out that ships of United States Registry (such as Dr. McIntire's) are banned from using radios if they do not have a license issued under § 301 of the Federal Communications Act. See *Broadcasting*, September 10, 1973, at 29. A federal court has now restrained the operation.

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## F. THE PRIME TIME ACCESS RULE

A direct result of the *Red Lion* decision's emphasis on the need for and the legitimacy of requiring access to broadcasting was the enactment by the FCC of its Prime Time Access Rule, 47 Code of Federal Regulations § 73.658(j) and (k); 23 FCC2d 382 (1970). This rule

is designed to reduce network dominance over prime time television programming. The aim of the rule is to release some prime time from network control in an effort to encourage the local stations to develop creative programming, and to give an opportunity for choice to the local broadcaster. The networks bitterly resisted the FCC effort to curtail the amount of network time a network affiliate could use and sought review of the FCC order in the United States Court of Appeals for the Second Circuit. On May 3, 1971, that court in *Mt. Mansfield v. FCC* affirmed the validity of the prime time access rule and even suggested that the rule might constitutionally be demanded.

The prime time access rule is geared to open up television in the top fifty markets to independent non-network originated programming. The prime time access rule prohibits network affiliates operating in the top fifty markets where there are at least three commercial television stations from taking more than three hours of network programming between 7:00 p. m. and 11:00 p. m. Since the networks offer only 3½ hours of network programming between those hours, the prime time access rule opens up one half hour of additional time per evening for non-network programs on affiliated stations. Feature films and off-network programming cannot be used to fill the void. (Why not?)

The network argument that a rule which cut off the amount of network time a licensee could use was a direct restraint on free speech was rejected by the court. The U. S. Court of Appeals for the Second Circuit took the view that the *Red Lion* case was dispositive: The Supreme Court had ruled that the public's right to access had priority over all other claims.

The *Mt. Mansfield* case approves positive governmental steps to implement the First Amendment. As Judge Hays said for the Court: "* * * far from violating the First Amendment," the prime time access rule "appears to be a reasonable step toward fulfillment of its fundamental precepts * * *."

The *Mt. Mansfield* case reflects a basic shift in First Amendment thinking about communications problems, a shift which the *Red Lion* decision unquestionably generated. The audience rather than the communicator, the public rather than the broadcaster, are the focal points of the Court's First Amendment analysis. Finally, the *Mt. Mansfield* decision is illuminating for its account of the rise of network dominance over prime time programming in commercial television.

The three major networks, CBS, ABC and NBC, all joined in a court test of the rule. The networks contended that limiting the amount of network time a network affiliate could use abridged the right of free speech. The court opinion affirmed the FCC's prime time access rule. *Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971).*

So far the prime time access rule has failed to bring the hoped for diversity to prime time television programming. One of the big factors in the lack lustre performance of the rule is that each network chose to program a different three hour period in the 7 to 11 time frame. Therefore, a lowest common denominator standard fare offering was always available on one of the networks to the disadvantage of whatever experimental fare might be offered in the non-network hour.

A possible solution might be to require network affiliates in a community to program non-network material during the same time slot. Still another problem has been the very unimaginative use by the stations of the mandatory non-network hour. These developments provide a sharp contrast with the ambitious purpose behind the prime time rule which

was to stimulate non-network sources for creative and experimental programming on television. For these and other reasons, the FCC revised in October, 1973 the prime time access rule.

In January, 1974, the FCC modified the "prime time access" rules first formulated in 1970. The main changes included making the access period the half-hour from 7:30–8:00 pm (Eastern Time), removing all restrictions on the half hour from 7:00–7:30 P.M.; eliminating the access period altogether on Sundays; barring all feature films, network programs, and network-produced shows that have gone into syndication from the access period Monday through Saturday; making specific exceptions for network-produced children's specials, public affairs programs, and "run-overs" of network sports events, and allowing for time-zone differences in live sports and news broadcasts; and exempting from the rule network coverage of special news events, and political broadcasts, including those "on behalf of" as well as "by" political candidates. See *Washington Post,* Saturday, January 26, 1974, at B5.

*Broadcasting* magazine, reporting on the FCC report issued with the change in the rules, noted that, in the Commission's opinion, the changes would make it easier for certain kinds of documentary material to find its way onto television screens and would further stimulate the development of local programming, the development of which was cited by the Commission as one of the principal reasons for retaining the rule. *Broadcasting,* January 28, 1974, at 19, 20.

Why was the prime time access rule limited in its application to the top 50 commercial television stations?

The FCC feared that the television stations in the smaller markets would not have the financial resources to originate an hour of prime time programming themselves. But it certainly can be argued that one hour of prime time should be locally originated. Ventilation of local issues is, oddly enough, more difficult to achieve at the local level. Small communities are usually served by a single daily newspaper. The network affiliate in a smaller community will usually opt to carry some network show which of course by its very nature must be aimed at a national audience. Local issues, as a result, are often relegated to early morning or late evening. Insistence on local origination of programming directly responsive to the local community could provide an alternative to neglect of local issues on network prime time.

Suppose you were given the task of rewriting the prime time rule? What would you propose?

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## G. THE *CBS* CASE: THE BROADCAST ACCESS CONTROVERSY

What has *Red Lion's* promise of suitable access to the public for ideas actually brought forth? One immediate result of the *Red Lion* decision was the release of a pent-up demand for individual and group access to television. The volume of access and fairness complaints rushing into the FCC was truly remarkable. A good and thorough account of these developments is found in Green and Lewis, Note, *A Fair Break for Controversial Speakers: Limitations of the Fairness Doctrine and the Need for Individual Access*, 39 Geo.Wash.L.Rev. 532 (1971).

A good test of FCC treatment of the promise of access extended by the *Red Lion* case was afforded in the angry public responses to the sudden American military involvement in Cambodia in the spring of 1970. The FCC experienced great difficulty in resolving the spate of

requests for access to television which the Indochina war issue generated all through the summer of 1970. Symptomatic of the tremendous citizen pressure for access for political and social controversy and controversialists on television was an unusual FCC decision which actually required a specific program to be provided for a specific point of view. See *In re Complaints of the Committee for the Fair Broadcasting of Controversial Issues,* 25 F.C.C.2d 283 (1970). In that case, the FCC ordered on August 14, 1970 that, in view of the fact that Richard Nixon had given five Presidential speeches in favor of American involvement in Vietnam, one prime time speech by an appropriate spokesman "for the contrasting viewpoint to that of the Administration on the Indochina war issue" was required.

Dissatisfaction with complete broadcaster control over entry to broadcasting for political groups and ideas continued unabated. In May 1970, the Democratic National Committee asked the FCC to prohibit broadcasters from refusing to sell time to groups like the Democratic National Committee for the solicitation of funds and for comment on public issues. The networks took the position that they did not sell half-hour segments of time for political and social comment. The FCC was sympathetic to the need of political parties for political spot announcements in which to solicit funds. But the FCC refused to rule that the networks were *required* to sell time to groups for the dissemination of political and social ideas. Such a rule, said the FCC, would be hostile to the broadcaster's role as trustee for the public. As between access and trusteeship, the FCC came down firmly in the *Democratic National Committee* case for licensee trusteeship, a term which the FCC defined to give broadcasters absolute discretion over programming.

Shortly thereafter, the U. S. Court of Appeals for the District of Columbia reversed and remanded the FCC's ruling. *Business Executives' Move v. FCC, 450 F.2d 642 (D.C.Cir.1971).* The Supreme Court in turn reversed the Court of Appeals in the opinions which follow:

## COLUMBIA BROADCASTING SYSTEM, INC. v. DEMOCRATIC NATIONAL COMMITTEE

412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973).

Mr. Chief Justice BURGER delivered the opinion of the Court (Parts I, II, and IV) together with an opinion (Part III) in which Mr. Justice STEWART and Mr. Justice REHNQUIST joined.

* * *

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. In re Democratic National Committee, 25 F. C.C. 216; In re Business Executives Move for Vietnam Peace, 25 F.C.C.2d 242. 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. Business Executives' Move For Vietnam Peace v. FCC, 146 U.S.App.D.C. 181, 450 F.2d 642 (1971).

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 it 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 F.C.C.2d 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 also rejected BEM's claim that WTOP had violated the Fairness Doctrine by failing to air views such as those held by members of BEM; the Commission pointed out that BEM had made only a "general allegation" of unfairness in WTOP's coverage of the Vietnam conflict and that the station had adequately rebutted the charge by affidavit. 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. § 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

[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.

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 regulations determining which and how many 'editorial advertisements' will be put on the air." *Ibid.*

* * *

* * * Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations. Only 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. License renewal proceedings, in which the listening public can be heard, are a principal means of such regulation. * * *

Subsequent developments in broadcast regulation illustrate how this regulatory scheme has evolved. Of particular importance, in light of Congress' flat refusal to impose a "common carrier" right of access for all persons wishing to speak out on public issues, is the Commission's "Fairness Doctrine," which evolved gradually over the years spanning federal regulation of the broadcast media. * * *

Since it is physically impossible to provide time for all viewpoints, however, the right to exercise editorial judgment was granted to the broadcaster. The broadcaster, therefore, is allowed significant journalistic discretion in deciding how best to fulfill its Fairness Doctrine obligations although that discretion is bounded by rules designed to assure that the public interest in fairness is furthered.

* * *

Thus, under the Fairness Doctrine broadcasters are responsible for providing the listening and viewing public with access to a balanced presentation of information on issues of public importance. * * * Consistent with the philosophy, the Commission on several occasions has ruled that no private individual or group has a right to command the use of broadcast facilities. * * * Congress has not yet seen fit to alter that policy, although since 1934 it has amended the Act on several occasions and considered various proposals that would have vested private individuals with a right of access.

With this background in mind, we 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 historic aversion to censorship led Congress to enact § 326 of the Act, which explicitly prohibits the Commission from interfering with the exercise of free speech over the broadcast frequencies. Congress pointedly refrained from divesting broadcasters of their control over the selection of voices; § 3(h) of the Act stands as firm congressional statement that broadcast licensees are not to be treated as common carriers, obliged to accept whatever is tendered by members of the public. Both these provisions clearly manifest the intention of Congress to maintain a substantial measure of journalistic independence for the broadcast licensee.

* * *

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 F.C.C.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 re-examine 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 dis-

cretion 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. * * *

There remains for consideration the question whether the "public interest" standard of the Communications Act requires broadcasters to accept editorial advertisements or, whether, assuming governmental action, broadcasters are required to do so by reason of the First Amendment. In resolving those issues, we are guided by 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 * * *." Whether there are "compelling indications" of error in this case must be answered by a careful evaluation of the Commission's reasoning in light of the policies embodied by Congress in the "public interest" standard of the Act. Many of those policies, as the legislative history makes clear, were drawn from the First Amendment itself; the "public interest" standard necessarily invites reference to First Amendment principles. Thus, the question before us is whether the various interests in free expression of the public, the broadcaster and the individual require broadcasters to sell commercial time to persons wishing to discuss controversial issues. * * *

At the outset we reiterate what was made clear earlier that nothing in the language of the Communications Act or its

legislative history compels a conclusion different from that reached by the Commission. As we have seen, Congress has time and again rejected various legislative attempts that would have mandated a variety of forms of individual access. That is not to say that Congress' rejection of such proposals must be taken to mean that Congress is opposed to private rights of access under all circumstances. Rather, the point is that Congress has chosen to leave such questions with the Commission, to which it has given the flexibility to experiment with new ideas as changing conditions require. In this case, the Commission has decided that on balance the undesirable effects of the right of access urged by respondents would outweigh the asserted benefits. The Court of Appeals failed to give due weight to the Commission's judgment on these matters.

The Commission was justified in concluding that the public interest in providing access to the marketplace of "ideas and experiences" would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth. Even under a first-come-first-served system, proposed by the dissenting Commissioner in these cases, the views of the affluent could well prevail over those of others, since they would have it within their power to purchase time more frequently. Moreover, there is the substantial danger, as the Court of Appeals acknowledged, 450 F.2d, at 664, that the time allotted for editorial advertising could be monopolized by those of one political persuasion.

These problems would not necessarily be solved by applying the Fairness Doctrine, including the *Cullman* doctrine, to editorial advertising. If broadcasters were required to provide time, free when necessary, for the discussion of the various shades of opinion on the issue discussed in the advertisement, the affluent could still determine in large part the issues to be discussed. Thus, the very premise of the Court of Appeals' holding —that a right of access is necessary to allow individuals and groups the opportunity for self-initiated speech—would have little meaning to those who could not afford to purchase time in the first instance.

If the Fairness Doctrine were applied to editorial advertising, there is also the substantial danger that the effective operation of that doctrine would be jeopardized. To minimize financial hardship and to comply fully with its public responsibilities a broadcaster might well be forced to make regular programming time available to those holding a view different from that expressed in an editorial advertisement; indeed, BEM has suggested as much in its brief. The result would be a further erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals who are not. The public interest would no longer be "paramount" but rather subordinate to private whim especially since, under the Court of Appeals' decision, a broadcaster would be largely precluded from rejecting editorial advertisements that dealt with matters trivial or insignificant or already fairly covered by the broadcaster. 450 F.2d, at 657, n. 36, 658. If the Fairness Doctrine and the *Cullman* doctrine were suspended to alleviate these problems, as respondents suggest might be appropriate, the question arises whether we would have abandoned more than we have gained. Under such a regime the congressional objective of balanced coverage of public issues would be seriously threatened.

Nor can we accept the Court of Appeals' view that every potential speaker is "the best judge" of what the listening public ought to hear or indeed the best

judge of the merits of his or her views. All journalistic tradition and experience is to the contrary. For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is not reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression.

It was reasonable for Congress to conclude that the public interest in being informed requires periodic accountability on the part of those who are entrusted with the use of broadcast frequencies, scarce as they are. In the delicate balancing historically followed in the regulation of broadcasting Congress and the Commission could appropriately conclude that the allocation of journalistic priorities should be concentrated in the licensee rather than diffused among many. This policy gives the public some assurance that the broadcaster will be answerable if he fails to meet their legitimate needs. No such accountability attaches to the private individual, whose only qualifications for using the broadcast facility may be abundant funds and a point of view. To agree that debate on public issues should be "robust, and wide-open" does not mean that we should exchange "public trustee" broadcasting, with all its limitations, for a system of self-appointed editorial commentators.

The Court of Appeals discounted those difficulties by stressing that it was merely mandating a "modest reform," requiring only that broadcasters be required to accept some editorial advertising. 450 F. 2d, at 663. The court suggested that broadcasters could place an "outside limit on the total amount of editorial advertising they will sell" and that the Commission and the broadcasters could develop " 'reasonable regulations' designed to prevent domination by a few groups or a few viewpoints." 450 F.2d, at 663, 664. If the Commission decided to apply the Fairness Doctrine to editorial advertisements and as a result broadcasters suffered financial harm, the court thought the "Commission could make necessary adjustments." 450 F.2d, at 664. Thus, without providing any specific answers to the substantial objections raised by the Commission and the broadcasters, other than to express repeatedly its "confidence" in the Commission's ability to overcome any difficulties, the court remanded the cases to the Commission for the development of regulations to implement a constitutional right of access.

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.[21]

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.

[21] DNC has urged in this Court that we at least recognize a right of our national parties to purchase airtime for the purpose of discussing public issues. We see no principled means under the First Amendment of favoring access by organized political parties over other groups and individuals.

Mr. Justice STEWART, concurring.

* * *

Mr. Justice BLACKMUN, with whom Mr. Justice POWELL joins, concurring.

Mr. 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 informed 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. In 1970 Congressman Farbstein introduced a bill,[1] never reported out of the Committee, which provided that any newspaper of general circulation published in a city with a population greater than 25,000 and in which fewer than two separately owned newspapers of general circulation are published "shall provide a reasonable opportunity for a balanced presentation of conflicting views on issues of public importance" and giving the Federal Communications Commission power to enforce the requirement.

[1] H.R. 18927, 91st Cong., 2d Sess. (1970).

Thomas I. Emerson, our leading First Amendment scholar has stated that

"* * * any effort to solve the broader problems of a monopoly press by forcing newspapers to cover all 'newsworthy' events and print all viewpoints, under the watchful eyes of petty public

officials, is likely to undermine such independence as the press now shows without achieving any real diversity." The System of Freedom of Expression (1970), p. 671.

* * *

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, in a carefully written opinion that was built upon predecessor cases put the TV and the radio under a different regime. I did not participate in that decision and, with all respect, would not support it. 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. In 1973—as in other years—there is clamoring to make the TV and radio emit the messages that console certain groups. There are charges that these mass media are too slanted, too partisan, too hostile in their approach to candidates and the issues.

* * *

Government has no business in collating, dispensing, and enforcing, subtly or otherwise, any set of ideas on the press. Beliefs, proposals for change, clamor for controls, protests against any governmental regime are protected by the First Amendment against governmental ban or control.

* * *

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL concurs, dissenting.

* * *

In my view, the principle at stake here is one of fundamental importance, for it concerns the people's right to engage in and to hear vigorous public debate on the broadcast media. And balancing what I perceive to be the competing interests of broadcasters, the listening and viewing public, and individuals seeking to express their views over the electronic media, I can only conclude that the exclusionary policy upheld today can serve only to inhibit, rather than to further, our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S. 254 (1964). I would therefore affirm the determination of the Court of Appeals that the challenged broadcaster policy is violative of the First Amendment.

The command of the First Amendment that "Congress shall make no law * * * abridging the freedom of speech, or of the press" is, on its face, directed at governmental rather than private action. Nevertheless, our prior decisions make clear that "[c]onduct that is formally 'private' may become so entwined with governmental policies or so inpregnated with a governmental character as to become subject to the constitutional limitations placed upon [governmental] action." * * *

At the outset, it should be noted that both radio and television broadcasting utilize a natural resource—the electromagnetic spectrum—that is part of the public domain. And although broadcasters are granted the temporary use of this valuable resource for terminable three-year periods, "ownership" and ultimate control remain vested in the people of the United States. * * *

* * * Such public "ownership" of an essential element in the operations of a private enterprise is, of course, an important and established indicium of "governmental involvement." * * *

A second indicium of "governmental involvement" derives from the direct dependence of broadcasters upon the Federal Government for their "right" to operate broadcast frequencies. There can be no doubt that, for the industry as a

whole, governmental regulation alone makes "radio communication possible by * * * limiting the number of licenses so as not to overcrowd the spectrum." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1969). Moreover, with respect to individual licensees, it is equally clear that "existing broadcasters have often attained their present position," not as a result of free market pressures but, rather, "because of their initial government selection. * * *" *Id.*, at 400. Indeed, the "quasi-monopolistic" advantages enjoyed by broadcast licensees "are the fruit of a preferred position conferred by the Government." *Ibid.* Thus, as Chief Justice (then Judge) Burger has himself recognized, "[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." Office of Communication of the United Church of Christ v. FCC, 123 U.S.App.D.C. 328, 337, 359 F.2d 994, 1003 (1966). And, along these same lines, we have consistently held that "when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself."

A further indicium of "governmental involvement" in the promulgation and enforcement of the challenged broadcaster policy may be seen in the extensive governmental control over the broadcast industry. It is true, of course, that this "Court has never held" that actions of an otherwise private entity necessarily constitute governmental action if that entity "is subject to * * * regulation in any degree whatever." Moose Lodge No. 107 v. Irvis, 407 U.S. at 173. Here, however, we are confronted not with some minimal degree of regulation but rather, with an elaborate statutory scheme governing virtually all aspects of the broadcast industry. Indeed, federal agency review and guidance of broadcaster conduct is automatic, continuing and pervasive. Thus, as the Court of Appeals noted, "[a]lmost no other private business—almost no other regulated private business—is so intimately bound to government. * * *" 450 F.2d, at 652.

Even more important than this general regulatory scheme, however is the *specific* governmental involvement in the broadcaster policy presently under consideration. There is, for example, an obvious nexus between the Commission's Fairness Doctrine and the absolute refusal of broadcast licensees to sell any part of their airtime to groups or individuals wishing to speak out on controversial issues of public importance. Indeed, in defense of this policy, the broadcaster-petitioners argue vigorously that this exclusionary policy is authorized and even compelled by the Fairness Doctrine. And the Court itself recognizes repeatedly that the Fairness Doctrine and other Communications Act policies are inextricably linked to the challenged ban. * *

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 airtime to groups or individuals wishing to speak out on controversial issues of public importance must be subjected to the restraints of the First Amendment.

* * *

As a practical matter, the Court's reliance on the Fairness Doctrine as an "ade-

quate" alternative to editorial advertising seriously overestimates the ability—or willingness—of broadcasters to expose the public to the "widest possible dissemination of information from diverse and antagonistic sources." As Professor Jaffe has noted, "there is considerable possibility that the broadcaster will exercise a large amount of self-censorship and try to avoid as much controversy as he safely can." Indeed, in light of the strong interest of broadcasters in maximizing their audience, and therefore their profits, it seems almost naive to expect the majority of broadcasters to produce the variety and controversiality of material necessary to reflect a full spectrum of viewpoints. Stated simply, angry customers are not good customers and, in the commercial world of mass communications, it is simply "bad business" to espouse—or even to allow others to espouse—the heterodox or the controversial. As a result, even under the Fairness Doctrine, broadcasters generally tend to permit only established—or at least moderated—views to enter the broadcast world's "marketplace of ideas."

Moreover, the Court's reliance on the Fairness Doctrine as the *sole* means of informing the public seriously misconceives and underestimates the public's interest in receiving ideas and information directly from the advocates of those ideas without the interposition of journalistic middlemen. Under the Fairness Doctrine, broadcasters decide what issues are "important," how "fully" to cover them, and what format, time and style of coverage are "appropriate." The retention of such *absolute* control in the hands of a few government licensees is inimical to the First Amendment, for vigorous, free debate can be attained only when members of the public have at least *some* opportunity to take the initiative and editorial control into their own hands.

* * * Thus, if the public is to be honestly and forthrightly apprised of opposing views on controversial issues, it is imperative that citizens be permitted at least *some* opportunity to speak directly for themselves as genuine advocates on issues that concern them.

Moreover, to the extent that broadcasters actually permit citizens to appear on "their" airwaves under the Fairness Doctrine, such appearances are subject to extensive editorial control. Yet it is clear that the effectiveness of an individual's expression of his views is as dependent on the style and format of presentation as it is on the content itself. And the relegation of an individual's views to such tightly controlled formats as the news, documentaries, edited interviews, or panel discussions may tend to minimize, rather than maximize the effectiveness of speech. Under a limited scheme of editorial advertising, however, the crucial editorial controls are in the speaker's own hands.

Nor is this case concerned solely with the adequacy of coverage of those views and issues which generally are recognized as "newsworthy." For also at stake is the right of the public to receive suitable access to new and generally unperceived ideas and opinions. Under the Fairness Doctrine, the broadcaster is required to present only "*representative* community views and voices on controversial issues" of public importance. Thus, by definition, the Fairness Doctrine tends to perpetuate coverage of those "views and voices" that are already established, while failing to provide for exposure of the public to those "views and voices" that are novel, unorthodox or unrepresentative of prevailing opinion.

Finally, it should be noted that the Fairness Doctrine permits, indeed *requires*, broadcasters to determine for themselves which views and issues are sufficiently "important" to warrant discussion. The briefs of the broadcaster-petitioners in this case illustrate the type of "journalistic discretion" licensees now

exercise in this regard. Thus ABC suggests that it would refuse to air those views which *it* considers "scandalous" or "crackpot," while CBS would exclude those issues or opinions that are "insignificant" or "trivial." Similarly, NBC would bar speech that strays "beyond the bounds of normally accepted taste," and WTOP would protect the public from subjects that are "slight, parochial or inappropriate."

* * *

The Fairness Doctrine's requirement of full and fair coverage of controversial issues is, beyond doubt, a commendable and, indeed, essential tool for effective regulation of the broadcast industry. But, standing alone, it simply cannot eliminate the need for a further, complementary airing of controversial views through the limited availability of editorial advertising. Indeed, the availability of at least *some* opportunity for editorial advertising is imperative if we are ever to attain the "free and general discussion of public matters [that] seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." * * *

* * *

This is not to say, of course, that broadcasters have *no* First Amendment interest in exercising journalistic supervision over the use of their facilities. On the contrary, such an interest does indeed exist, and it is an interest that must be weighed heavily in any legitimate effort to balance the competing First Amendment interests involved in this case. In striking such a balance, however, it must be emphasized that this case deals *only* with the allocation of *advertising* time—airtime that broadcasters regularly relinquish to others without the retention of significant editorial control. Thus, we are concerned here not with the speech of broadcasters themselves but, rather, with their "right" to decide which *other* individuals will be given an opportunity to speak in a forum that has already been opened to the public.

Viewed in this context, the *absolute* ban on editorial advertising seems particularly offensive because, although broadcasters refuse to sell any airtime whatever to groups or individuals wishing to speak out on controversial issues of public importance, they make such airtime readily available to those "commercial" advertisers who seek to peddle their goods and services to the public. Thus, as the system now operates, any person wishing to market a particular brand of beer, soap, toothpaste, or deodorant has direct, personal, and instantaneous access to the electronic media. He can present his own message, in his own words, in any format he selects and at a time of his own choosing. Yet a similar individual seeking to discuss war, peace, pollution, or the suffering of the poor is denied this right to speak. Instead, he is compelled to rely on the beneficence of a corporate "trustee" appointed by the Government to argue his case for him.

* * * Here, of course, the differential treatment accorded "commercial" and "controversial" speech clearly violates that principle. Moreover, and not without some irony, the favored treatment given "commercial" speech under the existing scheme clearly reverses traditional First Amendment priorities. For it has generally been understood that "commercial" speech enjoys *less* First Amendment protection than speech directed at the discussion of controversial issues of public importance.

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 in-

terest 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.

* * *

## NOTES AND QUESTIONS

1. The Democrats and BEM attempted and failed in the *CBS* case to launch a constitutional attack on private censorship. The attempt of broadcast networks, and broadcasters generally, to reserve to themselves the right to exclude the sale of time for the dissemination of views about politics and ideas was resisted by the Democrats and BEM on the ground that such exclusion violated the First Amendment. The Supreme Court did not agree that the First Amendment was violated. Why not? Was the difficulty in securing Supreme Court acceptance for a limited right of access to editorial advertising due to the fact that Chief Justice Burger thought of the BEM and DNC requests as an effort to establish a common carrier right of entry to all broadcast programming? The Court uses the magnitude of the access problem as a reason for recognizing no First Amendment rights of access to the broadcast media. For example, the Court was extremely sensitive to the complaint that the rich would buy up all available broadcast time and that the networks would have to sell time to the highest bidder if the requests of BEM and the Democratic National Committee were granted.

2. The use of the fairness doctrine in the *CBS* case makes a fascinating spectacle. The Court relied on the fairness doctrine to save broadcasting from a right of access. In view of the industry's effort to have the fairness doctrine invalidated as contrary to the First Amendment, this development is ironic to say the least.

3. Note the Court's regulatory history of the fairness doctrine. The Court gives great importance to the "seek out" aspect of the fairness doctrine. Under the "seek out" rule the broadcaster must seek out controversial viewpoints. He cannot merely wait for spokesmen for such views to come and ask him for time. On the basis of the cases and materials reflecting fairness doctrine considerations which you have read, has the "seek out" rule figured very significantly in the fortunes of the fairness doctrine? Why does the Court emphasize the "seek out" aspect of the fairness doctrine now?

Do you think it might be true to say that if the fairness doctrine's "seek out" rule had been applied more vigorously the momentum for a right of access to the broadcast media probably would have been less?

4. In *CBS*, Chief Justice Burger describes the fairness doctrine as follows: "The doctrine imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect viewpoints." Does this statement mean that there must be coverage that provides a fair reflection of controversial viewpoints of public importance generally or that the *broadcaster* must affirmatively seek out differing views the broadcaster has *chosen* to cover? What difference does it make?

5. 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 non-governmental 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.,* subjected 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. Four of the reasons given by the Court for refusing to view the broadcaster policy on editorial advertising as constituting state action are as follows:

(1) Private power aggregates such as the broadcast media should not be viewed as quasi-public in order to satisfy the state action requirement.

(2) As private parties, the broadcast media owe no First Amendment duties to other private parties as distinguished from the duties imposed on them by the Federal Communications Act.

(3) If the state action problem can be sufficiently bridged for the broadcast media it could be broadened for the print media as well and this would be unthinkable.

(4) Private power should not be constitutionalized because it is not all that powerful anyway.

6. The Court in *CBS* stated that the FCC neither required nor forbade the broadcaster policy of refusing to sell time for purchase of editorial advertisements; there was no state action in this case. Suppose the FCC had endorsed the position pressed on them by the Democratic National Committee and the BEM? Would the result have been different in the Supreme Court? On this point, the Court made the following observations:

"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 re-examine 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." Id. at 2094.

Does this language mean that the constitutional future of a right of access to the broadcast media is still alive?

7. The Court relied heavily for its view that broadcaster policy against the sale of editorial advertising did not constitute state action on a recent article by the well-known public law scholar Professor Louis Jaffe. But Professor Jaffe, critic of access and of an expanded state action theory that he is, took a more sophisticated and sensitive approach to the question of state action in media than did the Court in *CBS*. Thus, Professor Jaffe conceded that in cities with a single newspaper (and particularly where that paper owned the only television station), there was "a considerable risk of suppression of local news because of a likely tie-in of the newspaper with the local power structure." In such circumstances, said Professor Jaffe, "there may be more need for the finding of state action and the ensuing First Amendment obligations than in the great national concerns * * *." See Jaffe, *The Editorial Responsibility of the Broadcaster*, 85 Harv. L.Rev. 768, 782–787 (1962).

These comments are instructive because they represent a concession that some media may in some circumstances be subjected to First Amendment obligation even though the media in question are private-

ly-owned. Is any such concession to be found in the opinion for the Court in *CBS?*

A state action theory that was particularly objectionable to Professor Jaffe, was that sheer power, or, more specifically, sheer media power must be considered state action for constitutional purposes. How does Professor Jaffe's concession, discussed above, differ from saying that sheer media power should constitute state action?

8. The Court appears to be saying that FCC acquiescence in a network policy which refuses to sell time for editorial advertising does not constitute state action because the whole history of broadcast regulation has been in line with such a policy:

> 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 re-examine 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.

But doesn't the logic in this passage constitute a *non sequitur?* If FCC approval and Congressional intention are so clearly behind the broadcaster conduct at issue in *CBS*, this should serve as much to prove as to disprove an interdependence between government and broadcasters sufficient to provide the requisite state action to make First Amendment duties apply.

9. The Court in *CBS* is apparently of the opinion that the First Amendment itself does not require broadcasters to accept editorial advertisements. But suppose the FCC chose to define the authority given it under the Federal Communications Act to regulate in behalf of the "public interest" as requiring a limited right of access to editorial advertising in broadcasting? First the Court observed that the Congress has chosen "to leave such questions with the Commission, to which it has given the flexibility to experiment as changing conditions require."

On the other hand, the Court was certainly of the view that it was permissible for the FCC to refuse to find that the "public interest" standard required a right of access. Chief Justice Burger offered two reasons for this conclusion:

> (1) (T)he public interest in providing access to the marketplace of 'ideas and experiences' would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth.
>
> (2) (T)he time allotted for editorial advertising could be monopolized by those of one political persuasion.

10. The Court said that neither the "public interest" standard nor the First Amendment required a right of access for editorial advertising time because such a right would mean an end to the editorial function in broadcast journalism. Using language which was very welcome to broadcast journalism, Chief Justice Burger identified the request of the petitioners in *CBS* with an assault on the editorial function and he defended that function as follows:

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors —newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new * * *.

But isn't there a difference between seeking some access to advertising time

and the editorial function as exercised in a broadcaster's news or public affairs programming? In the case of newspapers, advertising space along with letter to the editors have always been distinguished from the editorial page and news columns as the traditionally "open" section of the newspaper. Is there any special reason for the fact that broadcast advertising has developed a different tradition? If broadcast advertising time is looked at as roughly analogous to newspaper advertising space, are the Chief Justice's remarks on editorial advertising really responsive to the problems presented in *CBS?*

11. Did the Supreme Court believe that the "public interest" was served by guarding against the pervasive emergence of the editorial advertisement? If so, why isn't this equally true of commercial advertisements on television?

12. Supreme Court case law had long held that commercial speech merited less protection than public or political speech. Cf. *Valentine v. Chrestensen, 316 U.S. 52 (1942),* text, supra, p. 163. Judge Wright for the Court of Appeals said that the network policy of selling time for all manner of commercial advertisements but selling no time for editorial advertisements was an inversion of First Amendment values. Chief Justice Burger turned this argument around nicely by saying that cases in which political speech was held more important than commercial speech had arisen in areas where, unlike the broadcast cases, there were no fairness doctrine obligations. In this view, there can be no discrimination against public or political speech in broadcasting because of the existence of the fairness doctrine.

13. The harshest opponent of any affirmative view of the First Amendment turns out to be Mr. Justice Douglas who wrote a separate concurrence in *CBS.* Justice Douglas takes a rather surprisingly fundamentalist First Amendment view. He agrees that the constitutional structure as it bears on the press "may be largely aligned on the side of the status quo." This may call for a "redefinition of the responsibilities of the press in First Amendment terms."

But Justice Douglas says that the answer is not "to design systems of supervision and control nor empower Congress to read the mandate in the First Amendment that 'Congress shall make no law * * * abridging the freedom of the press' to mean that Congress may, acting directly or through any of its agencies such as FCC make 'some' laws 'abridging' freedom of the press."

The answer Justice Douglas suggests is that we may need a new First Amendment. Until such a rewriting occurs Mr. Justice Douglas has announced his intention to stick to that old time religion and maintain the private-public action dichotomy.

Justice Douglas struck out at all the phantom demons which allegedly afflict the privately-owned media: public broadcasting, the fairness doctrine, and a right of reply to the print media. All were scored as violating the First Amendment because at the very least they were held to "lead to self-censorship respecting matters of importance to the public that the First Amendment denies the Government the power to impose."

Mr. Justice Black participated in the unanimous decision for the Court in *Red Lion.* Mr. Justice Douglas did not participate in *Red Lion.* Justices Black and Douglas shared an absolute view of First Amendment protection. They believed that the First Amendment prohibited any governmental interference with freedom of the press. Why do you think Mr. Justice Black joined in the Court's decision in *Red Lion?*

14. Mr. Justice Brennan in dissent made a five-pronged argument for the position that the network policy at issue did constitute state action:

(1) (p)ublic "ownership" of the airwaves.

(2) the direct dependence of broadcasters upon the Federal Government for their right to operate broadcast frequencies.

(3) the extensive governmental control over the broadcast industry.

(4) the specific governmental involvement in the broadcaster policy. There is, for example, an obvious nexus between the Commission's fairness doctrine and the absolute refusal of broadcast licensees to sell any part of their airtime to groups or individuals wishing to speak out on controversial issues of public importance. Indeed in defense of this policy, the broadcaster-petitioners argue vigorously that this exclusionary policy is authorized and even compelled by the Fairness Doctrine.

(5) Finally, and perhaps most important, in a case virtually identical to the one now before us, we held that a policy promulgated by a privately owned bus company, franchised by the Federal Government and regulated by the Public Utilities Commission of the District of Columbia, must be subjected to the constraints of the First Amendment. Public Utilities Commission v. Pollak, 343 U.S. 451 (1952).

Doesn't the analysis in item 4 above of the fairness doctrine rebut Chief Justice Burger's no-state action conclusion? Mr. Justice Brennan points out that if the reason we can't have and don't need access is because we have the fairness doctrine, it should not be forgotten that the fairness doctrine manifests "specific governmental involvement" in broadcaster policy. Such involvement, in his view, constitutes state action. Thus, Mr. Justice Brennan is pointing out that although the fairness doctrine may look like a convenient weapon to club access to death, like all weapons it has its perils: It also serves to contradict the Court's conclusion that the broadcaster policy at issue here is private rather than state or governmental action.

In his dissent Mr. Justice Brennan takes the view that the Court seriously overestimates the efficacy of reliance on the fairness doctrine as an "adequate alternative to editorial advertising." He doubts the "ability—or willingness—of broadcasters to expose the public to the widest possible dissemination of information from diverse and antagonistic sources."

Access to the broadcast media was stimulated by the inadequacies of the fairness doctrine. In *CBS*, the fairness doctrine was used to obstruct acceptance of the access concept. But isn't it possible that the ultimate result of *CBS* may be a much more resilient and full-bodied fairness doctrine? If the Court is serious about the seek out quality of the fairness doctrine, post-*CBS* fairness doctrine enforcement could be given just that affirmative thrust which Mr. Justice Brennan says that it has lacked in the past.

15. Does the Supreme Court's decision in *CBS v. Democratic National Committee* undermine any rights to purchase reply time to answer broadcast advertisements on the basis of the public interest considerations detailed in *Banzhaf* and *WREO*? If there is no general right of access to buy broadcast time for political or ideological messages, ads, or programs, there may still be a right to buy spot announcements where advertisements have first been carried at the wish of the broadcaster so long as these advertisements contain an implicit message involving an area where Congress has made manifest that there is a public interest in the subject matter of the message.

In other words, do *Banzhaf* and *WREO* still stand after *CBS*? Presumably, they do survive. First the Court in *CBS* said nothing concerning these cases directly to weaken their authority. Secondly, *Banzhaf* and *WREO* were cases where reply time was sought to answer ads that broadcasters freely carried. The *CBS* decision involved a claim for access to buy time for ideas and messages that might not have been directly responsive to anything previously carried on the air before.

16. The student should contrast the *CBS* case with the print access materials in this text, pp. 553–609, *CBS* should be evaluated with particular reference to *Tornillo v. Miami Herald* where the Supreme Court of Florida upheld the Florida right of reply to the press law.

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## SECTION 5. THE PROBLEM OF REGULATING OBSCENITY IN BROADCAST PROGRAMMING

### A. THE BASIS FOR REGULATION

An area of considerable obscurity in broadcast regulation has been the field of obscenity. Obscenity is a difficult problem to resolve in broadcasting because the FCC has to reconcile two basically antagonistic statutes: 47 U.S.C.A. § 326 of the Federal Communications Act which prohibits censorship and 18 U.S.C.A. § 1464 of the criminal code which prohibits the broadcasting of "any obscene, indecent, or profane language."

Section 326 of the Federal Communications Act 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.

47 U.S.C.A. § 326.

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 the *WUHY* case, which follows, the FCC gave some attention to regulation of obscenity in broadcasting. A licensee was fined for "indecency" in broadcasting in *WUHY*. Notice that the licensee was not fined directly under 18 U.S.C.A. § 1464 but under a provision of the Federal 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 exacting forfeitures (fines) provided that a notice of apparent liability is given the offending party. An example of such a notice is found in the opinion reported below.

In summary, the broadcaster can be punished by the FCC for infractions of 18 U.S.C.A. § 1464 since that provision is incorporated, for the purpose of levying fines against offenders, into the Federal Communications Act. See 47 U.S. C.A. § 503(b)(1)(E) and (b)(2).

The broadcaster can also be punished directly for violation of 18 U.S.C.A. § 1464 by the United States Department of Justice. Such suits are tried in the federal courts. They are more serious than complaints brought by the FCC since they carry a risk of imprisonment.

The *WUHY* case appears to indicate a nominalistic approach to obscenity, *i. e.*, certain words are indecent. Do you think the approach the FCC takes in

*WUHY* coheres with the general structure of obscenity law in force at the time *WUHY* was decided as revealed in cases like *Roth v. United States*, 354 U.S. 476 (1957), reported in the text at 337, and *Ginsberg v. State of New York, 390 U.S. 629 (1968)*, reported in the text at 369?

How does the so-called "dirty word" test of *WUHY* comport with the Supreme Court's landmark obscenity decision announced in 1973, *Miller v. California, 413 U.S. 15 (1973)*, reported in the text at p. 375?

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## IN RE WUHY–FM EASTERN EDUCATION RADIO

24 F.C.C.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 the air from his hotel room. In the interview two of the most celebrated Anglo-Saxon four letter words were used with remarkable frequency by Garcia. 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.

NOTICE OF APPARENT LIABILITY

* * *

During the interview, about 50 minutes in length, broadcast on January 4, 1970, Mr. Garcia expressed his views on ecology, music, philosophy, and interpersonal relations. * * * His comments were frequently interspersed with the words "fuck" and "shit", used as adjectives, or simply as an introductory expletive or substitute for the phrase, et cetera. * * *

[*Editorial Note*: Immediately after Garcia's interview, a person known only as "Crazy Max" made some remarks about computers and society "which also used the word 'fuck.' " The licensee told the FCC that Crazy Max would not be allowed access to the microphone again.]

In its letter of February 12, 1970, written in response to the Commission's request for comments on the January 4th broadcast, the licensee further states:

> The licensee has a standing policy, known to all personnel including Mr. Bielecki, that all taped program material which contains controversial subject matter or language must be reviewed by Mr. Nathan Shaw, the station manager of WUHY–FM. Mr. Bielecki, the producer of this program, did not bring the program to Mr. Shaw's attention. Neither Mr. Shaw nor any other person in the station management heard or reviewed the program before it was aired. Mr. Bielecki has been removed as a producer because of this infraction of station policy. "Cycle II" has been suspended as a program pending licensee review of this entire matter. Internal procedures to insure against a similar incident are being strengthened.

*Discussion—policy.* 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. In re Renewal of Pacifica, 36 FCC 147, 149 (1964). It would markedly disserve the public interest, were the airwaves restricted only to inoffensive, bland material. Cf. Red Lion Broadcasting Co., Inc. v. F. C. C., 395 U.S. 367 (1969). Further, the issue

here does not involve presentation of a work of art or on-the-spot coverage of a bona fide news event. 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)). As to the first point, it conveys no thought to begin some speech with "Shit, man * * *", or to use "fucking" as an adjective throughout the speech. We recognize that such speech is frequently used in some settings, but it is not employed in public ones.

* * *

This brings us to the second part of the analysis—the consequence to the public interest. First, if WUHY can broadcast an interview with Mr. Garcia where he begins sentences with "Shit, man * * *", or uses "fucking" before word after word, just because he likes to talk that way, so also can any other person on radio. Newscasters or disc jockeys could use the same expressions, as could persons, whether moderators or participants, on talk shows, on the ground that this is the way they talk and it adds flavor or emphasis to their speech. But the consequences of any such widespread practice would be to undermine the usefulness of radio to millions of others. For these expressions are patently offensive to millions of listeners. *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 (Section 3(*o*) of the Communications Act, 47 U.S.C. § 153(*o*)) 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. No one could ever know, in home or car listening, when he or his children would encounter what he would regard as the most vile expressions serving no purpose but to shock, to pander to sensationalism. Very substantial numbers would either curtail using radio or would restrict their use to but a few channels or frequencies, abandoning the present practice of turning the dial to find some appealing program. In light of the foregoing considerations we note also that it is not a question of what a majority of licensees might do but whether such material is broadcast to a significant extent by any significant number of broadcasters. In short, in our judgment, increased use along the lines of this WUHY broadcast might well correspondingly diminish the use for millions of people.

* * *

*Discussion—Law (Authority).* There are two aspects of this issue. First,

there is the question of the applicability of 18 U.S.C. 1464, which makes it a criminal offense to "utter any obscene, indecent, or profane language by means of radio communication." This standard, we note, is incorporated in the Communications Act. See Sections 312(a)(6) and 503(b)(1)(E), 47 U.S.C. § 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" (Letter, p. 5). 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.

There is no precedent, judicial or administrative, for this case. There have been few opinions construing 18 U.S.C. 1464 [e. g., Duncan v. U. S., 48 F.2d 128 (C.C.A.Or.1931), certiorari denied 283 U.S. 863; Gagliardo v. U. S., 366 F.2d 720 (1966)], and none in the broadcast field here involved. The issue whether the term, "indecent", has a meaning different from "obscene" in Section 1464 was raised in Gagliardo (366 F.2d at pp. 725–726) but not resolved. Support for giving it a different meaning is indicated by U. S. v. Limehouse, 285 U.S. 424 (1932) which held that the word "filthy" which was added to the postal obscenity law by amendment, now 18 U.S.C. § 1461, meant something other than "obscene, lewd, or lascivious", and permitted a prosecution of the sender of a letter which "plainly related to sexual matters" and was "coarse, vulgar, disgusting, indecent; and unquestionably filthy within the popular meaning of that term." However, in line with the principle set out above in *Burstyn*, the matter is one of first impression, and can only be definitively settled by the courts. We hold as we do, since otherwise there is nothing to prevent the development of the trend which we described [above] from becoming a reality.

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. Broadcast licensees must operate in the public interest (Section 315(a)), and the Commission does have authority to act to insure such operation. Red Lion Broadcasting Co., Inc. v. F. C. C., 395 U.S. 367, 380 (1969). This does not mean, of course, that the Commission could properly assess program after program, stating that one was consistent with the public interest and another was not. That would be flagrant censorship. See Section 326 of the Communications Act, 47 U.S.C. § 326; Banzhaf v. F. C. C., 132 U.S.App. D.C. 14, 27; 405 F.2d 1082, 1095 (1968), certiorari denied, 395 U.S. 973 (1969). However, we believe that we can act under the public interest criterion in this narrow area against those who present programming such as is involved in this case. 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. These were the standards employed in Palmetto Broadcasting Co., 33 F.C.C. 483; 34 F.C.C. 101 (1963), affirmed on other grounds, E. G. Robinson, Jr. v. F. C. C., 118 U.S.App.D.C. 144, 344 F. 2d 534 (1964), certiorari denied, 379 U.S. 843, where the Commission denied the application for renewal of a licensee which, inter alia, had presented smut during a substantial period of the broadcasting day.

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). Cf. Red Lion Broadcasting Co, Inc. v. F. C. C., 395 U.S. 367, 376, n. 5. 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 F.C.C.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.

*Discussion—Application of the above principles to this case.* 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. See KWK, Inc., 34 F.C. C.2d 1039, affirmed 119 U.S.App.D.C. 144, 337 F.2d 540 (1964). 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.

We turn now to the question of the appropriate sanction. The licensee points out that this is one isolated occurrence, and that therefore the *Palmetto* decision is inapposite. We agree that there is no question of revocation or denial of license on the basis of the matter before us, even without taking into account the overall record of the station, as described

in the licensee's letter. See also In re Renewal of Pacifica, 36 F.C.C. 147 (1964). Rather, the 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. See, Taft Broadcasting Co., 18 F.C.C.2d 186; Bob Jones University, 18 F.C.C.2d 8; WBRE–TV, Inc., 18 F.C.C.2d 96. 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. We believe that a most crucial peg underlying all Commission action in the programming field is the vital consideration that the courts are there to review and reverse any action which runs afoul of the First Amendment. 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)). Indeed, we would welcome such review, since only in that way can the pertinent standards be definitively determined. Accordingly, in light of that consideration, the new ground which we break with this decision, and the overall record of this noncommercial educational licensee, we propose to assess a forfeiture of only $100.00.

*Conclusion*

We conclude this discussion as we began it. We propose no change from our commitment to promoting robust, wide-open debate. Simply stated, our position —limited to the facts of this case—is that such debate does not require that persons being interviewed or station employees on talk programs have the right to begin their speech with, "Shit, man * * *", or use "fucking", or "mother fucking" as gratuitous adjectives throughout their speech. This fosters no debate, serves no social purpose, and would drastically curtail the usefulness of radio for millions of people. Indeed, significantly, in this case, under the licensee's policy (which was by-passed by its volunteer employees), Mr. Garcia's views would have been presented *without* the gratuitous expressions, but with them, the public would never have heard his views.

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).

* * *

By Direction of the Commission

*Statement of Commissioner Kenneth A. Cox, Concurring in Part and Dissenting in Part*

* * * [The FCC] is exaggerating this problem out of all proportion. It is true that in recent months we have been receiving more complaints about the broadcast of allegedly obscene, indecent, or profane matter, but most of these involve matters outside the ambit of this ruling. That is, they deal with claims that certain records contain cryptic references to the use of drugs, that others are sexually suggestive, that the skits and blackouts on the Rowan and Martin Laugh-In are similarly suggestive, that the costumes on many variety programs are indecent, that the dances are too sensuous, that the performers are too free with each other, etc. But I think I could count on the fingers of both hands the complaints that have come to my notice which involve the gratuitous use of four letter words in situations comparable to the one in this case. This has simply not been a problem.

* * *

*"Indecent" Language (WUHY–FM)*

[In re Notice of Apparent Liability, issued to WUHY–FM, Eastern Education Radio, Philadelphia, Pennsylvania.]

Preliminary Dissenting Opinion of Commissioner Nicholas Johnson

"Oaths are but words, and words but wind."—Samuel Butler, *Hudibras* (1664)

What this Commission condemns today are not words, but a culture—a lifestyle it fears because it does not understand. Most of the people in this country are under 28 years of age; over 56 million students are in our colleges and schools. Many of them will "smile" when they learn that the Federal Communications Commission, an agency of their government, has punished a radio station for broadcasting the words of Jerry Garcia, the leader of what the FCC calls a "rock and roll musical group." To call The Grateful Dead a "rock and roll musical group" is like calling the Los Angeles Philharmonic a "jug band." And that about shows "where this Commission's at."

Today the Commission simply ignores decades of First Amendment law, carefully fashioned by the Supreme Court into the recognized concepts of "vagueness" and "overbreadth," see, e.g., Zwickler v. Koota, 389 U.S. 241, 249–250 (1967), and punishes a broadcaster for speech it describes as "indecent"—without so much as *attempting* a definition of that uncertain term. What the Commission tells the broadcaster he cannot say is anyone's guess—and therein lies the constitutional deficiency.

Today the Commission turns its back on Supreme Court precedent, see, e.g., Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968), citing Holmby Productions, Inc. v. Vaughn, 350 U.S. 870 (1954), as well as recent federal court precedent, see e.g., Williams v. District of Columbia, No. 20,927 (D.C.Cir., June 20, 1969) (en banc), which invalidated statutes with similarly vague descriptions of allegedly "indecent" speech.

Today the Commission decides that certain forms of speech and expression are "patently offensive by contemporary community standards"—although neither the station nor the FCC received *a single complaint* about the broadcast in question, and the FCC conducted not a single survey among the relevant population groups in Philadelphia, nor compiled a single word of testimony on contemporary community standards, nor attempted even to define the relevant "community" in question. * * *

Furthermore, when we do go after broadcasters, I find it pathetic that we always seem to pick upon the small, community service stations like a KPFK, WBAI, KRAB, and now WUHY–FM. See, e.g., Pacifica Foundation (KPFK–FM), 36 F.C.C. 147 (1964); United Federation of Teachers (WBAI–FM), 17 F.C.C.2d 204 (1969); Jack Straw Memorial Foundation (KRAB–FM), FCC 70–93, (released Jan. 21, 1970). It is ironic to me that of the public complaints about broadcasters' "taste" received in my office, there are probably a hundred or more about network television for every one about stations of this kind. Surely if anyone were genuinely concerned about the impact of broadcasting upon the moral values of this nation —and that impact has been considerable —he ought to consider the ABC, CBS and NBC television networks before picking on little educational FM radio stations that can scarcely afford the postage to answer our letters, let alone hire lawyers. We have plenty of complaints around this Commission involving the networks. Why are they being ignored? I shan't engage in speculation.

Today this Commission acts against a station that broadcasts 77 hours a week of locally-originated fine music, public and cultural affairs, and community-ori-

ented programming. Ironically, the Commission censures language broadcast by the station that received one of the Corporation for Public Broadcasting's first program grants for its experimental program in participatory democracy, "Free Speech." In 1969 alone, WUHY–FM received two "major" Armstrong Awards, one of the highest achievements in radio, two awards from Sigma Delta Chi, a professional journalism group, and the Corporation for Public Broadcasting's "Public Criteria" award—the only such award given to a Philadelphia station. I do not believe it a coincidence that this Commission has often moved against the programming of innovative and experimental stations (such as KPFK, WBAI and KRAB). I do not see how licensees (particularly ones that rely on the help of talented volunteers) can develop new and creative programming concepts without approaching the line that separates the orthodox from the unconventional and controversial. I believe today's decision will deter the few innovative stations that do exist from approaching that line. * * *

### NOTES AND QUESTIONS

1. In the *WUHY* case, the FCC ignored the concept of obscenity around which a whole body of constitutional adjudication was clustered. See Ch. IV supra.

Did the FCC choose "indecency" as the actionable term precisely because it had received a detailed and limiting construction by the courts but "indecency" had not? 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.

2. The FCC definition of "indecency" differed materially from the Supreme Court's pre-*Miller v. California* definition of obscenity. The FCC defined "indecency" in *WUHY* as follows:

> * * * 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.

3. The FCC identified certain words in *WUHY* as without social value. In the FCC's judgment, these words furthered no debate and served no social purpose. In *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413 (1966),* the Supreme Court defined obscenity as it had evolved from the starting point in *Roth:*

> Under the Roth definition of obscenity, as elaborated in subsequent cases, 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.

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 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?

4. It should be noted that the Supreme Court's new and revised definition of obscenity retains the inquiry into "(w)hether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest." See *Miller v. California,* text, p. 375.

The FCC's justification for creating its own definition of "indecency" and for refraining from using the definition of obscenity applied to the other media appears in footnote 7 of its opinion in *WUHY*:

> We stress that our analysis is limited to broadcasting because of its unique nature of dissemination into millions of homes. The difference is pointed up by this very document. It is perfectly proper, in the analysis here, to use the pertinent expressions of Mr. Garcia. There is no other way to deal intelligently with the subject. But in any event, it takes a conscious act by someone interested in the subject to obtain this document and study its content.

Are there compelling reasons for a more restricted latitude for expression on broadcasting? Is it demonstrably clear that the shock effect or impact of a single word is immeasurably greater on radio than it might be in a textbook? The real reason for the FCC's position in *WUHY* is that in the case of the radio broadcast it is difficult to make assumptions about, or to establish controls for, the ultimate composition of the broadcast audience. But are there not alternatives to making the most impressionable or susceptible viewer or listener the arbiter for what is tolerable in broadcasting?

5. One alternative to a rigid list of *verboten* words could be a variable obscenity approach to broadcast programming problems. The variable obscenity idea was outlined and developed in Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn.L.Rev. 5 (1960). Under this approach, the same material which would be proscribed if sold to children is perfectly permissible if sold to adults. The key is how the material is treated by the primary audience for whom it is intended. *Ginsberg v. New York, 390 U.S. 629 (1968),* was a high water mark for the variable obscenity idea. There, a prosecution was upheld involving the sale of magazines to children although the sale of the same magazines to adults would have been permissible.

Is the variable obscenity idea transferable to broadcasting? Obviously, one difficulty is that the broadcaster, unlike the cashier in the corner drug store, has no way of selecting those who receive his wares?

But the variable obscenity approach is by definition an elastic and flexible concept. Indeed, in *WUHY*, the broadcaster's defense against the charge of "indecent" programming was, in essence, a variable obscenity defense. The broadcaster said the program was not "indecent" because of three factors: (1) the time of the broadcast, (2) the unlikelihood that children were in the audience, and (3) the necessity of continuing announcements to listeners in advance of disagreeable programming.

6. The public interest standard the FCC used in *WUHY* is "patent offensiveness to contemporary standards." Does this standard consist of a list of shock words that cannot be used on broadcasting? Certainly it is at least that. Or is it more? It should be noted that the FCC's "patent offensiveness" standard leaves out the inquiry into

whether the material in question makes an "appeal to the prurient interest."

Broadcast law would have been much richer if WUHY–FM had declined to pay the fine and appealed the case to the courts. Unfortunately, WUHY chose to pay its $100 fine. Therefore, there was no appeal and the question whether broadcasting, apart from other media, should have an indigenous obscenity standard is still open.

7. In *Miller v. California, 413 U.S. 15,* text, supra, at p. 375, the Supreme Court denied that "there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or 'patently offensive.'" The Court added: "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." As a result of *Miller v. California,* one element in defining obscenity is whether "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law."

At present, as we have seen, obscenity-type problems in broadcasting are resolved by focusing on either a public interest standard or by making the operative statutory term some term other than obscenity such as "indecency." This strategy is presumably employed to avoid making the problems of broadcasting susceptible to the general law of obscenity.

As a result of *Miller v. California,* obscenity law is now a far more relative matter than it was in the reign of *Roth.* What is obscene in Maine may now not necessarily be so in California.

Should (must) broadcast regulation take account of the cultural or geographical relativity the Supreme Court has fed into the definition of obscenity in constitutional law? Should a New York City FM radio station, for example, be given greater latitude in expression than an Iowa AM radio station? If such distinctions are required by *Miller,* is it feasible to have such determinations made by the FCC? It is one thing for state and federal courts in different parts of the country to ascertain what is "patently offensive" for their part of the country. But how can the FCC sitting in Washington make such a determination?

FCC hearing examiners or administrative judges can and do conduct hearings in FCC matters in the parts of the country in which these matters arise. But the administrative judge who is sent from Washington to a particular part of the country for a hearing is a stranger. Unlike a local judge, he is unlikely to be especially attuned to the mores and social values of the region. Moreover, most important FCC cases will still be finally decided by the full Commission sitting in Washington.

8. Is it inherent in the broadcast media that censorship on obscenity grounds must be granted a greater clout because it is impossible to exclude children from the radio or television audience? Is it not still possible to construct a test for obscenity which will be contextually responsive to the nature of broadcasting, tolerant of artistic expression, and sensitive to the impressionability of children?

If WUHY had appealed the FCC decision to a court—a step WUHY declined to take, do you think a court would have affirmed the FCC decision?

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## SONDERLING BROADCASTING CORPORATION, WGLD–FM

27 P. & F. Radio Reg.2d 285 (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. 503(b)(2), pursuant to Section

503(b)(1)(E) of the Act, 47 U.S.C. 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. This section authorizes the imposition of a forfeiture upon broadcast licensees who violate Section 1464 of Title 18 of the United States Code by broadcasting obscene or indecent matter. We note at the outset that if a forfeiture should be imposed after our receipt and study of the licensee's written submission, the licensee would still be entitled to a trial *de novo* if he refused to pay the forfeiture. See Section 504(a) of the Act, 47 U.S.C. 504(a). For this reason, and recognizing that the courts are the final arbiters in this sensitive First Amendment field, we might conclude this notice at this point. However, we believe that the subject also calls upon us to state more fully the basis of our action, lest we inadvertently chill expression on matters of public concern and interest.

We have set forth many of the basic concepts relevant here in the 1970 Notice of Apparent Liability issued to station *WUHY–FM*, 24 FCC 2d 408, dealing with a somewhat different aspect of the same problem—there the gratuitous use of the foulest language during a broadcast interview program. We shall be brief in going over this ground again. 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. We are well aware that sex is a vital human relationship which has concerned humanity over the centuries, and that sex and obscenity are not the same thing. In this area as in others, we recognize the licensee's right to present provocative or unpopular programming which may offend some listeners, *Pacifica Foundation,* 36 FCC 147, 149 (1964). Second, we note that we are not dealing with works of dramatic or literary art as we were in *Pacifica.* 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 provocative material.[2]

Those standards are not simply the public convenience, interest or necessity. As we stated in *WUHY*, *supra*, at p. 413, the Commission cannot properly assess program after program, stating that one was consistent with the public interest and another was not. That would be flagrant censorship.

The standards here are strictly defined by the law: The broadcaster must eschew the "obscene or indecent." (18 U.S.C. 1464).

The Supreme Court in *Roth v. United States*, 354 U.S. 476, defined obscenity. We shall apply here the * * * *Roth*

[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.

test and guidelines such as in *Ginzburg v. U. S.*, 383 U.S. 463.

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. "Each method tends to present its own peculiar problems," *Burstyn v. Wilson*, 343 U.S. 495, 503. 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. We believe that this case involves ". . . an assault upon individual privacy by publication in a manner so blatant or obtrusive as to make it difficult or impossible for an unwilling individual to avoid exposure to it . . ." (dissenting opinion of Mr. Justice Stewart, *Ginzburg v. United States*, 383 U.S. 463, 498, n. 1). 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. 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

[3] In that sense, a broadcast or cable pay-TV operation (or any "locked-key" cable operation) may well stand on a different footing.

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 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 pre-school 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. In this very instance, the station received the following call complaining about the oral sex discussion on February 23, 1973:

> *Female Listener*: Yes, hello, what I wanted to know about your show was how can you people be so frank about things like this out in the open—I was always taught to believe that what the husband and wife do is for their bedroom only and between themselves—Now my daughter happens to be home and she's 13 and she accidently listened to this show, I mean, don't you think about children that are home from school?
>
> *Announcer*: Certainly that's why we don't allow anyone on the air under the age of 18.

There is evidence that this program is not intended solely for adults. On the February 16, 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.

* * *

*Violation of the indecent standard.* From the above discussion and that in *WUHY*, supra, it is clear that there 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. 1464, constituted a different standard from "obscene" in the broadcast field. We shall not repeat that discussion here. It is sufficient to note that to contravene the standard proscribing broadcast of indecent material, it must be shown that the matter broadcast is (a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value. *WUHY*, 24 FCC2d at 412. That is this case in light of the prior discussion. 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.

*Conclusion.* Here, as in *WUHY–FM*, we believe that if there is authority to act, we have a duty to do so—to prevent the erosion of the broadcast system in this country. We think that we do have the authority to proceed. As stated, we 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 $2000 is appropriate for the willful or repeated violations here involved (cover-

ing 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.

It is not our function, consistent with the First Amendment and Section 326 of the Communications Act, to impose upon broadcasters and listeners alike our personal standards of good taste. But neither is it our function to ignore the presentation of programming that in our view violates a criminal statute (18 U.S.C. 1464), especially when Congress has assigned to us a special role in the enforcement of that statute. (See 47 U.S.C. 503 (b)(1)(E).

Nevertheless, action in this area is always difficult. We therefore do not take our action today lightly. We are aware of the desirability of imposing a sanction only in the clear-cut case. We believe that this is that case. That being so, to shirk our responsibility would be to ignore the clear statutory mandate of Congress and to drastically curtail the usefulness of radio for millions of people.

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).

* * *

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Federal Censorship Commission
Re: WGLD–FM, Oak Park, Illinois.

Dissenting Opinion of Commissioner Nicholas Johnson.

* * * In effect, the majority appears to argue that expression which would not be considered obscene if contained in a book becomes obscene on television or radio because of the "obtrusive" nature of the medium. The majority thus presents broadcasters with a "continuum definition" of obscenity; with this approach I cannot agree.

If there exists a definable category of expression called "obscenity," that category does not expand as the medium through which it is communicated changes. * * *

* * *

I believe the F. C. C. has no business regulating non-obscene material. I see great dangers in allowing this Commission to regulate even material which might properly be deemed "obscene." But in this instance the majority even failed properly to apply the *Roth* test to the facts before us, and thus erred in concluding that the instant programming material was obscene. *Roth* demands, *inter alia,* that the expression, *taken as a whole,* be patently offensive by contemporary community standards. In the instant case, the majority focuses only on portions of the challenged program, makes absolutely *no* attempt to delineate the relevant "community" in question, and makes *no* effort whatsoever to determine the nature of the relevant community's standards. As a result, it seems rather bizarre for the majority to conclude that the "Femme Forum," taken as a whole, is patently offensive to an undefined community with unknown standards when it knows nothing of (1) the whole program, (2) the community, or (3) its standards.

And, indeed, such a conclusion becomes even more remarkable given the fact that WGLD–FM's "Femme Forum" has, according to at least one television columnist, become the top rated radio program in the Chicago area. *See* Clarence Petersen's column in the *Chicago Tribune,* March 12, 1973. Though a growing number of citizens are obviously not offended by this sort of program-

ming, the FCC majority has apparently determined that they ought to be.
* * *

I dissent.

### NOTES AND QUESTIONS

1. 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-Ginzburg* obscenity standard to broadcasting while making note that "the special quality of the medium must be taken into account." Note that the "commercial exploitation" theme of *Ginzburg v. United States,* text, supra, p. 359 was invoked.

2. Why did the FCC suddenly make the "obscenity" standard in 18 U.S.C.A. § 1464 operative? Perhaps, the fact, as the FCC put it, that "the announcer actively solicits the titillating response," made the *Ginzburg* addendum to *Roth* appear an appropriate standard to apply.

The difficulty with this approach is one of providing adequate notice to the parties affected. Would it not have been reasonable for the broadcasters and broadcast lawyers reading *WUHY* to conclude that the FCC was going to avoid *Roth* and post-*Roth* elaborations on the definition of obscenity? If so, it would have been reasonable to suppose, that the FCC intended to make the "indecency" standard the exclusively operative standard for 18 U.S.C.A. § 1464 enforcement purposes? Is the notice and fairness problem in *Sonderling* really overcome by saying somewhat perfunctorily that the "indecency" standard of 18 U.S.C.A. § 1464 was also violated?

3. 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? Note that the "dirty words" test of *WUHY* does not seem to have been violated by the broadcasts in question in *Sonderling?*

4. Commissioner Johnson in dissent attacked the FCC policy of enforcing both an obscenity standard and an indecency standard. His position is 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 complains further, that the defense of "indecency" is constitutionally imprecise. What is imprecise about it?

Do you think the censorship problems objected to by Commissioner Johnson would be solved if the FCC were to announce that hereafter it would regulate only "obscene" material but not "indecent" or otherwise non-obscene material?

Commissioner Johnson offers 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?*

5. Commissioner Johnson says 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 § 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 declare a provision of its statute unconstitutional.

6. Doesn't the difficulty here arise in the fact that although Congress has given the FCC an enforcement role in 18 U.S.C.A. § 1464, broadcasting presents unique problems in obscenity law and the federal case law under 18 U.S.C.A. § 1464 is too undeveloped to be of much assistance? Perhaps § 1464 should have been interpreted to proscribe "obscenity" as defined in *Roth* and nothing else. If the variable obscenity standard approved in the subsequent case law development of *Roth* had been extended to broadcasting, would the FCC law on broadcast regulation be clearer and fairer than is now the case?

7. There was a petition for reconsideration in *Sonderling*. See, *Sonderling Broadcasting Corp., WGLD–FM, 27 P. & F. Radio Reg.2d 1508 (1973)*.

The FCC decision in *Sonderling* is now under review by the Federal court of appeals.

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## B. THE RELATIONSHIP BETWEEN OBSCENITY IN BROADCASTING AND THE LICENSE RENEWAL PROCESS

The availability of the ultimate sanction of license renewal as a regulatory device to control obscene, indecent or profane utterance illustrates that obscenity in broadcasting is one of the few areas where FCC regulatory ardor has burned with a fairly high flame. 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 the Charlie Walker disc-jockey show which featured off-color jokes and remarks. The station involved, Palmetto Broadcasting Co., WDKD, was owned by the late Hollywood actor, movie "bad man" Edward G. Robinson, Jr. See *Palmetto Broadcasting Co., 33 FCC 250 (1962)*.

The obscenity issue in the Robinson radio case came up in the context of the renewal process. The FCC denied Robinson's application for renewal of radio station, WDKD, Kingstree, South Carolina. One of the grounds for denial listed by the FCC was that Robinson had made misrepresentations in the license renewal proceeding. (Robinson said he had never heard complaints about the objectionable disc-jockey show but numerous witnesses testified to the contrary.) The Court of Appeals in a per diem opinion affirmed the decision on that ground alone. *Robinson v. FCC, 334 F.2d 534 (D.C.Cir. 1964)*.

Judge Wilbur Miller, in a concurring opinion, believed that some of the Charlie Walker disc jockey shows constituted violations of 18 U.S.C.A. § 1464 "which denounced as criminal the uttering of obscene, indecent or profane language by means of radio communication."

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 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. 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. But, if it can be so denominated, then I think censorship to that extent is not only permissible but required in the public interest. Freedom of speech does not legalize using the public airways to peddle filth.

Robinson petitioned for rehearing and raised the issue once more that censorship by the FCC of program content was unconstitutional. Robinson argued that the Court's failure in the *Robinson* case to specifically rule on the "Commission's powers of program review" will be viewed as an "endorsement of Commission censorship." On consideration of the petition for rehearing *en banc,* the petition was denied by the Court of Appeals in a per curiam order. Judge Skelly Wright, however, filed a concurring opinion. Stating as follows:

I do not read the decision of this court to endorse program content regulation. See 48 Stat. 1091, 62 Stat. 682, 47 U.S.C. § 326. The opinion stated, "We intimate no views on whether the Commission could have denied the applications if Robinson had been truthful." The concurring judge noted: "Perhaps as the majority refrained from discussing the other issues because of a desire to avoid approving any Commission action which might be called program censorship."

If the Commission were likely to undertake such program content review, *en banc* consideration would be justified. But this does not seem likely, for the Commission seems to recognize the First Amendment, statutory, and policy bases for protection of programming from the Government censor. Subsequent to its action in the manner under review, the Commission announced:

"We recognize that * * * provocative programming * * * may offend some listeners. But this does not mean that those offended have the right, through the Commission's licensing power, to rule such programming off the air-waves. * * * In re Applications of Pacifica Foundation, FCC 64–43, No. 45386, pp. 3–5.

I see no need now to decide whether this statement exhausts the constitutional protection of free speech in broadcasting, or whether the Commission, in the quoted case and in the case before us, correctly applied the constitutional guarantees. It is enough now for me that the Commission realizes the vital importance of preserving both free speech and an atmosphere of freedom in these communications media. For this reason, I do not feel that an *en banc* consideration of this case is necessary.

### NOTES AND QUESTIONS

1. Do you think the per curiam opinion for the Court of Appeals can be read as authorizing a denial of license renewal for violation of an FCC programming standard? Is such a position strengthened or weakened by Judge Miller's concurrence? By Judge Wright's concurrence on rehearing?

2. It should be noted that the FCC decision in *Palmetto Broadcasting Co.* did not rely on the statutory language of 18 U.S.C.A. § 1464. The FCC took the position that since the broadcaster must perform in the public interest to secure renewal, renewal could be denied if the FCC found that the licensee had broadcast "coarse" and "vulgar" programs not in the public interest. In *Palmetto,* the FCC scored "coarseness and indecency" and did not predicate its decision on the general law of obscenity.

(The Palmetto decision was appealed under the name of *Robinson v. FCC.*) Judge Miller in his concurrence in *Robin-*

*son* relied on *KFKB Broadcasting Ass'n v. Federal Radio Commission, 47 F.2d 670 (D.C.Cir. 1931)* for the proposition that making obscene, indecent or profane language a demerit or at least a factor in a renewal proceeding was not censorship. Judge Miller quoted *KFKB* as follows:

> There has been no attempt on the part of the Commission to subject any part of appellant's broadcasting matter to scrutiny prior to its release. In considering the question whether the public interest, convenience or necessity will be served by a renewal of appellant's license, the commission has merely exercised its undoubted right to take note of appellant's past conduct, which is not censorship.

3. Another illustration of the use of the renewal process for regulation of obscenity-type problems concerned *In re Applications of Pacifica Foundation for Renewal, 36 F.C.C. 147 (1964).* On the license renewal application of Pacifica Foundation's FM radio station, KPFK, in Los Angeles, the FCC reviewed listener complaints against some of the programming carried by KPFK. The FCC's reaction to the complaints illustrates the agency's response to obscenity-type problems. The complaint against the broadcasting of Edward Albee's *Zoo Story* was rejected on the ground that the public ought to have access to serious and provocative drama.

The station also had drawn criticism for the broadcast of certain selections from the poetry of *avant garde* poets, Robert Creeley and Lawrence Ferlinghetti. Pacifica itself conceded that some passages from these poets did not meet the station's own standards.

Another KPFK decision that stimulated criticism was a program on the problems of homosexuals with eight homosexuals as panelists. The homosexual program was considered to be "within the licensee's judgment under the public interest standard." One Commissioner, Robert E. Lee, disagreed with the majority of Commissioners that the homosexual program met a public interest standard: "A microphone in a bordello, during slack hours, would give us similar information on a related subject."

The FCC in *Pacifica* used the public interest standard as the measuring stick for obscenity-type problems. But such a standard is a very imprecise standard.

In *Pacifica,* the FCC found that there was insufficient basis on which to deny the renewal applications of the *Pacifica* stations. *Pacifica,* in fact, professed to be using a kind of variable obscenity standard adapted for broadcasting. The decision quoted *Pacifica* as follows:

> Pacifica states that it is "sensitive" to its responsibilities to its listening audience and carefully schedules for late night broadcasts those programs which may not be understood by children although thoroughly acceptable to an adult audience.

In *Pacifica,* the FCC appeared to suggest that so long as Pacifica adhered, in the main, to its own programming standards, the FCC would not interfere so long as those standards met its own judgment of what was in the public interest. The difficulty with this approach is that the FCC failed to define the criteria characterizing programming which meets the public interest so that broadcast journalism will know in advance whether an obscenity-type complaint against a particular broadcast will prevail or not.

Pacifica was using what might be called a variable obscenity standard. Was it required to do so? Does the FCC endorse such a standard? The *Pacifica* decision fails to say.

4. Another recent broadcast obscenity case involved a Seattle station, KRAB–FM. A Seattle minister the Rev. Paul Sawyer prepared a 30 hour "autobiographical novel for tape." The broadcaster,

after listening to the tape heard some profanities when it was carried on his radio station, ordered the broadcast terminated. One listener complained about the same portion of the program and the FCC investigated. (Should there be some standards for even invoking an FCC investigation in a case like this? Should one complaint be enough to bring the FCC into the matter?)

As a result of the fracas about the case, the FCC initially determined to grant KRAB a short term one-year renewal, rather than the full three-year license renewal. KRAB–FM was disciplined, the FCC said, because it had breached its own self imposed program content standard that all material be pre-auditioned prior to broadcasting. See *Jack Straw Memorial Foundation, KRAB–FM, FCC 70–93, January 21, 1970.*

Do you see any problems in vigorous enforcement by the FCC of the broadcaster's own programming or censorship policies? Commissioner Nicholas Johnson dissented and issued a separate statement. *In the Matter of the Renewal of Station KRAB–FM*, 21 F.C.C.2d 833 (1970), June 24, 1970. "The Commission can no more enforce a rule adopted by a licensee in violation of the First Amendment than it can enact one," said Johnson.

On petition for reconsideration of the short-term renewal order, the FCC offered KRAB a hearing. KRAB accepted a hearing on the question of whether it should be a short or full term renewal and the hearing examiner decided to renew the KRAB license for the full three-year term. See *In re Application of the Jack Straw Memorial Foundation for Renewal of the License of KRAB–FM, 29 FCC2d 334 (1971).*

5. The whole area of obscenity in broadcasting has been an area, as *WUHY* and *KRAB* illustrate, where general constitutional standards are apparently not applied, this despite the fact that no indigenous standards have been evolved for broadcasting by either the FCC or the courts. The result is considerable ambiguity concerning the issue of obscenity in broadcasting. Commissioner Nicholas Johnson has put the following question to students of mass communication: "To put the problem bluntly, if *I am Curious (Yellow)* is cleared by the Supreme Court for distribution in movie houses around the United States, how should the FCC react to a network proposal to show it on the 'Nine O'Clock Movie' to a potential audience of sixty million?" See Johnson, Book Review, 68 Mich.L.Rev. 1456 at 1464 (1970).

How do the FCC materials in this chapter respond to this question?

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## C. "OBSCENE, INDECENT, OR PROFANE" UTTERANCE IN BROADCASTING: THE ENFORCEMENT ROLE OF THE FEDERAL COURTS

1. As has been the case with the FCC, the meaning of the words "indecent or profane" in 18 U.S.C.A. § 1464 has been a source of legal controversy in the federal courts. In *Tallman v. United States, 465 F.2d 282 (7th Cir. 1972)* a full inquiry into the meaning of these terms was avoided. Since the petitioner, the party being prosecuted, was indicted for having broadcast "obscene" language. The petitioner was actually tried only for using obscene language. The court said that the offending broadcasts "show plain filth by any contemporary standards of obscenity," so that there was no need for the jury to determine whether they were also "indecent" or "profane."

2. The court proposed a different guilty knowledge or scienter standard for the electronic media as opposed to the

print media? The Court said a bookseller could not know the contents of all the books in his store; but the petitioner could be indicted under 18 U.S.C.A. § 1464 if he knew or should have known that the words broadcast were a public wrong. To say that the law will presume that the defendant should know the import of the words uttered is, of course, to dispense with an actual scienter or guilty knowledge requirement.

3. What is an example of an utterance that is "profane" and "indecent" but not obscene?

The *Tallman* case took the position that the terms "profane" and "indecent" are capable of sufficiently precise definition to withstand constitutional attack. *United States v. Smith, 467 F.2d 1126 (7th Cir. 1972)* appears to take a similar view. There are no indications in *Tallman* on how these terms differ from the definition of "obscenity"? Perhaps, it would be a useful legislative revision of 18 U.S.C. § 1464 to drop the proscriptions against "indecent" or "profane" utterance and leave only the reference proscribing "obscene" utterance?

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## D. ANTI-OBSCENITY REGULATIONS AND PUBLIC ACCESS CHANNELS ON CABLE

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The absence of clear regulatory standards with regard to obscenity are a common problem of all the electronic media. The lack of clarity in the regulation of obscenity in cable television is particularly severe. In part, this is due to the fact that the FCC has chosen to combine the requirement that every cable system should maintain at least one public access channel and yet prohibit the presentation of "obscene or indecent" matter.

Under FCC rules the cable system operator is supposed to provide access on a "first come, nondiscriminatory" basis and to prohibit the prohibition of "obscene or indecent" matter. Are these inconsistent obligations? How can the cable operator guard against "obscene or indecent" matter without pre-screening or monitoring programming in advance? If such prescreening takes place, isn't the "nondiscriminatory" access purpose of the public access channel frustrated? The relevant regulations, 47 CFR 76.251(a)(4), provide as follows:

> (4) *Public Access Channel.* Each such system shall maintain at least one specially designated, noncommercial public access channel available on a first-come, nondiscriminatory basis. The system shall maintain and have available for public use at least the minimal equipment and facilities necessary for the production of programming for such a channel.
>
> * * *
>
> (11) Operating rules (i) For the public access channel(s), such system shall establish rules requiring first-come nondiscriminatory access; prohibiting the presentation of: any advertising material designed to promote the sale of commercial products or services (including advertising by or on behalf of candidates for public office); lottery information; and obscene or indecent matter (modeled after the prohibitions in §§ 76.213 and 76.215, respectively; and permitting public inspection of a complete record of the names and addresses of all persons or groups requesting access time. Such a record shall be retained for a period of two years.

The FCC regulation on obscenity in cable casting generally is as follows:

> 47 CFR § 76.215 *Obscenity*
>
> No cable television system when engaged in origination cable casting shall

transmit or permit to be transmitted on the origination cable casting channels material that is obscene or indecent.

A question the issue of obscenity in cablecasting raises is whether the criminal sanction of 18 U.S.C.A. § 1464 is applicable. Do the *Southwestern* and *Midwest Video* cases help answer this question? See text, p. 938 and p. 944.

## SECTION 6. THE ENFORCEMENT POWERS OF THE FCC

There are a number of methods the FCC has at its disposal in enforcing the "fairness" doctrine.

### A. 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. The Commission then 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?

### B. CEASE AND DESIST ORDERS

From a reading of the Federal Communications Act one might expect that § 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 granted on a widespread basis by the Commission. The Commission nevertheless professes to be willing to use them. An example of their use in a "fairness" context is provided by *Richard Sneed, 15 P. & F.Radio Reg. 158 (1967)*. In that case, a minister, objecting to the cancellation of a religious program that had been carried by the station, asked the Commission to issue a cease and desist order to restrain the licensee from dropping the program. The Commission refused to issue the cease and desist order and stated that the anti-censorship provision of the Federal Communications Act (§ 326) forbade it from ordering a licensee to broadcast any particular program. But what is significant about the case is that the Commission did say that it had authority to issue cease and desist orders when its programming standards had been violated.

The cease and desist order device was actually used by the FCC in *Mile High Stations, Inc., 28 FCC 795, 20 P. & F. Radio Reg. 345 (1960)*. In that case, the FCC first issued an order requiring an AM radio station licensee to show cause why its license should not be revoked because it repeatedly had carried off color remarks. The FCC retreated from that course of action and ultimately issued a cease and desist order against any similar broadcasts in the future.

### NOTES AND QUESTIONS

(1) Over the years the FCC has had to struggle with a limited budget and insufficient staff. Do you think these limitations have anything to do with the infrequent use of the cease and desist order by the Commission?

(2) Do you see any tension between § 312(b), the cease and desist order provision of the Act, and § 326, the anti-censorship provision of the Act? (See p. 784, supra.)

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## C. DENIAL OF THE APPLICATION FOR LICENSE RENEWAL

The most severe sanction in the FCC's enforcement arsenal is the Commission's power to deny an application for license renewal. The industry calls this particular sanction "the death sentence." As a sanction it exists more as a spectre than a reality since it is rarely used. A rare example of the use of the sanction is *Robinson v. FCC, 334 F.2d 534 (D.C. Cir. 1964)*. (See text, p. 883). 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 three-year renewal authorized under the Act. See 47 U.S.C.A. § 307(d) (1964).

Why does the Commission exercise such solicitude toward the applicant who has been licensed before?

A recent and very controversial example of the use of the ultimate sanction of denial of the application for license renewal (on misrepresentation) and violation of fairness doctrine grounds) is *Brandywine-Main Line Radio, Inc. v. Federal Communications Commission, 473 F.2d 16 (D.C.Cir. 1972)*.

## SECTION 7. STANDING TO ENFORCE THE FEDERAL COMMUNICATIONS ACT

### Who Is the Addressee of The Public Interest?

The sanctions that have been outlined in the previous section describe the enforcement devices available to the Commission. But the question immediately arises: 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 recently 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 con-

sumer 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.

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## OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST v. FCC

123 U.S.App.D.C. 328, 359 F.2d 994 (1966).

Before BURGER, McGOWAN and TAMM, Circuit Judges.

BURGER, Circuit Judge: This is an appeal from a decision of the Federal Communications Commission granting to the Intervenor a one-year renewal of its license to operate television station WLBT in Jackson, Mississippi. Appellants filed with the Commission a timely petition to intervene to present evidence and arguments opposing the renewal application. The Commission dismissed Appellants' petition and, without a hearing, took the unusual step of granting a restricted and conditional renewal of the license. Instead of granting the usual three-year renewal, it limited the license to one year from June 1, 1965, and imposed what it characterizes here as "strict conditions" on WLBT's operations in that one-year probationary period.

The questions presented are (a) whether Appellants, or any of them, have standing before the Federal Communications Commission as parties in interest under Section 309(d) of the Federal Communications Act to contest the renewal of a broadcast license; and (b) whether the Commission was required by Section 309(e) to conduct an evidentiary hearing on the claims of the Appellants prior to acting on renewal of the license.

Because the question whether representatives of the listening public have standing to intervene in a license renewal proceeding is one of first impression, we have given particularly close attention to the background of these issues and to the Commission's reasons for denying standing to Appellants.

### *Background*

The complaints against Intervenor embrace charges of discrimination on racial and religious grounds and of excessive commercials. As the Commission's order indicates, the first complaints go back to 1955 when it was claimed that WLBT had deliberately cut off a network program about race relations problems on which the General Counsel of the NAACP was appearing and had flashed on the viewers' screens a "Sorry, Cable Trouble" sign. In 1957 another complaint was made to the Commission that WLBT had presented a program urging the maintenance of racial segregation and had refused requests for time to present the opposing viewpoint. Since then numerous other complaints have been made.

When WLBT sought a renewal of its license in 1958, the Commission at first deferred action because of complaints of this character but eventually granted the usual three-year renewal because it found that, while there had been failures to comply with the Fairness Doctrine, the failures were isolated instances of improper behavior and did not warrant denial of WLBT's renewal application.

Shortly after the outbreak of prolonged civil disturbances centering in large part around the University of Mis-

sissippi in September 1962, the Commission again received complaints that various Mississippi radio and television stations, including WLBT, had presented programs concerning racial integration in which only one viewpoint was aired. In 1963 the Commission investigated and requested the stations to submit detailed factual reports on their programs dealing with racial issues. On March 3, 1964, while the Commission was considering WLBT's responses, WLBT filed the license renewal application presently under review.

To block license renewal, Appellants filed a petition in the Commission urging denial of WLBT's application and asking to intervene in their own behalf and as representatives of "all other television viewers in the State of Mississippi." The petition stated that the Office of Communication of the United Church of Christ is an instrumentality of the United Church of Christ, a national denomination with substantial membership within WLBT's prime service area. It listed Appellants Henry and Smith as individual residents of Mississippi, and asserted that both owned television sets and that one lived within the prime service area of WLBT; both are described as leaders in Mississippi civic and civil rights groups. Dr. Henry is president of the Mississippi NAACP; both have been politically active. Each has had a number of controversies with WLBT over allotment of time to present views in opposition to those expressed by WLBT editorials and programs. Appellant United Church of Christ at Tougaloo is a congregation of the United Church of Christ within WLBT's area.

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 per cent of the total population within its prime service area;[4] 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 or claim of injury than members of the general public." The Commission stated in its denial, however, that as a general practice it "does consider the contentions advanced in circumstances such as these, irrespective of any questions of

[4] The specific complaints of discrimination were that Negro individuals and institutions are given very much less television exposure than others are given and that programs are generally disrespectful toward Negroes. The allegations were particularized and accompanied by a detailed presentation of the results of Appellants' monitoring of a typical week's programming.

standing or related matters," and argues that it did so in this proceeding.

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. Indeed the renewal period was explicitly made a test of WLBT's qualifications in this respect.

> We are granting a renewal of license, so that the licensee can demonstrate and carry out its stated willingness to serve fully and fairly the needs and interests of its entire area—so that it can, in short, meet and resolve the questions raised.

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 conditions were stated as follows:

(a) "That the licensee comply strictly with the established requirements of the fairness doctrine."

(b) " * * * [T]hat the licensee observe strictly its representations to the Commission in this [fairness] area * * *."

(c) "That, in the light of the substantial questions raised by the United Church petition, the licensee immediately have discussions with community leaders, including those active in the civil rights movement (such as petitioners), as to whether its programming is fully meeting the needs and interests of its area."

(d) "That the licensee immediately cease discriminatory programming patterns."

(e) That "the licensee will be required to make a detailed report as to its efforts in the above four respects * * *."

Appellants contend that, against the background of complaints since 1955 and the Commission's conclusion that WLBT was in fact guilty of "discriminatory programming," the Commission could not properly renew the license even for one year without a hearing to resolve factual issues raised by their petition and vitally important to the public. The Commission argues, however, that it in effect accepted Petitioners' view of the facts, took all necessary steps to insure that the practices complained of would cease, and for this reason granted a short-term renewal as an exercise by the Commission of what it describes as a "'political' decision, 'in the higher sense of that abused term,' which is peculiarly entrusted to the agency." The Commission seems to have based its "political decision" on a blend of what the Appellants alleged, what its own investigation revealed, its hope that WLBT would improve, and its view that the station was needed.

*Standing of Appellants*

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), 76 U.S.App.D.C. 238, 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). It is interesting to note, however, that the Commission's traditionally narrow view of standing initially led it to deny standing to the very categories it now asserts are the only ones entitled thereto.

* * *

What the Commission apparently fails to see in the present case is that the courts have resolved questions of standing as they arose and have at no time manifested an intent to make economic interest and electrical interference the exclusive grounds for standing. *Sanders,* for instance, granted standing to those economically injured on the theory that such persons might well be the only ones sufficiently interested to contest a Commission action. 309 U.S. 470, 477. In *KOA* we noted the anomalous result that, if standing were restricted to those with an economic interest, educational and non-profit radio stations, a prime source of public-interest broadcasting, would be defaulted. Because such a rule would hardly promote the statutory goal of public-interest broadcasting, we concluded that nonprofit stations must be heard without a showing of economic injury and held that all broadcast licensees could have standing by showing injury other than financial (there, electrical interference). Our statement that *Sanders* did not limit standing to those suffering direct economic injury was not disturbed by the Supreme Court when it affirmed *KOA.* 319 U.S. 239 (1943).

It is important to remember that the cases allowing standing to those falling within either of the two established categories have emphasized that standing is accorded to persons not for the protection of their private interest but only to vindicate the public interest.

"The Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications. By § 402(b)(2), Congress gave the right of appeal to persons 'aggrieved or whose interests are adversely affected' by Commission action. * * * But *these private litigants have standing only as representatives of the public interest* quoting Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14 (1942).

On the other hand, some Congressional reports have expressed apprehensions, possibly representing the views of both administrative agencies and broadcasters, that standing should not be accorded lightly so as to make possible intervention into proceedings "by a host of parties who have no legitimate interest but solely with the purpose of delaying license grants which properly should be made." But the recurring theme in the legislative reports is not so much fear of a plethora of parties in interest as apprehension that standing might be abused by persons with no *legitimate* interest in the proceedings but with a desire only to delay the granting of a license for some private selfish reason. The Congressional Committee which voiced the apprehension of a "host of parties" seemingly was willing to allow standing to anyone who could show economic injury or electrical interference. Yet these criteria are no guarantee of the legitimacy of the claim sought to be advanced, for, as another Congressional Committee later lamented, "In many of these cases the protests are based on grounds which have little or no relationship to the public interest."

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 listen-

ing 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.

The Commission's rigid adherence to a requirement of direct economic injury in the commercial sense operates to give standing to an electronics manufacturer who competes with the owner of a radio-television station only in the sale of appliances, while it denies standing to spokesmen for the listeners, who are most directly concerned with and intimately affected by the performance of a licensee. 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. This much seems essential to insure that the holders of broadcasting licenses be responsive to the needs of the audience, without which the broadcaster could not exist.

There is nothing unusual or novel in granting the consuming public standing to challenge administrative actions. * * *

These "consumer" cases were not decided under the Federal Communications Act, but all of them have in common with the case under review the interpretation of language granting standing to persons "affected" or "aggrieved". The Commission fails to suggest how we are to distinguish these cases from those involving standing of broadcast "consumers" to oppose license renewals in the Federal Communications Commission. * * * Furthermore, assuming we look only to the commercial economic aspects and ignore vital public interest, we cannot believe that the economic stake of the consumers of electricity or public transit riders is more significant than that of listeners who collectively have a huge aggregate investment in receiving equipment.

The argument that a broadcaster is not a public utility is beside the point. True, it is not a public utility in the same sense as strictly regulated common carriers or purveyors of power, but neither is it a purely private enterprise like a newspaper or an automobile agency. A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligations imposed by law. 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. 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.

Nor does the fact that the Commission itself is directed by Congress to protect the public interest constitute adequate reason to preclude the listening public from assisting in that task. *Cf.* UAW v. Scofield, 382 U.S. 205 (1965). * * *

The theory that the Commission can always effectively represent the listener interests in a renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it. The gradual expansion and evolution of concepts of standing in administrative law attests that experience rather than

logic or fixed rules has been accepted as the guide.

The Commission's attitude in this case is ambivalent in the precise sense of that term. While attracted by the potential contribution of widespread public interest and participation in improving the quality of broadcasting, the Commission rejects effective public participation by invoking the oft-expressed fear that a "host of parties" will descend upon it and render its dockets "clogged" and "unworkable." The Commission resolves this ambivalence for itself by contending that in this renewal proceeding the viewpoint of the public was adequately represented since it fully considered the claims presented by Appellants even though denying them standing. It also points to the general procedures for public participation that are already available, such as the filing of complaints with the Commission, the practice of having local hearings, and the ability of people who are not parties in interest to appear at hearings as witnesses. In light of the Commission's procedure in this case and its stated willingness to hear witnesses having complaints, it is difficult to see how a grant of formal standing would pose undue or insoluble problems for the Commission.

We cannot believe that the Congressional mandate of public participation which the Commission says it seeks to fulfill was meant to be limited to writing letters to the Commission, to inspection of records, to the Commission's grace in considering listener claims, or to mere non-participating appearance at hearings. We cannot fail to note that the long history of complaints against WLBT beginning in 1955 had left the Commission virtually unmoved in the subsequent renewal proceedings, and it seems not unlikely that the 1964 renewal application might well have been routinely granted except for the determined and sustained efforts of Appellants at no small expense to themselves. 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 for at least three years 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. Yet if there is only one outlet, there are no rivals at hand to assert the public interest, and reliance on opposing applicants to challenge the existing licensee for the channel would be fortuitous at best. 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 propritious 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. By process of elimination those "consumers" willing to shoulder the burdensome and costly processes of intervention in a Commission proceeding are likely to be the only ones "having a sufficient interest" to challenge a renewal application. The late Edmond Cahn addressed himself to this problem in its broadest aspects when

he said, "Some consumers need bread; others need Shakespeare; others need their rightful place in the national society —what they all need is processors of law who will consider the people's needs more significant than administrative convenience." *Law in the Consumer Perspective,* 112 U.Pa.L.Rev. 1, 13 (1963).

Unless the Commission is to be given staff and resources to perform the enormously complex and prohibitively expensive task of maintaining constant surveillance over every licensee, some mechanism must be developed so that the *legitimate* interests of listeners can be made a part of the record which the Commission evaluates. An initial applicant frequently floods the Commission with testimonials from a host of representative community groups as to the relative merit of their champion, and the Commission places considerable reliance on these vouchers; on a renewal application the "campaign pledges" of applicants must be open to comparison with "performance in office" aided by a limited number of responsible representatives of the listening public when such representatives seek participation.

* * * In order to safeguard the public interest in broadcasting, therefore, we hold that some "audience participation" must be allowed in license renewal proceedings. We recognize this will create problems for the Commission but it does not necessarily follow that "hosts" of protestors must be granted standing to challenge a renewal application or that the Commission need allow the administrative processes to be obstructed or overwhelmed by captious or purely obstructive protests. The Commission can avoid such results by developing appropriate regulations by statutory rulemaking. Although it denied Appellants standing, it employed *ad hoc* criteria in determining that these Appellants were responsible spokesmen for representative groups having significant roots in the listening community. These criteria can afford a basis for developing formalized standards to regulate and limit public intervention to spokesmen who can be helpful. A petition for such intervention must "contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent" with the public interest. 74 Stat. 891 (1960), 47 U.S.C. 309(d)(1) (1964).

The responsible and representative groups eligible to intervene cannot here be enumerated or categorized specifically; such community organizations as civic associations, professional societies, unions, churches, and educational institutions or associations might well be helpful to the Commission. These groups are found in every community; they usually concern themselves with a wide range of community problems and tend to be representatives of broad as distinguished from narrow interests, public as distinguished from private or commercial interests.

The Commission should be accorded broad discretion in establishing and applying rules for such public participation, including rules for determining which community representatives are to be allowed to participate and how many are reasonably required to give the Commission the assistance it needs in vindicating the public interest. The usefulness of any particular petitioner for intervention must be judged in relation to other petitioners and the nature of the claims it asserts as basis for standing. Moreover it is no novelty in the administrative process to require consolidation of petitions and briefs to avoid multiplicity of parties and duplication of effort.

The fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out. Always a restraining factor is the expense of participation in the administrative process, an economic reality

which will operate to limit the number of those who will seek participation; legal and related expenses of administrative proceedings are such that even those with large economic interests find the costs burdensome.

In line with this analysis, we do not now hold that all of the Appellants have standing to challenge WLBT's renewal. We do not reach that question. 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.

It is difficult to anticipate the range of claims which may be raised or sought to be raised by future petitioners asserting representation of the public interest. It is neither possible nor desirable for us to try to chart the precise scope or patterns for the future. The need sought to be met is to provide a means for reflection of listener appraisal of a licensee's performance as the performance meets or fails to meet the licensee's statutory obligation to operate the facility in the public interest. The matter now before us is one in which the alleged conduct adverse to the public interest rests primarily on claims of racial discrimination, some elements of religious discrimination, oppressive overcommercialization by advertising announcements, and violation of the Fairness Doctrine. Future cases may involve other areas of conduct and programming adverse to the public interest; at this point we can only emphasize that intervention on behalf of the public is not allowed to press private interests but only to vindicate the broad public interest relating to a licensee's performance of the public trust inherent in every license.

*Hearing*

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 supplied.)

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. Yet the Commission recognized that WLBT's past behavior, as described by Appellants, would preclude the statutory finding of public interest necessary for license renewal; hence its grant of the one-year license on the policy ground that there was an urgent need at the time for a properly run station in Jackson must have been predicated on a belief that the need was so great as to warrant the risk that WLBT might continue its improper conduct.

We agree that a history of programming misconduct of the kind alleged would preclude, as a matter of law, the required finding that renewal of the license would serve the public interest. It is important to bear in mind, moreover, that although in granting an initial license the Commission must of necessity engage in some degree of forecasting future performance, in a renewal proceeding past performance is its best criterion. When past performance is in conflict with the public interest, a very heavy burden rests on the renewal applicant to show how a renewal can be reconciled with the public interest. Like public officials charged with a public trust, a renewal applicant, as we noted in our discussion of standing, must literally "run on his record."

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. The Commission's opinion reveals how it labored to justify the result it thought was dictated by the urgency of the situation. The majority considered the question of setting the application for hearing a "close" one; Chairman Henry and Commissioner Cox would have granted a hearing to Appellants as a matter of right.

The Commission's "policy" decision is not a reflection of some long standing or accepted proposition but represents an *ad hoc* determination in the context of Jackson's contemporary problem. Granted the basis for a Commission "policy" recognizing the value of properly run broadcast facilities to the resolution of community problems, if indeed this truism rises to the level of a policy, it is a determination valid in the abstract but calling for explanation in its application.

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. Not surprisingly, having asserted that it accepted Petitioners' allegations, the Commission thus considered itself unable to make a categorical determination that on WLBT's record of performance it was an appropriate entity to receive the license. It found only that *if* WLBT changed its ways, something which the Commission did not and, of course, could not guarantee, the licensing would be proper. 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.

We view as particularly significant the Commission's summary:

> We are granting a renewal of license, so that the licensee can demonstrate and carry out its stated willingness to serve fully and fairly the needs and interests of its entire area—so that it can, in short, meet and resolve the questions raised.

The only "stated willingness to serve fully and fairly" which we can glean from the record is WLBT's protestation that it had always fully performed its public obligations. As we read it the Commission's statement is a strained and strange substitute for a public interest finding.

We recognize that the Commission was confronted with a difficult problem and difficult choices, but it would perhaps not go too far to say it elected to post the Wolf to guard the Sheep in the hope that the Wolf would mend his ways because some protection was needed at once and none but the Wolf was handy. This is not a case, however, where the Wolf had either promised or demonstrated any capacity and willingness to change, for WLBT had stoutly denied Appellants' charges of programming misconduct and violations. In these circumstances a pious hope on the Commission's part for better things from WLBT is not a substitute for evidence and findings. *Cf.* Interstate Broadcasting Co. v. FCC, 116 U. S.App.D.C. 327, 323 F.2d 797 (1963).

Even if the embodiment of the Commission's hope be conceded *arguendo* to be a finding, there was not sufficient evidence in the record to justify a "policy determination" that the need for a properly run station in Jackson was so pressing as to justify the risk that WLBT

might well continue with an inadequate performance. 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.

It is open to question whether the public interest would not be as well, if not better served with one TV outlet acutely conscious that adherence to the Fairness Doctrine is a *sine qua non* of every licensee. Even putting aside the salutary warning effect of a license denial, there are other reasons why one station in Jackson might be better than two for an interim period. For instance, in a letter to the Commission, Appellant Smith alleged that the other television station in Jackson had agreed to sell him time only if WLBT did so. It is arguable that the pressures on the other station might be reduced if WLBT were in other hands —or off the air. The need which the Commission thought urgent might well be satisfied by refusing to renew the license of WLBT and opening the channel to new applicants under the special temporary authorization procedures available to the Commission on the theory that another, and better suited, operator could be found to broadcast on the channel with brief, if any, interruption of service. The Commission's opinion reflects no consideration of these or other alternatives.

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 his 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.

### QUESTIONS ON UNITED CHURCH OF CHRIST, I

1. In what sense does the very nature of the "fairness" doctrine stimulate a recognition of the inadequacy of the standing rules as they existed prior to *United Church of Christ?*

2. What difficulties do you see in implementing the new approach to standing of *United Church of Christ* and in relating it to programming areas other than the "fairness" doctrine?

3. The Court's opinion in *United Church of Christ* indicates an intent to strengthen the Commission's function in a case where an applicant is the only applicant for a license. See *Henry v. FCC,* p. 783. Do you see why a new approach to standing would have this effect in the single applicant context?

4. The Court's opinion in *United Church of Christ* appears to exude a mood of displeasure with the Commission's regulatory philosophy. Do you get any feeling from the opinion as to how the Court would have dealt with WLBT's renewal petition? Why then doesn't the Court state in so many words how the renewal application ought to be treated?

## *United Church of Christ II*

### The Meaning of Standing for the Citizen Group

On the basis of the first *United Church of Christ* decision, that listeners and viewers had standing to participate in broadcast renewal proceedings, the

United Church of Christ went back to the FCC ready to show at the hearing the unfitness of WLBT for license renewal. The lesson the immediate reaction of the FCC to the first *United Church of Christ* case provides for citizen groups is that to win a battle in the courts is not necessarily to win a victory before the FCC. After securing their hard-fought entry to participate in the FCC renewal proceeding, the FCC granted a full term three-year renewal to WLBT.

Once again the United Church of Christ took the FCC to court. Once again, Judge Burger reversed the FCC. But this time, Judge Burger, now Chief Justice Burger, revoked the license renewal grant to WLBT and directed the FCC to invite applicants to apply for the license.

The FCC had placed the burden of showing that WLBT was unqualified for renewal on the citizen group intervenors, the United Church of Christ. Judge Burger felt that the citizen groups had been treated by the FCC as intruders in the hitherto cozy world of bureaucrat and broadcaster. The FCC had adhered to the form but not the substance of the earlier decision. Burger's opinion in *United Church of Christ II* was a stinging rebuke to FCC treatment of citizen groups. The opinion also underscored the fact that the *United Church of Christ* case was no fluke: the federal court of appeals had fully intended to give a legitimate and vital place in FCC renewal proceedings to citizen groups.

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## OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST v. FEDERAL COMMUNICATIONS COMMISSION

425 F.2d 543 (D.C.Cir. 1969).

Before BURGER, McGOWAN and TAMM, Circuit Judges.

BURGER, Circuit Judge. This case returns to the Court again after hearings held pursuant to an earlier opinion of this Court in which we directed that intervenors representing segments of the licensee's listening public were to be permitted to intervene and participate. No additional intervenors thereafter sought to take part in the Commission proceedings.

* * *

The Examiner seems to have regarded Appellants as "plaintiffs" and the licensee as "defendant", with burdens of proof allocated accordingly. This tack, though possibly fostered by the Commission's own action, was a grave misreading of our holding on this question. We did not intend that intervenors representing a public interest be treated as interlopers. Rather, if analogues can be useful, a "Public Intervenor" who is seeking no license or private right is, in this context, more nearly like a complaining witness who presents evidence to police or a prosecutor whose duty it is to conduct an affirmative and objective investigation of all the facts and to pursue his prosecutorial or regulatory function if there is probable cause to believe a violation has occurred.

This was all the more true here because prior to the efforts of the actively participating intervenors, the Commission itself had long since found the licensee wanting. It was not the correct role of the Examiner or the Commission to sit back and simply provide a forum for the intervenors; the Commission's duties did not end by allowing Appellants to intervene; its duties began at that stage.

A curious neutrality-in-favor-of-the-licensee seems to have guided the Examiner in his conduct of the evidentiary hearing. An example of this is found in his reaction to evidence of a monitoring study conducted by Appellants for about one week in 1964 and which was the subject of two days of testimony at the

hearing. The Examiner's conclusion was that the play-back had "virtually no meaning for the simple reason that it was not * * * fair and equitable. [It] is worthless and therefore *completely discounted* for any consideration by the hearing examiner." 14 F.C.C.2d at 543. In context or out, this reaction is difficult to comprehend.[8] The Commission has often complained—and no doubt justifiably so—that it cannot monitor licensees in any meaningful way; here a 7-day monitoring, made at no public expense, was presented by a public interest intervenor and was dismissed as "worthless" by the Commission.

Concerning the cutting off of a network program relied on by Intervenors as showing violations of the Fairness Doctrine the Examiner found: "There is not one iota of evidence in the record that supports any such allegation." Yet in the transcript of proceedings we find testimony identifying the program which was admittedly cut off. The record shows the following:

Q. Did you recognize the lunch counter?

A. I recognized the Woolworth Counter where the demonstration occurred here and the picture immediately disappeared. I picked up the telephone and immediately called WLBT—

Q. With whom did you speak?

A. The man refused to identify himself. I did not identify myself. I said, "Did you cut that off because that showed those Negroes sitting in at Woolworth's in Jackson?" *The man said, "Yes."*

MR. GEORGE: *I object.* I may be anticipating but I will object to any statement as to the reply.

PRESIDING EXAMINER: *That is correct. We will sustain that portion of it. You can't quote some undisclosed person.*

[8] The following excerpts from the hearing transcript illustrate the licensee's success in placing an unrealistic burden on the Intervenors. Mrs. Elizabeth Ewing, who prepared the monitoring study exhibits on behalf of Appellants, was the witness:

Q. Could you tell from the tape whether the news of, well say, Dick Sanders, whether he was reading from United Press International wirecopy? Do you know what that is?

A. Yes.

Q. Could you tell whether he was reading from UPI wirecopy or from a transcript that he, himself, had prepared?

A. No.

Q. Did you make any identifications where the source of information was coming from?

A. No.

* * * * * * * *

Q. Have you ever lived in Jackson, Mississippi?

A. No, I have not.

Q. Did you receive any instructions as to what would be of interest to the people in Jackson, Mississippi?

A. No.

Q. Did you study any documents or books or papers to find out what would be of interest to the people in Jackson, Mississippi?

A. No.

Q. Did you read Jackson newspapers during this period in March 1964?

A. No.

* * * * * *

Q. Do you know whether or not Dick Sanders was quoting a press release from the Department of Justice?

A. No.

Q. Do you know whether he was quoting directly from the wire service?

A. No, I don't.

Joint Appendix 172, 183–184, 187 [hereinafter J.A.].

This witness had already produced evidence of the contents of the monitored broadcasts, yet she was pursued to ascertain the *source* of these programs—the type of information particularly in the control and at the disposal of a broadcast licensee. In evaluating Mrs. Ewing's testimony, the Examiner pursued the same tack, discrediting the study and the testimonial evidence to support it without ever placing on the licensee the affirmative burden of producing evidence to establish either the true source of the programming materials or, as compared to that of Mrs. Ewing, its own sensitivity to the needs and interests of portions of its listening audience.

*The portion of the answer is stricken where he was quoting some unidentified person which is sheer hearsay.*

On allegations that at least two of the licensee's commentators used disparaging terms with reference to Negroes there was testimony of listeners who said they heard these episodes; in his initial decision the Examiner noted that "[a]t least three of the [Appellants'] witnesses" so testified. Nevertheless, the Examiner chose to belittle this evidence:

Because of the conflicting testimony respecting Ellis [one of WLBT's commentators], there is no finding made as to whether he did or did not use the word "nigger" and "negra". But the evidence is undisputed that Alon Bee did use the expressions "negra" or "nigger" at some indefinite time in the past while broadcasting over station WLBT. *A glaring weakness of the intervenors' evidence here is that, as in many of their allegations, they did not pinpoint specific times when certain events supposedly occurred, thereby unfairly depriving the applicant of an opportunity properly to rebut such allegations.*

14 F.C.C.2d at 510 (emphasis added). It is not our function to determine whether this would have supported a finding that the licensee had violated the Fairness Doctrine but the Examiner's erroneous concept of the burden of proof shows a failure to grasp the distinction between "allegations" and testimonial evidence and prevented the development of a satisfactory record.

The infinite potential of broadcasting to influence American life renders somewhat irrelevant the semantics of whether broadcasting is or is not to be described as a public utility. By whatever name or classification, broadcasters are temporary permittees—fiduciaries—of a great public resource and they must meet the highest standards which are embraced in the public interest concept. The Fairness Doctrine plays a very large role in assuring that the public resource granted to licensees at no cost will be used in the public interest. In short, we do not determine how the factors we have discussed should have been weighed by the Commission but only that they had some probative value and should have been considered. To borrow a phrase from the Examiner, his response manifests a "glaring weakness" in his grasp of the function and purpose of the hearing and the public duties of the Commission.

We need not continue recitals from the record or examples of similar situations which shed light on the nature of the hearings; in our view the entire hearing was permeated by similar treatment of the efforts of the intervenors, and the pervasive impatience—if not hostility—of the Examiner is a constant factor which made fair and impartial consideration impossible. The Commission and the Examiners have an affirmative duty to assist in the development of a meaningful record which can serve as the basis for the evaluation of the licensee's performance of his duty to serve the public interest. The Public Intervenors, who were performing a public service under a mandate of this court, were entitled to a more hospitable reception in the performance of that function. As we view the record the Examiner tended to impede the exploration of the very issues which we would reasonably expect the Commission itself would have initiated; an ally was regarded as an opponent.

The Commission, except as modified on some minor points, adopted the Examiner's Initial Decision: "[W]e are in agreement with the examiner's conclusions that the intervenors failed to corroborate or substantiate virtually all of their allegations upon which the hearing was predicated * * *." Lamar Life Broadcasting Co., 14 F.C.C.2d 431, 433 (1968).

* * * As the Commission noted in closing: "We only conclude that the intervenors have failed to prove their charges and that the preponderance of the evidence before us establishes that WLBT has afforded reasonable opportunity for the use of its facilities by the significant community groups comprising its service area." 14 F.C.C.2d at 437–438. Once again we see the pervasiveness of the original error in confusing mere "allegations" and testimonial evidence—evidence which if not contradicted by the licensee's evidence, or on its face incredible, was entitled to carry the day in terms of establishing the point to which it was directed.

The Examiner and the Commission appear to have overlooked the 1965 Memorandum Opinion and Order of the Commission which contains much to the contrary to its present position; moreover, the practical effect of the Commission's action was to place on the Public Intervenors the entire burden of showing that the licensee was not qualified to be granted a renewal. The Examiner and the Commission exhibited at best a reluctant tolerance of this court's mandate and at worst a profound hostility to the participation of the Public Intervenors and their efforts.[12]

The record now before us leaves us with a profound concern over the entire handling of this case following the remand to the Commission. The impatience with the Public Intervenors, the hostility toward their efforts to satisfy a surprisingly strict standard of proof, plain errors in rulings and findings lead us, albeit reluctantly, to the conclusion that it will serve no useful purpose to ask the Commission to reconsider the Examiner's actions and its own Decision and Order under a correct allocation of the burden of proof. The administrative conduct reflected in this record is beyond repair.

The Commission itself, with more specific documentation of the licensee's shortcomings than it had in 1965 has now found virtues in the licensee which it was unable to perceive in 1965 and now finds the grant of a full three-year license to be in the public interest.

We are compelled to hold, on the whole record, that the Commission's conclusion is not supported by substantial evidence. For this reason the grant of a license must be vacated forthwith and the Commission is directed to invite applications to be filed for the license. We do refrain, however, from holding that the

[12] Two members of the Commission seemed to read the record much as we read it now. In a further statement filed by Commissioners Cox and Johnson in response to the majority's "further statement" in response to the original dissent, the dissenting Commissioners noted:

> We remain perplexed by our colleagues' interpretation of the burden of proof issue, notwithstanding their attempt to further elucidate this problem in the further statement. As we noted in our dissenting opinion, the court of appeals clearly expressed its expectation that the Commission would resolve the problem by placing upon petitioners [Public Interest Intervenors] "only the burden of going forward with evidence in the first instance." By the strictures of the Communications Act of 1934, it is the licensee who is obligated to prove that renewal of his license is in the public interest, convenience, or necessity.
>
> Our colleagues maintain that, "neither the burden of going forward with the evidence nor the burden of nonpersuasion [is] * * * discharged by the party on whom it may fall by the simple making of charges and/or allegations." Needless to say, we have not suggested that "simple charges and/or allegations" are adequate. However, under their construction, it almost seems that presumptions favoring the licensee arise as to each of the issues contained in the pleadings; and, thus, as to the ultimate issue of public interest. This rule of procedure is plainly unjust and flatly contradictory of the court's memorandum respecting the burden of proof questions, a fact noted in our dissent and not disputed by the further statement.

Lamar Life Broadcasting Co., 14 F.C.C. 2d 431, 487 (1968).

licensee be declared disqualified from filing a new application; the conduct of the hearing was not primarily the licensee's responsibility, although as the applicant it had the burden of proof. Moreover, the Commission necessarily did not address itself to the precise question of WLBT's qualifications to be an applicant in the new proceeding now ordered, and we hesitate to pass on this subject not considered by the Commission.

The Commission is directed to consider a plan for interim operation pending completion of its hearings; if it finds it in the public interest to permit the present licensee to carry on interim operations that alternative is available. The Commission is free to consider whether net earnings of the licensee should be impounded by the Commission pending final disposition of this license application.

Reversed and remanded for further proceedings in accordance with this opinion.

Before BAZELON, Chief Judge, and WRIGHT, McGOWAN, TAMM, LEVENTHAL, ROBINSON, MacKINNON and ROBB, Circuit Judges, in Chambers.

On Petitions for Rehearing or Clarification and Suggestions for Rehearing en banc

ORDER

PER CURIAM.

On consideration of the petitions filed herein by counsel for the Federal Communications Commission and intervenor, Lamar Life Broadcasting Company, for rehearing, for clarification of the Court's opinion and of the suggestions for rehearing *en banc*, it is

Ordered by the Court, insofar as the aforesaid petitions are directed to the assigned division of this Court, that said petitions be denied, and it is

Further ordered by the Court *en banc*, there not being a majority of the judges of this circuit in favor of having this case reheard by the Court sitting *en banc* that the suggestions for *en banc* hearing are denied.

STATEMENT OF JUDGES McGOWAN AND TAMM ACCOMPANYING VOTE TO DENY THE PETITION OF THE FEDERAL COMMUNICATIONS COMMISSION FOR REHEARING BY THE PANEL OR EN BANC.

The essential conclusion of the division which heard this case was that the record compiled upon remand was, because of the misconceptions of the Trial Examiner, in no state to admit of an informed and reliable finding as to whether the renewal sought was in the public interest. Since the licensee has not in over six years established its right to continue to be entrusted with this valuable public asset, the opinion understandably expressed some impatience with this state of affairs, although it recognized that the ineptitude of the Commission was as much, if not more, to blame for this scandalous delay than was the licensee. For this reason, the division was not disposed to declare the licensee ineligible to seek new authority to use the channel. It did think that the licensee should compete for that authority, on even terms as nearly as may be, with any other applicant.

The Commission professes concern that the court has improperly arrogated to itself a decision which assertedly is committed only to the Commission, namely, the denial of the license renewal application because the licensee is not qualified under any circumstances, in terms of the public interest, to have the channel. Had that been the division's purpose, it would not have contemplated that the licensee could be one of the competing applicants. What was held was that the proceedings on remand had been hopelessly bungled and that the public interest was best served by taking note of the ear-

ly expiration date * and getting on with a new hearing in which the Commission can decide who is best qualified to have this channel. The Commission knows full well how to do this under its existing powers, without interruption of the present service if that is deemed important and on such terms as it thinks fit.

The Commission points to the provision of 47 U.S.C. § 307(d) to the effect that, pending final disposition of a renewal application, the Commission "shall continue such license in effect." It says that this means that the licensee seeking renewal must be regarded as having continuing authority until its application has been finally disposed of adversely to it —and this last, so it is said, only the Commission can do. It is doubtful if Congress intended that a licensee should be able to remain in possession indefinitely merely because the Commission proves unable or unwilling to conduct proceedings which will survive judicial scrutiny. A licensee holding over on any such basis is at best, a licensee in name only, and it is presumably in such light that the licensee here involved will take its place among competing applicants.

### NOTES AND QUESTIONS

1. Judge Burger believed that on the basis of *United Church of Christ I*, and the Federal Communications Act itself, the burden of proof in a renewal hearing should be on the renewal applicant rather than the citizen group. What arguments would you make to defend Judge Burger's views on burden of proof? Against?

2. Judge Burger says the attitude of the Commission and the Examiner in the WLBT renewal hearing which followed *United Church of Christ I* were characterized by a neutrality-in-favor of the licensee. Are there any basic reasons in the structure of American broadcast regulation which lead to the kind of FCC sympathy for licensee failings and resistance to citizen group objections displayed in the *United Church of Christ* case?

* The license grant under review terminates June 1, 1970, and proceedings to determine who should be the licensee for the term beginning on that date would have to get under way in ample time before that.

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## The Petition to Deny and the Citizen Group

### *Hale v. FCC*

Suppose a citizen group is dissatisfied with the job a broadcast licensee has been doing. What can it do? If another applicant applies for a license, the citizen group can enter the renewal preceeding as a result of the *United Church of Christ* decision. But if there is no hearing in which to participate, what can a citizen 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,* 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–AM 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 § 309(d) and (e) of the Federal Communications Act to require a hearing only when the petition to deny reveal 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 citizen 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 difficulty citizen groups experience in obtaining a hearing from the FCC through a petition to deny.

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## HALE v. FEDERAL COMMUNICATIONS COMMISSION

425 F.2d 556 (D.C.Cir. 1970).

Before McGOWAN, TAMM and ROBB, Circuit Judges.

PER CURIAM.

This statutory review proceeding under the Federal Communications Act, 47 U. S.C. § 151 et seq., relates to the Commission's renewal, without an evidentiary hearing, of the radio broadcasting license of KSL–AM, a clear channel station broadcasting throughout the Salt Lake City area. Section 309(a) of the Act authorizes renewal only upon the Commission's finding that the "public interest, convenience, and necessity" would be served thereby. Appellants, individual residents of the Salt Lake area, had filed with the Commission letters protesting renewal, and requesting that the matter be set down for hearing pursuant to Section 309(e) of the Act, which reads in part:

> If, in the case of any application to which subsection (a) of this section applies, 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 would be served], it shall formally designate the application for hearing * * *.

The Commission, however, determined that there were no substantial questions of fact requiring resolution by means of a hearing, and that it was able to make a public interest finding without the aid of a hearing.

The two matters which require the illumination of a hearing, so appellants assert, are (1) the quality and fairness of the licensee's programming and (2) the impact upon the public interest of the concentration of ownership in the intervenor of communications and other business interests. As to the first, we have examined carefully the assertions made in appellants' letters to the Commission, and we find them far short of the kind of factual allegations which were brought forward by the protestants in *United Church of Christ*. Mainly appellants have attempted to establish that KSL–AM has been broadcasting in violation of the FCC's "fairness doctrine." That doctrine, relating to the broadcasting of controversial issues of public importance, requires that a station's programming present the several viewpoints that have developed around such issues. Its concern is with the scope of coverage of the station's total programming.

To establish a violation of this doctrine, appellants must show that specific programs have dealt with controversial issues partially, and, if so, that other programs on the station have not balanced the coverage by presenting the alternative

viewpoints.[4] While the doctrine does look to the general balance of a station's programming, proof of a violation must be based on quite specific facts:

Where complaint is made to the Commission, the Commission expects a complainant to submit specific information indicating (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station had afforded, or has plans to afford an opportunity for the presentation of contrasting viewpoints.

When viewed against this not unreasonable standard, it cannot be said that appellants' allegations present material questions of fact with respect to fairness doctrine violations, or the calibre of programming generally, that would require a hearing.

The second issue raised by appellants is of more substance. It rests upon the claim that KSL–AM is part of a business conglomerate so constituted as to create an undue concentration of business and broadcasting influence in the Salt Lake City area communications market.

* * *

Appellants essentially argue that the fact of the concentration, without further showing, is enough to require a hearing to determine whether the license renewal would serve the public interest. This is in reality a challenge to the wisdom of the Commission's existing multiple ownership rules,[11] which have allowed the granting of licenses to conglomerate structures of the kind involved here. Thus it is that, in the context of this particular renewal proceeding, appellants seek a hearing to effectuate an overhaul of the Commission's general policy that multiple ownership and resulting concentration are not *per se* against the public interest. The Commission has, however, embarked upon rule-making in this very area of multiple ownership of AM, FM and TV operations, 33 Fed.Reg. 5315; and it has initiated investigations into conglomerate ownership. Dismissing informal renewal protests very similar to those made by appellants, the Commission had this to say:

We believe that, in view of this showing, there is no basis for *ad hoc* action against the licensee on grounds of undue concentration of control of media of mass communications. Rather, any actions in this area as to a licensee such as this would be appropriate only in the context of overall rule-making proceedings. In this connection we point out the outstanding inquiry on conglomerate ownership and the specific rule-making proceeding, FCC Docket No. 18110.[12]

There is a rational foundation for the Commission's position that a basic change in policy such as appellants here seek is better and more fairly examined and considered in rule-making proceedings, where the inquiry can be thorough and where all interested parties can participate. Appellants' protests seem to us to assert that undue concentration of communications media has a tendency towards adverse impact on the public interest which warrants a policy of flat prohi-

[4] Appellants claim their inability to survey KSL–AM's general programming is due to the fact that the station does not publish a daily log of its programming in any newspaper. Such logs, however, are required to be kept by the licensee and could have been made available upon request. *See* 47 C.F.R. §§ 73.111–.116.

[11] 47 C.F.R. §§ 73.35, 73.240, 73.636.

[12] Commission letter of November 25, 1969, to protestants of renewal of the Post-Newsweek Stations WTOP–AM–FM–TV in the Washington, D.C. area. (FCC 69–1312, 38959). It is of interest to note that no dissents were recorded to this disposition, perhaps reflective of the fact that now the Commission is seriously engaged in a sweeping policy review.

bition without reference to whether there are incidental injuries in fact. But this is the very question which the Commission is presently pursuing in actual rule-making and in investigations looking toward rule-making. That pursuit may be more effectively and properly carried on there than by setting this renewal application down for hearing with a view to a change in policy with respect to this particular applicant.

Affirmed.

TAMM, Circuit Judge (concurring).

Today I cast my vote with the majority solely because the Federal Communications Commission is currently undertaking a comprehensive review of its doctrines governing concentration of control in the mass media. * * * Absent this single, crucial fact, I would find serious obstacles to affirming the Commission's action in this case.

* * *

### NOTES AND QUESTIONS

1. What motivates the FCC to take a construction of § 309 so hostile to attempts to secure hearings on license renewals which are objected to by petitions to deny?

2. Is there not a strong argument to be made that the majority decision in *Hale v. FCC* violates the spirit if not the letter of *United Church of Christ I and II?*

3. Petitions to deny are now being used to pressure stations into making changes particularly in the areas of personnel practices and minority programming policies. As a result of both the 1970 *Policy Statement* and the difficulties in obtaining a hearing on a license renewal, citizen groups increasingly are filing petitions to deny for their *in terrorem* effect and are then bargaining (often very successfully) privately and directly with the stations involved. If the citizen group requests are granted, the petition to deny is withdrawn. Sometimes the citizen 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).

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## NEW LIFE IN THE PETITION TO DENY PROCEDURE?

### REIMBURSEMENT OF A CITIZEN GROUP'S EXPENSES BY THE CHALLENGED LICENSEE

1. In the Texarkana, Texas case of KTAL–TV, the Office of Communications of the United Church of Christ extended legal and organizational assistance to 12 civic associations seeking to challenge the renewal of a broadcast license to a local television station. A petition to deny was prepared. Following negotiation with the licensee, the petition to deny was withdrawn, contingent upon the licensee's performance of certain programming reforms to better serve the needs of Texarkana's black community. This arrangement was approved by the Federal Communications Commission as being in the public interest, and KTAL's license was renewed. *KCMC, Inc.*, 19 FCC2d 109 (1969). Following this decision, the United Church of Christ sought FCC approval of a payment by KTAL–TV to the Church of legal and other expenses incurred in connection with the petition to deny. The licensee agreed to make reimbursement, subject to FCC approval.

In a 4 to 3 decision, however, the FCC refused to sanction payment of the agreed-upon amount to reimburse the

Church for its expenses, even though the licensee was willing to follow through on its promise. *KCMC, Inc.*, 25 FCC2d 603 (1970). The majority conceded that the public policy behind the Communications Act was to support the participation of local citizens in the broadcast licensing process and the voluntary good faith resolution of disputes through agreements such as that which KTAL had reached with the United Church of Christ and the local citizens of Texarkana. Nevertheless, the Commission concluded that "payment of expenses is not necessary to the effectiveness of either of these public interest goals." The opinion further stated that to allow reimbursement in situations involving withdrawal of petitions to deny would be to *harm* the public interest. The majority feared that spurious petitions to deny would be filed, in order to blackmail the licensees into "paying off" the citizen group with a reimbursement of (probably inflated) fees. Furthermore, the Commission suggested that financial considerations might impede good faith bargaining on the merits of the dispute, perhaps to the point that public interest groups would be willing to settle for less in the way of broadcaster effort in order to gain a financial windfall.

2. FCC Chairman Burch dissented, joined by Commissioner Johnson. Although they agreed there was a possibility of abuse, they suggested that reimbursement would be in the public interest and should be permitted, when the citizen group met certain conditions. In his view, these conditions were met in the KTAL–United Church of Christ case, and reimbursement should have been allowed.

Commissioners Burch and Johnson suggested that the citizen group be required to meet the following conditions:

(1) That the petition to deny was filed in good faith by a responsible organization;

(2) That the petition raised substantial issues;

(3) That the settlement also entailed solid, substantial results;

(4) That there was a detailed showing that the expenses claimed were legitimately and prudently made. *KCMC Inc. 25 FCC2d 603 at 605–606 (1970)*

Commissioner Cox filed a dissent also.

3. Commissioner Bartley also dissented in *KCMC, Inc.* and argued that the KTAL–United Church of Christ settlement agreement for reimbursement was not in the public interest. When the settlement agreement was initially presented to the Commission in 1969, it contained no reference to reimbursement. The request for approval of reimbursement, after the settlement had been approved and a license renewal had been granted to KTAL, was thus, in his view, "tainted with the uncontroverted evidence of misrepresentation." Commissioner Bartley went even further in dissent, saying he "would also issue an order to show cause why the KTAL–TV license should not be revoked."

Commissioner Cox, in dissent from the original decision to prohibit reimbursements, had discussed the special facts of the KTAL–United Church of Christ agreement, and the willingness of both sides to postpone a decision on reimbursement until after the FCC had made a decision on the merits of the settlement itself. Commissioner Bartley called this misrepresentation; Commissioner Cox argued that, if anything, it showed an abundance of good faith.

In approving reimbursement in *KCMC, Inc.*, the FCC was careful to confine its holding expressly to the facts of this case. Do you think that, given the broad ruling by the Court of Appeals, the FCC could vitiate the decision by successfully denying reimbursement in succeeding cases? Which standards are more conducive to reimbursement, Chairman Burch's or Judge Bazelon's? Would you predict that future requests for reimbursement will be met with FCC resistance? What effect might the Commission's posture have on the willingness of broadcast licensees to make voluntary reimbursements to public interest groups which have challenged their licenses? Commissioner Cox suggested that public interest groups would be wise in the future to make reimbursement an express term in their settlement agreements with licensees. Commissioner Cox believed that the FCC would more likely be swayed to approve reimbursement when it came up for decision in the context of a settlement agreement rather than after the fact.

The effect of the FCC's decision in *KCMC, Inc.*, was to impose a blanket ban on reimbursements to public interest groups in connection with negotiations with licensees and withdrawals of petitions to deny. Naturally, the United Church of Christ appealed the FCC decision, and the case went to the United States Court of Appeals for the District of Columbia Circuit. In yet another stinging rebuke to the FCC, the Court of Appeals reversed.

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## OFFICE OF COMMUNICATION OF UNITED CHURCH OF CHRIST v. FCC

465 F.2d 519 (D.C.Cir. 1972).

Before BAZELON, Chief Judge, DANAHER, Senior Circuit Judge, and ROBINSON, Circuit Judge.

BAZELON, Chief Judge:

In this appeal we are asked to review the Federal Communications Commission's refusal to permit the voluntary reimbursement of expenses to the appellant, the Office of Communication of the United Church of Christ, by a broadcast licensee. The proposed reimbursement was for legal advice and other services rendered by the Church to several civic associations in Texarkana, Texas in filing a petition to deny the license of KTAL–TV in Texarkana, negotiating a settlement with the licensee of KTAL, and subsequently withdrawing the petition to deny.

We specifically overrule the Commission's principle of general application that in no petition to deny situation is it in the public interest to permit reimbursement, and remand this case to the Commission for a determination of whether reimbursement should be allowed in accordance with this opinion.

* * *

Standard of Review

The issue posed by the Church is whether the Commission's interpretation of the public interest standard was correct. Since there is no explicit statutory provision which controls the Church's request for reimbursement, we find guidance for our standard of review of the Commission's decision from the Supreme Court: The Commission's construction of its own statutory mandate "should be followed unless there are compelling indications that it is wrong." Red Lion Broadcasting Co. v. F. C. C., 395 U.S. 367, 381 (1969).

It is the necessary and proper task of this court to undertake a careful and deliberate scrutiny of an agency's decisions to insure compliance with law and the legislative mandate.

We agree with appellant that the public interest standard cannot mean that the

Commission may totally prohibit reimbursement in all petition to deny situations. This rule cannot be sustained in light of the policies expressed in the Communications Act and the Commission's own interpretations of its statutory mandate.

### Allowing Reimbursement to Facilitate Settlement of Litigation

Appellant contends that the Commission must, in accordance with its statutory mandate to act in the public interest, permit voluntary reimbursement of parties seeking to settle and to withdraw litigation from the Commission if (1) the underlying agreement to withdraw is in the public interest and (2) the reimbursement sought is legitimate and prudent. We find compelling support for this contention in the Communications Act and in the Commission's own decisions. A rule which flatly prohibits reimbursement in all petition to deny situations plainly violates this principle.

For primary guidance, we of course turn to the Communications Act of 1934. In § 311(c)[22] Congress provides for Commission approval of reimbursement agreements when one or several competing applicants for new broadcasting facilities withdraws to permit the speedy initiation of service to the public by one broadcaster.

This is a statutory policy which has applicability to the case before us—reimbursement which facilitates withdrawal of competing or conflicting petitions is definitely in the public interest when termination of the litigation serves an overriding public interest goal. Even prior to the enactment of § 311(c) the Commission had occasionally allowed reimbursement of out-of-pocket expenses to a withdrawing party. Premier Television, Inc. 9 Pike & Fischer R.R. 397, 399 (1953).

The potential for abuse of reimbursement agreements through buy-outs of superior competitors or pay-offs to those filing frivolous applications was clearly recognized by this court.[24] Congress sought to deal with these abuses through § 311(c) which required strict scrutiny by the Commission on a case-by-case basis of the bona fides of the parties and the legitimacy of the reimbursement. Congress did not mandate an absolute bar against reimbursement.

Since the enactment of § 311(c), the Commission has been asked to approve withdrawal and reimbursement agreements in situations to which the statute does not explicitly apply. In the leading case, *National Broadcasting Co., Inc.*,[25] the Commission reasoned that Congress must have "overlooked" the possibility that the Commission would have to deal with pay-offs in a variety of situations. The Commission formulated the princi-

22 47 U.S.C. § 311(c) provides in part: "(c)(1) If there are pending before the Commission two or more applications for a permit for construction of a broadcasting station, only one of which can be granted, it shall be unlawful, without approval of the Commission, for the applicants or any of them to effectuate an agreement whereby one or more of such applicants withdraws his or their application or applications. * * * (3) The Commission shall approve the agreement only if it determines that the agreement is consistent with the public interest, convenience, or necessity. If the agreement * * * contemplates the making of any direct or indirect payment to any party thereto in consideration of his withdrawal of his application, the Commission may * * * (approve) of such payment * * * not in excess of the aggregate amount determined by the Commission to have been legitimately and prudently expended. * * *

24 In Clarksburg Publishing Co. v. FCC, 96 U.S.App.D.C. 211, 220, 225 F.2d 511, 520 (1955) this court refused to uphold Commission approval of reimbursement without some inquiry into "itemization of expenses, identification of the parties negotiating the agreement, and details of the arrangements between competing applicants, in order to determine if improper consideration was paid or promised for dismissal."

25 Pike & Fischer R.R. 67 (1963).

ple that "the spirit, but not the terms, of Section 311(c) is applicable." [26]

In *National Broadcasting*, Philco Corporation sought to withdraw its application for a construction permit filed in competition with NBC's request for renewal of its WRCV–TV license. As part of its request, Philco asked the Commission to approve NBC's offer to reimburse it for its expenses up to $550,000. Applying the policy of § 311(c), the Commission weighed the specific detriments and benefits to the public interest resulting from withdrawal of Philco's petition. If the litigation were terminated, the public would lose the opportunity to choose between applicants. This detriment would not be offset by a public interest goal since, unlike the situation covered by § 311(c), the public was already provided with service by NBC. The Commission therefore refused permission for reimbursement and for Philco's withdrawal.

Philco and NBC raised other interests to justify termination of their litigation, but the Commission classified these as private, and inappropriate for it to consider. The Commission implied, however, that it would be willing to consider other genuine public interest goals which might offset the detriment of loss of choice.

Subsequent to the *National Broadcasting* decision, the Commission has further shown its willingness to approve reimbursement agreements to facilitate termination of litigation.[28] In the decision below the Commission purports to rely on this "line of cases" for the proposition that it is "generally loath to permit payment of expenses." However, the Commission has clearly stated in other recent decisions that its disinclination can be overcome by public interest considerations:

"[I]n the absence of other countervailing considerations demonstrating that a grant of an agreement * * * is in the public interest, we in general look with disfavor upon agreements whereby an application for a new broadcast facility proposes to withdraw * * * upon reimbursement."

The case before us is a compelling example of the obvious benefits to the public interest which result from withdrawal of certain petitions to deny. The Commission wrote that "the settlement of the issues between the station and the petitioning group is generally a desirable goal" because it promotes an atmosphere of "generous cooperation—not strife and suspicion" and "should prove to be more effective in improving local service than would be the imposition of strict guidelines by the Commission." [32] In permitting the Texarkana groups to withdraw their petition, the Commission cited these public benefits and mentioned no specific detriment to the public interest.[33]

[26] Id. at 71. The Commission thus read § 311(c) as merely codifying the authority already possessed by the Commission with the specific limitation that payments exceeding legitimate and prudent expenses could not be allowed. Id. at 73, n. 5.

[28] Where competing applications for a new facility are filed but an interim operator has already been functioning: Great River Broadcasting, Inc., 16 Pike & Fischer R.R.2d 669 (1969); Grand Broadcasting Co., 5 Pike & Fischer R.R.2d 527 (1965). Where the merger agreement of two competing petitioners, which includes reimbursement to outside parties, will result in improved service: Seven (7) League Productions, Inc., 9 Pike & Fischer, R.R.2d 773 (1967); cf. Blue Island Community Broadcasting Co., Inc., 6 Pike & Fischer R.R.2d 137 (1965). Where competing applications in the renewal process were conceivably filed in a mistaken reliance on unclear Commission policy: Post-Newsweek Stations, Florida, Inc., 26 F.C.C. 2d 982 (1970); National Broadcasting Co., Inc. (KNBC), 24 FCC2d 218 (1970).

[32] 25 FCC2d at 604.

[33] Indeed, when a public group rather than a private competitor petitions to deny a local license, withdrawal of that petition entails no "loss of choice" since the group offers no alternative licensee.

It is therefore inexplicable that the Commission should reject the "spirit" of § 311(c) and its own line of cases in order to raise an absolute bar against reimbursement in all petitions to deny situations. In its opinion below, the majority revealed no reasons why the potential for abuse of reimbursement is sufficiently greater in a petition to deny situation to justify such a prohibition, and we can conceive of none.

We are not required in this case to consider whether there are reasons which would support a Commission policy prohibiting *all* reimbursement of expenses, since the Commission had already determined that the public interest is consistent with a policy of reimbursing some private interests, e. g., other applicants, who withdraw from further participation. In the context of this case, the public interest is likewise protected from abuse by the Commission's determinations that the public group seeking to withdraw is bona fide, and that the terms of its settlement with the local broadcaster serve the public interest. Once these determinations are made, voluntary reimbursement of legitimate and prudent expenses of the withdrawing group cannot be forbidden. The public interest therefore requires that the Commission's per se rule prohibiting reimbursement be overturned.

### Award of Reimbursement to Facilitate Public Participation

Appellant also asserts that a second, independent public interest goal requires approval of reimbursement in this case —facilitating the financial ability of groups like the Church to increase public participation in the renewal process. The Church draws support for this position from two of this court's decisions which recognized the necessity of granting standing to public organizations before the Commission. In recent years, the concept that public participation in decisions which involve the public interest is not only valuable but indispensable has gained increasing support.[37]

It seems to us that the goal of facilitating public participation is necessarily furthered by the rule we have established above. Precisely because the appellant Church represented public organizations was it able to achieve a settlement with KTAL which served the public interest in Texarkana. When such substantial results have been achieved, as in this case, voluntary reimbursement which obviously facilitates and encourages the participation of groups like the Church in subsequent proceedings is entirely consonant with the public interest.

### Remand

The operative principle established in Part IV thus remains—when the settlement of issues and termination of a petition to deny between the public and a broadcaster is in the public interest, voluntary reimbursement of the public group may be allowed. The Commission has already examined the underlying settlement and agreement to withdraw in this case and found them to be in the public interest. However, the expenses submitted by the Church have not yet received the Commission's scrutiny. While it is difficult to believe that they will not

[37] *See* Commissioner Cox's dissent in the instant case, 25 F.C.C.2d at 609. In the expanding field of environmental protection law, it has been held that "[i]n order to insure that the * * * [federal government] will adequately protect the public interest in the aesthetic, conservational, and recreational aspects * * * those who by their activities and conduct have exhibited a special interest in such areas," must be granted standing as an aggrieved party. Scenic Hudson Preservation Conf. v. Federal Power Com'n, 354 F.2d 608, 616 (2d Cir. 1965). Cf. Environmental Defense Fund, Inc. v. Ruckelshaus, 142 U.S.App.D.C. 74, 84, 439 F.2d 584, 594 (1971).

be found to be "legitimate and prudent" in accordance with the standard of 47 U. S.C. § 311(c), the Commission must be given the opportunity to pass on them.

Accordingly, this case is remanded to the Commission for a determination of whether the expenses submitted by appellant meet this standard.

### NOTES AND QUESTIONS

1. This case holds that citizen groups which had furnished legal advice in connection with a petition to deny were entitled to voluntary reimbursement of legitimate and prudent expenses incurred. The Court held that an FCC rule prohibiting reimbursement of expenses in a petition to deny situation violates the Federal Communications Act. Why did it violate the Communications Act?

What kind of expenses by a citizen group do you think the FCC would find to be not "legitimate and prudent" in accordance with the standard of 47 U.S.C. A. § 311(c)? If citizen groups can be reimbursed for these expenses, it can be argued that the public participation in the renewal process envisioned by *United Church of Christ I* and *United Church of Christ II* is greatly encouraged. On the other hand, it may be argued that citizen groups are not guaranteed reimbursement of their fees and expenses. In the light of the costs involved, and the risk they might ultimately have to be borne by the citizen group itself, the citizen group is still not in a financial position to participate in the renewal process in any extensive way.

2. On remand from the Court of Appeals, the FCC reviewed the case, decided that the expenses claimed by the Church were "legitimate and prudent", and approved payment by the licensee to the Church of $15,000. 24 P. & F. Radio Reg.2d 575 (1972).

## SECTION 8. DIVERSIFICATION OF OWNERSHIP IN BROADCASTING

### 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 7AM, 7FM radio stations or 7 television stations (of which no more than five may be VHF) is in itself contrary to the public interest. 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 U. S. v. Storer Broadcasting Co.,* 351 U.S. 192 (1956).

Do you see any connection between the "balanced programming" concept, the "fairness" doctrine, and the rules designed to diversify ownership of broadcasting stations?

The multiple ownership rules have been criticized in the past in that they focused on each type of electronic medium separately. Originally, under the multiple ownership rules, the same individual was permitted to own an AM station, an FM station, and a TV station—all in the same community. Do you see how this was possible? For discussion on this point and on the multiple ownership rules generally, see Note, *Diversification and the Public Interest: Administrative Responsibility of the FCC*, 66 Yale L.J. 365, 370–373 (1957). The student should note that there is now a rule pro-

hibiting 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 FCC2d 306 (1970). This rule is known popularly as the one-to-a-market rule. The student should note that the new 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, supra*, 22 FCC2d 306 at 323 (1970).

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).*

What argument would you make to defend the validity of the multiple ownership rules under the Federal Communications Act? To attack?

In March 1971, the FCC amended the so-called one-to-a-market rule so that the rule will apply only to combinations of VHF television stations with aural stations in the same market. The amendment to the one-to-a-market rule will 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 F.C.C. 2d 662 (1971). The FCC Memorandum Opinion order supporting the amendment defends the Amendment on the following grounds:

"In arriving at our decision concerning AM and FM stations, we acknowledged the fact that in most cases existing AM–FM combinations in the same area may be economically and/or technically interdependent, and that financial data submitted to the Commission by independent FM stations indicated that they are generally losing money. 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."

### NOTES AND QUESTIONS

1. In its decision to lift the prohibition against AM–FM radio common ownership in the same market, the FCC observed that its "official position" is that the paramount problem in securing diversification of control of mass media is that of cross-ownership of television stations and newspapers. The reasons for this doubtless is the consistency with which major markets reveal a pattern where a VHF network affiliated television station is presently owned by a newspaper in the same market.

2. 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 F.C.C.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. The Commission further conceded that perhaps it should have adopted rules on these subjects in connection with the "one-to-a-market" proceeding. The FCC then concluded:

"We considered it the better course to issue a further notice concerning them (divestiture and newspaper cross-ownership) because of the far reaching ramifications of any rules that might be adopted on these subjects and in order to develop additional information about them."

The further notice the FCC is referring to here is the announcement the FCC made simultaneous with the promulgation of the one-to-a-market rule of the initiation of a rule-making 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 FCC2d 339 (1970). This proceeding is still pending.

3. In the AM–FM combination exception proceeding, FCC also amended its multiple ownership or one-to-a-market rules, prohibiting "ownership, operation, or control of more than one broadcast station in the same market," in order to make an exception for UHF television stations. Applications of UHF licensees to build or acquire radio stations (AM, FM or AM–FM combinations) in the same market will not be dealt with on a case to case basis. 28 F.C.C.2d 662 at 674 (1971). Commissioner Robert T. Bartley dissented from this amendment and urged application to UHF of "the same restriction against ownership of aural stations (AM & FM) in the same market as is applied to VHF." Why did the FCC make an exception to the one-to-a-market rule for UHF?

3. Commissioner Johnson's dissent in the AM–FM combination exception proceeding, 28 F.C.C.2d 662 at 678 (1971), takes the position that if the economic fragility of the FM radio industry is such that present FM operators cannot survive unless common ownership of AM and FM radio stations in the same market is permitted, the solution is to license new FM operators, particularly among the members of the Black community who are "interested in getting into media ownership and operation." Yet Commissioner Johnson still would permit AM and FM common ownerships in some situations. Why?

4. For an excellent account of the problems of diversification of ownership and concentration of control in mass media as they affect the newly developing CATV industry, see Stephen Barnett, *Cable Television and Media Concentration, Part I: Control of Cable Systems by Local Broadcasters*, 22 Stan.L.Rev. 221 (1970). Besides setting forth suggestions for avoiding media concentration in CATV, Professor Barnett discusses and criticizes existing practices and policies with regard to concentration of control in broadcasting.

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## MANSFIELD JOURNAL CO. v. FCC

86 U.S.App.D.C. 102, 180 F.2d 28 (1950).

WASHINGTON, Circuit Judge.

* * *

The facts are as follows: The Mansfield Journal is the sole newspaper in the town of Mansfield, Ohio. The only other medium of mass communication in Mansfield is radio station WMAN, which is under different ownership than the newspaper and competes with it for

local advertising. The Commission found that the Mansfield Journal used its position as sole newspaper in the community to coerce its advertisers to enter into exclusive advertising contracts with the newspaper and to refrain from utilizing station WMAN for advertising purposes. It did this by refusing to permit certain advertisers, who also use the radio to sell their products, to secure regular advertising contracts or to place any advertisements in the newspaper whatever. The Commission found further that Mansfield Journal had demonstrated a marked hostility to station WMAN by declining to publish WMAN's program log and by failing to print any comments about the station unless unfavorable. The Commission concluded that such actions were taken with the intent and for the purpose of suppressing competition and of securing a monopoly of mass advertising and news dissemination, and that such practices were likely to continue and be reenforced by the acquisition of a radio station. The applications of the Mansfield Journal therefore were rejected, the Commission holding that a grant to it would be inconsistent with the public interest, and that it was unqualified.

* * *

The Commission has determined in the instant case that it is contrary to the public interest to grant a license to a newspaper which has attempted to suppress competition in advertising and news dissemination. This would not appear to be a consideration conceived in whimsy but rather a sound application of what has long been the general policy of the United States. Congress intended that there be competition in the radio broadcasting industry. It is certainly not in the public interest that a radio station be used to achieve monopoly.

Appellant argues that this amounts to enforcement of the antitrust laws. But whether appellant has been guilty of a violation of these laws is not here in issue. The fact that a policy against monopoly has been made the subject of criminal sanction by Congress as to certain activities does not preclude an administrative agency charged with furthering the public interest from holding the general policy of Congress to be applicable to questions arising in the proper discharge of its duties. Whether Mansfield's activities do or do not amount to a positive violation of law, and neither this court nor the Federal Communications Commission is determining that question, they still may impair Mansfield's ability to serve the public. Thus, whether Mansfield's competitive practices were legal or illegal, in the strict sense, is not conclusive here. Monopoly in the mass communication of news and advertising is contrary to the public interest, even if not in terms proscribed by the antitrust laws.

It may be that appellant is contending that if the Commission's findings of fact were correct, then appellant has violated the antitrust laws, and that in such case the Commission is without jurisdiction to consider these matters. There is no merit in such a contention. It is provided in the Federal Communications Act itself that the Federal Communications Commission may refuse a license to any person who "has been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize, radio communication, directly or indirectly * * * or to have been using unfair methods of competition." 47 U.S.C.A. § 311. The Mansfield Journal has not been convicted of any such violation. But the statute does not for that reason place the Journal's past conduct with regard to monopoly and the antitrust laws beyond the consideration of the commission.

* * *

We hold, therefore, that it was fully within the Commission's jurisdiction to

hear evidence on the alleged monopolistic practices of the appellant, regardless of whether or not such practices were specifically forbidden by statute, and to deny the licenses upon its finding that such practices had in fact taken place and were likely to carry over into the operation of the radio station.

Appellant contends that to deny it a license because it has refused to carry the log of station WMAN, or because it has refused to permit certain people to advertise, is to impinge upon the freedom of the press. We think that the appellant misconceives the Commission's holding. The Commission did not deny the license merely because the newspaper refused to print certain items or because it refused to serve certain advertisers, but rather because the Commission concluded that those practices were followed for the purpose of suppressing competition. Similarly, it would appear that Mansfield was not denied a license because it was a newspaper, but because it used its position as sole newspaper in the community to achieve a monopoly in advertising and news dissemination. Such a denial does not constitute a violation of the First Amendment.

* * *

With regard to (the case) in which the Lorain Journal was denied a license for an AM station: The denial was predicated on the grounds that there is a complete common ownership and common control of the Lorain and Mansfield Journals, and that the same control which cannot be entrusted with a radio station in Mansfield cannot be entrusted with a radio station in Lorain, as it is likely to abuse its power in either situation. While these two newspapers were separate corporations, with separate editorial staffs, and located in communities over fifty miles apart, the record shows that one family owns all of the stock in both corporations and that the owners took very active part in the control and policy formulation of the newspapers. We think the Commission was entitled to ascertain, and base its findings upon, the true locus of control. It could properly conclude that what had occurred in Mansfield was indicative of what might occur under similar circumstances in Lorain.

This is not to disregard the fact that the two newspaper companies conduct separate businesses. It is rather to recognize that the true applicant in each of these cases is the same individual, or group of individuals, and that the Commission is empowered to consider the conduct and history of the applicant before deciding to grant the benefits represented by a broadcasting license.
* * *

Upon examination of the record we find no reversible error. The decisions of the Federal Communications Commission in all three cases are therefore

Affirmed.

### NOTES AND QUESTIONS

1. Antitrust prosecution and conviction of the defendants in the principal case did, in fact, eventually occur. As a result, the FCC denied the license application of the Lorain Journal Co. Under § 313 of the Federal Communications Act the FCC is directed to refuse a license "to any person whose license has been revoked by a court." 47 U.S.C.A. § 313 (1964). Does such an explicit statutory provision argue for or against the result reached by the court in the *Mansfield Journal* case?

2. The facts of the *Mansfield Journal* case reveal still another inadequacy of the multiple ownership rules. They are entirely silent as to cross-media ownership. In other words, there is nothing in them to prohibit the acquisition by the only newspaper in a community of that

community's only television station. The reason for this omission can be grounded on the fact that newspapers are not licensed and are not under the jurisdiction of the FCC. However, it is possible to make an argument on the basis of the approach of the court in the *Mansfield Journal* case that the multiple ownership rules ought to be extended by the FCC to reach cross-media concentration of ownership. What would the content of such an argument be?

3. Perhaps the whole philosophy of the diversification of ownership concept in broadcasting is wrong-headed. 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? Do the facts of the *NBC* case, relied on by the court in *Mansfield*, also suggest the reasons why assuring diversification of ownership of stations is not itself assurance of diversification of programming?

4. While the FCC can, as seen in the *Mansfield Journal* case, consider antitrust policy when it makes a determination of whether "the public interest, convenience, or necessity" is served by granting or renewing a broadcast license, it is also clear that the broadcast industry is not itself exempt from the antitrust laws as a "regulated industry." In *United States v. Radio Corporation of America*, 358 U.S. 334 (1959), the Court rejected the argument made by RCA and its subsidiary, NBC, that FCC approval of the exchange of an NBC-owned station in Cleveland for one in Philadelphia barred the Justice Department's antitrust attack on that exchange. The Court held that since the broadcast industry was not regulated as a common carrier or a public utility, "there (is) no pervasive regulatory scheme, and no rate structure to throw out of balance, (so) sporadic action by federal courts can work no mischief." See S. C. Oppenheim and G. Weston, Federal Antitrust Laws, p. 44 (1968), and the cases and articles cited therein.

Against this background the Justice Department has recently moved against cross-media ownership and the major television networks. First, it has asked the FCC not to renew television licenses in three cities, Des Moines, Iowa, St. Louis, Missouri, and in the Twin Cities of Minneapolis and St. Paul, arguing before the Commission as an advocate of antitrust policy that the cross-ownership of daily newspapers and broadcast outlets in those cities is contrary both to competitive economic policy and to the free circulation of ideas. The Justice Department has also initiated an antitrust suit against the major television networks, alleging that their participation in production of TV serials, recordings, and other commercial, "nonbroadcasting" areas is in violation of the antitrust laws. The *Washington Post* reported that CBS in its reply to the government stated that the suit was an attempt by the Nixon administration to "stifle the network in violation of the First Amendment guarantees of freedom of the press." The *Washington Post*, Saturday, December 22, 1973, at A8.

For a discussion of antitrust problems as they relate to the newspaper press, see text, Ch. VIII, p. 629.

**The Background of the WHDH Case**

The following press release was issued by the FCC on January 23, 1969. The press release discusses the facts and important issues resolved in the FCC's WHDH case. The case is a milestone in broadcasting law since it represents the denial by the FCC of an application for license renewal by an established and presently operating licensee.

## COMMISSION WOULD AWARD BOSTON TV CHANNEL 5 TO BOSTON BROADCASTERS INC., ORDERS DECISION REPORTED TO U. S. COURT OF APPEALS

Applications to operate a TV station on Channel 5, Boston, Mass., have been resolved by Commission Decision in favor of Boston Broadcasters Inc.

Channel 5 has been occupied by WHDH Inc. since it got the original grant in 1957, but the case was remanded for further hearing in 1958 by the U. S. Court of Appeals for the D. C. Circuit and has been in litigation since then. The Decision specified no date for termination of the WHDH–TV operation because the court retained jurisdiction, but the FCC general counsel was ordered to report these proceedings to the court.

After the court remand in 1958, the Boston Channel 5 case moved between court and Commission a number of times. In September of 1962 the Commission released a Decision affirming the 1957 grant to WHDH. It issued licenses to cover the original construction permit for four months only, and WHDH appealed along with a losing applicant. When WHDH applied for renewal of license, new competing applications were filed by three other applicants, and the Commission designated them for comparative hearing in October of 1963. The Court, after argument of appeals from the September 1962 Decision, remanded the case for the Commission to consider whether changed conditions arising from the death in late 1963 of Robert B. Choate, who had been president both of the Boston Herald-Traveler Corp. and of WHDH Inc., had affected the grant.

* * *

This led to an Initial Decision released by Hearing Examiner Herbert Sharfman August 15, 1966. The current Commission Decision reversed this. It substantially adopted his findings of fact. "However," the Commission said, "we view those findings as warranting substantially different conclusions and a different ultimate result." Examiner Sharfman had awarded comparative preference to the WHDH application and recommended that the WHDH application for renewal of license be granted, with competing applications denied.

* * *

BBI (Boston Broadcasters, Inc., a competing applicant) was cited in the decision for superiority under the criteria of diversification of communications media control and integration of ownership with management. WHDH Inc. is licensee of WHDH–AM, Boston, and it is owned by the Boston Herald-Traveler Corp., daily newspaper publisher which also has a controlling interest in Entron Inc., CATV equipment manufacturer and system operator. The Commission gave BBI a slight preference on diversification over another competitor, Charles River Civic Television Inc. The proposed president of Charles River Civic Television is Theodore Jones, president of Charles River Broadcasting Co., which is the licensee of WCRB–AM–FM, Waltham, Mass., and owns the licensee corporation of WCRQ–FM, Providence, R. I.

* * *

Both BBI and Charles River were given preference by the Commission on integration of ownership with management.

* * *

The Commission gave a demerit to the WHDH application because of unauthorized transfers of control. They took place first with the death of Sidney W. Winslow Jr. and his replacement as president of the Boston Herald-Traveler Corp. by Mr. Choate, who also was president of WHDH, then the death of Mr.

Choate and his replacement in both presidencies by George E. Akerson. Although the examiner did not hold the licensee accountable, the Commission held "that an unauthorized transfer of *de facto* control occurred." It said an application for consent to involuntary transfer of control should have been filed by WHDH.

Separately on the issues involving Mr. Choate's death, the examiner concluded that no material changes had been made as a result of his death and that the Commission's September 1962 Decision should not be modified. He held also that questions of comparative demerit, if any, to be assessed against WHDH because of *ex parte* contacts by Mr. Choate, and the effect of his death, could be argued more effectively in the renewal proceeding. Ultimately he preferred the WHDH application on a comparative basis. (The *ex parte* contacts were by Mr. Choate with the late FCC Chairman George C. McConnaughey. After a hearing on this, the Commission in a Decision released July 14, 1960, had concluded that WHDH should be charged with a comparative demerit on the ground that two meetings by Mr. Choate with Chairman McConnaughey involved an attempt to influence him outside the recognized processes of adjudication. It found that while there were attempts to influence Commission members, no actual influence occurred. It set aside the grant and gave WHDH special temporary authority to stay on the air.)

In its current Decision, the Commission said, "The Examiner concluded that because of Mr. Choate's death his *ex parte* contacts are no longer a factor in the comparative evaluation. * * * In view of our denial of the WHDH application on other grounds, it is unnecessary to determine whether the Examiner reached a proper result on this question."

* * *

Action by the Commission January 22, 1969, by Decision. Commissioners Bartley and Wadsworth, with Commissioners Johnson concurring and issuing a statement, Hyde (Chairman) abstaining from voting and issuing a statement, Robert E. Lee dissenting and issuing a statement and Cox not participating.

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## IN THE MATTER OF WHDH, INC.

16 FCC2d 1 (1969).

Commissioner Bartley for the Commission: Chairman Hyde abstaining from voting and issuing a statement; Commissioner Robert E. Lee dissenting and issuing a statement; Commissioner Cox not participating; Commissioner Johnson concurring and issuing a statement; Commissioner H. Rex Lee absent.

* * *

*Evaluation of Comparative Criteria*

Our basic disagreement with the Examiner's conclusions lies in the preferred status which he gave to WHDH "not because it is an applicant for renewal but because it has an operating record and its very existence as a functioning, manned station to advance against its opponents, whose promises, after all, are as yet just so much talk." Thus, the Examiner decided that the traditional mode of comparing mutually exclusive applicants, "in the mechanical or point-by-point manner especially advocated by BBI", would have been a sterile exercise. In his judgment, the cardinal probative attribute—for good or bad—of WHDH was its operating record.

* * *

With regard to WHDH's past broadcast record, Examiner Sharfman concluded ultimately that as a whole such record is favorable. The superiority of WHDH's

claims to renewal against those of its competitors for initial authorization, the Examiner stated, rests on a basis of achievement, theirs on promises, often glittering, but of relatively uncertain and unestablished validity.

In our judgment, the Examiner's approach to this proceeding places an extraordinary and improper burden upon new applicants who wish to demonstrate that their proposals, when considered on a comparative basis, would better serve the public interest. In fairness to the Examiner, it should be pointed out that he followed what he understood to be the Commission's policy in proceedings of this nature, as expressed in *Hearst Radio, Inc. (WBAL)*, 6 R.R. 994 (1951), and *Wabash Valley Broadcasting Corporation (WTHI–TV)*, 35 FCC 677, 1 R.R.2d 573 (1963). Thus, in *Hearst* the determining factor in the Commission's decision was "the clear advantage of continuing the established and excellent service * * * [of the existing station] when compared to the risks attendant on the execution of the proposed programming of * * * [the new applicant] excellent though the proposal may be." * * *

*Diversification of the Media of* Mass Communications.

As noted in the *Policy Statement*, diversification is a factor of first significance since it constitutes a primary objective in the Commission's licensing scheme. The benefits derived from diversification have been set forth in many cases decided by the Courts and by the Commission, and they need not be recited in detail here. When compared with Charles River and BBI, WHDH manifestly ranks a poor third because of its ownership of a powerful standard broadcast station, an FM station, and a newspaper in the city of Boston itself. While it is true that the existence of numerous other media in Boston in which WHDH has no ownership interest may not be ignored and does somewhat diminish the weight to be accorded the preferences to Charles River and BBI on local diversification, nonetheless those preferences are quite significant here. A grant to either Charles River or BBI would clearly result in a maximum diffusion of control of the media of mass communications as compared with a grant of the renewal application of WHDH. A new voice would be brought to the Boston community as compared with continuing the service of WHDH–TV. We believe that the widest possible dissemination of information from diverse and antagonistic sources is in the public interest, and this principle will be significantly advanced by a grant of either the Charles River or the BBI application.

The desirability of maximizing the diffusion of control of the media of mass communications in Boston is highlighted by the Herald-Traveler's premature publication in its newspaper of a preliminary draft of a report of the Massachusetts Crime Commission without also simultaneously publicizing the report over its broadcast stations. Although the Herald-Traveler received the preliminary draft four or five days before it was published, personnel of Herald-Traveler's broadcast stations first heard of the impending publication of the draft report in the newspaper about midnight of the night before the draft was published. At the 1954 hearing, the testimony was that news would not be withheld from the public just because the Herald-Traveler publishes a newspaper. At the hearing in 1965, Mr. Akerson agreed that had any part of the story about the draft report appeared on the Herald-Traveler's stations, prior to newspaper publication, such news broadcast would have adversely affected the "scoop" value of the story. In this instance, the joint ownership of newspaper and broadcast interests inured

to the disadvantage of the broadcast stations and their listeners.

Although conceding that it has never editorialized, WHDH contends that this is a factor which minimizes any question of concentration of control flowing from the common ownership of newspaper and broadcast interests. We disagree with this contention. Licensees have an obligation to devote a reasonable amount of their broadcast time to the presentation of programs on controversial issues of public importance to their communities. *Editorializing by Broadcast Licensees,* 13 FCC 1246 (1949). If anything, the failure to editorialize demonstrates the wisdom of the Commission's policy in favor of a maximum diffusion of control of the media of mass communications.

* * *

Both Charles River and BBI must be preferred to WHDH under the diversification and integration criteria. In addition, a demerit attaches to the WHDH applicant because of the unauthorized transfers of control which have occurred.

As between Charles River and BBI, BBI is entitled to a slight preference on the diversification factor, and to a significant preference on the integration factor. As noted earlier herein, WHDH's past broadcast record and the past broadcast record of Mr. Jones of Charles River do not enter into the comparative evaluation for the reasons given in the discussion of such records. We also concluded that no one of the applicants merits a preference over the others regarding the proposed program service.

Because of its superiority under the diversification and integration criteria, we conclude that the public interest, convenience, and necessity will be best served by a grant of the application of Boston Broadcasters, Inc., and by denial of the renewal application of WHDH, Inc. and denial of the applications of Charles River Civic Television, Inc. and Greater Boston TV Co., Inc.

* * *

## DISSENTING STATEMENT OF COMMISSIONER ROBERT E. LEE

* * *

I reluctantly concurred in the *Policy Statement* and stated then, and still believe, that the preferred applicant could be one with newspaper and CATV interests. For this reason, I specifically reserved my right as to the weight to be assigned to the various criteria in a given case. This is such a case. Subsequent decisions of the Commission have further defined the policy with respect to renewals versus competing applications but only with respect to the admissibility of evidence pursuant to the policy but not the weight to be afforded such evidence. The majority here holds in effect that the weight to be afforded the comparative factors in a renewal application is the same as a new application. I believe that the weight to be given such evidence is substantially reduced in view of the renewal applicant's existing track record. To hold otherwise would permit a new applicant to submit a "blue sky" proposal tailor-made to secure every comparative advantage while the existing licensee must reap the demerits of hand-to-hand combat in the business world, and the community it serves, in which it is virtually impossible to operate without error or complaint, if for no other reason than there are insufficient hours in the broadcast day with which to satisfy all the desires of the public. A real question is raised in my mind whether the new applicant in this situation is seeking to satisfy the needs of the community or the policy of the Commission.

One further comment is required on a renewal applicant which is unlike the

case where all applicants are initially seeking an outlet. Vast expenditures for facilities and good will have been made which it would be inequitable to declare forfeited unless the licensee has operated against the public interest.

As with the majority, I too accept the Hearing Examiner's Findings of Fact. In addition, with several minor exceptions, I also accept his conclusions.

The majority assigns comparative decisional significance to the diversification and integration criteria with some minor demerit to WHDH, Inc. for unauthorized transfer of control.

The record shows that all of the WHDH, Inc. stock is owned by the Boston Herald-Traveler Corporation. The Herald-Traveler publishes two daily and one Sunday newspaper. Five other newspapers are published in Boston, including the Christian Science Monitor and none of the other newspapers have an ownership interest in an AM, FM or TV station. After the record was closed, the Boston Globe acquired a 50% interest in the New Boston Television, Inc., Channel 38, in which Kaiser Broadcasting Company also has a 50% interest. WHDH–FM is one of 12 FM stations in Boston and the immediate vicinity. WHDH–AM is one of three 50 kw stations, and 8 other AM stations with power up to 5 kw, which includes 3 daytime-only stations, in Boston and vicinity. Boston has 3 commercial VHF–TV stations, including WHDH–TV, 2 UHF commercial stations and a VHF educational station. The Herald-Traveler's average combined daily circulation was 23% of the market and the paper is ranked first in display linage. Herald-Traveler also has a 50% ownership of Entron, Inc., which concern manufactures CATV equipment and has substantial ownership in 5 systems all of which are completely removed from the Boston market.

I support, in principle, the policy that an applicant's interest in other mass communications media must be considered in our comparative analysis. The comparative weight to be assigned such evidence drops sharply where a healthy competitive situation exists from a number of other non-affiliated media in the same market. To hold otherwise would mean that certain categories of applicants (such as newspapers) would be automatically precluded.

WHDH, Inc. has a renewal of license application before us. This license was granted without condition (except for the 4 month period) and, of necessity, was found qualified under all applicable sections of our Act and rules. It was further clear that, as a renewal applicant, WHDH, Inc. could continue to operate the station until this proceeding is terminated under the Administrative Procedure Act. This being the case, weight must also be given "to the clear advantage of continuing an established and excellent service of the existing station". *Hearst Radio, Inc.* (WBAL), 6 R.R. 994 (1951); *Wabash Broadcasting Corporation* (WTHI–TV), 35 FCC 677, 1 R.R. 2d 573 (1963). The *Policy Statement* must be interpreted in the light of these holdings particularly when it is recognized that the *Policy Statement* sets forth procedures of a general nature which "cannot dispose of all problems or decide cases in advance."

A similar weighing process must also be applied to the preference the majority awards to BBI on Integration. While on paper, BBI shows up better than WHDH, Inc. on integration, this must be weighed in the light of the record which shows that WHDH, Inc. has done an above-average job in the past. This, to me, is a more accurate gauge of the future than the theory, which I recognize as valid for new applicants, that an owner-manager who spends full time at the station should provide better public service

than the absentee owner or one who devotes only part time to the station.

* * *

The majority places some significant emphasis on a news scoop of the Herald-Traveler which was not given to WHDH–TV and the fact that in the 1954 hearing Herald-Traveler testified that it would not withhold news from WHDH–TV just because it published a newspaper. The record is also clear that the Herald-Traveler Board of Directors is not a center of *de facto* or actual control over WHDH, Inc. Rather than this incident demonstrating the evil of newspaper-TV station ownership, it could be concluded on this record that the newspaper and TV station, for all operational purposes, were independent of each other.

Based on all the above, and the entire record in the proceeding, I find that the weight to be given the facts in this case, which both the majority and this dissent accept, dictate a grant of the renewal to WHDH, Inc.

I am very much afraid that this decision will be widely interpreted as an absolute disqualification for license renewal of a newspaper owned facility in the same market. Competing applications can be anticipated against most of these owners at renewal time.

Concurring statement of Commissioner Nicholas Johnson.

This case has a long and unfortunate history. We are essentially reconsidering matters that were first addressed by this Commission years before I came. Normally I would not participate in such a case. In this instance, however, my participation is necessary to constitute a working majority for decision. Accordingly, I concur in today's decision.

I feel no passion about the selection of the ultimate winner. As the opinion makes clear, a weighing of the merits of Charles River Civic Television, Inc., and Boston Broadcasters, Inc., is not overwhelming. And, as I have indicated elsewhere, I do not believe the comparative hearing process is an especially useful device for disposing of matters of this significance. *Farragut Television Corp.*, 8 F.C.C.2d 279, 285 (1967).

But this case is significant for other reasons. In America's eleven largest cities there is not a single network-affiliated VHF television station that is independently and locally owned. They are all owned by the networks, multiple station owners, or major local newspapers. The decision to not award Channel 5 to the *Herald-Traveler* is supported by good and sufficient reasons beyond the desire to promote diversity of media ownership in Boston. And I take no present position on the merits of continued newspaper ownership of broadcasting properties in markets where there is competing media. But I do think it is healthy to have at least *one* station among these politically powerful 33 network-affiliated properties in the major markets that is truly locally owned, and managed independently of the other major local mass media. It is a step, however small, back toward the Commission's often professed but seldom evidenced belief in the benefits of local ownership and media diversity. It is, at the very least, an interesting experiment which will be watched carefully by many.

Nor is the significance of this case limited to the impact on media ownership in Boston. For the Commission also speaks generally of situations in which a new competitor is seeking the right to broadcast as against a present broadcast license holder. We suggest that the standards at renewal time ought to be the same standards that would prevail if all applicants were new applicants. In doing so the Commission removes an ambiguity in its comparative hearing standards and procedures. In the words of the order:

"We believe that this approach is sound, for otherwise new applicants com-

peting with a renewal applicant would be placed at a disadvantage if the renewal applicant entered the contest with a built-in lead arising from the fact that it has a record as an operating station. More importantly, the public interest is better served when the foundations for determining the best practicable service, as between a renewal and new applicant, are more nearly equal at their outset."

Cases are overruled where licensees with substantial media concentrations were able to retain their license under a renewal comparative challenge. The door is thus opened for local citizens to challenge media giants in their local community at renewal time with some hope for success before the licensing agency where previously the only response had been a blind reaffirmation of the present license holder.

### NOTES AND QUESTIONS

1. 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 court 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.

The Commission opinion in the *WHDH* case strongly relies on the *Policy Statement on Comparative Broadcast Hearings* which had emphasized that the FCC was going to award a new degree of decisiveness to diffusion of control of the mass media in awarding broadcast licenses in comparative hearings. That this policy would actually result in denying a license to an established licensee, who had substantial ownership interests in other media, and to preferring new applicants, few of those knowledgeable in the broadcasting industry would have contemplated.

2. What does Commissioner Johnson mean when he says that since he was not on the Commission when the *WHDH* case first arose, he would have preferred, had his vote not been essential, not to have participated in the decision? His previous lack of involvement in the case ought to provide splendid equipment for the detached decision-making which is necessary to a member of a quasi-judicial tribunal. What do you think is the basis for Commissioner Johnson's statement?

3. Commissioner Hyde said that he had been in the past, alternatively, on the affirmative and then on the negative of the *WHDH* licensing issue. Now he said he chose to abstain presumably in an effort to occupy all sides of the question. What does this unusual candor tell you about FCC regulatory attitudes?

4. Did *WHDH* throw a pall on every existing licensee's chance for license renewal? On its broadest interpretation *WHDH* could mean those holding broadcast licenses, no matter how long they have been in business and how routinely their licenses have been renewed in the past, have no special claim to renewal. It is this broadcast interpretation which horrifies Commissioner Robert E. Lee. He points out that a renewal applicant is in a different position than applicants who are initially seeking an outlet: "Vast expenditures for facilities and good will have been made which it

would be inequitable to declare forfeited unless the licensee has operated against the public interest." On a narrower interpretation of its ruling, the *WHDH* case could be read to hold 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.

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Note on The Reaction to WHDH

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.

The so-called Pastore Bill, named for Senator John O. Pastore, Chairman of the Senate Subcommittee on Communications, who introduced the following rescue measure, was the industry hope.

The Pastore Bill, S. 2004, 91st Cong., 1st Sess., provided as follows:

" * * * section 309(a) shall be amended by adding the following after the final sentence thereof: Notwithstanding any other provision of the Federal Communications Act, the Commission, in acting upon any application for renewal of a broadcast license filed under section 308, may not consider the application of any other person for the facilities for which renewal is sought. If the Commission finds upon the record and representations of the licensee that the public interest, convenience, and necessity has been and would be served thereby, it shall grant the renewal application. If the Commission determines after a hearing that a grant of the application of a renewal applicant would not be in the public interest, convenience, and necessity, it shall deny such application, and applications for construction permits by other parties may then be accepted, pursuant to section 308, for the broadcast service previously licensed to the renewal applicant whose renewal was denied."

The public reaction to the Pastore Bill was hostile. Black groups such as BEST (Black Efforts for Soul in Television) contended that the Pastore Bill amounted to a grandfathering of existing broadcast licenses and a permanent exclusion of blacks from entry and ownership in the broadcast industry.

At this point on January 15, 1970, the FCC came in with its own new 1970 *Policy Statement on Renewals* which was superficially milder than the Pastore Bill since at least it would still be possible to challenge renewals. The Pastore Bill was quietly withdrawn. But the newly energized citizen groups contended that the Policy Statement entrenched existing ownership and made it very difficult for citizen groups to secure an evidentiary hearing in which to show that an existing licensee had not performed substantially in the public interest.

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 three years, it would not be possible for a station to render even substantial service. See *Policy Statement On Comparative Hearings Involving*

*Regular Renewal Applicants, 22 F.C.C. 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."

Professor Hyman Goldin of the Boston University School of Public Communication said the crucial flaw in the 1970 *Policy Statement* was the FCC's failure to give any meaning to the "substantial service" requirement. See Goldin, *'Spare the Golden Goose'—The Aftermath of WHDH in FCC License Renewal Policy,* 83 Harvard Law Review 1014 (1970). What definition of "substantial service" would you suggest? What should its components be? Community involvement and quality programming for children are components suggested by Professor Goldin.

If the FCC and the broadcast industry thought the attack on automatic renewals of broadcast licenses had been outflanked by the 1970 *Policy Statement,* they were taking comfort prematurely. For one thing, 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) It is true that Judge Leventhal, who wrote the opinion, emphasized that the 1970 *Policy Statement* was not involved in the case since it specifically stated it did not apply to "unusual cases" like *WHDH* where the renewal applicant, for unique reasons, is treated like a new applicant. But a basic fact remained: 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.*

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, a disenchantment given vivid expression in Judge Burger's decision in *United Church of Christ II.* See text, p. 901.

WHDH argued on appeal that the *Red Lion* decision pulled the rug out from under the FCC's "pretentious Policy Statement justification of its 'diversity' criterion." WHDH thought that the *Red Lion* stress on the need for access had rendered diversification of control of media unnecessary. Judge Leventhal responded that the *Red Lion* doctrine and diversification of control policy both were proper means to serve the goal of diversity of viewpoint.

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### The Citizens Communications Center Case: The Renewal Controversy Renewed

Citizen groups, led by Albert Kramer of the Citizens Communication Center and William D. Wright of BEST (Black Efforts for Soul in Television), challenged the legality of the 1970 policy statement.

* As a result of the *WHDH* case, the Boston *Herald-Traveler* found it could not go it alone. As a result, the *Herald-Traveler* merged with the *Record-American.* Paradoxically, as a result of *WHDH,* Boston has one *less* daily newspaper voice. Is this cause for reconsideration of a policy aimed against cross-ownership?

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 rule making proceedings was reversed.

The successful citizen 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. Further, the *Policy Statement* was unlawful because it deprived a competing applicant of a hearing in violation of § 309(e) 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. What is the thrust of the Court's argument on this last point?

The tremors the *Citizens Communications Center* case have sent through the broadcast industry rival the FCC's *WHDH* decision of January 1969. The unwritten rule of automatic renewal for the broadcast incumbent was once more under attack.

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## CITIZENS COMMUNICATION CENTER, BLACK EFFORTS FOR SOUL IN TELEVISION, ALBERT H. KRAMER AND WILLIAM D. WRIGHT v. FEDERAL COMMUNICATIONS COMMISSION

447 F.2d 1201 (D.C.Cir. 1971).

Before WRIGHT, MacKINNON and WILKEY, Circuit Judges.

WRIGHT, Circuit Judge: Appellants and petitioners in these consolidated cases challenge the legality of the "Policy Statement on Comparative Hearings Involving Regular Renewal Applicants," 22 FCC2d 424, released by the Federal Communications Commission on January 15, 1970, and by its terms made applicable to pending proceedings. Briefly stated, the disputed Commission policy is that, in a hearing between an incumbent applying for renewal of his radio or television license and a mutually exclusive applicant, the incumbent shall obtain a controlling preference by demonstrating substantial past performance without serious deficiencies. Thus if the incumbent prevails on the threshold issue of the substantiality of his past record, all other applications are to be dismissed without a hearing on their own merits.

Petitioners contend that this policy is unlawful under Section 309(e) of the Communications Act of 1934[4] and the

[4] 47 U.S.C. § 309. Section 309 was amended in 1952, 1960 and 1964. As summarized in a Staff Study for the Special Subcommittee on Investigations of the Committee on Interstate and Foreign Commerce, House of Representatives, 91st Cong., 2d Sess., November 1970 (hereinafter cited as Staff Study), "The Act's Legislative History reveals that the amendments dealt primarily with procedure and did not limit the hearing right of Section 309(a) discussed in Ashbacker. The 1952 amendment moved the hearing provision from subsection (a) to subsection (b). The 1960 amendment moved it to subsection (e)." Subsection (e) of § 309 today reads in pertient part as follows:

"If, in the case of any application to which subsection (a) of this section applies, * * * the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining * * *. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate * * *."

Subsection (a) of § 309 reads:

"Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon exami-

doctrine of Ashbacker Radio Corp. v. F. C.C., 326 U.S. 327 (1945). The 1970 Policy Statement is also attacked by petitioners on grounds that it was adopted in disregard of the Administrative Procedure Act and that it restricts and chills the exercise of rights protected by the First Amendment.

Respondents urge the court to refrain from considering these arguments at this time because the 1970 Policy Statement is neither a final order nor yet ripe for review. In the alternative, respondents take the position that the Policy Statement is a lawful exercise of the Commission's authority.

We find that the judicial review sought by petitioners is appropriate at this time. Without reaching petitioners' other grounds for complaint, we hold that the 1970 Policy statement violates the Federal Communications Act of 1934, as interpreted by both the Supreme Court and this court. * * * Whether the Policy Statement denies a competing applicant the full comparative hearing to which he is entitled is strictly a matter of statutory interpretation involving a comparision of the hearing procedures spelled out in the Policy Statement with the requirements of 47 U.S.C. § 309(e) and *Ashbacker*.

* * *

Although the 1965 Policy Statement explicitly refrains from reaching the "somewhat different problems raised where an applicant is contesting with a licensee seeking renewal," the Communications Act itself places the incumbent in the same position as an initial applicant. Under the 1952 amendment to the Act, both initial and renewal applicants must demonstrate that the grant or continuation of a license will serve the "public interest, convenience, and necessity." The Communications Act itself says nothing about a presumption in favor of incumbent licensees at renewal hearings; nor is an inability to displace operating broadcasters inherent in government management, as is established by the fact that in its early years of regulation the Federal Radio Commission often refused to renew licenses.

Nonetheless, the history of Commission decision and of the decisions of this court reflected until recently an operational bias in favor of incumbent licensees.

* * *

The 1970 Policy Statement sets forth that a licensee with a record of "substantial" service to the community, without serious deficiencies, will be entitled to renewal notwithstanding promise of superior performance by a challenger. Only upon a refusal to renew because of the incumbent's past failure to provide substantial service would full comparative hearings be held. Thus, in effect, the Policy Statement administratively "enacts" what the Pastore Bill sought to do. The Statement's test for renewal, "substantial service," seems little more than a semantic substitute for the bill's test, "public interest," and the bill's two-stage hearing, the second stage being dependent on the incumbent's failing the test, is not significantly different from the Statement's summary judgment approach. The "summary judgment" concept of the 1970 Policy Statement, however, runs smack against both statute and case law, as the next section of this opinion will show.

Superimposed full length over the preceding historical analysis of the "full hearing" requirement of Section 309(e) of the Communications Act is the towering shadow of *Ashbacker,* and its progeny, perhaps the most important series of

nation of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

cases in American administrative law. *Ashbacker* holds that under Section 309(e), where two or more applications for permits or licenses are mutually exclusive, the Commission must conduct one full comparative hearing of the applications. Although *Ashbacker* involved two original applications, no one has seriously suggested that its principle does not apply to renewal proceedings as well. This court's opinions have uniformly so held, as have decisions of the Commission itself.

It is not surprising, therefore, that the Commission's 1970 Policy Statement implicitly accepts *Ashbacker* as applicable to renewal proceedings. To circumvent the *Ashbacker* strictures, however, it adds a twist: the Policy Statement would limit the "comparative" hearing to a single issue—whether the incumbent licensee had rendered "substantial" past performance without serious deficiencies. If the examiner finds that the licensee has rendered such service, the "comparative" hearing is at an end and, barring successful appeal, the renewal application must be granted. Challenging applicants would thus receive no hearing at all on their own applications, contrary to the express provision of Section 309(e) which requires a "full hearing."

In *Ashbacker* the Commission had promised the challenging applicant a hearing on his application after the rival application was granted. The Supreme Court in *Ashbacker* said that such a promise was "an empty thing." At least the Commission here must be given credit for honesty. It does not make any empty promises. It simply denies the competing applicants the "full hearing" promised them by Section 309(e) of the Act. Unless the renewal applicant's past performance is found to be insubstantial or marred by serious deficiencies, the competing applications get no hearing at all. The proposition that the 1970 Policy Statement violates Section 309(e), as interpreted in *Ashbacker*, is so obvious it need not be labored.

In support of its 1970 Policy Statement the Commission is reduced to reciting the usual litany that "[t]he task of choosing between various claimants for the privilege of using the air waves is essentially an administrative one" consigned by Congress to the Commission. Brief for the Commission at 30. But Congress did not give the Commission *carte blanche*. To protect the public it limited its mandate with the Section 309(e) "full hearing" requirement. Unless the limitation is observed, any putative exercise of the mandate is a nullity.

* * *

We do not dispute of course, that incumbent licensees should be judged primarily on their records of past performance. Insubstantial past performance should preclude renewal of a license. The licensee, having been given the chance and having failed, should be through. *Compare WHDH* supra. At the same time, *superior* performance should be a plus of major significance in renewal proceedings.[35] Indeed, as *Ash-*

[35] The court recognizes that the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service. Given the incentive, an incumbent will naturally strive to achieve a level of performance which gives him a clear edge on challengers at renewal time. But if the Commission fails to articulate the standards by which to judge superior performance, and if it is thus impossible for an incumbent to be reasonably confident of renewal when he renders superior performance, then an incumbent will be under an unfortunate temptation to lapse into mediocrity, to seek the protection of the crowd by eschewing the creative and the venturesome in programming and other forms of public service. The Commission in rule making proceedings should strive to clarify in both quantitative and qualitative terms what constitutes superior service. See Comment, supra Note 26, 118 U.Pa.L.Rev. at 406. Along with elimination of excessive and loud advertising and delivery of quality programs, one test of superior service should certainly be whether and to what extent the incumbent has reinvested the profit on his

*backer* recognizes, in a renewal proceeding, a new applicant is under a greater burden to "make the comparative showing necessary to displace an established licensee." 326 U.S. at 332. But under Section 309(e) he must be given a chance. How can he ever show his application is comparatively better if he does not get a hearing on it? The Commission's 1970 Policy Statement's summary procedure would deny him that hearing.[36]

The suggestion that the possibility of nonrenewal, however remote, might chill uninhibited, robust and wide-open speech cannot be taken lightly. But the Commission, of course, may not penalize exercise of First Amendment rights. And the statute does provide for judicial review. Indeed, the failure to promote the full exercise of First Amendment freedoms through the broadcast medium may be a consideration against license renewal. Unlike totalitarian regimes, in a free country there can be no authorized voice of government. Though dependent on government for its license, independence is perhaps the most important asset of the renewal applicant.

The Policy Statement purports to strike a balance between the need for "predictability and stability" and the need for a competitive spur. It does so by providing that the qualifications of challengers, no matter how superior they may be, may not be considered unless the incumbent's past performance is found not to have been "substantially attuned" to the needs and interests of the community. Unfortunately, instead of stability the Policy Statement has produced *rigor morti*. For

license to the service of the viewing and listening public. We note with approval that such rule making proceedings may soon be under way. News Notes, 39 U.S.L. Week 2513 (March 16, 1971).

[36] Since one very significant aspect of the "public interest, convenience, and necessity" is the need for diverse and antagonistic sources of information, the Commission simply cannot make a valid public interest determination without considering the extent to which the ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it. Johnson Broadcasting Co. v. F.C.C., 85 U.S. App.D.C. 40, 175 F.2d 351 (1949); McClatchy Broadcasting Co. v. F.C.C., 99 U.S.App.D.C. 195, 239 F.2d 15 (1956), cert. denied, 353 U.S. 918 (1957); Scripps-Howard Radio v. F.C.C., 89 U.S.App.D.C. 13, 189 F.2d 677, cert. denied, 342 U.S. 830 (1951). The Supreme Court itself has on numerous occasions recognized the distinct connection between diversity of ownership of the mass media and the diversity of ideas and expression required by the First Amendment. See, e. g., Associated Press v. United States, 326 U.S. 1, 20 (1945); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969). While it is possible under the "fairness doctrine" approved in *Red Lion Broadcasting Co.*, supra, to insure that all stations will give time to more than one side of important and controversial issues, we reiterate the observation of this court in *WHDH*, supra Note 17, that:

"The Commission need not be confined to the technique of exercising regulatory surveillance to assure that licensees will discharge duties imposed on them, perhaps grudgingly and perhaps to the minimum required. It may also seek in the public interest to certify as licensees those who would speak out with fresh voice, would most naturally initiate, encourage and expand diversity of approach and viewpoint." * * * As new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in and chance to broadcast on our radio and television frequencies. According to the uncontested testimony of petitioners, no more than a dozen of 7,500 broadcast licenses issued are owned by racial minorities. The effect of the 1970 Policy Statement, ruled illegal today, would certainly have been to perpetuate this dismaying situation. While no quota system is being recommended or required, and while the fairness doctrine no doubt does serve to guarantee some minimum diversity of views, we simply note our own approval of the Commission's long-standing and firmly held policy in favor of decentralization of media control. Diversification is a factor properly to be weighed and balanced with other important factors, including the renewal applicant's prior record, at a renewal hearing. For two strong statements by the Commission itelf on the importance of diversification, see Bamberger Broadcasting Service, Inc., 3 Pike & Fischer R.R. 914, 925 (1946), *and* Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 394 & n. 4 (1965).

over a year now, since the Policy Statement substantially limited a challenger's right to a full comparative hearing on the merits of his own application, not a single renewal challenge has been filed.

Petitioners have come to this court to protest a Commission policy which violates the clear intent of the Communications Act that the award of a broadcasting license should be a "public trust." As a unanimous Supreme Court recently put it, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." Our decision today restores healthy competition by repudiating a Commission policy which is unreasonably weighted in favor of the licensees it is meant to regulate, to the great detriment of the listening and viewing public.

Wherefore it is ORDERED: (1) that the Policy Statement, being contrary to law, shall not be applied by the Commission in any pending or future comparative renewal hearings; (2) that the Commission's order of July 21, 1970 denying petitioners' petition for reconsideration of the Policy Statement and refusing to institute rule making proceedings is reversed; and (3) that these proceedings are remanded to the Commission with directions to redesignate all comparative renewal hearings to which the Policy Statement was deemed applicable to reflect this court's judgment.

MacKINNON, Circuit Judge: I concur in the foregoing opinion. While I recognize the desire and need for reasonable stability in obtaining renewal licenses, under the present statute as construed by Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), I do not consider it possible to provide administratively that operating licensees who furnish program service "*substantially* attuned to meeting the needs and interests of its area * * * [without] *serious* deficiencies * * * will be preferred over the newcomer and *his* application for renewal will be granted." Such policy would effectively prevent a newcomer applicant from being heard on the merits of his application, no matter how superlative his qualifications. It would also, in effect, substitute a standard of *substantial* service for the *best possible* service to the public and effectively negate the hearing requirements of the statute as interpreted by the Supreme Court. If such change is desired, in my opinion, it must be accomplished by amendment of the statute.

### NOTES AND QUESTIONS

1. Communications lawyers in Washington read with particular care footnotes 35 and 36 of Judge Wright's decision in the *Citizens Communications Center* case. See *Broadcasting,* June 21, 1971. Footnote 35 says licensees rendering "superior service" ought to be renewed, otherwise the public will suffer. What is necessary, therefore, is to define "superior service". Judge Wright suggests 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 attitude toward the renewal process?

2. Footnote 36 of the decision appears 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 Judge Wright's preference for a "superior service" standard could be used to frustrate concern over the fact that "only a dozen of 7500 broadcast licenses issues are owned by racial minorities"?

3. In the exhaustive study of the comparative hearing procedure presented by the Court in the *Citizens Communications Center* case, one of the most salient points made by Judge 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?

4. Although Judge Wright spoke kindly of a "superior service" standard, presently there is no such standard. As the *Citizens Communications Center* decision stands, therefore, the renewal applicant enjoys no particular advantage in the renewal process. Would you describe the *Citizens Communications Center* case as holding that the renewal applicant is to be treated just like a new applicant?

5. The diversification of ownership of the media issue received considerable attention in the *Citizens Communications Center* case. This scrutiny is significant because it means that the efforts of broadcast owners with newspaper affiliations to escape the *WHDH* ruling on the cross-newspaper ownership point have been dealt a heavy blow.

6. The FCC decided not to seek a rehearing of the *Citizens Communication Center* case from the full nine judge panel of the U.S. Court of Appeals. As the decision stands, the FCC is reported to believe that the *Citizens Communications Center* decision leaves the FCC with considerable discretion over the renewal process. *Broadcasting*, July 5, 1971.

Is it likely that a "superior service" standard may now emerge through the renewal hearing process?

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## THE REACTION TO THE CCC CASE

1. Since the 1970 *Policy Statement* was invalidated in the *Citizens Communications Center* case the FCC has moved warily with regard to promulgating new guidelines for the renewal process. One recent survey, *Federal Communications Commission: Fairness, Renewal and the New Technology*, 41 Geo.Wash.L.Rev. 683 at 687–88 (1973) summarized the situation as follows:

> In response to the CCC decision, the FCC has structured license renewal policy on a case-by-case basis utilizing the 1965 Policy Statement criteria.
>
> * * *
>
> Having been overruled by judicial decision in its 1970 attempt to articulate an objective guide for license renewals, the FCC appears to have refrained from attempting to establish substantive guidelines, anticipating that Congress or the President will soon supply them.

2. The FCC reaction to the *CCC* case was quite analogous to the FCC reaction to *United Church of Christ I*. In *Moline Television Corp.*, 31 FCC2d 263 (1971), the incumbent licensee was granted renewal even though the incumbent had not provided superior programming and the competing applicant offered superior programming proposals and greater integration of ownership. The decision drew an angry dissent from Commissioner Nicholas Johnson:

> The majority awards a deciding preference for Moline by finding one phrase in the *CCC* case it likes: "*superior* performance should be a plus of major significance in renewal proceedings." In its footnote to that phrase, the Court suggested three criteria the Commission should consider in defining superior performance:
>
> "Along with the elimination of excessive and loud advertising and delivery of quality programs, one test of superior service should certainly be whether and to what extent the incumbent has reinvested the profit on his li-

cense to the service of the viewing and listening public."

These phrases the majority apparently doesn't like and they are ignored —not disputed, simply ignored. The majority's road to "superior performance" is short. The breakdown of Moline's programming is repeated and found to be noteworthy. There are kudoes for "local, live" although it is significantly less than Moline said its community needed when it received its license. The majority likes Moline's specials and its news programs, without much explanation as to why. In paragraph 20 we learn that no one complained—although in oral argument the Broadcast Bureau pointed out that some community leaders would prefer to have available the prime time Moline had promised, but no one ever came back to let them know that the time was still available. Finally in paragraph 21 we find that Moline measures slightly better than two other TV stations in the Moline market, using more recent statistics from the other two stations. In one category, amount of local, live programming, Moline does less well than WOC–TV.

In short, there is nothing in the record to indicate that Moline's programming is anything more than average, and no amount of "puffing" by the majority can make it "superior."

I am afraid that "past broadcast record" has been equated with "substantial performance" which has then been equated with "superior performance"—and that that finding meant automatic renewal. In the *CCC* case the Court said that the Commission had made comparative renewal hearings into petition to deny hearings, and that S. 2004 had been adopted administratively.

In this case the Commission has gone farther still. S. 2004 would have provided that if under a petition to deny a renewal applicant should be found unqualified for renewal, then the Commission could consider new applicants. But here the renewal applicant is *not* qualified to be renewed, there *is* a new applicant, and the renewal applicant *still* gets renewed.

3. Shortly after the *CCC* case, the FCC issued a statement interpreting the significance the *CCC* case would have in the on-going FCC proceeding regarding the implementation of policies in broadcast renewals. *In the Matter of Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, FCC 71–826, August 4, 1971.* The FCC gave the following interpretation to the CCC decision:

> We believe that while the Court disapproved the procedure set up in the Renewal Policy Statement, and emphasized the need for a more flexible weighing of the good and bad points of both the renewal applicant and the new applicant, it did not intend to overturn the policy that "a plus of major significance" should be awarded to a renewal applicant whose past record warrants it or to undercut the purpose of the present proceeding to seek out and quantify, at least in part, that degree of performance. We therefore continue to propose for the comment of interested persons the percentage guidelines set forth in our prior Notice. It appears to us that they would *prima facie* indicate the type of service warranting a "plus of major significance" in the comparative hearing. That is the standard at whose recognition we are directing our efforts. We recognize that particular labels can be misleading. Thus, we used the term "substantial service" in the sense of "strong, solid" service—substantially above the mediocre service which might just minimally warrant renewal (see 22 FCC 2d at p. 425, n. 1). We

believe that the Court may have read this use of "substantial" service as meaning minimal service meeting the public interest standard (Sl. Op. 20), and therefore employed the term "superior" service to make clear that it had in mind a contrast with mediocre service—as it put it (Sl. Op. 26, fn. 35), a "lapse into mediocrity, to seek the protection of the crowd." In short, we believe that it is unnecessary to further refine the label. What rather counts are the guidelines actually adopted to indicate the "plus of major significance"—the type of service which, if achieved, is of such nature that one can "* * * reasonably expect renewal" (Sl. Op. 25, fn. 35). Interested parties should therefore address themselves to the appropriateness in this respect of the percentages set forth in the prior Notice.

4. Is the FCC really saying that "superior service" and "substantial service" are the same thing? Is this consistent with the court's reaction in the *CCC* case to the substantial service criterion? The real thrust of the foregoing excerpt is to re-establish the process of virtually automatic renewal for the incumbent licensee. If superior service, as defined by Judge Wright, were to be required before an incumbent licensee would be renewed, then routine renewal for the broadcast licensee would, of course, by no means be a certainty.

See footnote 36 of Judge Wright's opinion in *CCC*. Compare it with Commissioner Johnson's description of what the FCC did in the Moline renewal proceeding.

The FCC did not appeal the *CCC* decision to the Supreme Court. In the light of the FCC's substantial-equals-superior pronouncement stated above, is it reasonable that the FCC decided it would rather "interpret" the *CCC* decision than appeal it and have the decision resoundly affirmed?

5. Illustrative of the legislative struggles highlighting the continuing controversy concerning the license renewal process is a bill drafted by Congressman Torbert H. Macdonald (D.–Mass.), Chairman of the House Subcommittee on Communications and Power. The bill would increase the license period from three to four years and would eliminate the ban on multi-media ownership by television license holders. The bill was warmly received in broadcast circles. However, Rep. Lionel Van Deerlin (D.–Calif.), has proposed an amendment to the bill which would grant license renewal if "none of the competing applications offers proposals for broadcast operations and program service which are clearly superior to those of the renewal applicant and demonstrates that such proposals can and will be implemented."

The Van Deerlin proposal would really give a preference to an incumbent licensee. In this sense it differs from Judge Wright's suggestion in the *Citizens Communications Center* case that a preference be given when the incumbent has rendered superior service. The Van Deerlin proposal would give a preference to the competing applicant if he proposed, and was considered able to provide, superior service.

This approach is somewhat in keeping with the broadest reading of the FCC's decision in its *WHDH* case, which was that the incumbent licensee seeking renewal and the competing applicant should both be on the same footing. In addition, the Van Deerlin proposal gave an advantage to the competing applicant.

The National Association of Broadcasters has opposed the Van Deerlin amendment. Public interest groups, on the other hand, feel that the Van Deerlin proposal makes it possible to bring change to broadcasting in terms of stimulating the unseating of incumbents and in terms of improving the quality of programming by giving a chance for success

to competing applicants who offer the prospect of "clearly superior community service."

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## SECTION 9. THE NEW COMMUNICATIONS TECHNOLOGY AND NEW REGULATORY FRONTIERS: SOME CONTEMPORARY DEVELOPMENTS

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### A. COMMUNITY ANTENNA TELEVISION (CATV): CABLE TELEVISION

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## UNITED STATES v. SOUTHWESTERN CABLE CO.

## MIDWEST TELEVISION, INC. v. SOUTHWESTERN CABLE CO.

392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968).

Mr. Justice HARLAN delivered the opinion of the Court.

These cases stem from proceedings conducted by the Federal Communications Commission after request by Midwest Television for relief under §§ 74.1107 and 74.1109 of the rules promulgated by the Commission for the regulation of community antenna television (CATV) systems. Midwest averred that respondents' CATV systems transmitted the signals of Los Angeles broadcasting stations into the San Diego area, and thereby had, inconsistently with the public interest, adversely affected Midwest's San Diego station.[4] Midwest sought an appropriate order limiting the carriage of such signals by respondents' systems. After consideration of the petition and of various responsive pleadings, the Commission restricted the expansion of respondents' service in areas in which they had not operated on February 15, 1966, pending hearings to be conducted on the merits of Midwest's complaints. 4 F.C.C.2d 612. On petitions for review, the Court of Appeals for the Ninth Circuit held that the Commission lacks authority under the Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. § 151 et seq., to issue such an order. 378 F.2d 118. We granted certiorari to consider this important question of regulatory authority. 389 U.S. 911, 88 S.Ct. 235, 19 L.Ed.2d 258. For reasons that follow, we reverse.

CATV systems receive the signals of television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers. CATV systems characteristically do not produce their own programming, and do not recompense producers or broadcasters for use of the programming which they receive and redistribute. Unlike ordinary broadcasting stations, CATV systems commonly charge their subscribers installation and other fees.

* * *

CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond

[4] Midwest asserted that respondents' importation of Los Angeles signals had fragmented the San Diego audience, that this would reduce the advertising revenues of local stations, and that the ultimate consequence would be to terminate or to curtail the services provided in the San Diego area by local broadcasting stations. Respondents' CATV systems now carry the signals of San Diego stations, but Midwest alleged that the quality of the signals, as they are carried by respondents, is materially degraded, and that this serves only to accentuate the fragmentation of the local audience.

the range of local antennae. As the number and size of CATV systems have increased, their principal function has more frequently become the importation of distant signals. * * * Thus, "while the CATV industry originated in sparsely settled areas and areas of adverse terrain * * * it is now spreading to metropolitan centers. * * *"

* * *

We must first emphasize that questions as to the validity of the specific rules promulgated by the Commission for the regulation of CATV are not now before the Court. The issues in these cases are only two: whether the Commission has authority under the Communications Act to regulate CATV systems, and, if it has, whether it has, in addition, authority to issue the prohibitory order here in question.

The Commission's authority to regulate broadcasting and other communications is derived from the Communications Act of 1934, as amended. The Act's provisions are explicitly applicable to "all interstate and foreign communication by wire or radio * * *." 47 U.S.C. § 152(a). The Commission's responsibilities are no more narrow: it is required to endeavor to "make available * * * to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service * * *." 47 U.S.C. § 151. The Commission was expected to serve as the "single Government agency" with "unified jurisdiction" and "regulatory authority over all forms of electrical communication, whether by telephone, telegraph, cable, or radio." It was for this purpose given "broad authority." As this Court emphasized in an earlier case, the Act's terms, purposes, and history all indicate that Congress "formulated a unified and comprehensive regulatory system for the [broadcasting] industry." F. C. C. v. Pottsville Broadcasting Co., 309 U.S. 134, 137.

Respondents do not suggest that CATV systems are not within the term "communication by wire or radio." Indeed, such communications are defined by the Act so as to encompass "the transmission of * * * signals, pictures, and sounds of all kinds," whether by radio or cable, "including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding and delivery of communications) incidental to such transmission." 47 U.S.C. §§ 153(a), (b). These very general terms amply suffice to reach respondents' activities.

Nor can we doubt that CATV systems are engaged in interstate communication, even where, as here, the intercepted signals emanate from stations located within the same State in which the CATV system operates. We may take notice that television broadcasting consists in very large part of programming devised for, and distributed to, national audiences; respondents thus are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other States. The stream of communication is essentially uninterrupted and properly indivisible.

Nonetheless, respondents urge that the Communications Act, properly understood, does not permit the regulation of CATV systems. First, they emphasize that the Commission in 1959 and again in 1966 sought legislation that would have explicitly authorized such regulation, and that its efforts were unsuccessful. In the circumstances here, however, this cannot be dispositive. The Commission's requests for legislation evidently reflected in each instance both its uncertainty as to the proper width of its authority and its understandable preference for more detailed policy guidance than the Communications Act now provides. We have recognized that administrative agencies, should in such situations, be en-

couraged to seek from Congress clarification of the pertinent statutory provisions.

Nor can we obtain significant assistance from the various expressions of congressional opinion that followed the Commission's request. In the first place, the views of one Congress as to the construction of a statute adopted many years before by another Congress has "very little, if any, significance." Further, it is far from clear that Congress believed, as it considered these requests for legislation, that the Commission did not already possess regulatory authority over CATV.

* * *

Second, respondents urge that § 152(a) does not independently confer regulatory authority upon the Commission, but instead merely prescribes the forms of communication to which the Act's other provisions may separately be made applicable. Respondents emphasize that the Commission does not contend either that CATV systems are common carriers, and thus within Subtitle II of the Act, or that they are broadcasters, and thus within Subtitle III. They conclude that CATV, with certain of the characteristics both of broadcasting and of common carriers, but with all of the characteristics of neither, eludes altogether the Act's grasp.

We cannot construe the Act so restrictively. Nothing in the language of § 152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions. The section itself states merely that the "provisions of [the Act] shall apply to all interstate and foreign communication by wire or radio * * *." Similarly, the legislative history indicates that the Commission was given "regulatory power over all forms of electrical communication. * * *" S.Rep. No. 830, 73d Cong., 2d Sess., 1. Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wished "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission," F. C. C. v. Pottsville Broadcasting Co., that it conferred upon the Commission a "unified jurisdiction and "broad authority."

* * *

Moreover, the Commission has reasonably concluded that regulatory authority over CATV is imperative if it is to perform with appropriate effectivenesss certain of its other responsibilities. Congress has imposed upon the Commission the "obligation of providing a widely dispersed radio and television service," with a "fair, efficient, and equitable distribution" of service among the "several States and communities." 47 U.S.C. § 307(b). The Commission has, for this and other purposes, been granted authority to allocate broadcasting zones or areas, and to provide regulations "as it may deem necessary" to prevent interference among the various stations. 47 U.S.C. § 303(f), (h). The Commission has concluded, and Congress has agreed, that these obligations require for their satisfaction the creation of a system of local broadcasting stations, such that "all communities of appreciable size [will] have at least one television station as an outlet for local self-expression." In turn, the Commission has held that an appropriate system of local broadcasting may be created only if two subsidiary goals are realized. First, significantly wider use must be made of the available ultra-high frequency channels. Second, communities must be encouraged "to launch sound and adequate programs to utilize the television channels now reserved for educational purposes." These subsidiary goals have received the endorsement of Congress.

The Commission has reasonably found that the achievement of each of these

purposes is "placed in jeopardy by the unregulated explosive growth of CATV." H.R.Rep.No.1635, 89th Cong., 2d Sess., 6. Although CATV may in some circumstances make possible "the realization of some of the [Commission's] most important goals," First Report and Order, 38 F.C.C. 683, at 699, its importation of distant signals into the service areas of local stations may also "destroy or seriously degrade the service offered by a television broadcaster," id., at 700, and thus ultimately deprive the public of the various benefits of a system of local broadcasting stations.[43] In particular, the Commission feared that CATV might, by dividing the available audiences and revenues, significantly magnify the characteristically serious financial difficulties of UHF and educational television broadcasters. The Commission acknowledged that it could not predict with certainty the consequences of unregulated CATV, but reasoned that its statutory responsibilities demand that it "plan in advance of foreseeable events, instead of waiting to react to them." Id., at 701.

[43] See generally Second Report and Order, at 736–745. It is pertinent that the Senate Committee on Interstate and Foreign Commerce feared even in 1959 that the unrestricted growth of CATV would eliminate local broadcasting, and that, in turn, this would have four undesirable consequences: (1) the local community "would be left without the local service which is necessary if the public is to receive the maximum benefits from the television medium"; (2) the "suburban and rural areas surrounding the central community may be deprived not only of local service but of any service at all"; (3) even "the resident of the central community may be deprived of all service if he cannot afford the connection charge and monthly service fees of the CATV system"; (4) "[u]nrestrained CATV, booster, or translator operation might eventually result in large regions, or even entire States, being deprived of all local television service—or being left, at best, with nothing more than a highly limited satellite service." S.Rep.No. 923, supra, at 7–8. The Committee concluded that CATV competition "does have an effect on the orderly development of television." Ibid.

We are aware that these consequences have been variously estimated, but must conclude that there is substantial evidence that the Commission cannot "discharge its overall responsibilities without authority over this important aspect of television service." Staff of Senate Comm. on Interstate and Foreign Commerce, 85th Cong., 2d Sess., The Television Inquiry: The Problem of Television Service for Smaller Communities 19 (Comm.Print 1959).

The Commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting. The significance of its efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population. The Commission has reasonably found that the successful performance of these duties demands prompt and efficacious regulation of community antenna television systems. We have elsewhere held that we may not, "in the absence of compelling evidence that such was Congress' intention * * * prohibit administrative action imperative for the achievement of an agency's ultimate purposes." There is no such evidence here, and we therefore hold that the Commission's authority over "all interstate * * * communication by wire or radio" permits the regulation of CATV systems.

There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue "such rules and regulations and prescribe such restrictions and conditions,

not inconsistent with law," as "public convenience, interest or necessity requires." 47 U.S.C. § 303(r). We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes.

We must next determine whether the Commission has authority under the Communications Act to issue the particular prohibitory order in question in these proceedings. In its Second Report and Order, 2 F.C.C.2d 725 the Commission concluded that it should provide summary procedures for the disposition both of requests for special relief and of "complaints or disputes." Id. at 764. It feared that if evidentiary hearings were in every situation mandatory they would prove "time consuming and burdensome" to the CATV systems and broadcasting stations involved. Ibid. The Commission considered that appropriate notice and opportunities for comment or objection must be given, and it declared that "additional procedures, such as oral argument, evidentiary hearing, or further written submissions" would be permitted "if they appear necessary or appropriate. * * *" Ibid. See 47 CFR § 74.-1109(f). It was under the authority of these provisions that Midwest sought, and the Commission granted, temporary relief.

The Commission, after examination of various responsive pleadings but without prior hearings, ordered that respondents generally restrict their carriage of Los Angeles signals to areas served by them on February 15, 1966, pending hearings to determine whether the carriage of such signals into San Diego contravenes the public interest. The order does not prohibit the addition of new subscribers within areas served by respondents on February 15, 1966; it does not prevent service to other subscribers who began receiving service or who submitted an "accepted subscription request" between February 15, 1966, and the date of the Commission's order; and it does not preclude the carriage of San Diego and Tiajuana, Mexico, signals to subscribers in new areas of service. 4 F.C.C.2d 612, 624–625. The order is thus designed simply to preserve the situation as it existed at the moment of its issuance.

* * *

The Commission has acknowledged that, in this area of rapid and significant change, there may be situations in which its generalized regulations are inadequate, and special or additional forms of relief are imperative. It has found that the present case may prove to be such a situation, and that the public interest demands "interim relief * * * limiting further expansion," pending hearings to determine appropriate Commission action. Such orders do not exceed the Commission's authority. This Court has recognized that "the administrative process [must] possess sufficient flexibility to adjust itself" to the "dynamic aspects of radio transmission," National Broadcasting Co. v. United States, 319 U.S. at 219, and that it was precisely for that reason that Congress declined to "stereotyp[e] the powers of the Commission to specific details * * *." Ibid.

* * * Thus, the Commission has been explicitly authorized to issue "such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). See also 47 U.S.C. § 303(r). In these circumstances, we hold that the Commission's order limiting further expansion of respondents' service pending appropriate hearings did not exceed or abuse its authority under the Communications Act. And there is no claim that its procedure in this respect is in any way constitutionally infirm.

The judgments of the Court of Appeals are reversed, and the cases are remanded for further proceedings consist-

ent with this opinion. It is so ordered. Judgments reversed and cases remanded.

Mr. Justice DOUGLAS and Mr. Justice MARSHALL took no part in the consideration or decision of these cases.

Mr. Justice WHITE, concurring in the result.

### NOTES AND QUESTIONS

1. Does the Supreme Court in *Southwestern Cable* think it a sufficient ground to base FCC jurisdiction over CATV on the fact that CATV may have an adverse effect on broadcasting? If so, do you agree with the view that under such a theory there is no legal limit to FCC jurisdiction? See Note, *The Federal Communications Commission and Regulation of CATV,* 43 N.Y.U.L.Rev. 117 at 122 (1968).

2. One of the concerns expressed in the *Southwestern Cable* case is that the ability of CATV to make available many channels to viewers receiving the service is at odds with the emphasis the FCC has placed on local service programming. The ability of listeners to view channels far from their homes erodes the audience of the locally based channel and therefore shrinks its appeal to local advertisers. Moreover, the FCC's licensing policy favors applicants who have strong identifications with the community they wish to serve. The basis for the policy is the belief that, if applicants are familiar with the needs of the community, they will therefore be in the best position for local expression. But the problem with the local service emphasis is that it, like all programming responsibilities, is placed on the individual station licensee. But how much responsibility does the typical TV station licensee have for his programming? See also Barrow, *The Attainment of Balanced Program Service in Television,* 52 Va.L.Rev. 633 at 641 (1966):

"The selection of programming is for the most part in the hands of the networks, whose primary guide in selection is the needs of a mass advertiser. Meanwhile, the FCC seeks to protect the public interest by regulating the licensed broadcaster. This approach is of limited efficacy since the broadcaster places practical reliance on the network and does not exercise his nondelegable duty to select programming."

Perhaps the rise of CATV places network-originated and advertiser-financed TV in as much danger as it presents to the development of UHF and educational TV. Do you suppose the networks and the broadcasting industry approve or oppose FCC jurisdiction over CATV? The argument can be made that if the FCC is industry dominated one of the best ways to stimulate change in American broadcasting is to leave new technological developments outside the reach of the FCC.

3. The promise of CATV to alter and enrich broadcasting by using its multichannel capacity in ways that are barred to commercial VHF television is still unfulfilled. A very recent case which illustrates the legal problems that beset the new communications technology represented by CATV is *Midwest Video Corp. v. FCC,* decided by the Supreme Court, on June 7, 1972.

On June 24, 1970, the FCC ordered all CATV systems having 3500 or more subscribers to originate their own programming. The FCC ruling was heralded as a significant step toward providing an alternative to commercial television. The hope was that the development of local television programming by CATV systems in communities throughout the country might provide an alternative to network television, and an opportunity for local participation in community affairs through the new technology of cable television.

The conclusion of the Eighth Circuit in *Midwest Video* that the FCC lacked

jurisdiction to require cable systems to originate programming momentarily placed the future of cable in limbo, *Midwest Video Corp. v. United States,* 441 F.2d 1322 (8th Cir. 1971), a status which has been the hallmark of cable since its inception. The FCC has continually issued proposed rules and regulations for cable but adopted very few of them. The harsh lower federal court reaction to one of the few positive steps the FCC has taken with regard to cable—the program origination requirement—was a bitter pill for those who advocated FCC control over cable. The Supreme Court, however, reversed the lower court, sustained the program origination rule, and ushered in a theory of FCC jurisdiction over cable which was far more encompassing than that enunciated in *Southwestern.*

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## UNITED STATES v. MIDWEST VIDEO CORPORATION

406 U.S. 649, 92 S.Ct. 1860, 32 L.Ed.2d 390 (1972).

Mr. Justice BRENNAN announced the judgment of the Court, and an opinion in which Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN joined.

* * *

As we said in *Southwestern, id.,* at 164, CATV "[promises] for the future to provide a national communications system, in which signals from selected broadcasting centers would be transmitted to metropolitan areas throughout the country." Moreover, as the Commission has noted, "the expanding multichannel capacity of cable systems could be utilized to provide a variety of new communications services to homes and businesses within a community," such as facsimile reproduction of documents, electronic mail delivery, and information retrieval. Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417, 419–420 (1968). Perhaps more important, CATV systems can themselves originate programs, or "cablecast"—which means, the Commission has found, that CATV can "[increase] the number of local outlets for community self-expression and [augment] the public's choice of programs and types of services, without use of broadcast spectrum * * *."

Recognizing this potential, the Commission, shortly after our decision in *Southwestern,* initiated a general inquiry "to explore the broad question of how best to obtain, consistent with the public interest standard of the Communications Act, the full benefits of developing communications technology for the public, with particular immediate reference to CATV technology * * *." In particular, the Commission tentatively concluded, as part of a more expansive program for the regulation of CATV, "that, for now and in general, CATV program origination is in the public interest," and sought comments on a proposal "to condition the carriage of television broadcast signals (local or distant) upon a requirement that the CATV system also operate to a significant extent as a local outlet by originating." As for its authority to impose such a requirement, the Commission stated that its "concern with CATV carriage of broadcast signals is not just a matter of avoidance of adverse effects, but extends also to requiring CATV affirmatively to further statutory policies."

On the basis of comments received, the Commission on October 24, 1969, adopted a rule providing that "no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent[5] as a local

5 "By significant extent [the Commission indicated] we mean something more than the origination of automated services (such

outlet by cablecasting[6] and has available facilities for local production and presentation of programs other than automated services." 47 CFR § 74.1111(a).[7] In a report accompanying this regulation, the Commission stated that the tentative conclusions of its earlier notice of proposed rulemaking:

"recognize the great potential of the cable technology to further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services * * *. They also reflect our view that a multipurpose CATV operation combining carriage of broadcast signals with program origination and common carrier services,[8] might best exploit cable channel capacity to the advantage of the public and promote the basic purpose for which this Commission was created: 'regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges * * *' (sec. 1 of the Communications Act). After full consideration of the comments filed by the parties, we adhere to the view that program origination on CATV is in the public interest." [10] First Report and Order, 20 F.C.C.2d 201, 202 (1969).

as time and weather, news ticker, stock ticker, etc.) and aural services (such as music and announcements). Since one of the purposes of the origination requirement is to insure that cablecasting equipment will be available for use by others originating on common carrier channels, "operation to a significant extent as a local outlet' in essence necessitates that the CATV operator have some kind of video cablecasting system for the production of local live and delayed programing (e. g., a camera and a video tape recorder, etc.)." First Report and Order 214.

[6] "Cablecasting" was defined as "programming distributed on a CATV system which has been originated by the CATV operator or by another entity, exclusive of broadcast signals carried on the system." 47 CFR § 74.1101(j). As this definition makes clear, cablecasting may include not only programs produced by the CATV operator, but "films and tapes produced by others, and CATV network programing." First Report and Order 214. See also id., at 203. The definition has been altered to conform to changes in the regulation, see n. 7, infra, and now appears at 47 CFR § 76.5(w). See Report and Order on Cable Television Service 3279. Although the definition now refers to programing "subject to the exclusive control of the cable operator," this is apparently not meant to effect a change in substance or to preclude the operator from cablecasting programs produced by others. See id., at 3271.

[7] This requirement, applicable to both microwave and non-microwave CATV systems without any "grandfathering" provision, was originally scheduled to go into effect on January 1, 1971. See First Report and Order 223. On petitions for reconsideration, however, the effective date was delayed until April 1, 1971, see Memorandum Opinion and Order 827, 830, and then, after the Court of Appeals decision below, suspended pending final judgment here. See 36 Fed.Reg. 10876 (1971). Meanwhile, the regulation has been revised and now appears at 47 CFR § 76.-201(a). The revision has no significance for this case. See Memorandum Opinion and Order 827, 830 (revision effective Aug. 14, 1970); Report and Order on Cable Television Service, 3271, 3277, 3287 (revision effective March 31, 1972).

[8] Although the Commission did not impose common carrier obligations on CATV systems in its 1969 report, it did note that "the origination requirement will help ensure that origination facilities are available for use by others originating on leased channels." First Report and Order 209. Public access requirements were introduced in the Commission's Report and Order on Cable Television Service, although not directly under the heading of common carrier service. See Report and Order on Cable Television Service 3277.

[10] In so concluding the Commission rejected the contention that a prohibition on CATV originations was "necessary to prevent potential fractionalization of the audience for broadcast services and a siphoning off of program material and advertising revenue now available to the broadcast service." First Report and Order 202. "[B]roadcasters

The Commission further stated:

"The use of broadcast signals has enabled CATV to finance the construction of high capacity cable facilities. In requiring in return for these uses of radio that CATV devote a portion of the facilities to providing needed origination service, we are furthering our statutory responsibility to 'encourage the larger and more effective use of radio in the public interest' (§ 303(g)). The requirement will also facilitate the more effective performance of the Commission's duty to provide a fair, efficient, and equitable distribution of television service to each of the several States and communities (§ 307(b)), in areas where we have been unable to accomplish this through broadcast media."

Upon the challenge of respondent Midwest Video Corp., an operator of CATV systems subject to the new cablecasting requirement, the United States Court of Appeals for the Eighth Circuit set aside the regulation on the ground that the Commission "is without authority to impose" it. 441 F.2d 1322, 1328 (1971).[14] "The Commission's power [over CATV] * * *," the court explained, "must be based on the Commission's right to adopt rules that are reasonably ancillary to its responsibilities in the broadcasting field,"—a standard that the court thought the Commission's regulation "goes far beyond." [15] The court's opinion may also be understood to hold the regulation invalid as not supported by substantial evidence that it would serve the public interest. "The Commission report itself shows," the court said, "that upon the basis of the record made, it is highly speculative whether there is sufficient expertise or information available to support a finding that the origination rule will further the public interest." * * *

The parties now before us do not dispute that in light of *Southwestern* CATV transmissions are subject to the Commission's jurisdiction as "interstate * * * communication by radio or wire" within the meaning of § 2(a) even insofar as they are local cablecasts.[21] The contro-

and CATV originators * * *," the Commission reasoned, "stand on the same footing in acquiring the program material with which they compete." Id., at 203. Moreover, "a loss of audience or advertising revenue to a television station is not in itself a matter of moment to the public interest unless the result is a net loss of television service," ibid.—an impact that the Commission found had no support in the record and that, in any event, it would undertake to prevent should the need arise. See id., at 203–204. See also Memorandum Opinion and Order 826 n. 3, 828–829.

[14] Although this holding was specifically limited to "existing cable television operators," the court's reasoning extended more broadly to all CATV systems, and, indeed, its judgment set aside the regulation in all its applications. See 441 F.2d, at 1328.

Respondent also challenged other regulations, promulgated in the Commission's First Report and Order and Memorandum Opinion and Order, dealing with advertising, "equal time," "fairness," sponsorship identification, and per-program or per-channel charges on cablecasts. The Court of Appeals, however, did not "[pass] on the power of the FCC * * * to prescribe reasonable rules for such CATV operators who voluntarily choose to originate programs," id., at 1326, since respondent acknowledged that it did not want to cablecast and hence lacked standing to attack those rules. See id., at 1328.

[15] The court held, in addition, that the Commission may not require CATV operators "as a condition to [their] right to use * * * captured [broadcast] signals in their existing franchise operation to engage in the entirely new and different business of originating programs." Id., at 1327. This holding presents no separate question from the "reasonably ancillary" issue that need be considered here. See n. 22, infra.

[21] This, however, is contested by the State of Illinois as *amicus curiae*. It is, nevertheless, clear that cablecasts constitute communication by wire (or radio if microwave transmission is involved), as well as interstate communication if the transmission itself has moved interstate, as the Commission has authorized and encouraged.

The devotion of CATV systems to broadcast transmission—together with the interdependencies between that service and cable-

versy instead centers on whether the Commission's program origination rule is "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting." [22] We hold that it is.

casts, and the necessity for unified regulation—plainly suffices to bring cablecasts within the Commission's § 2(a) jurisdiction. See generally Barnett, State, Federal, and Local Regulation of Cable Television, 47 Notre Dame L. 685, 721–723, 726–734 (1972).

[22] Since "[t]he function of CATV systems has little in common with the function of broadcasters," Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 400 (1968), and since "[t]he fact that * * * property is devoted to a public use on certain terms does not justify * * * the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the [owner] has expressly or impliedly assumed," Nor. Pac. Ry. v. North Dakota, 236 U.S. 585, 595 (1915), respondent also argues that CATV operators may not be required to cablecast as a condition for their customary service of carrying broadcast signals. This conclusion might follow only if the program origination requirement is not reasonably ancillary to the Commission's jurisdiction over broadcasting. For, as we held in *Southwestern*, CATV operators *are*, at least to that extent, engaged in a business subject to the Commission's regulation. Our holding on the "reasonably ancillary" issue is therefore dispositive of respondent's additional claim. See pp. 1869–1872, infra.

It should be added that Fortnightly Corp. v. United Artists Television, Inc., supra, has no bearing on the "reasonably ancillary" question. That case merely held that CATV operators who retransmit, but do not themselves originate copyrighted works do not "perform" them within the meaning of the Copyright Act, 61 Stat. 652, as amended, 17 U.S.C. § 1, since "[e]ssentially, [that kind of] a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals * * *." 390 U.S., at 399. The analogy thus drawn between CATV operations and broadcast viewing for copyright purposes obviously does not dictate the extent of the Commission's authority to regulate CATV under the Communications Act. Indeed, *Southwestern*, handed down only a week before *Fortnightly*, expressly held that CATV systems are not merely receivers, but transmitters of interstate communication subject to the Commission's jurisdiction under that Act. See 392 U.S., at 168.

At the outset we must note that the Commission's legitimate concern in the regulation of CATV is not limited to controlling the competitive impact CATV may have on broadcast services. *Southwestern* refers to the Commission's "various responsibilities for the regulation of television broadcasting." These are considerably more numerous than simply assuring that broadcast stations operating in the public interest do not go out of business. Moreover, we must agree with the Commission that its "concern with CATV carriage of broadcast signals is not just a matter of avoidance of adverse effects, but extends also to requiring CATV affirmatively to further statutory policies." Since the avoidance of adverse effects is itself the furtherance of statutory policies, no sensible distinction even in theory can be drawn along those lines. More important, CATV systems, no less than broadcast stations, see, e. g., Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933) (deletion of a station), may enhance as well as impair the appropriate provision of broadcast services. Consequently, to define the Commission's power in terms of the protection, as opposed to the advancement, of broadcasting objectives would artificially constrict the Commission in the achievement of its statutory purposes and be inconsistent with our recognition in *Southwestern* "that it was precisely because Congress wished 'to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission,' * * * that it conferred upon the Commission a 'unified jurisdiction' and 'broad authority.' "

The very regulations that formed the backdrop for our decision in *Southwestern* demonstrate this point. Those regulations were, of course, avowedly designed to guard broadcast services from being undermined by unregulated CATV growth. At the same time, the Commis-

sion recognized that "CATV systems * * * have arisen in response to public need and demand for improved television service and perform valuable public services in this respect." Second Report and Order, 2 F.C.C.2d 725, 745 (1966). Accordingly, the Commission's express purpose was not:

"to deprive the public of these important benefits or to restrict the enriched programing selection which CATV makes available. Rather, our goal here is to integrate the CATV service into the national television structure in such a way as to promote maximum television service to all people of the United States (secs. 1 and 303(g) of the act [nn. 9 and 11, supra]), both those who are cable viewers and those dependent on off-the-air service. The new rules * * * are the minimum measures we believe to be essential to insure that CATV continues to perform its valuable supplementary role without unduly damaging or impeding the growth of television broadcast service." In implementation of this approach CATV systems were required to carry local broadcast station signals to encourage diversified programing suitable to the community's needs as well as to prevent a diversion of audiences and advertising revenues. The duplication of local station programing was also forbidden for the latter purpose, but only on the same day as the local broadcast so as "to preserve, to the extent practicable, the valuable public contribution of CATV in providing wider access to nationwide programing and a wider selection of programs on any particular day." Finally, the distant-importation rule was adopted to enable the Commission to reach a public-interest determination weighing the advantages and disadvantages of the proposed service on the facts of each individual case. In short, the regulatory authority asserted by the Commission in 1966 and generally sustained by this Court in *Southwestern* was authority to regulate CATV with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting.

In this light the critical question in this case is whether the Commission has reasonably determined that its origination rule will "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services * * *." We find that it has.

The goals specified are plainly within the Commission's mandate for the regulation of television broadcasting. In National Broadcasting Co. v. United States, 319 U.S. 190 (1943), for example, we sustain Commission regulations governing relations between broadcast stations and network organizations for the purpose of preserving the stations' ability to serve the public interest through their programing. Noting that "[t]he facilities of radio are not large enough to accommodate all who wish to use them," we held that the Communications "Act does not restrict the Commission merely to supervision of [radio] traffic. It puts upon the Commission the burden of determining the composition of that traffic." We then upheld the Commission's judgment that

" '[w]ith 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.'

" 'A station licensee must retain sufficient freedom of action to supply the program * * * needs of the local community. Local program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community by

broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest.' "

Equally plainly the broadcasting policies the Commission has specified are served by the program-origination rule under review. To be sure, the cablecasts required may be transmitted without use of the broadcast spectrum. But the regulation is not the less, for that reason, reasonably ancillary to the Commission's jurisdiction over broadcast services. The effect of the regulation, after all, is to assure that in the retransmission of broadcast signals viewers are provided suitably diversified programing the same objective underlying regulations sustained in National Broadcasting Co. v. United States, as well as the local-carriage rule reviewed in *Southwestern* and subsequently upheld. In essence the regulation is no different from Commission rules governing the technological quality of CATV broadcast carriage. In the one case, of course, the concern is with the strength of the picture and voice received by the subscriber, while in the other it is with the content of the programming offered. But in both cases the rules serve the policies of §§ 1 and 303(g) of the Communications Act on which the cablecasting regulation is specifically premised, and also, in the Commission's words, "facilitate the more effective performance of [its] duty to provide a fair, efficient, and equitable distribution of television service to each of the several States and communities" under § 307(b). In sum, the regulation preserves and enhances the integrity of broadcast signals and therefore is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."

Respondent, nevertheless, maintains that just as the Commission is powerless to require the provision of television broadcast services where there are no applicants for station licenses no matter how important or desirable those services may be, so, too, it cannot require CATV operators unwillingly to engage in cablecasting. In our view, the analogy respondent thus draws between entry into broadcasting and entry into cablecasting is misconceived. The Commission is not attempting to compel wire service where there has been no commitment to undertake it. CATV operators to whom the cablecasting rule applies have voluntarily engaged themselves in providing that service, and the Commission seeks only to ensure that it satisfactorily meets community needs within the context of their undertaking.

For these reasons we conclude that the program-origination rule is within the Commission's authority recognized in *Southwestern*.

The question remains whether the regulation is supported by substantial evidence that it will promote the public interest. We read the opinion of the Court of Appeals as holding that substantial evidence to that effect is lacking because the regulation creates the risk that the added burden of cablecasting will result in increased subscription rates and even the termination of CATV services. That holding is patently incorrect in light of the record.

In first proposing the cablecasting requirement, the Commission noted that "[t]here may * * * be practical limitations [for compliance] stemming from the size of some CATV systems" and accordingly sought comments "as to a reasonable cutoff point [for application of the regulation] in light of the cost of the equipment and personnel minimally necessary for local originations." Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417, 422 (1968). The comments filed in response to this request included detailed data indicating, for example, that a basic monochrome system for cablecasting could be obtained

and operated for less than an annual cost of $21,000 and a color system, for less than $56,000. See First Report and Order, 210. This information, however, provided only a sampling of the experience of the CATV systems already engaged in program origination. Consequently, the Commission

"decided not to prescribe a permanent minimum cutoff point for required origination on the basis of the record now before us. The Commission intends to obtain more information from originating systems about their experience, equipment, and the nature of the origination effort. * * * In the meantime, we will prescribe a very liberal standard for required origination, with a view toward lowering this floor in * * * further proceedings, should the data obtained in such proceedings establish the appropriateness and desirability of such action."

On this basis the Commission chose to apply the regulation to systems with 3,500 or more subscribers, effective January 1, 1971.

"This standard [the Commission explained] appears more than reasonable in light of the [data filed], our decision to permit advertising at natural breaks * * *, and the 1-year grace period. Moreover, it appears that approximately 70 percent of the systems now originating have fewer than 3,500 subscribers; indeed, about half of the systems now originating have fewer than 2,000 subscribers. * * * [T]he 3,500 standard will encompass only a very small percentage of existing systems at present subscriber levels, less than 10 percent."

On petitions for reconsideration the Commission observed that it had "been given no data tending to demonstrate that systems with 3,500 subscribers cannot cablecast without impairing their financial stability, raising rates or reducing the quality of service." Memorandum Opinion and Order, 23 F.C.C.2d 825, 826 (1970). The Commission repeated that "[t]he rule adopted is minimal in the light of the potentials of cablecasting," but, nonetheless, on its own motion postponed the effective date of the regulation to April 1, 1971, "to afford additional preparation time."

This was still not the Commission's final effort to tailor the regulation to the financial capacity of CATV operators. In denying respondent's motion for a stay of the effective date of the rule, the Commission reiterated that "there has been no showing made to support the view that compliance * * * would be an unsustainable burden." Memorandum Opinion and Order, 27 F.C.C. 2d 778, 779 (1971). On the other hand, the Commission recognized that new information suggested that CATV systems of 10,000 ultimate subscribers would operate at a loss for at least four years if required to cablecast. That data, however, was based on capital expenditure and annual operating cost figures "appreciably higher" than those first projected by the Commission. The Commission concluded:

"While we do not consider that an adequate showing has been made to justify general change, we see no public benefit in risking injury to CATV systems in providing local origination. Accordingly, if CATV operators with fewer than 10,000 subscribers request *ad hoc* waiver of [the regulation], they will not be required to originate pending action on their waiver requests. * * * Systems of more than 10,000 subscribers may also request waivers, but they will not be excused from compliance unless the Commission grants a requested waiver * * *. [The] benefit [of cablecasting] to the public would be delayed if the * * * stay [requested by respondent] is granted, and the stay would, therefore, do injury to the public's interest."

This history speaks for itself. The cablecasting requirement thus applied is

plainly supported by substantial evidence that it will promote the public interest.

* * *

Reversed.

Mr. Chief Justice BURGER, concurring in the result. * * *

Mr. Justice DOUGLAS, with whom Mr. Justice STEWART, Mr. Justice POWELL, and Mr. Justice REHNQUIST concur, dissenting.

* * *

* * * The Commission is not given *carte blanche* to initiate broadcasting stations; it cannot force people into the business. It cannot say to one who applies for a broadcast outlet in city A that the need is greater in city B and he will be licensed there. The fact that the Commission has authority to regulate origination of programs if CATV decides to enter the field does not mean that it can compel CATV to originate programs. The fact that the Act directs the Commission to encourage the larger and more effective use of radio in the public interest, 47 U.S.C. § 303(g), relates to the objectives of the Act and does not grant power to compel people to become broadcasters any more than it grants the power to compel broadcasters to become CATV operators.

The upshot of today's decision is to make the Commission's authority over activities "ancillary" to its responsibilities greater than its authority over any broadcast licensee. Of course, the Commission can regulate a CATV that transmits broadcast signals. But to entrust the Commission with the power to force some, a few, or all CATV operators into the broadcast business is to give it a forbidding authority. Congress may decide to do so. But the step is a legislative measure so extreme that we should not find it interstitially authorized in the vague language of the Act.

I would affirm the Court of Appeals.

### NOTES AND QUESTIONS

1. The *Southwestern* case grounded the assertion of FCC jurisdiction over cable on 47 U.S.C.A. § 152(a) of the Federal Communications Act which makes the Act applicable to all "interstate and foreign communication by wire." The Supreme Court in *Southwestern* in 1968 had limited FCC jurisdiction over cable to situations where regulation of cable was "reasonably ancillary to the effective performance of the (FCC's) various responsibilities for the regulation of television broadcasting." In *Midwest Video* the Supreme Court cautioned that this ancillary jurisdiction was not limited just to situations where CATV would have an adverse competitive effect on television broadcasting. In *Midwest Video*, the Supreme Court appears to expand the scope of FCC jurisdiction over cable far beyond the more tentative basis for FCC jurisdiction outlined in *Southwestern*. In *Midwest Video*, the Supreme Court suggested that the FCC can not only regulate cable to "protect" broadcasting but can also regulate to "promote" the objectives for which the FCC had been given jurisdiction over television broadcasting. As an illustration, the goal of diversified programming is said by the Court in *Midwest Video* to be such an objective and apparently can be implemented by FCC regulation of either cablecasting and television broadcasting.

2. Isn't the Supreme Court really saying in *Midwest Video* that any public interest objective which would justify a regulatory policy or action by the FCC with regard to television broadcasting may justify such a policy or action by the FCC with regard to cable?

If this is so, then the Supreme Court has laid the groundwork of plenary or complete jurisdiction by the FCC over cable. In other words, all of cable has now become potentially subject to FCC jurisdiction. Any aspect of cable not regulated by the FCC would then be unregulat-

ed as a matter of FCC choice not because of lack of power. If the doctrine of *Midwest Video* gives the FCC plenary jurisdiction over cable, this constitutes a significant retreat from the assertion in *Southwestern* that the FCC has jurisdiction over cable only insofar as such jurisdiction is necessary to protect television broadcasting.

3. Cable television is an industry which is subject to FCC jurisdiction but is nevertheless unlicensed by the FCC. If you want to enter the cable business, typically what you do is apply to a municipality for a franchise. Suppose the FCC issued a regulation asserting exclusive authority to license all new entrants to the cable business? Would such a regulation be permissible under the *Midwest Video* case?

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## THE COMPLEX COURSE OF CABLE REGULATION

Some of the major regulatory documents in cable are described hereafter. Many of these proposals and developments were announced in the form of long and technical reports and regulations. The purpose of the summary which follows is merely to underscore the highlights of these documents, an intimate, and detailed knowledge of the current regulatory status of cable can of course best be obtained by close study of the primary sources themselves.

### 1. The FCC Letter of Intent of August 5, 1971

In a Letter of Intent issued August 5, 1971, the FCC outlined a new set of proposals governing CATV in the big-city markets. Cable operators would be permitted to import at least two out-of-town channels or distant television signals into urban markets to stimulate cable subscriptions and to assure successful competition with "free" television. See Commission Proposals for Regulation of Cable Television, 31 FCC2d 115 (1971).

In return, cable systems would be expected to comply with new technical and public service standards. For example, they would be required to leave one of their 20 or more channels open as a free public forum for anyone seeking access. And for each channel that is devoted to transmitting conventional over-the-air TV broadcasts, another channel would be made available for lease, facsimile printing or original programming. New cable systems would also have to have a two-way capacity, allowing subscribers to send as well as receive messages; and CATV systems would be expected to provide substantial capacity for such future developments as satellite-to-home television, mail delivery, shopping by TV, meter-reading, international program exchanges, local and state government, and local education. In an attempt to boost the future of ultra-high frequency (UHF) television, cable systems in the top 100 markets importing distant station signals would have to carry on a priority basis any independent UHF television station within 200 miles.

In addition, the report recommended that no franchise be issued for more than 15 years and that the franchising fee be limited to between 3 and 5 per cent of a cable company's gross revenues, preferably the lower figure.

### 2. The Consensus Agreement or Broadcaster-Cable Agreement of November 11, 1971

In a recent study of the regulatory work of the FCC, which included a thorough review of FCC activity concerning cable, the Consensus Agreement was described as follows:

"[T]he Commission has agreed to a compromise proposal on the issue

of CATV distant signal transmission by the Office of Telecommunication Policy (OTP) and accepted by the National Cable Television Association (NCTA) and the National Association of Broadcasters (NAB). The substantive terms of this agreement are reflected in the final rules announced by the Commission. *Cf.* 47 C.F.R. §§ 76.57, .59, .61, .63, .65, .91, .93, .151, .157, .159 (1972). The Consensus Agreement was a compromise between broadcasters and cable operators on the issue of signal carriage, particularly the number and content of distant signals carried by CATV systems. The agreement requires that CATV systems provide a minimum service of three network and three independent stations in the top 50 television markets, three network and two independent stations in the second 50 markets, three network and one independent stations in markets below the top 100. Two additional signals are allowed for all markets once the minimum service requirement is met. The agreement also provides that a CATV operator will not broadcast a network program on an imported signal at the same time the program is appearing on a local network station. In addition, a one-year prohibition is established against duplication of non-network programs in the top 50 markets. If a distant signal is to be that of a station from one of the top 25 national markets, it must be sent by one of the two such markets closest to the CATV system. In addition, the parties agreed to collaborate in drafting copyright legislation and to promote congressional legislation concerning copyright laws governing CATV programming. *See* Consensus Agreement, 37 Fed.Reg. 3341, app. D (1972); Broadcasting, Nov. 8, 1971, at 16."

See *The Federal Communications Commission: Fairness, Renewal and the New Technology,* 41 Geo.Wash.L.Rev. 683 at fn. 255, 732 (1973).

3. The FCC's Cable Television Report And Order of 1972 (the February Regulations)

The FCC statement of cable policy announced on August 5, 1971, *Commission Proposals for Regulation of Cable Television*, 31 FCC2d 115 (1971), described above, was promulgated in the form of regulations on February 2, 1972, which became effective on March 31, 1972, *Cable Television Report and Order*, 37 Fed.Reg. 3251, 36 FCC2d 141 (1972). The *Cable Television Report and Order* has been properly characterized as "an amalgam of the Letter of Intent of August 5, 1971 and an agreement (mediated by Clay Whitehead of the Office of Telecommunications Policy and Dean Burch, Chairman of the FCC) between broadcasters and cable operators which was known as the *Broadcaster-Cable Agreement* or Consensus Agreement of November 11, 1971. See Botein, *The FCC's Cable Television Regulations—Round Four,* Annual Survey of American Law 1971/72, New York University School of Law. Professor Botein describes the *Cable Television Report and Order* as follows:

"Realistically, it (the *Cable Television Report and Order*) also represents an attempt to lock the Agreement into law before the parties could have second thoughts. As a result, the local signal provisions follow the Letter of Intent and the distant signal provisions follow the agreement."

Three novel features of the February 1972 *Cable Television Report and Order* were the provisions concerning exclusivity protection, the viewing standard, and leapfrogging:

Exclusivity Protection

Commissioner Johnson, who concurred in part and dissented in part, described the exclusivity protection rules as follows:

*Exclusivity protection.* The rules provide for "run of the contract exclusivi-

ty" to stations in the top 50 markets, and two year exclusivity to stations in markets 51–100. That is, a program supplier can sell, and a station can buy, an "exclusive" right to a given program, and gain thereby the legally enforceable right to keep any other station in the market from showing it. Now, says the FCC, the station can use that "exclusivity" to keep a cable system from importing that program from an out-of-market station as well. In other words, if a station in one of these markets has a contractual right to show David Frost or The Pawnbroker, no cable system in that market can import it from another city. Thus, although top 100 markets systems are "permitted" to import distant signals, these signals will have to be blacked out whenever they carry programs covered under exclusive contracts. One of the principal services offered by cable—not just different programming, but alternative schedules for the same programming—is hereby simply wiped out. Further, programs or films subject to local "exclusivity" may not be imported by cable even though the local station may not show them for years. *36 FCC2d 311.*

Leapfrogging

The FCC's new rules on leap-frogging are as follows:

> In establishing policy in this area we have had a number of conflicting considerations to reconcile. On the one hand, it is arguably desirable to allow cable systems the greatest possible choice, on the assumption that they will select those signals that will most appeal to their subscribers and are available at the least expense. But in that event there is a risk that most cable systems would select stations from either Los Angeles, Chicago, New York, or one of the other larger markets. There would then be no general participation by broadcast television stations in the benefits of cable carriage. There is the additional consideration that carriage of closer stations, because they are usually in the same region and often in the same state, supplies some programming that is more likely to be of interest in the cable community. We believe we have struck an appropriate balance.

The leapfrogging rules are applicable to cable systems in all television markets. With respect to network affiliates, a cable system must afford priority of carriage to the closest such station or, at the option of the cable system, to the closest such station within the same state. In selecting independent stations, cable systems have a choice as to the first two such stations carried, except that if stations from among those in the top 25 designated markets are selected, they must be taken from one or both of the two closest such markets. Systems permitted to carry a third independent station are required to select a UHF station from within 200 miles. In the absence of any UHF station in this area, a VHF independent from within the area may be carried or, at the option of the cable system, any UHF independent. During those periods when programming on a regularly carried independent station must be deleted by virtue of the program exclusivity rules, the system is free to insert unprotected programming from any other stations (including network affiliates) without regard to point of origin. Such substitute programming may be continued to its conclusion. The cable system may also substitute other programming when the material on the regularly carried independent is a program primarily of local interest to the distant community (e. g., local news or public affairs).

The "Viewing Standard"

The FCC made a slight change in defining what additional signals the cable sys-

tem could carry and still have signals defined as "local signals", signals that would not be defined as "distant" imported signals. This definition called the "viewing standard" was defined by the FCC in the *Cable Television Report and Order* as follows:

> We have concluded that an out-of-market network affiliate should be considered to be significantly viewed if it obtains at least a three per cent share of the viewing hours in television homes in the community and has a net weekly circulation of at least 25 per cent. For independent stations, the test is a share of at least two per cent viewing hours and a net weekly circulation of at least five per cent. The two criteria reflect distinct concepts. Net weekly circulation reflects the extent to which signals are of any interest to television viewers but tends largely to reflect the availability or viewability of a signal as a technical matter. Audience share indicates the intensity of viewer interests. The combination of these two criteria provides greater assurance that the signal meeting the test is in fact significantly viewed. The lower figures for independent stations are intended to reflect the smaller audiences that these stations generally attract even in their home markets. *36 FCC2d 175.*

Some of Commissioner Johnson's comments on the new "viewing standards" follow:

> Even with a little "rabbit ears" antenna, however, I can, for example, pick up Baltimore signals on my home receiver in Washington. One would assume, therefore, that cable systems would be permitted by the FCC to provide their subscribers *at least* what the subscribers can already pick up off the air. Right? Wrong. The rules contain a unique concept known as the "viewing standard." Cable systems in all cities with television stations are required to carry all stations licensed to cities within a 35 mile circle around them. That's no problem; most cable systems would want to do that anyway.
>
> * * *
>
> (T)he FCC (industry "viewing standard") is not whether the station can be watched, but whether it is, in fact, watched. Such an inquiry, is, of course, directed solely at protection of the local station's market revenues, not to the technological capabilities of cable. * * * the August 5 policy was that any station actually viewed by 1% of the local homes could be carried and that the 'compromise' raises that to 2%—and thereby cuts in about half the number of stations that may be carried. (For example, none of those Baltimore signals I can now watch could be carried by a Washington cable system). *36 FCC2d 312*

An excerpt from Commissioner Burch's concurring opinion in the *Cable Television Report and Order* follows. Chairman Burch sees the *Cable Television Report and Order* as an effort to blend the best of the August 5, 1971, Letter of Intent with the so-called Consensus Agreement.

Chairman Burch's concurrence took particular issue with Commissioner Johnson's criticism of the *Cable Television Report and Order:*

> It is patent nonsense for Commissioner Johnson to assert that the consensus agreement thus hammered out resulted from the efforts of the "powerful broadcast industry" to force a "sweetheart deal" down this Commission's throat. In fact, if I were to assess the varying degrees with which the principals have decided to accept the agreement—and all of them have some reservations—I would put the copyright owners first, cable second, and broadcasters a very distant third. Surely Commissioner Johnson has read Dr. Frank Stanton's letter of January

4, 1972, and Mr. C. Wrede Petersmeyer's of January 17th—both of which excoriate the Commission's regulatory program *and* the consensus agreement about equally. They both know that, with this agreement, there has been substantial progress toward the peace table (and toward legislation that will put cable on a sound footing). Both know that there is now the promise at least of an end to the warfare. Their motives are perfectly understandable. They fear the unknown. It seems to me that Commissioner Johnson's motives are equally understandable but much less commendable—that the threat of "peace breaking out" robs him of an issue. Significantly, Commissioner Johnson ignores the public interest considerations that are stated in the *Cable Television Report and Order* (pars. 61–67, and particularly 65) as the basis for our decision to implement the agreement. Because they do not fit into his scenario of an all-powerful broadcaster-White House "conspiracy", they simply do not exist for him.

I have already stated that my own motives were to find the basis for a consensus that would be reasonable, fair, and consistent with the public interest. I believe the November agreement meets the test. Using the August 5 Letter as a benchmark, there were two modifications in our earlier plan and one major addition—and I want to examine each in turn.

First, there was a change in the "viewing standard" (the test for defining a nearby-market signal as in effect a local signal) from a one percent audience share to a two percent, with respect to independent stations. I cannot believe that Commissioner Johnson or anyone else seriously believes this change undercuts our August 5 proposal. It affects only 11 core cities and 16 signals, and cable's future in the major markets clearly does not turn on such (to use the Commission's own phrase in the *Report and Order*) "variations on a theme". Commissioner Johnson uses the example of Baltimore signals in Washington, D.C. But the fact is, there is no variation at all as to the signals that may be carried in the Baltimore-Washington markets, whether the viewing standard is set at one or two percent.[5]

With respect to leapfrogging (the carriage rules that in general favor closer rather than more distant stations), the August 5 Letter imposed one set of restrictions and the consensus agreement another—both of them reasonable, and both of them a mixture of pluses and minuses from the viewpoint of broadcasters and cable systems. It is important to note that when a distant signal must be blacked out because of exclusivity protection, we have imposed no restriction on point of origin for substitute programming. And this catches Commissioner Johnson in a flat contradiction . He argues, on the one hand, that there will be extensive blackouts (p. 12) and, on the other, he alleges that the leapfrogging requirements are now much more onerous for cable (p. 14). He is right about the first, and dead wrong about the second.

The addition to our August 5 proposal, and the core of the consensus agreement, is the exclusivity protection that will be afforded to non-network programming—protection for local broadcasters against distant stations and, more fundamentally, for the owner's rights to control the use of his product. This does represent a change

[5] There would be great variation if cable systems were permitted to carry all signals that could be picked up with an antenna, as Commissioner Johnson suggests (p. 13). But this is a far cry from "rabbit ears" viewability. He unsuccessfully tried out this approach back in May or June.

from August 5, where we recognized the issue but promised merely to study it further. And, in my view, it represents a marked improvement. In the first place, exclusivity *should* be dealt with by the Commission, not left to Congress, because it is a complex area of regulation that will require revision and refinement as we accumulate experience with the effect of our rules. Moreover, it is important—both to cable and to broadcasting—to protect the copyright owner's continued ability to produce programming; and his right to sell "exclusives" in the major television markets is a key consideration in this respect. But after one terse reference to the owner's rights (p. 6), Commissioner Johnson simply drops that component of the public interest equation.

He grudgingly admits that, in the context of the consensus agreement as incorporated in the Commission's exclusivity rules, "cable will be able to make a very modest start in some of the smallest markets" (p. 11). This is a distortion of the grossest sort. Under our rules, there will now be some chance for cable growth in markets 1–100 for the first time.[6] This will be true even in the top 50 markets where exclusivity is greatest. Eleven of these markets have no independent television service at all. Three imported signals will represent a substantial boost; and, even with run-of-contract protection, there is a good deal of programming available beyond what the three network affiliates have purchased. And there are another 17 of the top 50 markets with only one independent station: here, too, our rules should give cable an opening.

Commissioner Johnson is quite right that cable will have no easy time of it in the very largest of the top markets where there is already a great deal of television service. That is true under the rules just adopted. And it was true under the terms of the August 5 proposal. In markets like New York and Los Angeles, for example, we have always recognized that a few additional television signals may not be enough to sell cable—that its ability to get started in such markets will be largely dependent on the new, nonbroadcast services that are unique to cable, and on its ability to serve select audiences. But what I do not comprehend is how Commissioner Johnson can equate the opening to cable of over two-thirds of the top 100 markets with "a very modest start in some of the smallest markets". He is wrong. He must know it. And he must know, too, that he is distorting reality—complex as it may be—just to grab a few flashy headlines.[7]

4. Report to the President, The Cabinet Committee on Cable Communications (1974)

In January 1973, the Cabinet Committee on Cable Television, consisting of Robert H. Finch, Leonard Garment, Her-

[6] In markets 51–100, contrary to Commissioner Johnson's assertion, there will be at most one-year protection for off-network series; the two years to which he refers applies to feature films. And because many of these series will already have been shown in a particular market, there will be no blackout at all.

He notes (p. 15) that there is no exclusivity afforded in smaller markets and says these were "given" to cable by broadcasters and copyright owners. But in the below top 100 markets—far from being "given" to cable—cable systems are limited to a 3–1 carriage formula.

[7] The extent of his success is plain, *The New York Times* of February 4, 1972, for example, ran its cable story under the two-column head, "New Rules on Cable TV Limit Growth in Cities". (Interestingly, *The Washington Post*—same day, same rules—headlined its story. "FCC Opens the Door to Let Cable TV Into Major Cities".) A further measure of Commissioner Johnson's success in distorting the cable story is the *Times* editorial of February 14, 1972: "* * * and Cable TV".

bert G. Klein, Peter G. Peterson, Elliot L. Richardson, and George Romney, under the chairmanship of Clay Whitehead, Director of the Office of Telecommunications Policy, came out with a new report containing recommendations on the regulation of cable television. The following summary of the Report is offered not because it is assumed that anything definitive has been achieved in the fast-changing and bewildering regulatory world of cable television but because it may indicate some of the critical issues facing cable television today. The Report contains many recommendations to develop the best of cable's many capacities. Only the most fundamental ones are discussed below.

The heart of the Cabinet Committee's report is a proposal to separate control of cable from programming. Under this approach, cable would operate as a common carrier on a first-come-first-served basis. Access to channels would be leased. Such a separation, the Cabinet Committee reasons, would remove the necessity to submit cable to fairness and equal time requirements.

Another major suggestion of the Cabinet Committee would be to permit a cable operator to provide the programming for one or two channels on his system.

Although in 1971 CBS was required to divest its cable holdings, the Report's sentiment in favor of cross-ownership would permit network ownership of cable. This bias in favor of cross-ownership in cable appears to be founded on the poor economic status of cable at present and on the need for the input of additional capital if cable is to fully realize its potential.

The Cabinet Committee suggested that the bulk of cable industry regulation should be transferred to the state and local governments rather than to the FCC. Cable operators would prefer the reverse. Why?

The Cabinet Committee does not expect the report's policy goals to go into effect until the cable industry penetrates 50% of the nation's TV households.

The Cable Committee Report recommends full copyright coverage of users of cable channels in order to protect program material and treat all electronic media equally. The Committee would entitle cable operators to a blanket copyright license to be set by law for re-transmission of broadcast signals. For a discussion of copyright issues in cable television, see Ch. VIII, text, p. 742.

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## B. THE ADVENT OF PUBLIC BROADCASTING

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### 1. THE PUBLIC BROADCASTING ACT OF 1967

Another significant development in the life of American radio and television was The Public Broadcasting Act of 1967, 47 U.S.C.A. §§ 390–401. In January 1967 the Carnegie Foundation under the Chairmanship of Dr. James R. Killian, Jr. of M.I.T. recommended the development of a non-profit corporation to encourage the development of non-commercial television. The Carnegie Report was a seminal document, and the Public Broadcasting Act of 1967 owes much to the Report. See *Public Television, A Program for Action,* The Report and Recommendations of the Carnegie Commission on Educational Television (New York, Harper & Row, 1967).

The Public Broadcasting Act authorized financial appropriations to stimulate the development of non-commercial educational broadcasting. The scheme for selecting the board of directors of the Corporation for Public Broadcasting, which was created by the Act, differed

from that utilized in staffing the directors of Comsat. All the Board members, a total of fifteen, are to be appointed by the President with the advice and consent of the Senate.

The use of communications satellites was contemplated to implement the purposes of the Act. Thus, one of the purposes of the Act is to assist in developing "one or more systems of interconnection" to be used for distributing educational television or radio programming. 47 U.S.C.A. § 396(g)(1)(B). Section 397 of the Act which defines terms used in the statute defines "interconnection" as, among other things, "the use * * * of communications space satellites, * * * for the transmission of television or radio programs." Another 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 government 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 an entirely new step in American broadcasting. Indeed, whether the federal government can finance an instrument, which will influence the opinion-making process, is itself an unresolved First Amendment question. For these reasons the Act is in some respects necessarily unclear.

It is not very clear, for example, whether or not the newly created Corporation for Public Broadcasting can itself own and operate an educational broadcasting network, or even stations, as distinguished to merely aiding in the development of one or more such networks or stations. The Act sets out a statement of policy for the newly created Corporation for Public Broadcasting. The statement of policy asserts that it is in the "public interest" for the Corporation to encourage the growth of noncommercial educational radio and television. The statement of policy also reflects a concern for diversity of programming and the view that assisting the growth of non-commercial educational radio and television is an "appropriate and important concern for the Federal Government." See 47 U.S.C.A. § 396.

Commissioner Nicholas Johnson of the FCC has observed that one of the premises of public broadcasting is to provide programming for minority tastes which are presently insufficiently supplied by the advertiser-financial networks. Commissioner Johnson's concept of public broadcasting assumes that commercial television's horror of the controversial and the novel will be counteracted by public broadcasting's concern for the heterodox and the experimental. See N. Johnson, *The Public Interest and Public Broadcasting: Looking at Communications as a Whole,* Wash.U.L.Q. 480 at 489–490 (1967). Apparently, it is to be the paradox of public broadcasting that its dominating bias, quite unlike private commercial broadcasting, is to be anti-majoritarian. The significance this attempt to increase the programming alternatives of viewers will have for a regulatory communications policy, which at least in theory is supposed to require balance and diversity in commercial broadcasting, is a continuing issue in public broadcasting.

The Public Broadcasting Act makes it very clear that the Corporation for Public Broadcasting set up under the Act is sup-

posed 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).

Do you see any difference between the Public Broadcasting Act's requirement of objectivity and the "fairness" doctrine? Section 392 of the Public Broadcasting Act makes it clear that any application for grants for construction of an educational radio or television station must be eligible for a license from the Federal Communications Commission. In light of this, isn't § 396 of the Public Broadcasting Act superfluous? (Note: § 396 is the Act's objectivity requirement.)

Section 399 of the Act says that "no non-commercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for public office."

As you will remember from the *Red Lion* case, p. 807 broadcast licensees are permitted to editorialize. Is there any justification for making a distinction with regard to noncommercial educational broadcasting? Does this distinction suggest a further difference between § 396 and the "fairness" doctrine?*

Section 398 of the Act says that federal interference or control over educational television broadcasting is prohibited. The purpose of this provision is obviously to prevent the use of federal funds designed to stimulate educational broadcasting from being perverted into a source for a government-sponsored line. But despite the language of this provision, isn't such federal control still a problem?

## 2. ADDITIONAL REGULATORY DEVELOPMENTS IN PUBLIC BROADCASTING

The non-commercial educational radio or television licensee has not in the past been required to ascertain the problems and needs of his community in the manner required of the commercial broadcaster. The Federal Communications Commission has now issued a "notice of inquiry" on whether the "educational" broadcaster also has an obligation to ascertain community needs as a part of his application for, or request for renewal of, his FCC non-commercial license. Responding to citizens groups who had requested the inquiry, the Commission noted that the emphasis of non-commercial broadcasting had shifted from educational or instructional programming to "public" broadcasting of public affairs and cultural programs. This shift in emphasis required that the Commission re-examine its earlier position that non-commercial licensees did not have to ascertain community needs. Although it pointed to its *Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 FCC2d 650, (1971),* for examples of what might be required, the Commission concluded that the problems of "public" broadcasters might necessitate different guidelines, and requested comments on this issue as well. See *Notice of Inquiry and Notice of Proposed Rule Making in Docket No. 19816, P. & F. Radio Reg. Current Service, 53:245 (1973).* Are the lines between "public" and "private" broadcasting beginning to blur?

* A public interest group, AIM (Accuracy In Media) is seeking enforcement of fairness doctrine obligations against the Corporation for Public Broadcasting, charging bias in public affairs programming produced by the Public Broadcasting Service. The FCC, however, has ruled that the Public Broadcasting Act of 1967, 47 U.S.C.A. §§ 390–399, did not give the Commission jurisdiction over the activities of the Corporation, and that the Corporation is not itself a network, noting that the fairness doctrine did not apply to the Corporation itself and that the Commission had no power to enforce the Public Broadcasting Act's prohibition of editorializing by a non-commercial, educational broadcasting station licensee. *Accuracy in Media, 28 P. & F. Radio Reg.2d 1239 (1973).*

### 3. THE CORPORATION FOR PUBLIC BROADCASTING (CPB) AND THE PUBLIC BROADCASTING SERVICE (PBS)

As of June 30, 1973, there were 244 public television stations in operation, all certified by the Corporation for Public Broadcasting (CPB) as eligible for the Community Service Grants administered by CPB. To become certified a station must have an FCC non-commercial educational license, the facilities for local program origination, and must produce regular local programming. In addition certain minimum requirements of time on the air and size of staff must be met. Certification is limited to one station in an area; if there is a population reached by two stations, each one must show that it also broadcasts to a sizeable, otherwise-unreached population. More than 600 public radio stations were in operation in 1973, but only 147 (of which more than 100 were FM) met CPB certification requirements, similar to those for television stations. See 1973 Corporation for Public Broadcasting, Annual Report.

Note that of the 244 public television stations, 150 are UHF and 94 are VHF. These figures should be kept in mind when you consider the possible effects of CATV on the future success of public television.

Since it was formed in 1967, the CPB has not been immune to controversy. With the issue of whether the Corporation could own and operate a network still unresolved, the CPB in 1970 formed the Public Broadcasting Service (PBS). Former CPB President John Macy, described PBS "as the instrument through which the (local) stations could work in close collaboration with CPB, but at one remove from the federal funding source. The role of CPB was to provide a heat shield protecting the system from the political fire that might be generated by controversial public affairs or cultural programming." Macy, *The Short and Unhappy Life of PBS,* Center magazine, vol. 4, no. 3, p. 52, May/June, 1973.

Macy's "heat shield" did not prove very effective. Controversy centered around the question of whether CPB and PBS could or should exert control over public broadcasting, or whether control should be returned to the local public station licensees. The height of the controversy was reached when President Nixon vetoed the 1972 CPB authorization bill on June 30, 1972. The bill, in addition to granting CPB more funds than it had asked for, attempted to clarify the issue of control by stating that Congress encouraged CPB in its efforts to establish a national system of program production and distribution. See H.R. 13918, 92d Cong., 2d sess., 1972. The President's veto message expressed the administration views on the Public Broadcasting Act of 1967 and the directions public broadcasting should take in the future:

"There are many fundamental disagreements concerning the directions which public broadcasting has taken and should pursue in the future. Perhaps the most important one is the serious and widespread concern—expressed in Congress and within public broadcasting itself—that an organization, originally intended only to serve the local stations, is becoming instead the center of power and the focal point of control for the entire public broadcasting system.

"The Public Broadcasting Act of 1967 made localism a primary means of achieving the goals of the educational broadcasting system. Localism places the principal public interest responsibility on the individual educational radio and television stations, licensed to serve the needs and interests of their own communities. By not placing adequate emphasis on localism, H.R. 13918 threatens to erode substantially public broadcasting's impressive potential for promoting innova-

tive and diverse cultural and educational programming.

"The public and legislative debate regarding passage of H.R. 13918 has convinced me that the problems posed by Government financing of a public broadcast system are much greater than originally thought. They cannot be resolved until the structure of public broadcasting has been more firmly established, and we have a more extensive record of experience on which to evaluate its role in our national life." *The President's Message to the House of Representatives Returning H.R.13918 Without His Approval*, Weekly Compilation of Presidential Documents 1118, July 3, 1972.

Shortly after the President's veto, John Macy resigned in protest from his position as CPB president. He and six members of the CPB board of directors were replaced by Nixon appointees. The future of public broadcasting, particularly of PBS, to which nearly all of the public television stations presently subscribe, remains in doubt.

The question of the future of public broadcasting has been debated almost solely by the executive and legislative branches of government. Rarely have courts had the opportunity to consider the matter. But Justice Douglas, in a separate concurring opinion in the *CBS v. DNC* case, see text, p. 859 took the opportunity to consider public broadcasting's role as part of the "press" and to raise a doubt as to the constitutionality of public broadcasting:

"Public broadcasting, of course, raises quite different problems from those tendered by the TV outlets involved in this litigation.

"* * * (The Corporation for Public Broadcasting) is a nonprofit organization and by the terms of 396(b) (of the Public Broadcasting Act of 1967) is said not to be 'an agency or establishment of the United States Government.' Yet, since it is a creature of Congress whose management is in the hands of a Board named by the President and approved by the Senate, it is difficult to see why it is not a federal agency engaged in operating a 'press' as that word is used in the First Amendment. If these cases involved that Corporation, we would have a situation comparable to that in which the United States owns and manages a prestigious newspaper like the New York Times. * * * The government as owner and manager would not, as I see it, be free to pick and choose such news items as it desired. For by the First Amendment it may not censor or enact or enforce any other 'law' abridging freedom of the press. Politics, ideological slants, rightist or leftist tendencies could play no part in its design of programs. * * * More specifically, the programs tendered by the respondents in the present cases could not then be turned down.

"Governmental action may be evidenced by various forms of supervision or control of private activities * * *. I have expressed the view that the activities of licensees of the government operating in the public domain are governmental actions, so far as constitutional duties and responsibilities are concerned. * * * But that view has not been accepted. If a TV or radio licensee were a federal agency, * * * (as) a license of the Federal Government (it) would be in precisely the situation of the Corporation for Public Broadcasting. A licensee, like an agency of the government, would within limits of its time be bound to disseminate all views. For being an arm of the government it would be unable by reason of the First Amendment to 'abridge' some sectors of thought in favor of others. The Court does not, however, decide whether a broadcast licensee is a federal agency within the context of this case." *Columbia Broadcast-*

*ing System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).

Justice Douglas asserts that a public station could not refuse the programs offered by the DNC and the spot announcements of BEM. Would public television serve as a solution to the access problem? What consequences might the formal adoption of Justice Douglas' views on public broadcasting have as an antidote to the anti-majoritarian bias of public broadcasting discussed earlier? If the only difference between private commercial stations and the public, noncommercial ones, particularly if CPB control is diminished, turns out to be that public stations receive federal grants that match their private contributions, while private stations must rely on advertising revenue, is that enough justification to treat the two media differently under the First Amendment?

## C. COMMUNICATIONS SATELLITES: THEIR POTENTIAL FOR BROADCASTING

Ever since satellites were launched into orbit, their communications possibilities have been particularly intriguing. At present television signals are transmitted into home receivers by using both underground or coaxial cables and microwave stations. Cables are not capable of the long distance simultaneous multipoint service of which satellites are capable. Moreover, the use of cables for broadcast transmission requires paying the cost of using the cables to the common carrier systems which operate them.

Therefore, to the potentialities of community antenna TV, we should add communications satellites since their extended use for broadcasting would not only totally transform domestic broadcasting but indeed might make such things as an international television system technically and economically feasible.

Technological developments in the communications satellite field, made possible by federal funds, have progressed steadily. In June 1965, a commercial communications service was established between North America and Western Europe for telegraph messages, voice and television by a satellite. These developments have been rapidly extended.

Domestically, Telstar was launched on July 10, 1962, and exhibited its ability to transmit live television. The significant policy question then arises: how should communications satellites be developed? Should the government own such facilities or should they be left to private development and ownership? Congress refused to answer the question in such an either-or fashion and enacted a statute which purported to strike a compromise. On August 31, 1962, Congress enacted the Communications Satellite Act of 1962, 76 Stat. 419, §§ 701–44, 47 U.S. C.A. §§ 701, 702 (1964). The Act created a corporation called the Communications Satellite Corporation, or as it has come to be known, Comsat. The corporation is chartered by Congress and authorized to create an international satellite communications system. The Act permits the private common carriers to purchase half the capital stock of the new corporation. The remaining stock was required to be distributed so that its ownership would be fairly diffusely spread among the general public.

According to the terms of the Act, Comsat was to be run by a board of fifteen directors. Of these fifteen directors, six are selected by the common carrier stockholders, six by the owners of the publicly-held stock, and the final three directors are appointed by the President with the advice and consent of the Senate.

The compromise between private and public control of the Communications Satellite Corporation which the Act reflects has been criticized. Criticism has been directed to the appointment of government directors to what was essentially a private board. The fear is that a minority of government directors may create the illusion that the protection of the public interest is assured in the operations of Comsat by the presence of Presidentially-appointed directors when in fact the influence of those directors may be quite minimal. See Schwartz, *Governmentally Appointed Directors In a Private Corporation—The Communications Satellite Act of 1962*, 79 Harv.L.Rev. 350 (1965).

In a subsequent article Professor Schwartz expressed concern that those members of the board of directors representing the common carriers would necessarily be committed to the older and threatened technology, i. e., communications via cable rather than communications via satellite; and that therefore they would eventually be exposed to a conflict of interests. See Schwartz, *Comsat, the Carriers, and the Earth Station: Some Problems with 'Melding the Variegated Interests'*, 76 Yale L.J. 441, 475–479 (1967).

Comsat is subject to FCC regulation under both the Federal Communications Act and the Communications Satellite Act. The FCC is authorized under the Communications Satellite Act, § 47 U.S. C.A. § 721(c)(1)(2)(4) and (6) (1964) to regulate additions to the satellite system and to require the establishment of facilities to provide commercial satellite communication to specified foreign points when the Secretary of State and NASA so advise.

Domestically, the advent of the communications satellite has occasioned great interest because of the possibilities it presents for affording a new and less expensive means for making non-commercial television feasible. Since the broadcast of national network television is not now transmitted directly over long distances, but must be transmitted from the originating source to the local broadcaster by means of microwave and coaxial cable facilities, the cost of using those facilities is a very important expense factor of broadcasting presently. Since the satellite can transmit television on many points at once, without recourse to cables, television broadcasting by means of communications satellite promises a real reduction in costs. How shall such a system be set up and what shall be done with the savings secured by such a system?

These questions were the subject of a general inquiry initiated by the FCC in March, 1966. This investigation addressed itself to the problems raised by the use of satellites for domestic broadcasting. *Notice of Inquiry: Establishment of Domestic Noncommon Carrier Communication Satellite Facilities by Nongovernmental Entities*, 2 FCC2d 668 (1966).

The progress of the FCC inquiry into the best means to develop a domestic satellite communications system has been painfully slow.

Although there has been considerable interest and activity on the international and foreign scene with regard to satellite communications systems, the pre-existence of a land-based heavily developed and heavily regulated domestic television industry has obviously retarded their growth in the United States. On December 27, 1972, the FCC issued a final order on the question of whether domestic satellite facilities were going to be permitted to be set up by private industry. See *Establishment of Domestic Communications-Satellite Facilities by Non-Governmental Entities*, 38 FCC2d 665 (1972). The so-called Final Order would permit all qualified applicants to furnish domestic satellite (domsat) serv-

ices. The FCC approved a joint Comsat-AT&T proposal by a newly organized entity, MCI Lockheed Satellite Corporation, to be owned equally by Comsat, Microwave Communications Inc. and Lockheed Aircraft. The FCC prohibited AT&T from furnishing domestic satellite services which would be competitive with other common carriers. The FCC also ordered AT&T to divest itself of its holding in Comsat. The theory behind this latter requirement was that if AT&T and Comsat are to compete in the domestic satellite field each should be independent of the other.

As the summary of the FCC's Final Order discloses, the FCC has apparently made a choice in favor of free and open competition in the furnishing of domestic satellite communications services. However, this choice has been attacked. The Network Project, based at Columbia University, made the following critique of FCC policy vis-a-vis the development of domestic satellite communications in its comments in the FCC hearing which preceded the adoption of the FCC's Second Report. See *Establishment of Domestic Communications-Satellite Facilities by Non-Governmental Entities*, 37 Fed.Reg. 12312, 35 FCC2d 844 (1972):

> The Commission has proposed two structural alternatives for the satellite system, one a model of free and open competition, the other a modified-competition model based on the different satellite technologies proposed by the applicants, with few regulatory constraints.
>
> In our estimation these are apparent, not real, alternatives. In either case, a system shaped by corporate concerns for the maximization of profit will be imposed. By leaving the ownership and management of a domestic satellite system in the hands of private industry as both options do, "access"—whether by educational institution or by individual—becomes the prerogative of a specialized interest which has historically subordinated public service to private gain. Those given control over a communications system inevitably shape the means of transmission and frame the communication which emanates from it; hence access is a function of financing, of structure, and of control. The traditional practice of entrusting a public service to private entrepreneurs has had a chilling effect on both the availability of information to the public and the public's freedom of speech. In the case of common-carriers, such an effect was felt when AT&T pre-empted its long-line transmission facilities during a broadcast which did not favor development of the ABM weapons system (AT&T, the Pentagon's third largest contractor, provided more than $1 billion in military services) during the 1971 fiscal year. In the case of non-common-carrier communications, such as television, a history of similar repressive control would fill several volumes.
>
> The Network Project views public access to, and control of, satellite facilities as a fundamental right, particularly in view of the fact that the American people have already invested more than $20 billion in the space program through their taxes. If the Commission is now to surrender the control of domestic satellites to private parties, the public will be effectively disenfranchized from influencing national communications policy over a technology which has been developed at its own expense.

See the Network Project, *Domestic Communications Satellites* 3–4 (1972).

Although FCC approval for private companies to go forward with the development of domestic communications satellites services may spur a higher level of development than has occurred heretofore, the fact remains that although the United States has built communica-

tions satellites for other nations as well as all the Intelsat satellites for international communication, there has been no functioning domestic satellite for communications between points in this country. See generally, *Comsat: The First Ten Years*, Report to the President and the Congress (1973); *Federal Communications Commission: Fairness, Renewal, and the New Technology*, 41 Geo.Wash.L.Rev. 1 at 756–757 (1973). Phillips, *Domestic Telecommunications Policy: An Overview*, 29 Wash.Lee L.Rev. 235 (1972).

Slowly the beginnings of domestic satellite communications are beginning to be seen in the United States.

RCA began the nation's first domestic satellite communication service with the dedication of the Satcom System, which uses leased circuits on Telesat Canada's Anik II satellite to link the East and West Coasts of the contiguous U. S. and both coasts with Alaska. The system was used among other purposes, to transmit the Super Bowl, January 13, 1973, live to Alaska. Some cable systems appear particularly interested in using RCA's Satcom. The new system uses four RCA earth stations, in the vicinity of New York, San Francisco, Juneau and Anchorage, and two satellite channels leased from Telesat Canada. Western Union Telegraph Co. is also shooting for a mid-July 1974 start. Four other FCC approved applicants have their projected systems in various stages of development. See *Broadcasting*, pp. 39–40, January 14, 1974.

# APPENDIX A

## MIAMI HERALD PUBLISHING CO. v. TORNILLO

Decided June 25, 1974.
— U.S. — (1974).

Mr. 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 demanded 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 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 Publishing 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 Publishing Co., 287 So.2d 78 (1973).[3] 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 impermissably 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,

[3] The Supreme Court did not disturb the Circuit Court's holding that injunctive relief was not proper in this case even if the statute were constitutional. According to the Supreme Court neither side took issue with that part of the Circuit Court's decision. 287 So.2d, at 85.

at 85.[4] 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.

We postponed consideration of the question of jurisdiction to the hearing of the case on the merits. 414 U.S. 1142 (1974).

* * *

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.[7]

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 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

[4] The Supreme Court placed the following limiting construction on the statute:

"[W]e hold that the mandate of the statute refers to 'any reply' which is wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane."

287 So.2d, at 86.

[7] In its first court test the statute was declared unconstitutional. State v. News-Journal Corp., 36 Fla.Supp. 164 (Volusia County J, Ct., Fla.1972). In neither of the two suits, the instant action and the 1972 action, has the Florida Attorney General defended the statute's constitutionality.

[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.Car.L.Rev. 1, 8–9 (1973) (hereinafter "Lange").

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

[15] "Local monopoly in printed news raises serious questions of diversity of information and opinion. What a local newspaper does not print about local affair 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).

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 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." (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.[18]

Access advocates note that Mr. 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

[18] "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] * * *

"[15] Some states have adopted retraction statutes or right-of-reply statutes * * *.

"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."

> 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.[19] 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 National Committee, 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 Commission 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

[19] The National News Council, an independent and voluntary body concerned with press fairness, was created in 1973 to provide a means for neutral examination of claims of press inaccuracy. The Council was created following the publication of the Twentieth Century Fund's Task Force Report for a National News Council, A Free and Responsive Press. The Background Paper attached to the Report dealt in some detail with the British Press Council, seen by the author of the paper as having the most interest to the United States of the European press councils.

[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.

to editorial judgment and to the free expression of views on these and other issues, however controversial."

Dissenting in *Pittsburgh Press*, Mr. Justice STEWART joined by Mr. 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 Company v. Times Mirror Company, 440 F.2d 133, 135 (9th Cir. 1971).

We see that 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.[22]

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.[23] 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.

[22] "However, since the amount of a space a newspaper can devote to 'live news' is finite,[39] if a newspaper is forced to publish a particular item, it must as a practical matter, omit something else.

"[39] The number of column inches available for news is predetermined by a number of financial and physical factors, including circulation, the amount of advertising, and, increasingly, the availability of newsprint. * * *"

Note, 48 Tulane L.Rev. 433, 438 (1974) (footnote omitted).

Another factor operating against the "solution" of adding more pages to accommodate the access matter is that "increasingly subscribers complain of bulky, unwieldly papers." Bagdikian, Fat Newspapers and Slim Coverage, Columbia Journalism Review, Sept./Oct., 1973, at 19.

[23] See the description of the likely effect of the Florida statute on publishers, in Lange, 52 N.C.L.Rev., at 70–71.

Alabama, 384 U.S. 214, 218 (1966), stated that

> "there is practicaly universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions 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.[24] 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.

Mr. 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 beneficient-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." [2] Any other accommodation—any other system that would supplant private control of the press with the heavy hand of government intrusion—would make

[24] "[L]iberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper. A journal does not merely print observed facts the way a cow is photographed through a plate glass window. As soon as the facts are set in their context, you have interpretation and you have selection, and editorial selection opens the way to editorial suppression. Then how can the state force abstention from discrimination in the news without dictating selection?" 2 Z. Chaffe, Jr., Government and Mass Communications 633 (1947).

[2] Letter to Col. Charles Yancey, in XIV The Writings of Thomas Jefferson 384 (Lipscomb ed. 1904).

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." 2 Z. 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 attaks 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 Commission 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. See New York Times Co. v. United States, supra, at 730 (concurring opinion). 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., ante, goes far towards eviscertating 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) (footnote omitted).

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.

Mr. Justice BRENNAN, with whom Mr. 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).

# APPENDIX B

## LEHMAN v. CITY OF SHAKER HEIGHTS

Decided June 25, 1974.
— U.S. — (1974).

**Editorial Notes:**

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, 34 Ohio St.2d 143, 296 N.E.2d 683 (1973), approving a city's right to prohibit political advertising on city buses. 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. Mr. Justice Blackmun wrote the Court's opinion in *Lehman*, joined by Justice 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.

Mr. Justice Douglas supplied the crucial fifth vote in *Lehman* against access on the ground that a political candidate had no right to force his message on a "captive audience" of commuters.

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.

# APPENDIX C

## GERTZ v. ROBERT WELCH, INC.

Decided June 25, 1974.
— U.S. — (1974).

Mr. Justice POWELL delivered the opinion of the Court. * * *

In 1968 a Chicago policeman named Nuccio shot and killed a youth named Nelson. The state authorities prosecuted Nuccio for the homicide and ultimately obtained a conviction for murder in the second degree. The Nelson family retained petitioner Elmer Gertz, a reputable attorney, to represent them in civil litigation against Nuccio.

Respondent publishes American Opinion, a monthly outlet for the views of the John Birch Society. Early in the 1960's the magazine began to warn of a nationwide conspiracy to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a communist dictatorship. As part of the continuing effort to alert the public to this assumed danger, the managing editor of American Opinion commissioned an article on the murder trial of officer Nuccio. For this purpose he engaged a regular contributor to the magazine. In March of 1969 respondent published the resulting article under the title "FRAME-UP: Richard Nuccio And The War On Police." The article purports to demonstrate that the testimony against Nuccio at his criminal trial was false and that his prosecution was part of the communist campaign against the police. * * *

These statements contained serious inaccuracies. The implication that petitioner had a criminal record was false. Petitioner had been a member and officer of the National Lawyers Guild some 15 years earlier, but there was no evidence that he or that organization had taken any part in planning the 1968 demonstrations in Chicago. There was also no basis for the charge that petitioner was a "Leninist" or a "Communist-fronter." And he had never been a member of the "Marxist League for Industrial Democracy" or the "Intercollegiate Socialist Society."

The managing editor of American Opinion made no effort to verify or substantiate the charges against petitioner. Instead, he appended an editorial introduction stating that the author had "concluded extensive research into the Richard Nuccio case." And he included in the article a photograph of petitioner and wrote the caption that appeared under it: "Elmer Gertz of the Red Guild harrasses Nuccio." Respondent placed the issue of American Opinion containing the article on sale at newsstands throughout the country and distributed reprints of the article on the streets of Chicago.

Petitioner filed a diversity action for libel in the United States District Court for the Northern District of Illinois. He claimed that the falsehoods published by respondent injured his reputation as a lawyer and a citizen. * * *

The jury awarded $50,000 to petitioner.

Following the jury verdict and on further reflection, the District Court concluded that the *New York Times* standard should govern this case even though petitioner was not a public official or public figure. It accepted respondent's contention that that privilege protected discussion of any public issue without regard to the status of a person defamed therein. Accordingly, the court entered judgment for respondent notwithstanding the jury's verdict. * * *

Petitioner appealed to contest the applicability of the *New York Times* standard to this case. Although the Court of Appeals for the Seventh Circuit doubted the correctness of the District Court's determination that petitioner was not a public figure, it did not overturn that finding. It agreed with the District Court that respondent could assert the constitutional privilege because the article concerned a matter of public interest, citing this Court's intervening decision in Rosenbloom v. Metromedia, Inc., supra. The Court of Appeals read *Rosenbloom* to require application of the *New York Times* standard to any publication or broadcast about an issue of significant public interest, without regard to the position, fame, or anonymity of the person defamed, and it concluded that respondent's statements concerned such an issue. After reviewing the record, the Court of Appeals endorsed the District Court's conclusion that petitioner had failed to show by clear and convincing evidence that respondent had acted with "actual malice" as defined by *New York Times*. There was no evidence that the managing editor of American Opinion knew of the falsity of the accusations made in the article. In fact, he knew nothing about petitioner except what he learned from the article. The court correctly noted that mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth. Rather, the publisher must act with a "high degree of awareness * * * of probable falsity." St. Amant v. Thompson, 390 U.S. 727, 731 (1968). The evidence in this case did not reveal that respondent had cause for such an awareness. The Court of Appeals therefore affirmed 471 F.2d 801 (7th Cir. 1972). For the reasons stated below, we reverse.

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. * * *

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." Shaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). * * * The First Amendment requires that we protect some falsehood in order to protect speech that matters. * * * Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation. * * *

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 exteremely 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. * * * 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. * * * 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. 64, 77 (1964), the public's interest extends to "anything that 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.

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 falsehoods concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office nor assumed an "influential role in ordering society." Curtis Publishing Co. v. Butts, supra, 388 U.S., at 164 (opinion of Warren, C. J.). 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 Mr. 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.* (Emphasis added)

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." * * *

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 falsehoods 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 un-

controlled 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 action. 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. * * *

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 recognize 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 be-

comes 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.

Petitioner has long been active in community and professional affairs. He has served as an officer of local civil 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.

Justices STEWART, MARSHALL, BLACKMUN and REHNQUIST join in the opinion of the Court. Justice BLACKMUN filed a concurring opinion.

Mr. Justice BLACKMUN, concurring.

* * *

Although the Court's opinion in the present case departs from the rationale of the *Rosenbloom* plurality, in that *the Court now conditions a libel action by a private person upon a showing of negligence, as contrasted with a showing of willful or reckless disregard*, (Emphasis added) I am willing to join, and do join, the Court's opinion and its judgment for two reasons:

1. By removing the spectres of presumed and punitive damages in the absence of *New York Times* malice, the Court eliminates significant and powerful motives for self-censorship that otherwise are present in the traditional libel action. By so doing, the Court leaves what should prove to be sufficient and adequate breathing space for a vigorous press. What the Court has done, I believe, will have little, if any, practical effect on the functioning of responsible journalism.

2. The Court was sadly fractionated in *Rosenbloom*. A result of that kind inevitably leads to uncertainty. I feel that it is of profound importance for the

Court to come to rest in the defamation area and to have a clearly defined majority position that eliminates the unsureness engendered by *Rosenbloom's* diversity. If my vote were not needed to create a majority, I would adhere to my prior view. A definitive ruling, however, is paramount. * * *

Mr. Chief Justice BURGER, dissenting.

Mr. Justice DOUGLAS, dissenting.

Mr. Justice BRENNAN, dissenting. * * * I cannot agree * * * that free and robust debate—so essential to the proper functioning of our system of government—is permitted adequate "breathing space" when, as the Court holds, the States may impose all but strict liability for defamation if the defamed party is a private person and "the substance of the defamatory statement 'makes substantial danger to reputation apparent.'" I adhere to my view expressed in Rosenbloom v. Metromedia, Inc., that we strike the proper accommodation between avoidance of media self-censorship and protection of individual reputations only when we require States to apply, the New York Times Co. v. Sullivan, 376 U.S. 254 (1964), knowing-or-reckless-falsity standard in civil libel actions concerning media reports of the involvement of private individuals in events of public or general interest.

The Court does not hold that First Amendment guarantees do not extend to speech concerning private persons' involvement in events or public or general interest. * * * Thus, guarantees of free speech and press necessarily reach "far more than knowledge and debate about the strictly official activities of various levels of government," Rosenbloom v. Metromedia, Inc.; for "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable members of society to cope with the exigencies of their period." Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

The teaching to be distilled from our prior cases is that while public interest in events may at times be influenced by the notoriety of the individuals involved, "[t]he public's primary interest is in the event[,] . . . the conduct of the participant and the content, effect, and significance of the conduct. * * *" *Rosenbloom*. Matters of public or general interest 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." Ibid. See Times, Inc. v. Hill, 385 U.S. 374, 388 (1967). * * * Today's decision will exacerbate the rule of self-censorship of legitimate utterance as publishers "steer far wider of the unlawful zone," Speiser v. Randall, 357 U.S. 513, 526 (1958). * * * Adoption, by many States, of a reasonable care standard in cases where private individuals are involved in matters of public interest—the probable result of today's decision—will likewise lead to self-censorship since publishers will be required carefully to weigh a myriad of uncertain factors before publication. The reasonable care standard is "elusive;" it saddles 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." Under a reasonable care regime, publishers and broadcasters will have to make pre-publication judgments about juror assessment of such diverse considerations as the size, operating procedures, and financial condition of the newsgathering system, as well as the relative costs and benefits of instituting less frequent and more costly reporting at a higher level of accuracy. * * * And most hazardous, the flexibility which inheres in the reasonable care standard will create the danger that a jury will convert it into "an instrument for the suppres-

sion of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' * * * which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971). * * *

I reject the argument that my *Rosenbloom* view improperly commits to judges the task of determining what is and what is not an issue of "general or public interest." [3] I noted in *Rosenbloom* that performance of this task would not always be easy. But surely the courts, the ultimate arbiters of all disputes concerning clashes of constitutional values, would only be performing one of their traditional functions in undertaking this duty. *Also, the difficulty of this task has been substantially lessened by that "sizeable body of cases, decided both before and after Rosenbloom, that have employed the concept of a matter of public concern to reach decisions in * * * cases dealing with an alleged libel of a private individual that employed a public interest standard * * * and * * * cases that applied Butts to the alleged libel of a public figure."* (Emphasis added) Comment, The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis, 70 Mich.L.Rev. 1547, 1560 (1972). The public interest is necessarily broad; any residual self-censorship that may result from the uncertain contours of the "general or public interest" concept should be of far less concern to publishers and broadcasters than that occasioned by state laws imposing liability for negligent falsehood. * * *

I would affirm the judgment of the Court of Appeals.

Mr. Justice WHITE, dissenting.

* * *

The impact of today's decision on the traditional law of libel is immediately obvious and indisputable. No longer 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*. In addition, he must prove some further degree of culpable conduct on the part of the publisher, such as intentional or reckless falsehood or negligence. And if he succeeds in this respect, he faces still another obstacle: recovery for loss of reputation will be conditioned upon "competent" proof of actual injury to his standing in the community. This will be true regardless of the nature of the defamation and even though it is one of those particularly reprehensible statements that have traditionally made slanderous words actionable without proof of fault by the

[3] The Court, taking a novel step, would not limit application of First Amendment protection to private libels involving issues of general or public interest, but would forbid the States from imposing liability without fault in any case where the substance of the defamatory statement made substantial danger to reputation apparent. As in Rosenbloom v. Metromedia, Inc., 403 U.S., at 44 n. 12, 48–49 n. 17, I would leave open the question of what constitutional standard, if any, applies when defamatory falsehoods are published or broadcast concerning either a private or public person's activities not within the scope of the general or public interest.

Parenthetically, my Brother White argues that the Court's view and mine will prevent a plaintiff—unable to demonstrate some degree of fault—from vindicating his reputation by securing a judgment that the publication was false. This argument overlooks 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. Cf. Note, Vindication of the Reputation of a Public Official, 80 Harv.L.Rev. 1730, 1739–1747 (1967). Although it may be that questions could be raised concerning the constitutionality of such statutes, certainly nothing I have said today (and, as I read the Court's opinion, nothing said there) should be read to imply that a private plaintiff, unable to prove fault, must inevitably be denied the opportunity to secure a judgment upon the truth or falsity of statements published about him. Cf. Rosenbloom v. Metromedia, Inc., supra, at 47 & n. 15.

publisher or of the damaging impact of his publication. *The Court rejects the judgment of experience that some publications are so inherently capable of injury, and actual injury so difficult to prove, that the risk of falsehood should be borne by the publisher, not the victim.* (Emphasis added) Plainly, with the additional burden on the plaintiff of proving negligence or other fault, it will be exceedingly difficult, perhaps impossible, for him to vindicate his reputation interest by securing a judgment for nominal damages, the practical effect of such a judgment being a judicial declaration that the publication was indeed false. Under the new rule the plaintiff can lose, not because the statement is true, but because it was not negligently made.

So too, the requirement of proving special injury to reputation before general damages may be awarded will clearly eliminate the prevailing rule, worked out over a very long period of time, that, in the case of defamations not actionable *per se*, the recovery of general damages for injury to reputation may also be had if some form of material or pecuniary loss is proved. Finally, an inflexible federal standard is imposed for the award of punitive damages. No longer will it be enough to prove ill will and an attempt to injure.

These are radical changes in the law and severe invasions of the prerogatives of the States. They should at least be shown to be required by the First Amendment or necessitated by our present circumstances. Neither has been demonstrated.

* * *

In any event, if the Court's principal concern is to protect the communications industry from large libel judgments, it would appear that its new requirements with respect to general and punitive damages would be ample protection. Why it also feels compelled to escalate the threshold standard of liability I cannot fathom, particularly when this will eliminate in many instances the plaintiff's possibility of securing a judicial determination that the damaging publication was indeed false, whether or not he is entitled to recover money damages. *Under the Court's new rules, the plaintiff must prove not only the defamatory statement but also some degree of fault accompanying it. The publication may be wholly false and the wrong to him unjustified, but his case will nevertheless be dismissed for failure to prove negligence or other fault on the part of the publisher.* (Emphasis added) I find it unacceptable to distribute the risk in this manner and force the wholly innocent victim to bear the injury; for, as between the two, the defamer is the only culpable party. It is he who circulated a falsehood that he was not required to publish.

It is difficult for me to understand why the ordinary citizen should himself carry the risk of damage and suffer the injury in order to vindicate First Amendment values by protecting the press and others from liability for circulating false information. This is particularly true because such statements serve no purpose whatsoever in furthering the public interest or the search for truth but, on the contrary, may frustrate that search and at the same time inflict great injury on the defenseless individual. The owners of the press and the stockholders of the communications enterprises can much better bear the burden. And if they cannot, the public at large should somehow pay for what is essentially a public benefit derived at private expense.

* * *

I fail to see how the quality or quantity of public debate will be promoted by further emasculation of state libel laws for the benefit of the news media. If anything, this trend may provoke a new and radical imbalance in the communications process. Cf. Barron, Access to the Press —A New First Amendment Right, 80

Harv.L.Rev. 1641, 1657 (1967). It is not at all inconceivable that virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themselves with social problems. This would turn the First Amendment on its head. Note, The Scope of First Amendment Protection for Good-Faith Defamatory Error, 75 Yale L.J. 642, 649 (1966); * * *. David Riesman, writing in the midst of World War II on the fascists' effective use of defamatory attacks on their opponents, commented: "Thus it is that the law of libel, with its ecclesiastic background and domestic character, its aura of heart-balm suits and crusading nineteenth-century editors, becomes suddenly important for modern democratic survival." Riesman, Democracy and Defamation: Fair Game and Fair Comment I, 42 Col.L.Rev. 1085, 1088 (1942).

This case ultimately comes down to the importance the Court attaches to society's "pervasive and strong interest in preventing and redressing attacks upon reputation." Rosenblatt v. Baer, supra, 383 U. S., at 86. From all that I have seen, the Court has miscalculated and denigrates that interest at a time when escalating assaults on individuality and personal dignity counsel otherwise. At the very least, the issue is highly debatable, and the Court has not carried its heavy burden of proof to justify tampering with state libel laws.[43] * * *

[43] With the evisceration of the common law libel remedy for the private citizen, the Court removes from his legal arsenal the most effective weapon to combat assault on person reputation by the press establishment. The David and Goliath nature of this relationship is all the more accentuated by the Court's holding today in The Miami Herald Publishing Co. v. Tornillo, post, which I have joined, that an individual criticized by a newspaper's editorial is precluded by the First Amendment from requiring that newspaper to print his reply to that attack. While that case involves an announced candidate for public office, the Court's finding of a First Amendment barrier to government "intrusion into the function of editors," post, at 16, does not rest on any distinction between private citizens or public officials. In fact, the Court observes that the First Amendment clearly protects from governmental restraint "the exercise of editorial control and judgment," i. e., "[t]he 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 * * *." Ibid. (Emphasis added.)

We must, therefore, assume that the helpless ordinary citizen libeled by the press (a) may not enjoin in advance of publication a story about him, regardless of how libelous it may be, Near v. Minnesota, 283 U.S. 697 (1931); (b) may not compel the newspaper to print his reply; and (c) may not force the newspaper to print a retraction, because a judicially-compelled retraction, like a "remedy such as an enforceable right of access," entails "governmental coercion" as to content, which "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." The Miami Herald Publishing Co. v. Tornillo. * * * Gertz v. Robert Welch, Inc., n. 3 (Brennan, J., dissenting).

My Brother Brennan also suggests that there may constitutionaly be room for "the possible enactment of statutes, not requiring proof of fault, which provide * * * 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." Ibid. The Court, however, does not even consider this less drastic alternative to its new "some fault" libel standards.

For the foregoing reasons, I would reverse the judgment of the Court of Appeals and reinstate the jury's verdict.

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