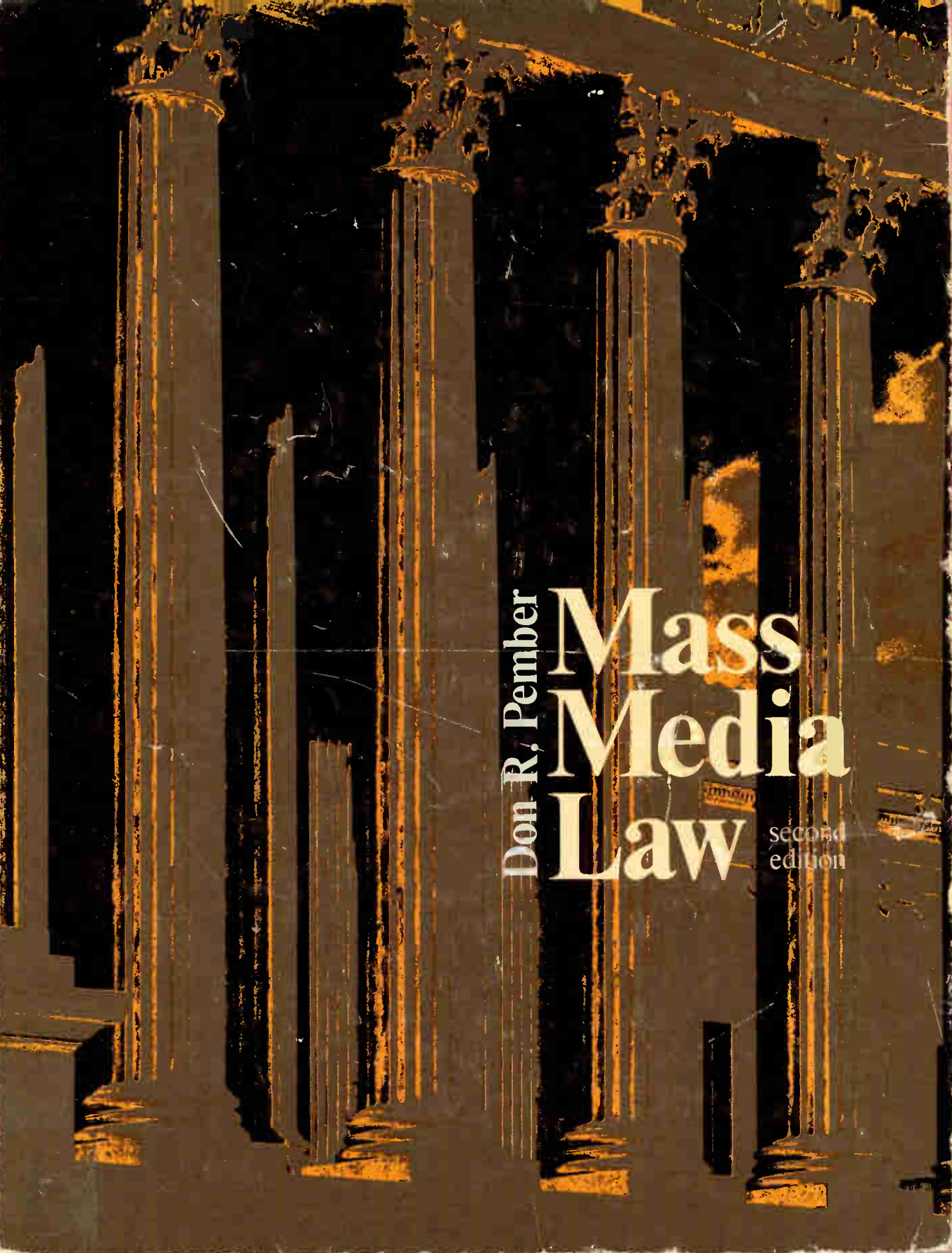
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Mass Media Law
second edition

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Preface

Writing the second edition of *Mass Media Law* was, in some ways, more difficult than writing the first edition. The challenge was to retain the good aspects of the manuscript, weed out the weaknesses that emerged after three years of use, and restructure the textual material in light of the often significant changes in American mass communications law. In doing this I was ably assisted by students, instructors who used the book, colleagues, and editors at Wm. C. Brown Company.

Several goals were in the forefront of my thinking as I revised this mass media law text. The first and most obvious was to update the material in every chapter. Much has happened in communications law during the past three years, and I have incorporated many of these legal developments into the book. As with the first edition, however, I have resisted using material simply because it is new or controversial. The primary focus of the book remains the presentation of the law needed by a working journalist, broadcaster, or person in advertising or public relations. Consequently you will not find material in the second edition on the widely publicized *Herbert* v. *Lando* ruling by the Supreme Court, a case dealing with the discovery process used by attorneys after the libelous material has been published. The case is interesting, but an understanding of the ruling is of little importance to the working communicator, since it does not change the law of libel one bit. The Supreme Court simply reinstated discovery procedures which the Second Circuit Court of Appeals had changed. Two or three other cases have been left out for the same reason.

The second goal of the book was to add a chapter on regulation of the press through antitrust laws and taxation. Many users of the book feel that such a chapter is needed. While I do not generally include this material in my

press law course, I can see the need for such information. The information is provided in chapter 12, Regulation of the Media as a Business.

The third goal of the book was to "tighten up" some chapters. New material makes the book somewhat longer, but cutting and trimming unneeded or extraneous material has kept the length of the text a reasonable size.

Finally, three important organizational changes were made. Chapter 2, Freedom of the Press, a broad, general discussion of freedom of expression, now reflects the more common manner of dealing with this material. For example, the section on prior restraint is divided into several subsections that discuss prior restraint generally and then national security matters, "fighting words," doctrine, prior restraint in schools, and time, place, and manner restrictions specifically.

Chapter 3, Gathering News and Information, is new and represents the second major organizational change. A series of decisions by the Supreme Court and various lower courts over the past five years focused upon the journalist as a news gatherer and upon the integrity of the news-gathering process. In teaching the course I find that combining the material on these subjects with material on protection of sources and access to information makes considerable sense. Hence, chapter 3 deals with the law and news gathering. Included is material on newsroom search, source confidentiality, prison interview, problems of trespass, access to government-held information, and other matters.

The final organizational change is of chapter 4, Libel, and rests upon my firm belief that the law of libel needs to be made more understandable; especially for students, in light of the fault requirements placed upon libel plaintiffs since the mid-1970s. After the 1964 *New York Times* ruling and in the years immediately preceding the *Gertz* decision, I (like other press law teachers) considered the requirement that public-person plaintiffs prove actual malice to be a libel defense and talked about it as a defense. Proof of actual malice was never really a defense, at least from a technical standpoint, since the burden of proving actual malice rests solely upon the plaintiff. It is true defendants in such suits can argue that a particular plaintiff is a public person and should have to prove actual malice, but this argument confuses the issue and does not make the malice requirement a defense. The *Gertz* ruling—that all plaintiffs have to prove some level of fault—exacerbates the teaching problem.

In 1978, shortly after the first edition of this book was published, I changed the way I teach my class. I discuss fault immediately after other aspects of the plaintiff's case—defamation, publication, and identification—are discussed. The fact that all plaintiffs must prove some level of fault is stressed, and then the ramifications of private persons, limited public persons, all-purpose public persons, negligence, and actual malice are gone into. Next,

the traditional common law defenses are considered, but the *New York Times* rule is not discussed as a constitutional defense. It seems to me that the new way of teaching the material is superior to past methods since a libel suit is not always litigated in the step-by-step manner which we are forced to use when teaching libel law. Moreover, inclusion of the material on fault as a part of the plaintiff's requirement seems to make sense to students. Therefore, chapter 3 is organized in the manner just outlined, and the dilemma regarding whether the fault requirement is a defense or part of the plaintiff's case is explained. The material on fault is a self-contained unit and can be assigned as part of the reading on defenses.

One additional small change in the libel chapter: all reference to "common law malice," that kind of malice plaintiffs can use to overturn a common law defense such as fair comment, was dropped from the chapter, but I do continue to talk in terms of material being published for an improper motive or as a means of hurting someone. Everything that was in the first edition regarding common law malice remains in the second edition. It simply isn't called "common law malice." This tactic avoids using such terms as "actual malice" and "common law malice" that seem to confuse students.

Many people deserve thanks for making this book possible. I have gained much of value from my students, who helped me develop material and other resources included in this book. Colleagues—especially Roger Simpson and Gerald Baldasty—gave invaluable advice and patiently listened as I outlined new ideas about press law and the teaching of press law. Thanks also goes to the many persons who reviewed the manuscript and provided important assistance in preparation of the second edition. I would especially like to thank Donald Brod, Northern Illinois University; Rick D. Pullen, California State University, Fullerton; and Bill F. Chamberlin, University of North Carolina, Chapel Hill. Editors Julie Kennedy and Susan J. Soley were extremely helpful, patient, and concerned about the welfare of both the book and its author.

Greatest thanks obviously and properly go to those closest to me. Writing a book is difficult and is undoubtedly as tough or tougher on an author's family as it is on the author. So my deepest thanks go to Alison and Brian, for understanding and accepting a part-time Daddy for many months, and to Diann, who gave great assistance and help (and also typed the manuscript) through the long process. It is to these three persons that the second edition of *Mass Media Law* is dedicated.

Mass Media Law

1 The American Legal System

Probably no nation is more closely tied to the law than the American Republic. From the 1770s, when in the midst of a war of revolution we attempted to legally justify our separation from the motherland, to the 1970s, when a dissatisfied people used the law as a wedge to drive a president from office, and during the nearly two hundred years between, the American people have showed a remarkable faith in the law. One could write a surprisingly accurate history of this nation using reports of court decisions as the only source. Beginning with the sedition cases in the late 1790s which reflected the political turmoil of that era, one could chart the history of the United States from adolescence to maturity. As the frontier expanded in the nineteenth century, citizens used the courts to argue land claims and boundary problems. Civil rights litigation in both the midnineteenth and midtwentieth centuries reflects a people attempting to cope with racial and ethnic diversity. Industrialization brought labor unions, workmen's compensation laws, and child labor laws, all of which resulted in controversies that found their way into the courts. As mass production developed and large manufacturers began to create most of the consumer goods used, judges and juries had to cope with new laws on product safety, honesty in advertising, and consumer complaints.

Americans have protested nearly every war the nation has fought—including the Revolutionary War. The record of these protests is contained in scores of court decisions. Prohibition and the crime of the twenties and the economic woes of the thirties both left residue in the law. In the United States,

The Bibliography at the end of each chapter supplies additional information about the sources and legal cases cited in the text. An explanation of how to locate a given case using its citation is provided on page 8.

as in most other societies, law is a basic part of existence, as necessary for the survival of civilization as are economic systems, political systems, cultural achievement, and the family.

This chapter has two purposes: to acquaint readers with the law and to present a brief outline of the legal system in the United States. Students who study mass media law frequently face the serious difficulty of studying a special area of law without having an understanding of the law or the court system in general, a situation somewhat like a medical student studying neurosurgery before taking work in anatomy, basic medicine, and surgical techniques. While this chapter is not designed to be a comprehensive course in law and the judicial system—such material can better be studied in depth in an undergraduate political science course—it does provide sufficient introduction to understand the remaining eleven chapters of the book.

The chapter opens with a discussion of the law, giving consideration to the five most important sources of the law in the United States, and moves on to the judicial system including both the federal and state court systems. Judicial review is discussed, and finally there is a brief explanation of how lawsuits, both criminal and civil, are started and proceed through the courts.

SOURCES OF THE LAW

There are almost as many definitions of law as there are people who study the law. Some people say that law is any social norm, or any organized or ritualized method of settling disputes. Most writers on the subject insist that it is a bit more complex, that some system of sanctions is required before law exists. John Austin, a nineteenth-century English jurist, defined law as definite rules of human conduct with appropriate sanctions for their enforcement. He added that both the rules and the sanctions must be prescribed by duly constituted human authority. Roscoe Pound, an American legal scholar, has suggested that law is really social engineering—the attempt to order the way people behave. For the purposes of this book it is probably more helpful to consider the law to be a set of rules which attempt to guide human conduct and a set of sanctions which are applied when those rules are violated.

Scholars still debate the genesis of "the law." A question that is more meaningful and easier to answer is, What is the source of American law? There are really five major sources of law in the United States: the common law, the law of equity, the statutory laws, the Constitution, and the rulings of various administrative bodies and agencies. Historically we can trace American law to Great Britain. As colonizers of much of the North American Continent, the British supplied Americans with an outline for both a legal system and a judicial system. In fact, because of the many similarities between British and American law, many people consider the Anglo-American legal system to be a single entity.

The Common Law

The common law, which developed in England during the two hundred years after the Norman Conquest in the eleventh century, is one of the great legacies of the British people to colonial America. During those two centuries the crude mosaic of Anglo-Saxon customs was replaced by a single system of law worked out by jurists and judges. The system of law became common throughout England; it became the common law. It was also called the common law to distinguish it from the ecclesiastical (church) law prevalent at the time. Initially, the customs of the people were used by the king's courts as the foundation of the law, disputes were resolved according to community custom, and governmental sanction was applied to enforce the resolution. As such, the common law was, and still is, considered "discovered law." It is law that has always existed, much like air and water. When a problem arises, the court's task is to find or discover the proper solution, to seek the common custom of the people. The judge doesn't create the law; he merely finds it, much like a miner finds gold or silver.

This, at least, is the theory of the common law. Perhaps at one point judges themselves believed that they were merely discovering the law when they handed down decisions. As legal problems became more complex and as the law began to be professionally administered (the first lawyers appeared during this era and eventually professional judges), it became clear that the common law reflected not so much the custom of the land as the custom of the court—or more properly, the custom of the judges. While judges continued to look to the past to discover how other courts had decided, given similar facts (precedent is discussed in a moment), many times judges were forced to create the law themselves.

This common law system was the perfect system for the American colonies. Like most Anglo-Saxon institutions, it was a very pragmatic system aimed at settling real problems, not at expounding abstract and intellectually satisfying theories. The common law is an inductive system of law in which a legal rule is arrived at after consideration of a great number of specific instances of cases. (In a deductive system the rules are expounded first and then the court decides the legal situation under the existing rule.) Colonial America was a land of new problems for British and other settlers. The old law frequently didn't work. But the common law easily accommodated the new environment. The ability of the common law to adapt to change is directly responsible for its longevity.

Fundamental to the common law is the concept that judges should look to the past and follow earlier court precedents. The Latin expression for the concept is this: *Stare decisis et non quieta movere* ("to stand by past decisions and not disturb things at rest"). *Stare decisis* is the key phrase: let the decision stand. A judge should resolve current problems in the same manner as similar problems were resolved in the past. When Barry Goldwater sued publisher

Ralph Ginzburg for publishing charges that the conservative Republican senator was mentally ill, was paranoid, the judge most certainly looked to past decisions to discover whether in previous cases such a charge had been considered defamatory or libelous. There are ample precedents for ruling that a published charge that a person is mentally ill is libelous, and Senator Goldwater won his lawsuit (*Goldwater* v. *Ginzburg,* 1969).

At first glance one would think that under a system which continually looks to the past the law can never change. What if the first few rulings in a line of cases were bad decisions? Are we saddled with bad law forever? Fortunately, the law does not operate quite in this way. While following precedent is the desired state of affairs (many people say that certainty in the law is more important than justice), it is not always the proper way to proceed. To protect the integrity of the common law, judges have developed several means of coping with bad law and with new situations in which the application of old law would result in injustice.

Imagine for a moment that the newspaper in your hometown publishes a picture and story about a twelve-year-old girl who gave birth to a seven-pound son in a local hospital. The mother and father do not like the publicity and sue the newspaper for invasion of privacy. The attorney for the parents finds a precedent (*Barber* v. *Time,* 1942) in which a Missouri court ruled that to photograph a patient in a hospital room against her will and then to publish that picture in a news magazine is an invasion of privacy.

Now does the existence of this precedent mean that the young couple will automatically win their lawsuit? that the court will follow the decision? No, it does not. For one thing, there may be other cases in which courts have ruled that publishing such a picture is not an invasion of privacy. In fact in 1956 in the case of *Meetze* v. *AP,* a South Carolina court made just such a ruling. But for the moment assume that *Barber* v. *Time* is the only precedent. Is the court bound by this precedent? No. The court has several options concerning the 1942 decision.

First, it can accept the precedent as law and rule that the newspaper has invaded the privacy of the couple by publishing the picture and story about the birth of their child. Second, the court can modify or change the 1942 precedent by arguing that *Barber* v. *Time* was decided almost forty years ago when people were more sensitive about going to a hospital, since a stay in a hospital was often considered to reflect badly on a patient, but that hospitalization is no longer a sensitive matter to most people. Therefore, a rule of law restricting the publication of a picture of a hospital patient is unrealistic, unless the picture is in bad taste or needlessly embarrasses the patient. Then its publication is an invasion of privacy. If not, the publication of such a picture is permissible. In our imaginary case, then, the decision turns on what kind of picture and story the newspaper published—a pleasant picture which

flattered the couple? or one that mocked and embarrassed them? If the court rules in this manner, it modifies the 1942 precedent, making it correspond to what the judge perceives to be contemporary life.

As a third option the court can argue that *Barber* v. *Time* provides an important precedent for a plaintiff hospitalized because of disease—as Dorothy Barber was. But that in the case before the court the plaintiff was hospitalized to give birth to a baby, a different situation: Giving birth is a voluntary status; catching a disease is not. Consequently the *Barber* v. *Time* precedent does not apply. This practice is called ***distinguishing the precedent from the current case***, a very common action.

Finally, the court can overrule the precedent. In 1941 the United States Supreme Court overruled a decision made by the Supreme Court in 1918 regarding the right of a judge to use what is called the summary contempt power (*Toledo Newspaper Co.* v. *U.S.*, 1918). This is the power of a judge to charge someone with being in contempt of court, to find him guilty of contempt, and then to punish him for the contempt—all without a jury trial. In *Nye* v. *U.S.* (1941) the high Court said that in 1918 it had been improperly informed as to the intent of a measure passed by Congress in 1831 which authorized the use of the summary power by federal judges. The 1918 ruling was therefore bad, was wrong, and was reversed. (Fuller explanation of summary contempt as it applies to the mass media is given in chapter 7.) The only courts that can overrule the 1942 decision by the Missouri Supreme Court in *Barber* v. *Time* are the Missouri Supreme Court and the United States Supreme Court. Judges in other states can just ignore the *Barber* v. *Time* precedent if they believe it to be a poor decision.

Obviously the preceding discussion oversimplifies the judicial process. Rarely is a court confronted with but a single precedent. And numerous other factors must be taken into account in addition to past case law. In fact, many people talk about the "hunch theory" of jurisprudence which suggests that judges decide a case on the basis of their instincts and then seek to find rational reasons to explain the decision. The imaginary invasion-of-privacy case just discussed demonstrates that the common law can have vitality, that despite the rule of precedent a judge is rarely bound tightly by the past. There is a saying, Every age should be the mistress of its own law. This saying applies to the common law as well as to all other aspects of the legal system.

It must be clear at this point that the common law is not specifically written down someplace for all to see and use. It is instead contained in the hundreds of thousands of decisions handed down by courts over the centuries. Many attempts have been made to summarize the law. Sir Edward Coke compiled and analyzed the precedents of common law in the early seventeenth century. Sir William Blackstone later expanded Coke's work in the monumental *Commentaries on the Law of England*. More recently, in such works as the massive *Restatement of Torts* the task was again undertaken, but on

a narrower scale. Despite these compilations, in the eyes of some European attorneys the common law remains "the law nobody knows" because it isn't spelled out neatly in a statute book or administrative edict.

Courts began to keep records of their decisions centuries ago. In the thirteenth century unofficial reports of cases began to appear in Year Books, but they were records of court proceedings in which procedural points were clarified for the benefit of legal practitioners, rather than collections of court decisions. The modern concept of fully reporting the written decisions of all courts probably began in 1785 with the publication of the first British Term Reports.

While scholars and lawyers still uncover the common law using the case-by-case method, it is fairly easy today to locate the appropriate cases through a simple system of citation. The cases of a single court (such as the United States Supreme Court or the federal district courts) are collected in a single case reporter (such as the *United States Reports* or the *Federal Supplement*). The cases are collected chronologically and fill many volumes. Each case collected has its individual citation which reflects the name of the reporter in which the case can be found, the volume of that reporter, and the page on which the case begins. For example, the citation for the decision in *Adderly* v. *Florida* (a freedom-of-speech case) is 385 U.S. 39 (1966). The letters in the middle (U.S.) indicate that the case is in the *United States Reports*, the official government reporter for cases decided by the Supreme Court of the United States. The number 385 refers to the specific volume of the *United States Reports* in which the case is found. The last number (39) gives the page on which the case appears. Finally, 1966 provides the year in which the case was decided. So, *Adderly* v. *Florida* can be found on page 39 of volume 385 of the *United States Reports*.

If you have the correct citation, you can easily find any case you seek. Locating all citations of the cases apropos to a particular problem—such as a libel suit—is a different matter and is a technique taught in law schools. A great many legal encyclopedias, digests, compilations of the common law, books, and articles are used by lawyers to track down the names and citations of the appropriate cases.

There is no better way to sum up the common law than to quote Oliver Wendell Holmes (*The Common Law*, published in 1881):

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order

> to know what it is, we must know what it has been, and what it tends to become. . . . The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned.

The Law of Equity

The common law is not the only legal legacy the British provided the American people. The law of equity, as developed in Britain beginning in the fourteenth and fifteenth centuries, is also a remnant of our British heritage and is the second basic source of the law in the United States. Equity was originally a supplement to the common law and developed side by side with the common law. During the 1300s and 1400s the king's courts became rigid and narrow. Many persons seeking relief under the common law for very real grievances were often turned away because the law did not provide a suitable remedy for their problems. In such instances the disappointed litigant could take his problem to the king for resolution, petitioning the king to "do right for the love of God and by way of charity." According to legal scholar Henry Abraham (*The Judicial Process*), "The king was empowered to mold the law for the sake of 'justice,' to grant the relief prayed for as an act of grace." Soon the chancellor, the king's right-hand man, set up a special office or court to settle the kinds of problems which the king's common law courts could not resolve. At the outset of the hearing the aggrieved party had to establish that he had no adequate remedy under the common law and that he needed a special court to hear his case. The office of the chancellor soon became known as the Court of Chancery. Decisions were made on the basis of conscience or fairness or "equity."

British common law and equity law were American law until the Revolution in 1776. After independence was won, the basic principles of common law in existence before the War of Revolution were kept because the cases remained acceptable precedent. After some hesitation, equity was accepted in much the same way. While present-day United States courts can consider decisions made in British courts after the Revolution, they are not bound by these decisions. For example, when the law of privacy is discussed, it will be seen that the decisions of British courts were often cited by American judges in the early development of privacy law, but were rarely fully accepted.

Initially there was a separate court of equity, or chancery, in Great Britain. But today in Great Britain and the United States, the same court hears cases both in equity and under the common law. Depending upon the kind of judicial relief sought by the plaintiff, the judge applies either the common law or the rules of equity.

The rules and procedures under equity are far more flexible than those under the common law. Equity really begins where the common law leaves off. Equity suits are never tried before a jury. Rulings come in the form of judicial decrees, not in judgments of yes or no. Decisions in equity are (and

were) discretionary on the part of judges. And despite the fact that precedents are also relied upon in the law of equity, judges are free to do what they think is right and fair in a specific case.

Equity provides another advantage for troubled litigants—the restraining order. A judge sitting in equity can order preventive measures as well as remedial ones. Individuals who can demonstrate that they are in peril, or about to suffer a serious irremediable wrong, can usually gain a legal writ such as an injunction or a restraining order to stop someone from doing something. Generally a court issues a temporary restraining order until it can hear arguments from both parties in the dispute and decide whether an injunction should be made permanent.

In 1971 the federal government asked the federal courts to restrain the *New York Times* and the *Washington Post* from publishing what have now become known as the Pentagon Papers (this case is discussed in greater detail in chapter 2). This case is a good example of equity law in action. The government argued that if the purloined documents were published by the two newspapers the nation would suffer irremediable damage; that foreign governments would be reluctant to entrust the United States with their secrets if those secrets might someday be published in the public press; that the enemy would gain valuable defense secrets. The federal government argued further that it would do little good to punish the newspapers after the material had been published since there would be no way to repair the damage. The federal district court temporarily restrained both newspapers from publishing the material while the case was argued—all the way to the Supreme Court of the United States. After two weeks of hearings the high Court finally ruled that publication could continue, that the government failed to prove that the nation would be damaged (*New York Times Co.* v. *U.S.*, 1971).

Prior to the Revolution, Americans were also bound by laws made by their colonial legislatures as well as by the British Parliament. Following independence, the British statutes passed by Parliament were no longer applicable in the United States; instead the residents of the new nation were bound by the laws of their own local, federal, and state legislatures. Legislation is therefore the third great source of United States law.

Statutory Law

Today there are legislative bodies of all shapes and sizes. The common traits they share are that they are popularly elected and that they have the authority to pass laws. In the beginning of our nation, legislation, or statutory law, really didn't play a very significant role in the legal system. Certainly many laws were passed, but the bulk of our legal rules were developed from the common law and from equity law. After 1825 statutory law began to play an important role in our legal system, and it was between 1850 and 1900 that a greater percentage of law began to come from legislative acts than from common law court decisions. Today, most American law comes from various

legislatures: Congress, state legislatures, city councils, county boards of supervisors, township boards, and so forth. In fact, legislative action is the most important source of American law in the 1980s.

Several important characteristics of statutory law can best be understood by contrasting them with common law. First, statutes tend to deal with problems affecting society or large groups of people, in contrast to common law, which usually deals with smaller, individual problems. (Some common law rulings affect large groups of persons, but this occurrence is rare.) It should also be noted in this connection the importance of not confusing common law with constitutional law. Certainly when judges interpret the Constitution they make policy which affects us all. However, it should be kept in mind that the Constitution is a legislative document voted upon by the people and is not "discovered law" or "judge-made law."

Second, statutory law can anticipate problems, and common law cannot. For example, a state legislature can pass a statute which prohibits publication of the school records of a student without prior consent of the student. Under the common law the problem cannot be resolved until a student's record has been published in a newspaper or broadcast on television and the student brings action against the medium to recover damages for the injury incurred.

Third, the criminal laws in the United States are all statutory laws—common law crimes no longer exist in this country and haven't since 1812. Common law rules aren't precise enough to provide the kind of notice needed to protect a criminal defendant's right to due process of law.

Fourth, statutory law is collected in codes and law books, instead of in reports as in the common law. When a proposal or bill is adopted by the legislative branch and approved by the executive branch, it becomes law and is integrated into the proper section of a municipal code, a state code, or whatever. However, this does not mean that some very important statutory law cannot be found in the case reporters.

Passage of a law is rarely the final word on the subject. Courts become involved in the process of determining what that law means. While a properly constructed statute usually needs little interpretation by the courts, judges are frequently called upon to rule upon the exact meaning of ambiguous phrases and words. The resulting process is called **statutory construction** and is a very important part of the law. Even the simplest kind of statement often needs interpretation. For example, a prohibition stating "it is illegal to distribute an obscene newspaper" is filled with ambiguity. What does *distribution* mean? Can an obscene newspaper by sent through the mail? distributed from house to house? passed out on street corners? Are all of these actions prohibited? What constitutes a newspaper? Is any printed matter a newspaper? Is any printed matter published regularly a newspaper? Are mimeographed sheets and photocopied newsletters considered newspapers? Of course, implicit is the classic question with which courts have wrestled in this country for nearly a century, What is obscenity?

Usually a legislature tries to leave some kind of trail to help a judge find out what the law means. For when judges rule on the meaning of a statute, they are supposed to determine what the legislature meant when it passed the law (the legislative intent), not what they think it should mean. Minutes of committee hearings in which the law was discussed, legislative staff reports, and reports of debate on the floor can all be used to help a judge determine the legislative intent. Therefore when lawyers deal with statutes, they frequently are forced to search the case reporters to find out how the courts interpreted a law in which they are interested.

Constitutional Law

Great Britain does not have a written constitution. The United States does have a written constitution, and it is an important source of our law. In fact, there are many constitutions in this country: the federal Constitution, state constitutions, city charters, and so forth. All of these documents accomplish the same ends. First, they provide the plan for the organization of the government. Next, they outline the duties, responsibilities, and powers of the various elements of government. Finally, they usually guarantee certain basic rights to the people, such as freedom of speech and freedom to peaceably assemble.

One Supreme Court justice described a constitution as a kind of yardstick against which all the other actions of government must be measured to determine whether the actions are permissible. The United States Constitution is the supreme law of the land. Any law or other constitution which conflicts with the United States Constitution is unenforceable. A state constitution plays the same role for a state: a statute passed by the Michigan legislature and signed by the governor of that state is clearly unenforceable if it conflicts with the Michigan constitution. And so it goes with all levels of constitutions.

While constitutions tend to be short and infrequently amended, the process of determining what specific areas of these documents mean and whether a specific law or government action violates a certain constitutional provision is a laborious one, usually taking hours and hours and days and days of court time. Consequently, with the exception of the bare-bone documents themselves, the case reporters are once again the repository for the constitutional law which governs the United States.

Twenty-six amendments are appended to the United States Constitution. The first ten of these are known as the Bill of Rights and provide a guarantee of certain basic human rights to all citizens. Included are freedom of speech and freedom of the press, rights you will come to understand more fully in future chapters.

Constitutions are an important source of the law in the United States, especially law involving the mass media.

Administrative Rules

By the latter part of the nineteenth century in the United States, not only had the simple idyllic life of the eighteenth century slipped away, but also the job of governing had become much more complex. Congress was being asked to resolve questions going far beyond such simple matters as budgets, wars, treaties, and the like. Technology created new kinds of problems for the Congress to resolve. Many such issues were complex and required specialized knowledge and expertise which the Congress lacked and could not easily acquire, had it wanted to. Federal agencies were therefore created to deal with these problems.

For example, the flow of natural gas through long pipelines which traversed the nation created numerous disputes. Since questions concerning use of these pipelines fell within the commerce power of the Congress, that deliberative body was given the task of resolving this complex issue. But pipeline regulation involved serious technical matters and competent regulation required a high level of expertise. To deal with these problems, Congress created the first administrative agency, the Interstate Commerce Commission (ICC). This agency was established by legislation and funded by Congress. Its members were appointed by the president and approved by the Congress. Each member served a fixed term in office. The agency was independent of the Congress, the president, and the courts. Its task was (and is) to regulate commerce between the states, a matter which concerned pipelines, shipping, and transportation. The members of the board presumably were somewhat expert in the area before appointment and of course became more so during the course of their term.

Today hundreds of such agencies exist at both federal and state levels. Each agency undertakes to deal with a specific set of problems which are too technical or too large for the legislative branch to handle. Typical is the Federal Communications Commission (FCC) which was created by Congress in 1934. Its task is to regulate broadcasting in the United States, a job which Congress has really never attempted. Its members must be citizens of the United States and are appointed by the president. The single stipulation is that at any one time no more than four of the seven individuals on the commission can be from the same political party. The Senate must confirm the appointments.

Congress sketched the broad framework for the regulation of broadcasting in the Federal Communications Act of 1934, and this act is used by the agency as its basic regulatory guidelines. The agency also creates much law itself in administration of the 1934 Act. In interpreting provisions, handing down rulings, developing specific guidelines, and the like, the FCC has developed a sizable body of regulations which bind broadcasters. For example, the Federal Communications Act of 1934 states that broadcasters must operate in the public interest, convenience, or necessity. The FCC holds that one aspect of operation in the public interest is to air all sides of a controversial issue to

make certain that the audience has access to the full range of opinion on the topic. This general rule gradually emerged during the past forty years as the fairness doctrine, a full-blown set of rules created by the FCC which carry the force of law. Broadcasters who fail to live up to these rules can be fined or (rarely) have their license to broadcast taken away.

Persons dissatisfied with rulings by the FCC can go to court and seek a reversal of the commission action. But courts are strictly limited in their power when reviewing decisions by administrative agencies, and can overturn a commission ruling or any other action by an administrative agency in only these limited circumstances: (1) if the original act which established the commission is unconstitutional, (2) if the commission exceeds its authority, (3) if the commission violates its own rules, or (4) if there is no evidentiary basis whatsoever to support the ruling. The reason for these limitations is simple: These agencies were created to bring expert knowledge to bear on complex problems, and the entire purpose for their creation would be defeated if judges with no special expertise in a given area can reverse an agency ruling merely because they have a different solution to a problem.

The case reporters contain some law created by the administrative agencies, but the reports which each of these agencies themselves publish contain much more such law. These reports are also arranged on a case-by-case basis in chronological order. A citation system similar to that used for the case reporters is used in these reports.

As the problems which governments must deal with become more complicated and more numerous, administrative agencies seem to proliferate, and more and more of our law comes from such agencies.

There are other sources of American law. Executives—a governor, a president, a mayor—have the power to make law in some circumstances through executive order. The five sources just discussed—common law, law of equity, statutory law, Constitutional law, and rules and regulations by administrative agencies—are the most important, however, and are of most concern in this book. First Amendment problems fall under the purview of constitutional law. Libel and invasion of privacy are matters generally dealt with by the common law and the law of equity. Obscenity laws in this country are statutory provisions (although this fact is frequently obscured by the hundreds of court cases in which judges attempt to define the meaning of obscenity). And of course the regulation of broadcasting and advertising falls primarily under the jurisdiction of administrative agencies.

While this section provides a basic outline of the law and is not comprehensive, the information is sufficient to make upcoming material on mass media law understandable.

THE JUDICIAL SYSTEM

This section gives an introduction to the court system in the United States. Since the judicial branch of our three-part government is the field upon which most of the battles involving communications law are fought, an understanding of the judicial system is essential.

It is technically improper to talk about the American judicial system. There are fifty-one different judicial systems in the United States, one for the federal government and one for each of the fifty states. While each of these systems is somewhat different from all the others, the similarities among the fifty-one systems are much more important than the differences. Each of the systems is divided into two distinct sets of courts, trial courts and appellate courts. Each judicial system is established by a constitution, federal or state. In each system the courts act as the third branch of a common triumvirate of government: a legislative branch which makes the law, an executive branch which enforces the law, and a judicial branch which interprets the law.

Common to all judicial systems is the distinction between trial courts and appellate courts, and it is important to understand this distinction. Each level of court has its own function: basically, trial courts are fact-finding courts and appellate courts are law-reviewing courts. Trial courts are the courts of first instance, the place where nearly all cases begin. Juries sit in trial courts, but never in appellate courts. Trial courts are empowered to consider both the facts and the law in a case. Appellate courts consider only the law. The difference between facts and law is significant. The facts are what happened. The law is what should be done about the facts.

The difference between facts and law can be emphasized by looking at an imaginary libel suit that might result when the *River City Sentinel* publishes a story about costs at the Sandridge Hospital. (See story on page 16.)

The Sandridge Hospital sued the newspaper for libel. When the case got to court, the first thing that had to be done was to establish what the facts were—what happened. Both the hospital and the newspaper presented evidence, witnesses, and arguments to support its version of the facts. Several issues had to be resolved. In addition to the general questions of whether the story had been published and whether the hospital had been identified in the story, the hospital had to supply evidence that its reputation had been injured, that its good name had been damaged, and that the newspaper staff had been negligent. The newspaper relied on the truth as its defense. It presented evidence to document its charges that the hospital overcharged patients, that the medications were stale, that expired medicine is less effective than fresh medicine, and that patients did receive the stale medicine.

All this testimony and evidence establishes the factual record—what actually took place at the hospital. When there is conflicting evidence, the jury decides whom to believe (in the absence of a jury, the judge makes the decision). Suppose that the evidence presented by the newspaper convinced

Ineffective Medications Given to Ill, Injured
SANDRIDGE HOSPITAL OVERCHARGING PATIENTS ON PHARMACY COSTS

Scores of patients at the Sandridge Hospital have been given ineffective medications, a three-week investigation at the hospital has revealed. In addition, many of those patients were overcharged for the medicine they received.

The *Sentinel* has learned that many of the prescription drugs sold to patients at the hospital had been kept beyond the manufacturer's recommended storage period.

Many drugs stored in the pharmacy (as late as Friday) had expiration dates as old as six months ago. Drug manufacturers have told the *Sentinel* that medication used beyond the expiration date, which is stamped clearly on most packages, may not have the potency or curative effects that fresher pharmaceuticals have.

Hospital spokesmen deny giving patients any of the expired drugs, but sources at the hospital say it is impossible for administrators to guarantee that none of the dated drugs were sold to patients.

In addition, the investigation by the *Sentinel* revealed that patients who were sold medications manufactured by _____ Pharmaceuticals were charged on the basis of 1980 price lists despite the fact that the company lowered prices significantly in 1981.

the jury that the hospital did possess expired drugs, that patients were charged 1980 prices for some medications, and that most authorities do regard expired medication to be less beneficial than fresher drugs. Given the factual record of the case, what is the law? Had the newspaper really proved its charges against the hospital? Had it proved the truth? A simple explanation is that in order to successfully use the defense of truth (defense of truth is discussed further in chapter 3) the newspaper must prove the substance of its charges, the heart of its allegations. In this case, a judge would probably rule that the newspaper had not proved the substance of its charges: there was no evidence that any patients had been given expired medication. Therefore, the hospital wins the suit. If the newspaper is unhappy with the verdict, it can appeal.

In an appeal, the appellate court does not reconsider the factual record. No more testimony is taken. No more witnesses are called. The factual record established by the jury at the trial stands and cannot be reconsidered. What the appellate court can do is to decide whether the law has been applied properly in light of the facts. It is possible that in this case the appellate court would rule that in establishing that the drugs were stored in the hospital pharmacy the newspaper has in fact established the substance of its charge—that it is inconceivable that patients had not received the expired medicine

and that the trial judge erred in applying the law. Perhaps the judge erred in allowing certain testimony into evidence, or he refused to allow a certain witness to testify. Nevertheless, in reaching an opinion the appellate court considers only the law; the factual record established at the trial stands.

What if new evidence is found or a previously unknown witness comes forth to testify? If the appellate court believes that the new evidence is important, it can order a new trial. However, the court itself does not hear the evidence. These facts are given at a new trial.

The important differences between trial and appellate courts have now been pointed out. Other differences will undoubtedly emerge as the specific structure of each court system is discussed.

In the discussion that follows, the federal court system and its methods of operating are considered first, and then some general observations about state court systems are given, based on the discussion of the federal system.

The Federal Court System

The Congress has the authority to abolish every federal court in the land save the Supreme Court of the United States. The United States Constitution calls for but a single federal court, the Supreme Court. Article III, Section 1 states: "The judicial power of the United States shall be vested in one Supreme Court." The Constitution also gives Congress the right to establish inferior courts if it deems these courts to be necessary. And Congress has, of course, established a fairly complex system of courts to complement the Supreme Court.

The jurisdiction of the federal courts is also outlined in Article III of the Constitution. The jurisdiction of a court is its legal right to exercise its authority. Briefly, federal courts can hear the following cases:

1. Cases that arise under the United States Constitution, United States law, and United States treaties
2. Cases that involve ambassadors and ministers, duly accredited, of a foreign country
3. Cases that involve admiralty and maritime law
4. Cases that involve controversies when the United States is a party to the suit
5. Cases that involve controversies between two or more states
6. Cases that involve controversies between a state and a citizen of another state (we must remember that the Eleventh Amendment to the Constitution states that a state must give its permission before it can be sued)
7. Cases that involve a controversy between citizens of different states

While special federal courts have jurisdiction which goes beyond this broad outline, these are the circumstances in which a federal court may normally exercise its authority. Of the seven categories of cases just listed, categories one and seven account for most of the cases getting to federal court.

For example, disputes which involve violations of the myriad federal laws and disputes which involve constitutional rights such as the First Amendment are heard in federal courts. Also, disputes between citizens of different states—what is known as a diversity of citizenship matter—are heard in federal courts. It is very common, for example, for libel suits and invasion of privacy suits against publishing companies to start in federal courts rather than in state courts. If a citizen of Arizona should be libeled by *Time* magazine, the case would very likely be tried in a federal court in the state of Arizona, rather than in a state court. The magazine would look at the tribunal as a more neutral court. But the federal court would still follow Arizona law when hearing the case.

The Supreme Court

The Supreme Court of the United States is the oldest federal court, having been in operation since 1789. The Constitution does not establish the number of justices who will sit on the high Court. That task is left to the Congress. In 1789 the Congress passed the first judiciary act and established the membership of the high Court at six: a chief justice and five associate justices. This number was increased to seven in 1807, to nine in 1837, and to ten in 1863. The Supreme Court had ten members until 1866 when Congress ruled that only seven justices would sit on the high tribunal. Since 1869 the Supreme Court has had eight associate justices and the Chief Justice of the United States. (Note the title: not Chief Justice of the Supreme Court, but the Chief Justice of the United States.)

No attempt to change the size of the Court has occurred since the 1930s when President Franklin Roosevelt, unhappy about the manner in which it treated some of his New Deal legislation, proposed enlarging the Court. Publicly, Roosevelt argued that serving on the Court was arduous and that the work load for the older judges had become onerous. He sought the power to appoint one new justice for every justice over seventy years of age, to a limit of fifteen justices on the high Court. The public response to the president's plan was strongly negative, and the measure never came to a vote in the Senate. But the president won in the end when James McReynolds, one of the Court's staunchest New Deal foes, retired and Roosevelt was able to appoint a jurist more of his own philosophical bent as a replacement. In addition, following the announcement of the president's judiciary plan, the high Court handed down a ruling which seemed to indicate that one of the formerly anti-New Deal justices (Owen Roberts) had changed his position regarding the president's social and economic programs. Despite a political defeat, Roosevelt got his legislation, and in the end he appointed nine men to the high Court, more than any president except Washington.

The Supreme Court exercises both original and appellate jurisdiction. Under its original jurisdiction the Court is the first court to hear a case and acts much like a trial court in ascertaining facts and deciding the law. By the

middle of this century the Court had exercised its original jurisdiction only one hundred twenty-nine times. The Supreme Court has the authority to exercise this jurisdiction in only certain instances. In cases between two or more states, for example, the Supreme Court is the only court which can hear the matter and has exclusive jurisdiction. In cases involving foreign ambassadors and ministers the Supreme Court can exercise original jurisdiction, but Congress has given federal district courts jurisdiction in these matters as well. While there are a few other situations in which the high Court can exercise original jurisdiction, as a practical matter it rarely does so. Consequently this power is not very important.

The appellate jurisdiction of the Supreme Court, which has been established by Congress, *is* important, for it is under this jurisdiction that much of the law in the United States is ultimately made or reviewed. Basically, under appellate jurisdiction a case gets to the Supreme Court in one of two ways: by direct appeal or by writ of certiorari. The third way, by certification, is rarely used—so rarely that the Court hears even fewer cases by certification than under original jurisdiction.

Under appeal, the aggrieved party (the aggrieved party is the appellant; the answering party is the appellee or respondent) has a statutorily granted right to carry an appeal to the Supreme Court. When does the right to appeal exist? Following are some examples of this right:

1. When a federal circuit court says that a state statute violates the United States Constitution or that it conflicts with a federal law or a federal treaty and is invalid, the state has the right to appeal the decision to the Supreme Court.
2. When a federal court declares an act of Congress to be unconstitutional, the United States has the right to appeal the matter to the Supreme Court.
3. When a state court rules that a United States law is unconstitutional or that one of the state's own laws violates the United States Constitution, the right of appeal to the United States Supreme Court exists.

These are just some instances of when technically the Supreme Court must accept jurisdiction and hear an appeal. The word *technically* is important to note, because over the years the Court has constructed a vast loophole to escape from hearing cases under direct appeal. The Court can reject even a statutorily granted appeal if the case lacks "a substantial federal question." That is, if the Court feels that an issue is unimportant, that an issue has been decided previously by other courts, or that an issue isn't as important or as pressing as other issues, the Court can simply refuse to hear the case.

Despite the right to appeal, many litigants are turned away from the high Court without a hearing. Generally, the Supreme Court is concerned more

with construction of law than with ensuring all citizens in the land their full measure of justice. The high Court is a policy-making court. If it heard every case in which a litigant claimed he or she was treated unfairly, it would have no time to do anything else. The Supreme Court looks for cases which raise important points of law, issues which are ripe for decision, issues which are troubling lower courts, issues which need a final resolution. Sometimes a citizen who has been denied justice by the lower courts finds the Supreme Court unwilling to set things right just because it is too busy.

Only about 9 percent of the Supreme Court's business comes to it through direct appeal. The much more common way for a case to reach the nation's high Court is via a writ of certiorari. No one has the right to such a writ. It is a discretionary order issued by the Court when it feels that an important legal question has been raised. Litigants using both the federal court system and the various state court systems can seek a writ of certiorari. The most important requirement which must be met before the Court will even consider issuing a writ is that a petitioner exhaust all other legal remedies. While there are a few exceptions, this generally means that if a case begins in a federal district court, the trial level court, the petitioner must first seek a review by a United States Court of Appeals before bidding for a writ of certiorari. The writ can be sought if the court of appeals refuses to hear the case or sustains the verdict against the petitioner. All other legal remedies have then been exhausted. In state court systems every legal appeal possible must be made within the state before seeking a review by the United States Supreme Court. This usually means going through a trial court, an intermediate appeals court, and finally the state supreme court.

But occasionally the law provides for limited appeal and sometimes for no appeal at all—to wit, the case of Shufflin' Sam and the city of Louisville, Kentucky. Sam Thompson was an itinerant soul who made his way through life the best he could on the streets of Louisville. He may have been a vagrant, but he was harmless and rarely got into trouble. Sam's name was added to American legal history because he liked music and he liked to dance. Since he didn't have a radio or record player of his own, he frequently stood in the doorway of cafés and restaurants and shuffled his feet to the beat of the jukebox music playing inside. He was arrested one day during a spell of shuffling and charged with loitering and disorderly conduct. At police court he was convicted and received a small fine. The public defender felt that the law under which Sam was tried was too vague and therefore sought an appeal of the ruling. But there was no provision in the law for appeal—the lowly police court was the highest and only court which could hear the matter. Sam had exhausted all the state remedies. The next step was the United States Supreme Court. A writ was granted. In 1960 the high Court overturned the conviction and ruled that the city had presented no evidence that Sam had violated the law, and that to convict a man without evidence was a violation

of the Fifth Amendment to the Constitution (*Thompson* v. *Louisville,* 1960). This is a rare event in United States legal history—not every litigant can go from police court to Supreme Court and win.

When the Supreme Court grants a writ of certiorari, it is ordering the lower court to send the records to the high Court for review. Each request for a writ is considered by the entire nine-member Court, and an affirmative vote of four justices is required before the writ can be granted. The high Court rejects most of the petitions it receives. Again, work load is the key factor. Certain important issues must be decided each term, and the justices do not have the time to consider thoroughly most cases for which an appeal is sought. Term after term, suggestions to reduce the Court's work load are made. Chief Justice Burger has on several occasions argued that a second high Court, a court just below the Supreme Court, is needed to screen out less important cases. Theoretically, the Supreme Court would then have more time to deliberate on really important matters, while the second-level court would arbitrate less cosmic problems.

But such plans have got a cool reception from attorneys, Congress, and the public. All citizens believe that they should have the right to appeal to the Supreme Court—even if the appeal will probably be rejected, and even if the Court may never hear the case, the right to make the appeal should remain.

Hearing a case While it is impossible to go into detail about each court considered here, it is important to understand the manner in which the Supreme Court operates.

The first thing the Court does is to decide whether it will hear a case, either on appeal or via a writ of certiorari. Once a case is accepted, the attorneys for both sides have the greatest burden of work during the next few months. Oral argument on the case is scheduled, and both sides are expected to submit briefs—their legal arguments—for the Court to study before the hearing. The greatest burden at this point is on the party seeking appeal since he or she must provide the Court with a complete record of the lower court proceedings in the case. Included are trial transcripts, lower court rulings, and all sorts of other materials. Getting multiple copies of all the records is time-consuming and, more important, is quite costly.

Arguing a matter all the way to the Supreme Court takes a long time, often as long as five years—sometimes longer—from initiation of the suit until the Court gives its ruling. James Hill brought suit in New York in 1953 against Time, Inc., for invasion of privacy. The United States Supreme Court made the final ruling in the case in 1967 (*Time* v. *Hill,* 1967). Even at that the matter would not have ended had Hill decided to go back to trial, which the Supreme Court said he must if he wanted to collect damages. He chose not to.

After the nine justices study the briefs (or at least the summaries provided by their law clerks), the oral argument is held. For a generation schooled on Perry Mason and Owen Marshall, oral argument before the Supreme Court (or indeed before any court) must certainly seem strange. For one thing, the attorneys are strictly limited as to how much they may say. Each side is given a brief amount of time, often no more than an hour or ninety minutes, to present its arguments. In important cases "friends of the court" (amici curiae) are allowed to present briefs and to participate for thirty minutes in the oral arguments. For example, the American Civil Liberties Union often seeks the friend status in important civil rights cases. The attorneys' arguments are carefully planned and often scripted, to make full use of the allotted hour or so. The justices often destroy these plans by their questions and comments to participants on both sides of the issue. Sometimes the justices get into small disputes among themselves during an attorney's oral argument and use up valuable time. In some instances the justices can be downright rude as the legal advocates attempt to make their argument. For example, during oral argument on a case involving a Florida law which required newspapers to allow political candidates space to respond to editorial attacks upon them (*Miami Herald* v. *Tornillo,* 1974), former Justice William O. Douglas opened and slammed shut law books on the desk in front of him. Such behavior is a trifle disconcerting at best.

After the oral argument, which of course is given in open court with visitors welcome, is over, the members of the high Court move behind closed doors to undertake their deliberations. No one is allowed in the discussion room except members of the Court itself—no clerks, no bailiffs, no secretaries. The discussion, which often is held several days after the arguments are completed, is opened by the Chief Justice. Discussion time is limited, and by being the first speaker the Chief Justice is in a position to set the agenda, so to speak, for each case—to raise what he thinks are the key issues. Next to speak is the justice with the most seniority, and after him, the next most senior justice. The Court usually has an average of seventy-five items or cases to dispose of during one conference or discussion day; consequently brevity is valued. Each justice has just a few moments to state his thoughts on the matter. After discussion, a tentative vote is taken and recorded by each justice in a small, hinged, lockable docket book. In the voting procedure the junior justice votes first; the Chief Justice, last. The Court normally works from 10 A.M. to 5:30 P.M. on conference days in an attempt to get through all the matters before it.

Under the United States legal system, which is based so heavily upon the concept of court participation in developing and interpreting the law, a simple yes-or-no answer to any legal question is hardly sufficient. More important than the vote, for the law if not for the litigant, are the reasons for the decision.

Therefore the Supreme Court and all courts which deal with questions of law prepare what are called opinions in which the reasons, or rationale, for the decision are given. At the Supreme Court this is a complex task. One of the justices voting in the majority is asked to write what is called the Court's opinion. If the Chief Justice is in the majority, he selects the author of the opinion. If he is not, the senior associate justice in the majority makes the assignment. Either the Chief Justice or the senior associate justice can write the opinion himself.

Opinion writing is a difficult task. Getting five or six or seven people to agree to yes or no is one thing; getting them to agree upon why they say yes or no is something else. The opinion must therefore be carefully constructed. After it is drafted, it is circulated among all Court members, who make suggestions or even draft their own opinions. The opinion writer incorporates as many of these ideas as possible into the opinion to retain its majority backing. While all this is done in secret, historians have learned that rarely do court opinions reflect solely the work of the writer. They are more often a conglomeration of paragraphs and pages and sentences from the opinions of several justices. Henry Abraham, in his book *The Judicial Process*, writes that former Chief Justice Earl Warren wrote, circulated, and rewrote his opinion in the case of *Brown* v. *Board of Education* (1954) for nearly two years in an attempt to get a unanimous Court with a single opinion. (This was the case in which the Court ruled that segregation in the schools in Topeka, Kansas, violated the Constitution.)

A justice in agreement with the majority who can't be convinced to join in backing the Court's opinion has the option of writing what is called a concurring opinion. This means that the justice agrees with the outcome of the decision, but does so for different reasons than those of the majority. The late Justice Hugo Black and former Justice Douglas frequently joined in writing concurring opinions in freedom-of-expression cases. While other members of the Court often agreed that in a particular case government censorship was not appropriate, Black and Douglas often wrote opinions in which they argued that government censorship is *never* permissible.

Justices who disagree with the majority can also write an opinion, either individually or as a group, called a dissenting opinion. Dissenting opinions are very important. Sometimes, after the Court has made a decision, it becomes clear that the decision was not the proper one. The issue is often litigated again by other parties who use the arguments in the dissenting opinion as the basis for a legal claim. If enough time passes, if the composition of the Court changes sufficiently, or if the Court members change their minds, the high Court can swing to the views of the original dissenters. This is what happened in the case of *Nye* v. *U.S.* (noted earlier) when the high Court repudiated a stand it had taken in 1918 and supported instead the opinion of Justice Oliver Wendell Holmes, who had vigorously dissented in the earlier decision.

Finally, it is possible for a justice to concur with the majority in part and to dissent in part as well. That is, the justice may agree with some of the things the majority says, but disagree with other aspects of the ruling. This kind of stand by a justice, as well as an ordinary concurrence, frequently fractures the Court in such a way that in a six-to-three ruling only three persons subscribe to the Court's opinion, two others concur, the sixth concurs in part and dissents in part, and three others dissent. Such splits by the members of the Court have seemingly become more common in recent years. In several key mass media law decisions (*Branzburg* v. *Hayes*, 1972, and *Gannett* v. *DePasquale*, 1979, for example) such disarray has left substantial confusion among persons vitally interested in the issues.

The Supreme Court can dispose of a case in two other ways. A per curiam ("by the court") opinion can be prepared. This is an unsigned opinion drafted by one or more members of the majority and published as the Court's opinion. There are probably several good reasons for the publication of unsigned opinions, but these opinions normally succeed only in creating confusion among Court watchers and other persons who study decisions of the high Court. Per curiam opinions are not common, but neither are they rare.

Finally, the high Court can dispose of a case with a memorandum order—that is, it just announces the vote without giving an opinion. Or the order cites an earlier Supreme Court decision as the reason for affirming or reversing a lower court ruling. This device is quite common today as the work load of the high Court increases. In cases with little legal importance and in cases in which the issues were really resolved earlier, the Court saves a good deal of time by just announcing its decision.

One final matter in regard to voting remains for consideration: What happens in case of a tie vote? When all nine members of the Court are present, a tie vote is technically impossible. However, if there is a vacancy on the Court, only eight justices hear a case. Even when the Court is full, a particular justice may disqualify himself from hearing a case. For instance, when William Rehnquist was named an associate justice a few years ago, before the Court were several cases on which he had worked as a member of the justice department before being appointed to the Court. It would not have been fair for him to act as a judge in these matters. Former Justice Douglas also had a slight conflict of interest in cases involving Grove Press, Inc. Grove Press publishes much erotic literature and is frequently in court on charges of violating obscenity laws. Douglas was paid a small sum for writing an article for one of the Grove Press publications. However tenuous, this was said to give him an interest in the case, and he was forced to sit out several cases involving Grove Press. This situation shows that a tie vote is possible. What happens? Nothing. A tie means that the opinion of the lower court is sustained or affirmed. No opinion is written. It is almost as if the high Court had never heard the case.

During the circulation of an opinion justices have the opportunity to change sides, to change their vote. The number and membership in the majority may shift. It is not impossible for the majority to become the minority if one of the dissenters writes a particularly powerful dissent which attracts support from members originally opposed to his opinion. This event is probably very rare. Nevertheless, a vote of the Court is not final until it is announced on decision day, or opinion day. The authors of the various opinions— court opinions, concurrences, and dissents—publicly read or summarize their views. Printed copies of these documents are handed out to the parties involved and to the press. In the past, opinion day was always on Monday, and three Mondays during each month were set aside for this public reading. But on some opinion days when the Supreme Court handed down several important rulings, important cases were often overlooked by both the press and the public. Suggestions were made that the Court hand down opinions on other days as well. And that is the practice today—any day of the week can be a decision day, but it is usually Monday.

After the decision Are lower courts bound to follow United States Supreme Court decisions? The answer to that is yes and no. Since the Supreme Court is the supervisor of the federal courts, lower federal courts are bound closely by the high Court rulings. Still, occasionally lower federal courts are reluctant to follow the lead of the high Court.

The Supreme Court is not empowered to make a final judgment when it reviews a state court decision. All it can do, as Henry Abraham writes in *The Judicial Process*, is "to decide the federal issue and remand it to the state court below for final judgment 'not inconsistent with this opinion.' " However, new issues can be raised at the lower level by the state courts, and the opportunity to evade the ruling of the Supreme Court always exists. One study undertaken by the *Harvard Law Review* showed that of one hundred seventy-five cases remanded to state courts between 1941 and 1951, twenty-two of the litigants who won at the high Court level ultimately lost in the state courts following the high Court ruling. As pointed out earlier, because courts operate on a case-by-case basis the opportunity for defiance beyond the instant case is real.

Finally, the Supreme Court itself has no real way to enforce decisions and must depend upon other government agencies for enforcement of its rulings. The job normally falls to the executive branch. If perchance the president decides not to enforce a Court ruling, no legal force exists to compel him to do so. If former President Nixon, for example, had chosen to refuse to turn over the infamous Watergate tapes after the Court ruled against his arguments of executive privilege, no other agency could have forced him to give up those tapes.

At the same time, there is one force which usually works to see that Supreme Court decisions are carried out—public opinion. Political scientists frequently use the concept of "legitimacy" in connection with public opinion to describe how those "nine old men" can wield such immense power in the nation. People believe in the high Court; they have an immense amount of faith that what the Supreme Court does is probably right. This doesn't mean that they always agree with the decision. But they do agree that this is the proper way to settle disputes, and that when the Supreme Court speaks, its opinions become the rule of law. The Court helps engender this spirit or philosophy by acting in a temperate manner. It generally avoids answering highly controversial questions in which an unpopular decision could weaken its legitimacy. It calls such disputes "political questions," nonjusticiable matters. When it senses that the public is ready to accept a ruling, the Court may take on a controversial issue. Desegregation is a good example. Many people think that *Brown* v. *Board of Education* (1954) came out of the blue. Of course this isn't true. There had been almost a decade of desegregation decisions and executive actions prior to the *Brown* case. The nation was prepared for the decision, and it was generally accepted, even by the South which continued to fight desegregation tooth and nail for nearly ten years more. The high Court will continue to enjoy its legitimacy so long as it avoids rushing headlong into unsettled issues which the people consider important. Caution is the byword. This is not to say however that the high Court is conservative. It isn't, or at least it was not during the fifties and sixties and early years of the seventies. The Court frequently leads both the Congress and the executive branch in forging new social policy. It can be argued, however, that this situation reflects not the radical policy of the Court, but rather the Stone-Age thinking of Congress and the executive branch.

In summary it can be safely said that the Supreme Court of the United States is unique, that there is no other institution in the world like it, and that it plays a role in our government probably not envisioned by the drafters of the Constitution nearly two hundred years ago. In this role, it adds an important element to our democratic system. In addition, the Court gives the law and the legal process high visibility in this nation and is at least partially responsible for the stability of our democratic Republic during the past two centuries.

The United States Supreme Court is the most visible, perhaps the most glamorous (if that word is appropriate), of the federal courts. But it is not the only federal court nor even the busiest. There are two lower echelons of federal courts, plus various special courts, within the federal system. These special courts, such as the Court of Military Appeals, Court of Claims, Customs Court, and so forth, were created by the Congress to handle special kinds of problems.

The United States District Courts

Most business in the federal system begins and ends in a district court. This court was created by Congress by the Federal Judiciary Act of 1789, and today there are nearly one hundred such courts in the United States. Every state has at least one United States district court. Some states are divided into two districts: an eastern and western district or a northern and southern district. Individual districts often have more than one judge, sometimes many more than one. The Southern District of New York (a veritable hotbed of litigation), for example, has two dozen judges at work full time. Other metropolitan areas frequently have six or eight district judges.

When there is a jury trial, the case is heard in a district court. It has been estimated that about half the cases in United States district courts are heard by a jury.

The United States Courts of Appeal

At the intermediate level in the federal judiciary are the United States courts of appeal. Until thirty years ago these courts were called circuit courts of appeals, a reflection of the nation's early history when members of the Supreme Court "rode the circuit" and presided at circuit court hearings. The court of appeals was also created by the Federal Judiciary Act of 1789. Today the nation is divided into eleven circuits, and there are eleven courts of appeals. Ten of the circuits are numbered (the Second Circuit comprises Connecticut, New York, and Vermont; the Seventh, Illinois, Indiana, and Wisconsin, for example). The eleventh unnumbered circuit is the District of Columbia Court of Appeals in Washington, a very busy court which has the added responsibility of hearing direct appeals of decisions made by many of the federal regulatory agencies such as the Federal Communications Commission.

The courts of appeal are appellate courts, which means that they hear appeals from lower courts and other agencies exclusively. These courts are the last stop for nine out of ten cases in the federal system. Each circuit has nine or more judges. While all judges can hear a single case—sitting en banc it is called—more commonly three judges hear a case. It is possible for two judges to hear a case, but this is unusual. In a case of great importance all the judges hear the case, as in the Pentagon Papers case, when in both the Second Circuit Court and the District of Columbia Circuit Court, all members of the court heard the appeals from the two district courts.

Federal Judges

All federal judges are appointed by the president and must be confirmed by the Senate. The appointment is for life. The only way a federal judge can be removed is by impeachment. Nine federal judges have been impeached. Four were found guilty by the Senate, and the other five were acquitted. Impeachment and trial is a long process and one rarely undertaken.

Political affiliation plays a distinct part in the appointment of federal judges. Democratic presidents usually appoint Democratic judges, and Republican presidents appoint Republican judges. Nevertheless, it is expected that nominees to the federal bench be competent jurists. This is especially

true for appointees to the courts of appeal and to the Supreme Court. The Senate must confirm all appointments to the federal courts, a normally perfunctory act in the case of lower court judges. More careful scrutiny is given nominees to the appellate courts. The Senate has rejected twenty-one men nominated for the Supreme Court either by adverse vote or by delaying the vote so long that the appointment was withdrawn by the president, or the president left office and the new chief executive nominated a different individual.

American presidents have used various schemes to select justices to the Supreme Court, but normally most presidents ask the American Bar Association to approve a list of potential nominees. In selecting a justice to the high Court the president obviously seeks a person who reflects some of his personal philosophy. Because so many different kinds of issues confront the Court, to find someone who is both "right" on all the issues and professionally competent is virtually impossible. A potential nominee may have the same philosophy on law-and-order issues, but take a stance opposite the president on labor matters and antitrust law.

While district judges must live in the community in which they work and are therefore clearly sensitive to some public pressure, judges of the courts of appeal and the justices of the Supreme Court are quite isolated from public pressure. Hence, philosophy can change when an individual reaches the Court; judges and justices mature or change in many directions. Liberal President John Kennedy named Justice Byron White to the Supreme Court, but Justice White more often than not takes the conservative position in recent years. On the other hand conservative President Dwight Eisenhower appointed former Chief Justice Earl Warren and Justice William Brennan, two of the Court's most outstanding liberals in the last half of the twentieth century. It is difficult to predict just which way an appointee will move after reelection or reappointment is no longer a factor.

The State Court System

The constitution of every one of the fifty states either establishes a court system in that state or authorizes the legislature to do so. The court system in each of the fifty states is somewhat different from the court system in all the other states. There are, however, more similarities among than differences between the fifty states.

Its trial courts (or court) are the base of each judicial system. At the lowest level are usually what are called courts of limited jurisdiction. Some of these courts have special functions, like a traffic court which is set up to hear cases involving violations of the motor vehicle code. Some of these courts are limited to hearing cases of relative unimportance, such as trials of persons charged with misdemeanors or minor crimes or civil suits where the damages sought fall below $1,000. The court may be a municipal court set up to hear

cases involving violations of the city code. Whatever the court, the judges in these courts have limited jurisdiction and deal with a limited category of problems.

Above the lower level courts normally exist trial courts of general jurisdiction similar to the federal district courts. These courts are sometimes county courts and sometimes state courts, but whichever they are, they handle nearly all criminal and civil matters. They are primarily courts of original jurisdiction; that is, they are the first court to hear a case. However, on occasion they act as a kind of appellate court when the decisions of the courts of limited jurisdiction are challenged. When that happens, the case is retried in the trial court—the court does not simply review the law. This proceeding is called hearing a case de novo.

A jury is most likely to be found in the trial court of general jurisdiction. It is also the court in which most civil suits for libel and invasion of privacy are commenced (provided the state court has jurisdiction), in which prosecution for violating state obscenity laws starts, and in which many other media-related matters begin.

Above this court may be one or two levels of appellate courts. Every state has a supreme court, although some states don't call it that. In New York, for example, it is called the Court of Appeals, but it is the high court in the state, the court of last resort. Formerly a supreme court was the only appellate court in most states. As legal business increased and the number of appeals mounted, the need for an intermediate appellate court became evident. Therefore, in most states there is an intermediate court, usually called the court of appeals. This is the court where most appeals end. In some states it is a single court with three or more judges. More often numerous divisions within the appellate court serve various geographic regions, each division having three or more judges. Since every litigant is normally guaranteed at least one appeal, this intermediate court takes much of the pressure off the high court of the state. Rarely do individuals appeal beyond the intermediate level.

State courts of appeal tend to operate in much the same fashion as the United States courts of appeals, with cases being heard by small groups of judges, usually three at a time.

Cases not involving federal questions go no further than the high court in a state, usually called the supreme court. This court—usually a seven- or nine-member body—is the final authority regarding the construction of state laws and interpretation of the state constitution. Not even the Supreme Court of the United States can tell a state supreme court what that state's constitution means. Some years ago a group of citizens protested the use of public money to pay for crossing guards and safety devices to protect students walking to parochial schools. They sued in federal court to have the support stopped on the grounds that it violated the First Amendment to the United States Constitution which guarantees the separation of Church and State. The

United States Supreme Court ruled that the First Amendment did not prohibit a state from giving money to church-sponsored schools to pay for safety materials and crossing guards. So the citizens brought suit in state court and argued that the payments violated a similar provision of the state constitution which ensures the separation of Church and State. This time they won; the state supreme court ruled this was indeed a violation of the state constitution. The decision was final. The United States Supreme Court could not overrule it, because what was involved was interpretation of the state constitution, not of the federal Constitution.

State supreme court judges—like most state judges—are usually elected. Normally the process is nonpartisan, but because they are elected and must stand for reelection periodically, state court judges are generally a bit more politically motivated than their federal counterparts. In some states the judges or justices are appointed, and a few states have experimented with a system which both appoints and elects. Under this scheme, called the Missouri Plan, the state's high court judges (and sometimes all judges) are appointed to the bench by the governor from a list supplied by a nonpartisan judicial commission. After a one-year term the judge must stand before the people during a general election and win popular support. The voter's ballot asks "Shall Judge Smith be retained in office?" If Judge Smith wins support, his next term is usually a long one, up to twelve years. If support is not forthcoming, a new person is selected to fill the seat for one year, and at the end of the term the judge must seek voter approval.

The advantages of the Missouri Plan are appointment of a qualified person initially and eventual citizen participation in the selection process.

Judicial Review

One of the most important powers of courts and at one time one of the most controversial is the power of judicial review—that is, the right of any court to declare any law or official governmental action invalid because it violates a constitutional provision. We usually think of this in terms of the United States Constitution. However, a state court can declare an act of its legislature to be invalid because the act conflicts with a provision of the state constitution. Theoretically, any court can exercise this power. The Circuit Court of Lapeer County, Michigan, can rule that the Environmental Protection Act of 1972 is unconstitutional because it deprives citizens of their property without due process of law, something guaranteed by the Fifth Amendment to the federal Constitution. But this action isn't likely to happen, because a higher court would quickly overturn such a ruling. In fact, it is rather unusual for any court—even the United States Supreme Court—to invalidate a state or federal law on grounds that it violates the Constitution. Only about one hundred federal statutes have been overturned by the courts in the nearly two-hundred-year history of the United States. During the same period less than eight hundred state laws and state constitutional provisions have been declared

invalid. Judicial review is therefore not a power which the courts use excessively. In fact, a judicial maxim states: When a court has a choice of two or more ways in which to interpret a statute, the court should always interpret the statute in such a way that it is constitutional.

Judicial review is extremely important when matters concerning regulations of the mass media are considered. Because the First Amendment prohibits laws which abridge freedom of the press and freedom of speech, each new measure passed by the Congress, by state legislatures, and even by city councils and township boards must be measured by the yardstick of the First Amendment. Courts have the right, in fact have the duty, to nullify laws or executive actions or administrative rulings which do not meet the standards of the First Amendment. While many lawyers and legal scholars rarely consider constitutional principles in their work and rarely seek judicial review of a statute, attorneys who represent newspapers, magazines, broadcasting stations, and motion-picture theaters constantly deal with constitutional issues, primarily those of the First Amendment. The remainder of this book will illustrate the obvious fact that judicial review, a concept at the very heart of American democracy, plays an important role in maintaining the freedom of the American press, even though the power is not included in the Constitution.

LAWSUITS

Very important basics

The final topic which needs to be understood before mass media law itself is considered is what happens in a lawsuit. The brief discussion of the process which follows is simplified as much as possible. Many good books on the subject are available for persons interested in going further into the intricacies of lawsuits (some are listed in the Bibliography at the end of the chapter).

The party who commences a civil action is called the plaintiff, the person who brings the suit. The party against whom the suit is brought is called the defendant. In a libel suit the person who has been libeled is the plaintiff, and he starts the suit against the defendant— the newspaper, the magazine, the television station, or whatever. To file a civil suit is a fairly simple process. A civil suit is usually a dispute between two private parties. The government offers its good offices—the courts—to settle the matter. A government can bring a civil suit such as an antitrust action against someone, and an individual can bring a civil action against the government. But normally a civil suit is between private parties. (In a criminal action, the government always initiates the action.)

To start a civil suit the plaintiff first picks the proper court, one which has jurisdiction in the case. Then the plaintiff presents the charges in the form of a complaint. The plaintiff also summons the defendant to appear in court to answer the charges. If the defendant chooses not to answer the charges, he or she normally loses the suit by default. After the complaint is filed, a hearing is scheduled. Then the plaintiff prepares a more detailed set of charges and

arguments called pleadings, a very formal, written statement of the charge and the remedy sought. Usually the remedy involves money damages.

The defendant then prepares his or her own set of pleadings which constitute an answer to the plaintiff's charges. If there is little disagreement at this point about the facts—what happened—and that a wrong has been committed, the plaintiff and the defendant might settle their differences out of court. The defendant might say, "I guess I did libel you in this article, and I really don't have a very good defense. You asked for $15,000 in damages, would you settle for $7,500 and keep this out of court?" The plaintiff might very well answer yes, because a court trial is costly and takes a long time, and the plaintiff can also end up losing the case. Smart lawyers try to keep their clients out of court if possible and settle matters in somebody's office.

If there is disagreement, the case is likely to continue. A common move for the defendant to make at this point is to file a motion to dismiss, or a demurrer. In such a motion the defendant says this to the court: "I admit that I did everything the plaintiff says I did. On June 5, 1979, I did publish an article in which he was called a socialist. But Your Honor, it is not libelous to call someone a socialist." The plea made then is that even if everything the plaintiff asserts is true the plaintiff is not legally wronged. The law cannot help the plaintiff. The court might grant the motion, in which case the plaintiff can appeal. Or the court might refuse to grant the motion, in which case the defendant can appeal. If the motion to dismiss is ultimately rejected by all the courts up and down the line, a trial is then held. It is fair play for the defendant at that time to begin argument of the facts, in other words, to deny that his newspaper published the article containing the alleged libel.

Before the trial is held, the judge may schedule a conference between both parties in an effort to settle the matter before starting the formal hearing or at least to narrow the issues so that the trial can be shorter and less costly. If this move fails, the trial goes forward. If the facts are agreed upon by both sides and the question is merely one of law, a judge without a jury hears the case. There are no witnesses and no testimony, only legal arguments before the court. If the facts are disputed, the case can be tried before either a jury or, again, only a judge. Note that both sides must waive the right to a jury trial. In this event, the judge becomes both the fact finder and the law giver. Now, suppose that the case is heard by a jury. After all the testimony is given, all the evidence is presented, and all the arguments are made, the judge instructs the jury in the law. Instructions are often long and complex, despite attempts by judges to simplify them. Instructions guide the jury in determining guilt or innocence if certain facts are found to be true. The judge will say that if the jury finds that X is true and Y is true and Z is true, then it must find for the plaintiff, but if the jury finds that X is not true, but that R is true, then it must find for the defendant.

After deliberation the jury presents its verdict, the action by the jury. The judge then announces the judgment of the court. This is the decision of the court. The judge is not bound by the jury verdict. If he or she feels that the jury verdict is unfair or unreasonable, the judge can reverse it and rule for the other party. Needless to say this happens rarely.

If either party is unhappy with the decision, an appeal can be taken. At that time the legal designations change. The person seeking the appeal becomes the appellant. The other party becomes the appellee or respondent. The name of the party initiating the action is listed first in the name of the case. For example: Smith sues Jones for libel. The case name is *Smith* v. *Jones.* Jones loses and takes an appeal. At that point Jones becomes the party initiating the action and the case becomes *Jones* v. *Smith.* This change in designations often confuses novices in their attempt to trace a case from trial to final appeal. If Jones wins the appeal and Smith decides to appeal to a higher court, the case again becomes *Smith* v. *Jones.*

The end result of a successful civil suit is usually awarding of money damages. Sometimes the amount of damages is guided by the law, as in a suit for infringement of copyright in which the law provides that a losing defendant pay the plaintiff the amount of money he might have made if the infringement had not occurred, or at least a set number of dollars. But most of the time the damages are determined by how much the plaintiff seeks, how much the plaintiff can prove he or she lost, and how much the jury thinks the plaintiff deserves. It is not a very scientific means of determining the dollar amount. In chapter 4 in the discussion of libel damages we will see that considerable hocus-pocus is involved.

A criminal case is like a civil suit in many ways. The procedures are more formal, are more elaborate, and involve the machinery of the state to a greater extent.

The state brings the charges, usually through the county or state prosecutor. The defendant can be apprehended either before or after the charges are brought. In the federal system persons must be indicted by a grand jury, a panel of twenty-one citizens, before they can be charged with a serious crime. But most states do not use grand juries in that fashion, and the law provides that it is sufficient that the prosecutor issue an information, a formal accusation. After the defendant is charged, he or she is arraigned. An arraignment is the formal reading of the charge. It is at the arraignment that the defendant makes his formal plea of guilty or not guilty. If the plea is guilty, the judge then gives the verdict of the court and passes sentence, but usually not immediately, for presentencing reports and other procedures must be undertaken.

If the plea is not guilty, a trial is then scheduled. Some state judicial systems have an intermediate step called a preliminary hearing or preliminary examination. The preliminary hearing is held in a court below the trial court,

such as a municipal court, and the state has the responsibility of presenting enough evidence to convince the court—only a judge—that a crime has been committed and that there is sufficient evidence to believe that the defendant might possibly be involved. There is no need to convince the judge that the defendant is quilty, only that he or she might be guilty. The trial is then held in much the same fashion as is a civil trial. A jury may or may not be used—this decision is up to the defendant. The evidence is presented, the verdict is announced, the judgment is read, the sentence is imposed, and the appeals are undertaken.

In both a civil suit and a criminal case, the result of the trial is not enforced until the final appeal is exhausted. That is, a money judgment is not paid in civil suits until defendants exhaust all of their appeals. The same is true in a criminal case. Imprisonment or payment of a fine is not required until the final appeal. However, if the defendant is dangerous or if there is some question that the defendant might not surrender when the final appeal is completed, bail can be required. Bail is money given to the court to ensure appearance in court.

As stated at the outset, this chapter is designed to provide a glimpse, only a glimpse, of both our legal system and our judicial system. The discussion is in no way comprehensive, but it provides enough information to make the remaining eleven chapters meaningful. The chapter is not intended to be a substitute for a good political science course in the legal process. Students of communications law are at a distinct disadvantage if they don't have some grasp of how the systems work and what their origins are.

The United States legal and judicial systems are old and tradition bound. But they have worked fairly well for these last two hundred years. In the final analysis the job of both the law and the men and women who administer it is to balance the competing interests of society. How this balancing act is undertaken comprises the remainder of this book. The process is not always easy, but it is usually interesting.

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2 The Freedom of the Press

When a man reaches the final years of his life he often ponders how people will remember him. What aspects of his character and his contributions to society will people cherish? What will be quickly forgotten? So too is it with nations. Historians outline the important contributions made by ancient Greece and Rome, by Imperial Spain, and by the British Empire. What will historians consider the outstanding contributions of America and Americans? William O. Douglas, former associate justice of the Supreme Court of the United States, suggests that United States technology will not be the most memorable aspect of the nation's life. Instead, it will be our experiment with freedom of expression, an experiment shared with other Western democracies. Freedom of speech and freedom of the press—they are the achievements people will look upon with awe in eons to come.

No one knows whether Justice Douglas will be right. Clearly the attempt by Western democracies during the past three centuries to construct societies based upon the freedom to speak, the freedom to publish, and the freedom to criticize the government is a remarkable effort. Perhaps even more remarkable is that the experiment has worked so well. The guarantee of freedom of expression can be found in the constitution of nearly every nation. Only in a few countries such as the United States, however, are the people and the government dedicated to making the ideal come true.

The purpose of this chapter is to sketch a broad outline of the meaning of freedom of the press in the United States today. Freedom of the press is an element in all aspects of mass media—libel, invasion of privacy, obscenity, regulation of broadcasting, and so forth. Indeed, in any area in which the law touches mass media the First Amendment is a material consideration. At the

same time, broader general principles defining freedom of expression have been fashioned by the courts in the past half-century. It is these broader principles that we will focus upon in chapter 2.

HISTORICAL DEVELOPMENT

Before freedom of the press can be defined, however, a brief look at the roots of the idea, roots which wind through many centuries, is necessary. Freedom of the press is not, and was not, exclusively an American idea. We did not invent the concept—in fact, no one invented it. Like Topsy, it just grew from crude beginnings which can be traced back to Plato and Socrates. The concept developed more fully during the past four hundred years. The modern history of freedom of the press really began in England during the sixteenth and seventeenth centuries as printing developed and grew. Today the most indelible embodiment of the concept is the First Amendment to the United States Constitution, forged in the last half of the eighteenth century by the men who built upon their memory of earlier experiences. To understand the meaning of freedom of the press and freedom of speech, it is necessary to understand the meaning of censorship, for viewed from a negative position freedom of expression can be simply defined as the absence of censorship. To understand censorship it is necessary to look first at the experience of the British who fought to be free from the yoke of censorship more than four centuries ago.

Freedom of the Press in England

When William Caxton set up the first British printing press in Westminster in 1476 his printing pursuits were restricted only by his imagination and ability. There were no laws governing what he could or could not print—he was completely free. For five centuries Englishmen and Americans have attempted to regain the freedom that Caxton enjoyed, for shortly after he started publishing, the British crown began the control and regulation of printing presses in England. Printing developed during a period of great religious struggle in Europe and it soon became an important tool in that struggle. Printing presses made communication with hundreds of persons fairly easy and in doing so gave considerable power to small groups or individuals who owned and/or could use a printing press. These facts make the printing press unique in the development of mass communication, since it became a weapon in the fight for the minds of men. To understand the importance implied here, consider how other modern mass media developed. Motion pictures began as an entertainment device, radio was considered only a gadget until its commercial possibilities became evident, and television also developed as a commercial device, a twentieth-century electronic medicine show.

The British government soon realized that unrestricted publication and printing could seriously dilute its own power. Information is a powerful tool in any society, and the individual or individuals who control the flow and content of the information received by a people exercise considerable control over those people. The printing press broke the crown's monopoly of the flow of information, and therefore control of printing was essential.

In his study of censorship of the British press during the three hundred years between establishment of printing in England and the American Revolution, Frederick Siebert (*Freedom of the Press in England*) lists several means used by the crown to limit or restrict the press. Criticism of the government or of the king or the great men of the realm was called "sedition" or "seditious libel" and considered a serious crime. Whether the criticism was truthful was immaterial. In fact, for many years British courts considered truthful criticism of the government more harmful than untruthful criticism since untruthful criticism was easier to deny. Truthful criticism could more easily stir the people to dissatisfaction and anger. Hence the maxim which was the law in Britian for decades: The greater the truth, the greater the libel, that is, the more truthful the criticism, the more serious the crime.

In England, the press was licensed as well until the 1690s. Licensing meant prior censorship since all printers were forced to get prior approval to publish from the crown or the Church. Bonding ensured that printers followed the rules. Printers were required to put up large sums of money before they were allowed to print. If they violated the law or failed to assist the government in enforcing the law, they forfeited the money and were out of business until they raised another bond. The British government granted patents and monopolies to certain printers in exchange for their cooperation in publishing only acceptable material and for their assistance in locating printers who broke the law by printing without permission or printing seditious material. For their help these printers were granted exclusive rights to publish various categories of books such as spellers, Bibles, and grammar books.

These restraints were just some of the means the British used between 1476 and 1776 to control printing, and they are considered by most authorities to have been effective in controlling the press. While control was fairly effective, it did not go unchallenged. Men of ideas—writers, philosophers, even statesmen—argued for the rights of free British subjects to enjoy freedom of expression: the right to print without prior restraint and the right to criticize the government and the Church without punishment. The basic elements of what is called today the natural rights philosophy come from the ideas of these men. The natural rights philosophy asserts that man is a rational thinking creature and must be free to plot his destiny. Men may have to sacrifice some natural rights in order to live in harmony with other men in society, but basic rights such as the freedom to think, the freedom to speak, and the freedom to publish can never be denied.

The men who drafted the Constitution were well acquainted with these ideas as well as with British censorship and control of the press. In addition, the founding fathers could draw upon first-hand experience of British control of the press in the American colonies.

Freedom of the Press in Colonial America

There were laws in the United States restricting freedom of the press for almost thirty years before the first newspaper was published. As early as 1662 statutes in Massachusetts made it a crime to publish anything without first getting prior approval from the government, twenty-eight years before Benjamin Harris published the first—and last—edition of *Publick Occurrences.* The second and all subsequent issues of the paper were banned because Harris failed to get permission to publish the first edition, which contained material construed to be criticism of British policy in the colonies, as well as a report that scandalized the Massachusetts clergy because it said the French king took immoral liberties with a married woman (not his wife).

Despite an inauspicious beginning, the American colonists seemed to have had a much easier time getting their views into print than their British counterparts. There was censorship, but when the British prosecuted offenders, American juries were reluctant to convict. Also, the colonial government was less efficient, and the British had less control over the administration of its colonies in North America, making criticism of the government somewhat easier for publishers.

The British attempted to use sedition laws to control the press in America, but did not attempt to organize guilds or printing monopolies. Licensing, which died in England in 1695, continued until the 1720s in the colonies. In 1723 the government of Massachusetts forbade printer James Franklin to publish the *New England Courant* or any similar newspaper or pamphlet without government supervision. Franklin, who was Benjamin Franklin's older brother, angered officials by charging in his newspaper that the colonial government was ineffective in protecting coastal communities from raids by bands of pirates. This restraint was the dying gasp of licensing in America.

The few taxes on the press were legitimate taxes levied to raise revenues, not to censor the press. The taxes were generally ignored by publishers and printers. The most widely known tax, the Stamp Act of 1765, succeeded only in increasing disgust toward and hatred of Parliament and the king. The stamps were poorly distributed, not being available in many communities. Newspaper publishers, who were supposed to buy the stamps and affix one to each copy of papers printed and sold, devised a multitude of schemes to avoid the tax. Some publishers removed the nameplate (the name of the paper) from the first page and declared they no longer published newspapers, but pamphlets, which were not subject to the tax. Others defied the law with little fear of retribution.

The first widely publicized lawsuit in the colonies which involved a freedom of expression issue was the trial of John Peter Zenger for seditious libel. While the legal importance of the case is certainly a debatable issue, there can be no question that the case commanded (and continues to command) considerable attention. However, the *Zenger* case was not the first sedition case in the colonies.

One of the nation's leading scholars on colonial freedom of the press, Professor Harold L. Nelson, reports that at least four sedition cases occurred prior to the widely publicized trial of Zenger (*American Journal of Legal History*, 1959). Nelson found no record of subsequent sedition trials in justice courts after the Zenger case, but he did find at least four other instances in which charges of seditious libel were brought against colonists by colonial legislatures.

In the *Zenger* case, the defendant, an immigrant printer, was prosecuted because in the newspaper he published, the *New York Weekly Journal*, he printed statements which the royal governor of New York, William Cosby, believed to be critical of both him and the government. In all likelihood the *Zenger* case became famous because some of the participants wanted to make it famous. At the time freedom of expression was an important issue both in the colonies and in Great Britain, and the results of the trial, as well as a short book about the trial, were widely circulated. The case is also well known because it has all the elements needed to become well known: a noble cause, a proper villain, and a truly eloquent advocate as spokesman for freedom of the press.

Zenger's newspaper was sponsored by political opponents of Governor Cosby, who was unpopular since Cosby apparently saw his position as a means to acquire great wealth. His chief opponent was Lewis Morris, a wealthy politician who also had his eye on the money to be made from land speculation in the colony. Lewis Morris enlisted an associate, James Alexander, to publish a newspaper opposing the governor in hope of political gain. Zenger printed the newspaper and thereby became embroiled in a political dispute not of his making.

The first edition of the *New York Weekly Journal* appeared on November 5, 1733. The attacks on Cosby in subsequent editions were relentless, and in November of 1734 Zenger found himself in jail, accused of printing and publishing seditious libels which "tended to raise factions and tumults in New York, inflaming the minds of the people against the government, and disturbing the peace." Since Zenger was one of only two printers in the colony (the other printed a progovernment newspaper), Morris and Alexander had to get him out of jail if they were to continue publication of the *Journal*. Although Alexander was a lawyer, he could not defend Zenger because he was disbarred for attacking the authority of two members of the Supreme Court.

A court-appointed attorney, John Chambers, prepared to defend Zenger as the trial opened in August 1735. He was ably assisted by Andrew Hamilton, a fifty-nine-year-old Scots attorney and a renowned criminal lawyer whose interest in the case led him to come from Philadelphia to participate in the defense. Professor Stanley Nider Katz, an authority on the Zenger trial, writes

in Alexander's *A Brief Narrative on the Case and Trial of John Peter Zenger,* "Armed with years of courtroom experience and a well-prepared brief, speaking with the daring of one indifferent to the local political contests, Hamilton made short work of convincing the sympathetic jury of Zenger's injured innocence." Defying both British law and tradition with regard to seditious libel, Hamilton urged the jury to find Zenger innocent if they believed that his criticism of the government was truthful and fair. This impassioned plea caught the fancy not only of the thousands who read about the trial, but also of the members of the jury. A verdict of not guilty was returned and Zenger was freed.

Despite its fame the *Zenger* case did not, as lawyers like to say, make any "new law." The law before the trial was that truth is not a defense in a prosecution for seditious libel. This remained the law after the trial. In addition, the jury was prevented by British law from determining whether the criticism of the government was seditious. The judge made such determinations. All the jury could rule upon was whether the defendant had in fact printed or published the work. The *Zenger* case did not change that rule, either. The verdict was simply a case of jury revolt. The freemen on the jury ignored the law and found Zenger innocent.

The debate continues as to whether the Zenger trial really matters to American law. Legally, it probably does not. Politically, it is probable that the trial suggested strongly to colonial governors that future prosecutions for sedition before colonial juries were likely to fail. Historically, it is one of the best publicized instances in colonial America in which a ringing defense of freedom of the press carried the day. As such, the case is fondly remembered by most journalists and civil libertarians.

After Zenger's trial, government strategy changed. Rather than haul printers and editors before juries often hostile to the State, the government hauled printers and editors before legislatures and state assemblies which were usually hostile to journalists. The charge was not sedition, but breach of parliamentary privilege, or contempt of the assembly. There was no distinct separation of powers then, and the legislative body could order the printer to appear, question him, convict him, and penalize him. The same kinds of criticism which previously provoked a sedition trial now resulted in a trial before a colonial assembly. Only the basis of the charge was changed. In a contempt hearing the printer was accused of questioning the authority of the assembly, detracting from its honour, affronting its dignity, or impeaching its behavior, rather than of arousing general dissatisfaction among the people. Professor Nelson estimates that probably a large number of persons were brought before legislatures on such charges, but much more research is needed before all that happened during that period is known. We do know that repression of this kind was powerful and quite common. The press was as free as the colonial legislatures and assemblies permitted it to be.

The belief of many persons that freedom was a hallmark of society in colonial America ignores history. Political scientist John Roche (*Shadow and Substance*) writes persuasively that in colonial America the people and their representatives simply did not understand that freedom of thought and expression means freedom for the other fellow also, particularly for the fellow with hated ideas. Roche points out that colonial America was an open society dotted with closed enclaves—villages and towns and cities—in which citizens generally shared similar beliefs about religion and government and so forth. Citizens could hold any belief they chose and could espouse that belief, but personal safety depended upon the people in a community agreeing with a speaker or writer. If they didn't, the speaker then kept quiet or moved to another enclave where the people shared his ideas. While there was much diversity of thought in the colonies, there was often little diversity of belief within towns and cities, according to Roche.

The propaganda war which preceded the Revolution is a classic example of the situation. In Boston, the Patriots argued vigorously for the right to print what they wanted in their newspapers, even criticism of the government. Freedom of expression was their right, a God-given right, a natural right, a right of all British subjects. Many persons, however, did not favor revolution or even separation from England. Yet it was extremely difficult to publish such pro-British sentiments in many American cities after 1770. Printers who published such ideas in newspapers and handbills did so at their peril in many instances. In cities like Boston the printers were attacked, their shops were wrecked, and their papers were destroyed. Freedom of the press was a concept with limited utility in many communities for colonists who opposed revolution once the Patriots had moved the populace to their side. In other cities where the pro-British held the upper hand, colonists seeking independence published in fear for their safety.

Many small towns in the United States still operate in much the same way. There is no governmental censorship, but social censorship makes certain that alien ideas don't often find their way into the community. Many activists on both the right and the left who speak the loudest about freedom deny that freedom to their political or economic opponents without hesitation.

Freedom is often fragile, and in the United States, as well as in other countries, the government is not always the most powerful censor. The community or social pressure, sometimes violent social pressure, is often a greater villain than the law in stifling freedom of expression. The First Amendment, which is the next subject at hand, affords little protection for the publisher or speaker in these kinds of cases.

The First Amendment

As stated previously, the men who built the legal structure of this nation drew upon their colonial experience (just recounted here) in establishing a government. Freedom of expression was clearly not a new idea. British subjects both

in England and in colonial America fought for this right for nearly two centuries. The basic belief that men can best serve themselves and their society when they are exposed to a full range of opinion was an idea with broad support in all levels of society, although it was not universally accepted in colonial America.

Even before the end of the Revolution, the government of this new nation drafted its first constitution, the Articles of Confederation. The Articles provided for a loose-knit confederation of the thirteen colonies, or states. It was a weak government system and unworkable in many ways, since the separate states retained most of the power and were frequently reluctant to work in concert to solve problems which affected the entire nation. Many persons criticized the national charter because it did not contain a single article which ensured citizens the freedom of conscience, freedom of the press, or any of the other rights which Americans had insisted the British respect. The Articles of Confederation did not contain such provisions because the men who drafted the Articles did not believe such guarantees necessary. The states remained sovereign and independent under our first Constitution. The national government had little power. There was no need to forbid the national government from interfering with freedom of expression. It had no power to do so in the first place. With regard to the power of the states, most states had guarantees of freedom of expression in their state constitutions.

Virginia was fairly typical. In June 1776, nearly a month before the Declaration of Independence was signed, a new constitution containing a declaration of rights or a bill of rights was adopted. The document, written by George Mason, guaranteed citizens that the state could never impose excessive bail, that the state could never use cruel or unusual punishment, that an accused person would enjoy a speedy trial, that an accused person would not have to testify against himself, and that freedom of religion would be preserved. Section 12 of that document states: "That the freedom of the press is one of the great bulwarks of liberty and can never be restrained except by despotic governments." Other states soon followed Virginia's lead, and declarations of rights could be found in the charters of most of the new states by 1785.

The weaknesses in the confederated system of government soon became intolerable. Despite the hopes of many of the nation's new citizens who desired to see the states retain sovereignty and power in the new alliance called the United States of America, it soon became obvious that a loose collection of states could not survive. A stronger alliance was needed, an alliance that would create a nation. In the hot summer of 1787 each state sent a handful of delegates to Philadelphia to revise or amend the Articles of Confederation. It was a remarkable group of men; perhaps no such group has gathered before or since. The members were merchants and planters and professional men and

none were full-time politicians. As a group these men were by fact or inclination members of the economic, social, and intellectual aristocracy of their respective states. These men shared a common education centered around history, political philosophy, and science. Some of them spent months preparing for the meeting—studying the governments of past nations. Professor Robert Rutland (*The Birth of the Bill of Rights*) reports that James Madison outlined the history of scores of past nations and tried to determine the governmental defects which led to their ultimate downfall. While some members came to modify the Articles of Confederation, many others knew from the start that a new constitution was needed. In the end that is what they produced, a new governmental charter. The charter was far different from the Articles in that it gave vast powers to a central government. The states remained supreme in some matters, but in other matters they were forced to relinquish their sovereignty to the new federal government.

No official record of the convention was kept. The delegates deliberated behind closed doors as they drafted the new charter. However, some personal records remain. We do know, for example, that inclusion of a bill of rights in the new charter was not discussed until the last days of the convention. The Constitution was drafted in such a way as not to infringe upon state bills of rights. When the meeting was in its final week George Mason of Virginia indicated his desire that "the plan be prefaced with a Bill of Rights. . . . It would give great quiet to the people," he said, "and with the aid of the state declarations, a bill might be prepared in a few hours." Few joined Mason's call. Only one delegate, Roger Sherman of Connecticut, spoke against the suggestion. He said he favored protecting the rights of the people when it was necessary, but in this case there was no need. "The state declarations of rights are not repealed by this Constitution; and being in force are sufficient." He said that where the rights of the people are involved Congress could be trusted to preserve the rights. The states, voting as units, unanimously opposed Mason's plan. While the Virginian later attempted to add a bill of rights in a piecemeal fashion, the Constitution emerged from the convention and was placed before the people without a bill of rights.

Opposition to the proposed national charter sprung up immediately. Opponents of the charter are remembered as the anti-Federalists. Their primary complaint was that the new Constitution gave the federal government too much power. They had many other complaints, one of which was that the document lacked the guarantee that the federal government would not interfere with the rights of citizens such as freedom of expression, freedom of religion, and so forth. Thomas Jefferson, who was in France, wrote a letter to James Madison complaining about the lack of a bill of rights. The anti-Federalists argued that the new Constitution would be the supreme law of

the land, and that state declarations of rights were of little value in the face of the powerful new charter. They pointed out that the new charter gave the Congress the power to do anything necessary and proper to carry out its responsibilities under the Constitution. Congress was given the right to make war. What if Congress decided that curtailing freedom of speech was necessary and proper to making war? What was to stop Congress from undertaking such a restriction?

Supporters of the Constitution, the Federalists, worked diligently to win passage of the new charter. As part of this campaign, John Jay, James Madison, and Alexander Hamilton published a series of letters in a New York newspaper. These eighty-five letters, known today as *The Federalist* papers, represent an eloquent argument for adoption of the new Constitution in which the authors attempted to refute the arguments of the opposition. In letter eighty-four Alexander Hamilton argued that a bill of rights was not needed. Specifically, Hamilton asked in respect to a provision which guaranteed the liberty of the press, "Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" He then added:

> What signifies a declaration that "the liberty of the press shall be inviolably preserved"? What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable: and from this I infer that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend upon public opinion, and on the general spirit of the people and the government.

When the states finally voted on the matter, the Constitution was approved, but only after the Federalists had promised in several states, such as Virginia, that the first Congress would add a bill of rights.

James Madison was elected from Virginia to the House of Representatives, defeating James Monroe for the House seat only after promising his constituents to work toward adoption of a declaration of human rights. When Congress convened, Madison worked diligently toward keeping his promise. He first proposed that the new legislature incorporate a bill of rights into the body of the Constitution, but the idea was later dropped. That the Congress would adopt the declaration was not a foregone conclusion. There was much opposition, but after several months, twelve amendments were finally approved by both houses and sent to the states for ratification. Madison's original amendment dealing with freedom of expression states: "The people shall not be deprived or abridged of their right to speak, to write or to publish their sentiments and freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." Congressional committees changed the wording several

times, and the section guaranteeing freedom of expression was merged with the amendment guaranteeing freedom of religion and freedom of assembly. The final version is the version we know today:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereon; 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 grievance.

The concept of the "first freedom" has been discussed often. Historical myth tells us that because the amendment occurs first in the Bill of Rights it was considered the most important right. In fact, in the Bill of Rights presented to the states for ratification the amendment was listed third. Amendments one and two were defeated and did not become part of the Constitution. The original First Amendment called for a fixed schedule that apportioned seats in the House of Representatives on a ratio many persons thought unfair. The Second Amendment prohibited senators and representatives from altering their salaries until after a subsequent election of representatives. Both amendments were rejected, and amendment three became the First Amendment.

Passage of the last ten amendments didn't occur without struggle. Not until two years after being transmitted to the states for approval did a sufficient number of states adopt the amendments for them to become part of the Constitution. Connecticut, Georgia, and Massachusetts didn't ratify the Bill of Rights until 1941, a kind of token gesture on the one hundred fiftieth anniversary of its constitutional adoption. In 1791 approval by these states was not needed since only two-thirds of the former colonies needed to agree to the measures.

The First Amendment in the Eighteenth Century

What did the First Amendment mean in 1790? What was the accepted definition of freedom of expression at that time? There is no easy answer to these questions. One theory, held by most scholars until about twenty years ago, is that freedom of expression included at least the right to criticize the government and the right to be free from prior restraint, or from prior censorship.

Freedom from prior restraint was supposedly guaranteed to all British subjects, as well as to American subjects, even before the Revolution. As has been noted, licensing of printers came to an end in England in the 1690s and in the colonies sometime in the 1720s. Between 1765 and 1769 Sir William Blackstone, the first professor of English law at Oxford University, published four volumes summarizing the common law at that time. In *Commentaries on the Law of England* Blackstone noted that liberty of the press was essential to the nature of a free state, and defined freedom of expression as "laying no previous restraints upon publication." The law professor asserted, however, that if something improper or mischievous or illegal is printed the publisher must then take the consequences. This obligation he said, is necessary for the

preservation of peace and good order and is the only solid foundation of civil liberty. The First Amendment contained at least the prohibition against prior censorship.

American legal scholars, however, contended until recently that it contained more. They argued that one of the reasons for the Revolution was to rid the nation of the hated British sedition law. Americans, they argued, fought for the right to criticize their government and their governors. The First Amendment is a guarantee of the unrestricted discussion of public affairs.

This notion was challenged in 1960 by Professor Leonard Levy in a book entitled *Legacy of Suppression.* Levy argued that the common definition of freedom of the press in 1790 included only freedom from prior restraint. The crime of seditious libel, Levy asserted, remained intact following the adoption of the First Amendment. Basing his argument upon eighteenth-century philosophical tracts plus a few court opinions from cases involving freedom of the press issues, Levy asserted that Americans in 1790 did not believe in the unrestricted criticism of government.

Levy's book provoked a good deal of comment and research. At the University of Wisconsin, for example, scholars examined Levy's thesis in light of how juries operated between the Revolution and 1800. They also closely examined what newspaper editors wrote and printed during the same period. On the basis of this evidence they concluded that discussion and criticism of government during the period were robust and relatively free and uninhibited. Even sharp criticism of the state brought little retaliation from official sources. The few trials which did result often ended in acquittal for the publisher or pamphleteer. This evidence suggests that Professor Levy was wrong, or at least not completely right, in his assertion that the people believed unrestricted criticism of government should not go unpunished.

It must be recognized that any attempt to discern what a concept meant almost two hundred years ago is not without problems. The written residue of the period reveals only a partial story. Undoubtedly, in 1790 the First Amendment's guarantee of freedom of expression meant different things to different people. In fact, one can speculate that the inherent vagueness in the constitutional guarantee enhanced its chances of being adopted. The First Amendment could mean almost anything a citizen wanted it to mean. A more specific definition might have prompted heated debate and endangered passage of the First Amendment.

This is not to say that there was no definition of freedom of expression in 1790. On the contrary, there were probably many definitions. There was probably little consensus on the exact meaning of the concept, even among the congressmen who drafted the First Amendment. There is little consensus today on the meaning of the First Amendment. Were it not for the Supreme Court, which periodically defines the First Amendment, the law would be in

a terrible state. One is not being facetious to say that in the 1980s the First Amendment means what the Supreme Court of the United States says it means—no more and no less. It should come as no surprise that many people, sometimes a majority of the people, disagree with the high Court's definition of freedom of expression. One person says it means freedom to publish anything, another person says it means the freedom to publish anything but obscenity, and a third person qualifies it even more and says it means freedom to print anything but obscenity or material which will hurt the nation. And so it goes.

The Supreme Court had barely begun operation in 1790, and the nation was thus denied its wisdom concerning the meaning of the First Amendment. In fact the high Court has taken nearly two centuries to offer, in its case-by-case approach, a comprehensive definition of the meaning of freedom of expression in the United States. Even today some questions remain completely unanswered. For example, does the First Amendment and freedom of the press guarantee the right of the press to gather news and information for publication? The Supreme Court has never fully answered this question.

The best practical definition of freedom of expression in 1790 is the one Professor John Roche gives, which we noted earlier. In 1790 freedom of the press meant that one could publish anything the community would tolerate. If a person's beliefs fit nicely with majority sentiment, freedom of expression was broad indeed. If a person was a political or religious heretic, freedom was narrow and tenuous, and the best solution was to find another place to live, a community whose people agreed with his ideas.

SEDITIOUS LIBEL AND THE RIGHT TO OPPOSE THE GOVERNMENT

The First Amendment of the United States Constitution states:

> 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 essence of a democracy is the participation by citizens in the process of government. At its most basic level this participation is selecting leaders for the nation, the state, and the various local governments through the electoral process. Popular participation also includes examination of government and public officials to determine their fitness for serving the people. Discussion, criticism, and suggestion all play a part in the orderly transition of governments and elected leaders. The right to speak and print, then, is inherent in a nation governed by popularly elected rulers.

Whether the rights of free expression as defined in 1790 included a broad right to criticize the government, this kind of political speech has emerged as a central element of our modern understanding of the First Amendment.

The right to discuss the government, the right to criticize the government, the right to oppose the government, the right to advocate the change of the government—all of these dimensions of free speech and free press are at the center of our political philosophy today. But this hasn't always been the case. Even today we are sometimes troubled when asked to decide just how far an individual can go in criticizing or opposing the government. Can the use of force or violence be advocated as a means of changing the government? Can a citizen use the essence of democracy, free expression, to advocate the violent abolition of democracy and the establishment of a repressive state in which the rights of free speech and free press would be denied? Americans familiar with the history of the past two hundred years know these are more than academic questions. Some of the fiercest First Amendment battles have been fought over exactly these issues. Indeed, the new nation was less than ten years old when its resolve regarding freedom of expression was first put to the test. The results of the test were not encouraging.

Alien and Sedition Acts

Some basic history is needed to put the affair in perspective. In 1798 John Adams was in the third year of his presidency. As Washington's successor to the high office, Adams was also the head of the nation's first political party, the Federalist party, the party of the Constitution. It was the party which favored a strong national government. It was the party of Alexander Hamilton and Timothy Pickering and John Marshall. Arrayed against the Federalists was the party of Thomas Jefferson, the Anti-Federalist (also called the Republican, the Democratic-Republican, and the Jeffersonian) party.

The young nation was experiencing policy difficulties with the French in 1798. Some persons—usually Federalists—said that war with France was imminent. The impact of democratic ideas generated by the French Revolution clearly stirred some segments of the American population, but the stories of French espionage and plots against the United States government were largely rumors. Nevertheless, antagonism to the French and French aliens ran high in many Federalist districts. The feud with France was fueled by the Republican press, which rarely missed an opportunity to attack Adams or the Federalists. Many Republican editors were French sympathizers, and a large number were aliens, some French aliens. Journalism was not as we know it today. Newspapers were tied closely to political parties and sought to interpret news and events in terms of political affairs. Editorials in 1798 were editorials, not tame explanatory "comment" so often present in the press today. Editors were outspoken and wrote in polemical terms—they were vicious, they were vitriolic. In many instances the papers were funded either by the government or by the political party out of power.

No one will ever know whether John Adams really feared war with France and sought to stifle dissent in order for the nation to present a united front to Europe, or whether the trouble with France was a convenient excuse to muzzle some of his political enemies. In either case Adams approved of the efforts of

some extremists in the Federalist party to curb the power of the aliens, the Republicans, and the Republican press. In 1798 the Federalist Congress passed four laws known today as the Alien and Sedition Acts of 1798. The first three acts dealt with aliens: the period of residence for naturalization was extended from five to fourteen years, and the president was given the power to apprehend, restrain, and deport aliens whom he deemed to be dangerous. The sedition law was aimed directly at the Jeffersonian press. It forbade false, scandalous, and malicious publications against the United States government, the Congress, and the president. It said nothing about scandalous and malicious writing against the vice-president because Thomas Jefferson was vice-president, and the last thing the Federalists wanted to do was silence criticism of their number one political enemy. The new law also punished persons who sought to stir up sedition or urged resistance to federal laws. The punishment was a fine of as much as $2,000 and a jail term of not more than two years.

Truth was a defense in a prosecution brought under the new law, and the jury was given the power to determine whether the words were seditious. However, these safeguards proved ineffective. The courts insisted that the defendant had to prove that his statements or opinions were true. This was a reversal of the normal criminal law presumption of innocence in which the state must prove that the words are false and scandalous. Since the trials were normally held in communities dominated by Federalists, both the judge and jury were highly sensitive to criticism of the Federalist government.

The fifteen prosecutions under the law ranged from ludicrous to absurd. Speaking for the Republican party were five major newspapers in Philadelphia, Boston, New York, Richmond, and Baltimore. The editors of four of the five newspapers were prosecuted, as well as the editors of four lesser Republican newspapers. Even Congressmen did not escape. Matthew Lyon, a Republican member of Congress from Vermont, was prosecuted for publishing an article in which he asserted that under President Adams, "every consideration of the public welfare was swallowed upon in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation and selfish avarice." He also printed a letter written by a friend that suggested the president be committed to a madhouse. For these offenses against the government Congressman Lyon was fined $1,000 and spent four months in jail. While he was in jail he was reelected to Congress.

In Massachusetts two residents erected the liberty pole, a kind of 1798 billboard, which carried this inscription: No Stamp Act, No Sedition, No Alien Bill, No Land Tax; downfall to the tyrants of America, peace and retirement to the President. The two men were indicted for this crime. One recanted, saying that he really didn't mean it, that he loved his president. He was sentenced to spend six hours in jail and fined $5—the lightest punishment any defendant received. His associate refused to recant and was fined $400 and sentenced to eighteen months in jail. When he couldn't pay the fine, he spent two years in jail.

The low comedy of the entire episode was furnished by the government prosecution of Luther Baldwin, a Newark tavern lounger who was elevated to the status of Republican hero overnight after the government prosecuted him for a drunken remark made against President Adams. The president was traveling through Newark on the way to his home in Massachusetts for summer vacation. Newark celebrated the event as a festive occasion; flags were everywhere, as was the local militia. As the church bells pealed and the town cannon fired a salute to the passing president, Baldwin struggled to get to the local dramshop. As Adams passed along the street, the cannon positioned several yards beyond the president nevertheless fired in the direction the presidential party moved. One drunken soul standing outside the tavern noted, "There goes the President and they are firing at his ass." To which Luther Baldwin loudly replied, "I don't care if they fire through his ass." This remark was seditious to the Federalists in the crowd, and Luther was indicted and convicted of violating the 1798 law. He was fined $150 and spent several days in jail until money to pay his fine was raised.

Baldwin became a martyr, as did the other citizens prosecuted under the punitive and repressive law. Far from striking down dissension, Adams succeeded only in generating dissension among many persons who were formerly his supporters. The constitutional issues raised by the law never reached the Supreme Court, although the validity of the measure was sustained by Federalist judges and by three Federalist Supreme Court justices hearing cases on the circuit. The people, however, acted as a kind of court and voted Adams out of office in 1800, replacing him with his Republican foe Thomas Jefferson. Other factors prompted public dissatisfaction with the Massachusetts nationalist to be sure, but unpopularity of the alien and sedition laws cannot be underestimated. The Sedition Act expired in 1801. Jefferson pardoned all persons convicted under it, and Congress eventually repaid most of the fines.

Several lessons emerge from the experience under that set of laws. Foremost is the proposition that the First Amendment does nothing, in and of itself, to guarantee freedom of expression. The people and the courts must support the proposition before it becomes workable. In 1798 the courts were staffed with Federalists who were basically sympathetic to the law, and juries sympathetic to the Federalist cause could also be drawn quite easily. In 1798 the defense of truth didn't help much when it was framed in such a way as to force the defendant to prove the truth of his assertions. The same difficulty exists for defendants today in civil libel cases. Truth is not a very effective defense because convincing a jury of the truth of a statement or of an allegation is often very difficult. More about that later.

We discovered that in 1798 there was little consensus on what freedom of the press really means. Some of the best writing ever on the topic was published during this period as the Republicans attempted to define free expression in a way which tolerated a broader range of governmental criticism.

Tracts by men like Tunis Wortman, forgotten by most scholars for more than one hundred fifty years, have emerged in the second half of the twentieth century and offer legal scholars profound insight into how freedom of expression and stability of the government can be balanced.

Another lesson is that the nation's first peacetime sedition law left such a bad taste that another peacetime sedition law was not passed until the Smith Act of 1940.

Our brief consideration of this episode also shows that Americans (to their probable chagrin) were not really so different from their colonial forebearers on the issue of free expression, that an American president and a Congress could be as ignorant of the importance of freedom of speech as a British king and parliament.

While the last three years of the eighteenth century in the United States can be considered a period of political repression, the period clearly was no Dark Ages for freedom of expression, as some authorities assert. In fact, the period might be better called a Renaissance, because during this period difficult questions for which there seemed to be few answers were asked. The period marked the rebirth of the entire concept of freedom of expression and its meaning, and a few halting first steps toward understanding were taken. Indeed, discussion of the meaning of freedom of expression continues today.

The conflict between political criticism and freedom of expression was not dormant for the next one hundred fifteen years, but neither was it at the forefront of public discussion as in 1800 and at the approach of World War I. Debate on freedom of expression arose again during the period in which abolitionist publishers worked to end slavery in the United States. Between 1830 and 1840 both the states and the members of the federal government made serious efforts to stop the circulation of abolitionist newspapers on the grounds that they tended to incite slave revolt. The legal moves were defeated in northern states, and the Congress, instead of bowing to President Andrew Jackson's request to ban these publications from the United States mail, insisted that local postmasters had to deliver all mail, even if it contained abolitionist sentiments. Informal pressure was far more effective in stifling publication and circulation of abolitionist newspapers. This was especially true in the South where community pressure was a far more effective censor, despite the existence of laws in a few states making circulation of some abolitionist tracts punishable by death. During the antebellum period freedom of expression in most of the South meant freedom to discuss or publish only the views with which a community did not disagree.

In the North the issue of liberty of the press received a substantial airing during debates over censorial statutes in many state legislatures. However, because slavery did not touch the lives of many Northerners, persons living north of the Mason-Dixon line found it easier to stand behind a more expansive definition of freedom of expression.

Freedom of expression was an issue during the Civil War also. Some newspapers were temporarily closed in the North. The government effectively screened most war news published in the press, and Lincoln showed little sensitivity to civil liberties on some occasions. Still, the war was a national crisis of unprecedented proportions, and one way or another most persons were intimately involved in the war. Freedom of the press paled somewhat when placed next to the life-and-death struggle many persons suffered.

The right to criticize the government did not again become a controversial issue in this nation until after the turn of the century when the political "isms" of the late 1800s (socialism, anarchism, syndicalism) fused with the war in Europe. The safety of the nation appeared to be at stake, and repression once again seemed to be the proper answer.

In the late nineteenth century hundreds of thousands of Americans began to realize that democracy and capitalism were not going to bring the prosperity promised by some obscure national compact. The right to pursue happiness did not assure that one would find it. The advancing rush of the new industrial society left many Americans behind, and they were unhappy. Some of the more dissatisfied persons wanted to do something about the situation and proposed new systems of government and advanced new economic theories. The spectre of revolution arose in the minds of millions of Americans. Emma Goldman, Big Bill Haywood, and Daniel DeLeon represented salvation and hope to their tens of thousands of followers, but they represented a violent change in the comfortable status quo to many other thousands of Americans. Hadn't the radicals caused a riot in 1886 in Chicago? Hadn't they killed President McKinley in 1902? Hadn't they planted bombs along the West Coast and in the Northwest? Didn't they advocate general strikes? Didn't they want to take over the plants and factories and let the workers control production? With this threat lurking in the background, the United States found a real live bogeyman in 1917 when the nation went to war against the Hun—to win the war that would make the world safe for democracy.

Sedition in the Twentieth Century

The history of sedition law in the United States during and since World War I centers upon the struggle by courts at all levels to fashion some kind of test which permitted the government to protect itself from damaging criticism without stifling expression which is protected by the First Amendment. Beginning with cases which grew out of dissent against the war in Europe through cases in the early 1970s, federal courts, especially the Supreme Court, have made numerous attempts to develop a satisfactory test or formula. In the following section these attempts are outlined through a discussion of many of the major cases which raised this difficult problem. But before the cases can be discussed, it is necessary to look briefly at the period which many regard as the most repressive in the history of the nation, the World War I era.

World War I is probably the most unpopular war this nation fought until the Vietnam conflict of the sixties and seventies. The war was a replay of the imperial wars of the seventeenth and eighteenth centuries in Europe, except that it was fought with more deadly new weapons. Patriots were thrilled that the United States was finally asked to fight in the big leagues. Farmers and industrialists saw vast economic gains. The military believed that no more than six months or so were needed to clean up what many called at the outset "that lovely little war." So most of the ins liked the idea of going to war. But most of the outs hated it because they had to fight the war, because many were born in nations now our enemies, and because a war always signals the beginning of a period of internal political repression for the outs. When persons who opposed the war in an organized way spoke out against it, their opposition became just another excuse for suppression, fines, and jail.

Suppression of freedom of expression reached a higher level during World War I than at any other time in our history. Government prosecutions during the Vietnam War, for example, were minor compared to government action between 1918 and 1920. Vigilante groups were active as well, persecuting when the government failed to prosecute.

Two federal laws were passed to deal with persons who opposed the war and United States participation in it. In 1917 the Espionage Act was approved by the Congress and signed by President Woodrow Wilson. The measure dealt primarily with espionage problems, but some parts were aimed expressly at dissent and opposition to the war. The law provided that it was a crime to willfully convey a false report with the intent to interfere with the war effort. It was a crime to cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the armed forces. It also was a crime to willfully obstruct the recruiting or enlistment service of the United States. Punishment was a fine of not more than $10,000 or a jail term of not more than twenty years. The law also provided that material which violated the law could not be mailed.

In 1918 the Sedition Act, an amendment to the Espionage Act, was passed, making it a crime to attempt to obstruct the recruiting service. It was criminal to utter or print or write or publish disloyal or profane language which was intended to cause contempt of or scorn for the federal government, or of the Constitution, or the flag, or of the uniform of the armed forces. Penalties for violation of the law were imprisonment for as long as twenty years and/or a fine of $10,000. Approximately two thousand offenders were prosecuted under these espionage and sedition laws, and nearly nine hundred were convicted. Offenders who found themselves in the government's dragnet were usually aliens, radicals, publishers of foreign-language publications, and other persons who opposed the war.

In addition the United States Post Office Department censored thousands of newspapers, books, and pamphlets. Some publications lost their right to the government-subsidized second-class mailing rates and were forced to use the costly first-class rates or find other means of distribution. Entire issues of magazines were held up and never delivered, on the grounds that they violated the law (or what the postmaster general believed to be the law). Finally, the states were not content with allowing the federal government to deal with dissenters, and most adopted sedition statutes, laws against criminal syndicalism, laws which prohibited the display of a red flag or a black flag, and so forth.

While the Congress adopted measures making it a crime to oppose the government or to oppose the recruiting service, the courts were given the task of reconciling these laws with the guarantee of freedom of expression in the First Amendment. The courts, ultimately the Supreme Court, had to specifically define what kinds of words were protected by the First Amendment and what kinds of words were outside the range of protected speech. The United State had been in the war but a short time when the case that would become the Supreme Court's first opportunity to reconcile the First Amendment and outlaw political speech began.

The Philadelphia Socialist party authorized Charles Schenck, the general secretary of the organization, to publish 15,000 antiwar leaflets. They were distributed through the party's bookshop and mailed directly to young men who had been drafted. The publication urged the young inductees to join the Socialist party and work for the repeal of the selective service law, told the young men that the law was a violation of the Thirteenth Amendment which abolished slavery, and told the draftees that they were being discriminated against because certain young men (Quakers and clergymen) didn't have to go to war. The pamphlet also described the war as a cold-blooded and ruthless adventure propagated in the interest of the chosen few of Wall Street. Schenck and other party members were arrested, tried, and convicted of violating the Espionage Act. The Socialist appealed to the high Court, asserting that the law denied him the right of freedom of speech and freedom of the press. Justice Oliver Wendell Holmes wrote the opinion in this important case (*Schenck* v. *U.S.*, 1919). Holmes initially asserted that the main purpose of the First Amendment is to prevent prior censorship, although he conceded that the amendment might not be confined to that. In ordinary times, such pamphlets might have been harmless and considered protected speech. "But the character of every act depends upon the circumstances in which it is done. . . . 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. It is a question of proximity and degree."

Translated, this is what Holmes's proposition means. Congress has a right to outlaw certain kinds of conduct which can be harmful to society. Words, as in publications or public speeches, which can result in persons undertaking the illegal conduct can also be outlawed, and publishers or speakers can be punished without infringing upon First Amendment rights. How great must be the connection between the forbidden conduct and the words? Holmes said the words must create a "clear and present danger" that the illegal activity will result.

Needless to say, in Holmes's view the requisite clear and present danger of obstructing the recruiting service existed in the *Schenck* case, and the conviction was upheld. In two other Espionage Act cases also decided in the spring of 1919, Holmes wrote the opinion for the Court and used the clear and present danger test to affirm the convictions of Jacob Frohwerk, editor of a German-language newspaper (*Frohwerk* v. *U.S.*, 1919) and Eugene V. Debs, leader of the American Socialist party during World War I (*Debs* v. *U.S.*, 1919). The requisite clear and present danger existed in both cases, Holmes said.

Many authorities consider Oliver Wendell Holmes to be one of the great civil libertarians to sit on the Supreme Court. Consequently, it is often erroneously assumed that Holmes's "clear and present danger" test was a truly liberal attempt designed to afford maximum protection for freedom of expression. The assumption is incorrect, Holmes seemed to admit as much later in 1919 in an important dissent he wrote in *Abrams* v. *U.S.* During the summer of 1919 civil libertarians criticized rulings of the Supreme Court in the *Schenck, Frohwerk,* and *Debs* cases. Many distinguished students of the law including friends of Holmes sharply attacked the clear and present danger test. In an interesting article in the *Journal of American History* (1971) Professor Fred D. Ragan states that Holmes was aware of the criticism and during that summer became convinced that the freedom of expression established by the First Amendment was far broader than championed in his spring decisions.

In November 1919 when the Court decided its first appeal of conviction under the Sedition Act, Holmes shifted dramatically to the left. In *Abrams* v. *U.S.* (1919) the high Court upheld the convictions of five young radicals who protested the movement of American troops into the Soviet Union and called for a general strike to stop the production of munitions and arms. In writing for the majority Justice John Clarke wrote that the leaflets published by the defendants "obviously intended to provoke and to encourage resistance to the United States in the war." Whether they intended to hurt the United States was not at issue. "Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce." As Professor Ragan notes: "Thus Clarke employed criteria used by Holmes earlier in the year . . . to sustain the conviction."

Holmes, on the other hand, joined his colleague Louis Brandeis in a dissent and wrote one of the most stirring defenses of freedom of expression of the twentieth century. The jurist wrote that the ultimate good desired is better reached by free trade in ideas, that the best test of truth is the power of a thought to get accepted in the marketplace. "That, at any rate, is the theory of our Constitution," he wrote. Holmes then argued that nobody could seriously believe that the silly leaflet published by the five defendants would hinder the war effort. He turned his back on notions of probable or indirect interference with the prosecution of the war. To be guilty of resistance meant direct and immediate opposition to some effort by the United States to prosecute the war. There was no evidence of that here, Holmes concluded.

Holmes's change of heart did not spell the demise of the clear and present danger test. It was used in other sedition cases by the high Court. However the only instances in which a majority of the high Court subscribed to the test were to uphold convictions under various sedition laws. Holmes and Brandeis used the test often to argue that the requisite clear and present danger was missing, that the utterances or published materials were protected by the First Amendment. These arguments, it should be noted, were in dissenting opinions.

Landmark Civil Rights Decision

The next sedition case of significance during the postwar era was *Gitlow* v. *New York* (1925). Many scholars argue that this decision by the Supreme Court ranks as one of the most important civil rights decisions of the twentieth century, despite the fact that defendant Benjamin Gitlow lost his First Amendment appeal. Gitlow and three other persons were arrested, tried, and convicted of publishing and distributing a pamphlet which, the state of New York argued, advocated the violent overthrow of the government—a violation of the New York Criminal Anarchy Law. The pamphlet, the *Left Wing Manifesto,* was a dreadfully dull thirty-four-page political tract on revolution and social and economic change. In his book *Free Speech in the United States,* Zechariah Chafee, a renowned legal scholar of Harvard University, accurately notes, "Any agitator who read these thirty-four pages to a mob would not stir them to violence, except possibly against himself. This manifesto would disperse them faster than the riot act." Nevertheless Gitlow was sentenced to ten years in prison. In his appeal to the high Court he argued that the state criminal anarchy statute violated his freedom of expression guaranteed by the United States Constitution. In making this plea, Gitlow was asking the Court to overturn a ninety-two-year-old precedent.

In 1833 the Supreme Court of the United States ruled that the Bill of Rights, the first ten amendments to the United States Constitution, were applicable only in protecting citizens from actions of the federal government (*Barron* v. *Baltimore,* 1833). Chief Justice John Marshall ruled that the

people of the United States established the United States Constitution for their government, not for the government of the individual states. The limitations of power placed upon government by the Constitution applied only to the government of the United States. Applying this rule to the First Amendment meant that neither Congress nor the federal government could abridge freedom of the press, but that the government of New York or the government of Detroit could interfere with freedom of expression without violating the guarantees of the Constitution. The citizens of the individual states or cities could erect their own constitutional guarantees in state constitutions or city charters. Indeed, such provisions existed in many places.

As applied to the case of Benjamin Gitlow, then, it seemed unlikely that the First Amendment (which prohibited interference by the federal government with freedom of speech and press) could be erected as a barrier to protect the radical from prosecution by the state of New York. Yet this is exactly what the young Socialist argued.

Gitlow's attorneys, especially Walter Heilprin Pollak, did not attack the rule directly; instead they went around it. Pollak constructed his argument upon the Fourteenth Amendment to the Constitution which was adopted in 1868, thirty-five years after the decision in *Barron* v. *Baltimore*. The attorney argued that there was general agreement that the First Amendment protected a citizen's right to liberty of expression. The Fourteenth Amendment says in part "no state shall deprive any person of life, liberty or property, without due process of law. . . ." Pollak asserted that included among the liberties guaranteed by the Fourteenth Amendment is liberty of the press as guaranteed by the First Amendment. Therefore, a state cannot deprive a citizen of the freedom of the press which is guaranteed by the First Amendment without violating the Fourteenth Amendment. By jailing Benjamin Gitlow for exercising his right of freedom of speech granted by the First Amendment, New York State denied him the liberty assured him by the Fourteenth Amendment. Simply, then, the First Amendment as applied through the Fourteenth Amendment prohibits states and cities and counties from denying an individual freedom of speech and press.

The high Court had heard this argument before, but apparently not as persuasively as Mr. Pollak presented it. In rather casual terms Justice Edward Sanford made a startlingly new constitutional pronouncement: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement 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."

Despite this important ruling, Gitlow lost his case. Justice Sanford said that the New York law was warranted and did not violate the First Amendment nor the Fourteenth Amendment. Sanford then went on to outline his own rather novel interpretation of Holmes's clear and present danger test. He said that in passing the Espionage Act, the Congress forbade certain deeds—interference with the recruiting service, for example. In such instances when the defendant is charged with using words to promote the forbidden deeds, the courts must decide whether the language used by the accused creates a clear and present danger for bringing about the forbidden deeds. In other words, does the defendant's pamphlet create the danger that persons will in fact interfere with the recruiting service?

However, in this case, Sanford said, the New York legislature outlawed certain words—that is, words advocating violent overthrow of the government are forbidden. The clear and present danger test doesn't apply, he said. The only issue the court has to decide is, Do the words in question, in this case the *Left Wing Manifesto,* fall within the class of forbidden words, words that advocate violent overthrow of the government? The court has no power to determine in such a case if in fact the defendant's pamphlet creates the danger of a violent revolt. It is sufficient that the state has outlawed such words. Only if the judgment of the legislature is completely without foundation can the court interfere. In this case the legislature's action is warranted: Gitlow's pamphlet falls within the category of proscribed words—ten years in jail!

Holmes and Brandeis vigorously dissented, arguing that it was absurd to think that Gitlow's small band of followers posed any danger at all to the government. "It is said that this manifesto was more than a theory," Holmes wrote, "that it was an incitement. Every idea is an incitement. . . . The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result." The argument was to no avail. After three years in prison Gitlow was pardoned by Governor Alfred Smith.

The importance of the *Gitlow* case is that the high Court acknowledged that the Bill of Rights places limitations upon the actions of states and local government as well as upon the federal government. The *Gitlow* case states that freedom of speech is protected by the Fourteenth Amendment. In later cases the Court placed freedom of the press, freedom of religion, freedom from self-incrimination, and freedom from illegal search and seizure under the same protection. Today, virtually all of the rights outlined in the Bill of Rights are protected via the Fourteenth Amendment from interference by states and cities as well as by the federal government. The importance of the *Gitlow* case cannot be underestimated. It truly marked the beginning of attainment of a full measure of civil liberties for the citizens of the nation. It was the key which unlocked an important door.

Threats of Violence as Sedition

The Sanford interpretation of the clear and present danger test was next used two years later when the Supreme Court reviewed the prosecution by California of sixty-year-old philanthropist Anita Whitney for threatening the security of the state (*Whitney* v. *California,* 1927). Miss Whitney, the niece of Justice Stephen J. Field who served on the Supreme Court from 1863 to 1897, joined the Socialist party in the early 1920s. At a convention in Chicago the chapter to which Miss Whitney belonged seceded from the Socialist party and formed the Communist Labor party. The Communist Labor party held a convention in Oakland to which Miss Whitney was a delegate. She worked hard as a delegate to ensure that the new party worked through political means to capture political power, but the majority of delegates voted instead for the party to dedicate itself to gaining power through revolution and general strikes in which the workers would seize power by violent means. After this convention Miss Whitney was not active in the party, but she was nevertheless arrested three weeks after the Oakland convention and charged with violating the California Criminal Syndicalism Act which prohibited advocacy of violence to change the control or ownership of industry or to bring about political change.

Following her conviction she appealed to the high Court, arguing that the law violated the guarantees of freedom of expression. Justice Edward Sanford, writing for the majority, again ruled that the clear and present danger test did not apply, that the Califoria state legislature outlawed certain kinds of words which it deemed a danger to public peace and safety, and that the Court could not hold that the action was unreasonable or unwarranted. There was therefore no infringement upon the First Amendment.

This time Holmes and Brandeis concurred with the majority, but only, Brandeis said, because the constitutional issue of freedom of expression had not been raised sufficiently at the trial to make it an issue in the appeal. In his concurring opinion, Brandeis disagreed sharply with the majority regarding the limits of free expression. In doing so he added flesh and bones to Holmes's clear and present danger test. Looking to the *Schenck* decision, the justice noted that the Court had agreed that there must be a clear and imminent danger of a substantive evil which the state has the right to prevent before an interference with speech can be allowed. Then he went on to describe what he believed to be the requisite danger (*Whitney* v. *California*):

> 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 law-breaking heightens it 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.

Brandeis concluded that if there is time to expose through discussion the falsehoods and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.

This truly is a clear and present danger test that even the most zealous civil libertarian can live with. And this is the test that many mistakenly confuse with Holmes's original pronouncement. Unfortunately, this version of the clear and present danger test has never found its way into a majority opinion in a sedition case.

Before the last two important sedition cases decided during this century are discussed, it should be noted that in 1927 the Supreme Court first struck down a state sedition conviction because the defendant's federal constitutional rights had been violated (*Fiske* v. *Kansas,* 1927). In Kansas a man named Fiske was arrested, tried, and convicted of violating that state's criminal anarchy statute. He was an organizer for the International Workers of the World (IWW), a radical union group. The evidence the state used against him was the preamble to the IWW constitution which discussed in vague terms the struggle between workers and owners and the necessity for workers to take control of the machinery of production and to abolish the wage system. No mention was made of violence, but the state supreme court upheld the conviction on the grounds that despite the lack of specific reference to violence it was possible for the jury to read between the lines in light of the reputation of the IWW. The United States Supreme Court reversed the conviction because there was no evidence on the record to support the conviction. There was no suggestion in the testimony that Fiske used anything but lawful methods, and thus the conviction was "an arbitrary and unreasonable exercise of the police power of the state, unwarrantably infringing upon the liberty of the defendant." While this was a terribly small victory and no major liberal interpretation of the First Amendment was announced, as Zechariah Chafee (*Free Speech in the United States*) notes, "the Supreme Court for the first time made freedom of speech mean something."

The Smith Act

The Congress adopted the nation's first peacetime sedition law in 1798 and approved the second law in 1940 when it ratified the Smith Act, a measure making it a crime to advocate the violent overthrow of the government, to conspire to advocate the violent overthrow of the government, to organize a group which advocates the violent overthrow of the government, or to be a member of a group which advocates the violent overthrow of the government.

When the Sedition Act of 1918 was repealed in 1921 (the Espionage Act is still on the books, but is applicable only during wartime), the United States Department of Justice and the military sought a replacement for the act. From the early 1920s to 1940 numerous attempts were made to pass such a bill, but were always unsuccessful because labor unions, civil rights groups, farm organizations, and even the United States press sent representatives to Washington to work against the law. But in 1940, America's second peacetime sedition law, buried in an innocuous omnibus bill called the Alien Registration Act, quietly wormed its way through Congress and was signed by the president. There is no doubt that the times were different. Hitler had won stunning victories in Europe and had recently forced the French to surrender. In the Far East, rumblings of war became louder each day, and rumors were rife that the Japanese would attack Indochina momentarily.

The Smith Act, which was aimed at the Communist party, was drafted by Congressman Howard Smith of Virginia and Congressman John McCormack of Massachusetts. It received little publicity, and many months elapsed before civil libertarians realized that the act had been passed. Among others Zechariah Chafee (*Free Speech in the United States*) writes, "Not until months later did I for one realize this statute contains the most drastic restriction on freedom of speech ever enacted in the United States during peace."

While the government suggested during hearings on the measure that Congress best act quickly, lest the Communists take over the nation, the first prosecution of Communists under the Smith Act did not take place until eight years later. A small band of Trotskyites, members of the Socialist Workers party, were prosecuted and convicted in 1943, but not until 1948 did a federal grand jury indict twelve of the nation's leading Communists for advocating the violent overthrow of the United States government. The trial began in January 1949 and lasted nine months. Eleven defendants (one became sick during the trial and was excused temporarily) were convicted, including Eugene V. Dennis, one of the party leaders in the United States. The trial judge, Harold Medina, who was presiding at his first criminal trial after being appointed a federal district judge, told the jury that the statute did not prohibit discussing the propriety of overthrowing the government by force or violence, but "the teaching and advocacy of action for the accomplishment of that purpose by language reasonably and ordinarily calculated to incite persons to such action." In other words, the Smith Act prohibited the teaching or advocacy of action aimed at the violent overthrow of the government.

The convictions were appealed all the way to the Supreme Court, and in *Dennis* v. *U.S.* (1951) the high Court once again was called upon to outline the limitations which might be constitutionally applied against persons who oppose the government. In arguing that the Smith Act violated the guarantees of freedom of speech and press in the First Amendment, the defendants raised

the almost thirty-year-old clear and present danger test as a barrier to the prosecution. The actions of this small band of Communists did not represent a clear and present danger to the nation, they argued. Chief Justice Fred Vinson wrote the opinion for the Supreme Court in the seven-to-two ruling that upheld the constitutionality of the federal sedition law. In considering the clear and present danger test, Vinson could have chosen to adopt the crabbed view of freedom of expression enunciated by Holmes in the *Schenck* case, or he could have followed Brandeis's more liberal exposition of the test from the *Whitney* decision. Vinson ended up creating a new test which fell politically somewhere between the tests outlined by Holmes in 1919 and Brandeis in 1927.

Vinson first insisted that the evil involved in the case (the evil which Congress has the right to prevent) was a substantial one, the overthrow of the government. That was the professed aim of the Communists, no doubt, but it wasn't very realistic. That doesn't matter, Vinson wrote, rejecting the contention that success or probability of success is the criterion, "Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt." However, Vinson equated advocacy of overthrow with actual attempt at overthrow. It could be asked, how likely is it that the words spoken or written by the defendants would lead even to an attempted overthrow? Vinson's opinion was a far cry from Justice Brandeis's statement in *Whitney*. Recall Brandeis's words: "But even advocacy of violation (of the law), 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 upon. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind."

Vinson outlined the test used by Judge Learned Hand when the Second United States Court of Appeals sustained the conviction of the eleven Communists. "In each case [courts] must ask whether the gravity of the 'evil,' discounted by improbability, justifies such invasion of free speech as is necessary to avoid the danger." Vinson said, "We adopt this statement of the rule."

The clear and probable danger test really says little more than the original Holmes clear and present danger test if Holmes's exposition in the *Debs, Frohwerk,* and *Schenck* cases are added. If the gravity of the evil is considered, Holmes said that the evil must be substantive or serious. Hand said that the probability of what might occur must be considered. What might occur?

Might the overthrow succeed? Might the overthrow be attempted? Might the words lead someone to attempt an overthrow? What kind of danger are we trying to avoid? The issue is so unclear.

One could speculate that if the clear and present danger test as articulated by Justice Brandeis had been applied in this case the convictions would have gone out the window. The danger wasn't clear, nor was it present. However, in the atmosphere of 1951, such was not likely. We were in the midst of both a cold war with the Soviet Union and a hot war with the North Koreans and Communist Chinese, and as was said previously, the Supreme Court (all courts for that matter) are political bodies at least to some extent.

Chief Justice Vinson made one additional important observation. Almost in passing, he noted that the Smith Act is aimed at advocacy, not at discussion. Judge Medina said the law is aimed at advocacy of action or at the teaching of action aimed at violent overthrow. Justice Vinson said the law is aimed at advocacy, and that is all.

After the government's success in the *Dennis* case, more prosecutions were initiated against Communists in the United States. Seven separate prosecutions were started in 1951, three in 1952, one in 1953, and five more during the next three years. One trial begun in late 1951 involved the top Communist leadership on the West Coast. At the trial after hearing both sides, Judge William C. Mathes told the jury that any advocacy dealing with the forcible overthrow of the government and presented with a specific intent to accomplish the overthrow is illegal under the Smith Act. This is about what Vinson said in the *Dennis* case, but is far different from the standard used by Judge Medina in the *Dennis* trial. The defendants appealed their conviction, and six years later, in 1957, the Supreme Court voted five to two to reverse the convictions (*Yates* v. *U.S.*, 1957). On what grounds? Several factors influenced the reversal in *Yates* v. *U.S.*, but the basic reason is that Judge Mathes failed to distinguish between the advocacy of forcible overthrow as an abstract doctrine and the advocacy of action aimed at the forcible overthrow of the government. The Smith Act reaches only advocacy of action for the overthrow of government by force and violence, Justice John Marshall Harlan wrote for the court. "The essential distinction," Harlan notes, "is that those to whom the advocacy is addressed must be urged to do something now or in the future, rather than merely to believe in something." How specific must this advocacy of action be? It does not have to be immediate action; it can be action in the future. But it must be an urge to do something: form an army, blow up a bridge, prepare for sabotage, train for street fighting, and so forth.

The government was unprepared to meet this new burden of proof. Far more evidence is needed to prove that someone has urged people to do something than to prove that someone has merely urged them to believe something. All but one of the cases pending were dismissed. The defendants in the single case that was tried were set free on an evidentiary issue (*Bary* v. *U.S.*, 1957)

and were never retried. In fact, there has not been a single successful prosecution for advocacy of violent overthrow since the *Yates* decision. One successful prosecution under the membership clause of the Smith Act has occurred, but it was in 1961 (*Scales* v. *U.S.*, 1961).

To his credit, Justice Harlan did not attempt to apply either the clear and present danger test or the clear and probable danger test. This consideration wasn't necessary since the constitutionality of the law is not the heart of the appeal in the *Yates* case as it is in *Dennis*. Still, the temptation to take a crack at defining that catchy little phrase must have been great.

Few sedition trials have occurred since 1957. In 1969, the Supreme Court once again looked at a state sedition law in *Brandenburg* v. *Ohio* (1969). In this case a Ku Klux Klan leader was prosecuted by the state of Ohio for advocating unlawful methods of terrorism and crime as a means of accomplishing industrial and political reform. The high Court voided his conviction on the grounds that the Ohio law failed to distinguish between the advocacy of ideas and the incitement to unlawful conduct. In its per curiam opinion the Court said, "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 or is likely to incite or produce such actions." This opinion came close to how Louis Brandeis outlined the clear and present danger test in 1927 in the *Whitney* case.

The famous Holmes test is not dead by any means. It still lives, for example, in criminal contempt law where the high Court has fashioned it into a workable test to protect both courts and defendants from the interference of the mass media in the judicial process. If it is not dead, the test is certainly lifeless with regard to sedition law, partly because sedition law is not nearly so robust as it was forty years ago. The Communists long since ceased to be a threat in this nation. In fact one author suggests that the party is currently alive only because it is subsidized by the United States government. Indeed, political scientist John Roche (*Shadow and Substance*) asserts that if the many undercover FBI agents who are members of the party were to withdraw their membership and stop paying dues the party would collapse.

More seriously, the federal government chose not to use sedition laws in prosecuting protestors and dissidents during the Vietnam War. Instead the government used rather exotic conspiracy laws and still enjoyed little success. The Smith Act is still on the books, and it probably could have been used against some antiwar leaders. But it was not. The law is not popular today. Sedition laws are not popular today. When people feel little direct threat to their well-being, they are willing to exercise a remarkable range of tolerance of unpopular ideas and suggestions. Unpopular or unorthodox speakers and writers are written off as kooks, which in many cases they are. However,

should there occur another serious war, a deep depression which causes loss of confidence in the government, or other situation in which people feel threatened, what could happen is difficult to predict.

Today, in the last quarter of the twentieth century, Americans probably enjoy as much right to oppose their government as do citizens in any other nation in the world, and more of this freedom is enjoyed now than at any other time during this century, perhaps during the lifetime of the Republic. If the legal tests used to measure the danger of words seem really to be silly little word games devised by grown men to fill their time, that outlook is in some respects correct. However, the games are devised more in desperation than for any other reason, for democracy has not yet solved the problem of determining how far to go in allowing dissent which attacks the system of government itself. Scholars continue to argue about using this test or that test. Judges and legal scholars continue to look for the correct formula, the key which will provide both maximum freedom and maximum safety. The key probably does not exist. But it is man's nature to continue to search.

THE PROBLEM OF PRIOR RESTRAINT

The great compiler of the British law William Blackstone defined freedom of the press in the 1760s as freedom from "previous restraint," or prior restraint. Regardless of the difference of opinion on whether the First Amendment is intended to protect political criticism, most students of the constitutional period agree that the guarantees of freedom of speech and press were intended to bar the government from exercising prior restraint. Despite the weight of such authority, the media in the United States in the 1980s still faces instances of prepublication censorship. The issue is clearly not completely settled.

Prior censorship, or prior restraint, is probably the most insidious kind of government control. Speakers and publishers are stopped before they can speak or print. The people are not allowed to discover what was going to be said or published. We are denied the benefit of these ideas or suggestions or criticisms.

Prior censorship is difficult to define, as scores of laws or government actions hold the potential for a kind of prior restraint. In privacy law, for example, it is possible under some statutes to stop the publication of material which illegally appropriates a person's name or likeness. In extreme cases the press can be stopped from publishing information it has learned in a criminal case. The two instances just mentioned as well as others will be discussed fully in later, more appropriate sections of this book. The purpose of this section is to outline those kinds of prior restraint that seem to fall outside the boundaries of other chapters in the book. We will therefore discuss injunctions against public nuisances, laws which place limits on when and where materials may be distributed, cases involving national security matters, and other topics.

Public Nuisance Statutes

The Supreme Court did not consider the issue of prior restraint until more than a decade after it had decided its first major sedition case. In 1931 in *Near* v. *Minnesota* the high Court struck an important blow for freedom of expression.

Near v. *Minnesota*

City and county officials in Minneapolis, Minnesota, brought a legal action against Jay M. Near and Howard Guilford, publishers of the *Saturday Press*, a small weekly newspaper. Near and Guilford were reformers whose purpose was to clean up city and county government in Minneapolis. In their attacks upon corruption in city government, they used language which was far from temperate and defamed some of the town's leading government officials. Near and Guilford charged that Jewish gangsters were in control of gambling, bootlegging, and racketeering in the city, and that city government and its law enforcement agencies did not perform their duties energetically. They repeated these charges over and over in a highly inflammatory manner.

Minnesota had a statute which empowered a court to declare any obscene, lewd, lascivious, malicious, scandalous, or defamatory publication a public nuisance. When such a publication was deemed a public nuisance, the court issued an injunction against future publication or distribution. Violation of the injunction resulted in punishment for contempt of court.

In 1927 County Attorney Floyd Olson initiated an action against the *Saturday Press*. A district court declared the newspaper a public nuisance and "perpetually enjoined" publication of the *Saturday Press*. The only way either Near or Guilford would be able to publish the newspaper again was to convince the court that their newspaper would remain free of objectionable material. In 1928 the Minnesota Supreme Court upheld the constitutionality of the law, declaring that under its broad police power the state can regulate public nuisances, including defamatory and scandalous newspapers.

The case then went to the United States Supreme Court which reversed the ruling by the state supreme court. The nuisance statute was declared unconstitutional. Chief Justice Charles Evans Hughes wrote the opinion for the Court in the five-to-four ruling, saying that the statute in question was not designed to redress wrongs to individuals attacked by the newspaper. Instead, the statute was directed at suppressing the *Saturday Press* once and for all. The object of the law, Hughes wrote, was not punishment but censorship—not only of a single issue, but also of all future issues—which is not consistent with the traditional concept of freedom of the press. That is, the statute constituted prior restraint, and prior restraint is clearly a violation of the First Amendment.

One maxim in the law holds that when a judge writes an opinion for a court he should stick to the problem at hand, that he shouldn't wander off and talk about matters that don't really concern the issue before the court.

Such remarks are considered dicta, or words that don't really apply to the case. These words, these dicta, are never really considered an important part of the ruling in the case. Chief Justice Hughes's opinion in *Near* v. *Minnesota* contains a good deal of dicta.

In this case Hughes wrote that the prior restraint of the *Saturday Press* was unconstitutional, but in some circumstances, he added, prior restraint might be permissible. In what kinds of circumstances? The government can constitutionally stop publication of obscenity, the government can stop publication of material which incites people to acts of violence, and it may prohibit publication of certain kinds of materials during wartime. Hughes admitted, on the other hand, defining freedom of the press as the only freedom from prior restraint is equally wrong, for in many cases punishment after publication imposes effective censorship upon the freedom of expression.

Near v. *Minnesota* stands for the proposition that under American law prior censorship is permitted only in very unusual circumstances; it is the exception, not the rule. Courts have reinforced this interpretation many times since 1931. Despite this considerable litigation, we still lack a complete understanding of the kinds of circumstances in which prior restraint might be acceptable under the First Amendment, as a series of recent cases (some of which are concerned with national security) illustrate.

Austin v. *Keefe*

A case that to some extent reinforced the *Near* ruling involved the attempt of a real estate broker to stop a neighborhood community action group from distributing pamphlets about him (*Organization for a Better Austin* v. *Keefe,* 1971). The Organization for a Better Austin was a community organization in the Austin suburb of Chicago. Its goal was to stabilize the population in the integrated community. Members were opposed to the tactics of certain real estate brokers who came into white neighborhoods, spread the word that blacks were moving in, bought up the white-owned homes cheaply in the ensuing panic, and then resold them at a good profit to blacks or other whites. The organization received pledges from most real estate firms in the area to stop these blockbusting tactics. But Jerome Keefe refused to make such an agreement. The comunity group then printed leaflets and flyers describing his activities and handed them out in Westchester, the community in which Keefe lived. Group members told the Westchester residents that Keefe was a "panic peddler" and said they would stop distributing the leaflets in Westchester as soon as Keefe agreed to stop his blockbusting real estate tactics. Keefe went to court and obtained an injunction which prohibited further distribution by the community club of pamphlets, leaflets, or literature of any kind in Westchester on the grounds that the material constituted an invasion of Keefe's privacy and caused him irreparable harm. The Organization for a Better Austin appealed the ruling to the United States Supreme Court. In May 1971 the high Court dissolved the injunction. Chief Justice Warren Burger wrote,

"The injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights." He said that the injunction, as in the *Near* case, did not seek to redress individual wrongs, but instead sought to suppress on the basis of one or two handbills the distribution of any kind of literature in a city of 18,000 inhabitants. Keefe argued that the purpose of the handbills was not to inform the community, but to force him to sign an agreement. The Chief Justice said this argument was immaterial and was not sufficient cause to remove the leaflets and flyers from the protection of the First Amendment. Justice Burger added (*Austin* v. *Keefe):*

> Petitioners [the community group] were engaged openly and vigorously in making the public aware of respondent's [Keefe's] real estate practices. Those practices were offensive to them, as the views and practices of the petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.

The *Keefe* case did a good job of reinforcing the high Court's decision in *Near* v. *Minnesota.*

National Security Issues

While it is more famous, another 1971 decision is not as strong a statement in behalf of freedom of expression as either *Near* or *Keefe.* This is the famous Pentagon Papers decision (*New York Times Co.* v. *U.S.; U.S.* v. *Washington Post,* 1971). While the political implications of the ruling are very important, the ruling itself is legally quite unsatisfying.

Pentagon Papers Case

As many remember, the case began in the summer of 1971 when the *New York Times,* followed by the *Washington Post* and a handful of other newspapers, began publication of a series of articles based on a top-secret forty-seven-volume government study entitled "History of the United States Decision-Making Process on Vietnam Policy." The day after the initial article on the Pentagon Papers appeared, Attorney General John Mitchell asked the *New York Times* to stop publication of the material. When the *Times*'s publisher refused, the government went to court to get an injunction to force the newspaper to stop the series. A temporary restraining order was granted as the case wound its way to the Supreme Court. Such an order was also imposed upon the *Washington Post* after it began to publish reports based on the same material.

At first the government argued that the publication of this material violated federal espionage statutes. When that assertion didn't satisfy the lower federal courts, the government argued that the president had inherent power under his constitutional mandate to conduct foreign affairs to protect the national security, which includes the right to classify documents secret and top secret. Publication of this material by the newspapers was unauthorized

disclosure of such material and should be stopped. This argument didn't satisfy the courts either, and by the time the case came before the Supreme Court the government argument was that publication of these papers might result in irreparable harm to the nation and its ability to conduct foreign affairs. The *Times* and the *Post,* consistently made two arguments. First, they said that the classification system is a sham, that people in the government declassify documents almost at will when they want to sway public opinion or influence a reporter's story. Second, the press also argued that an injunction against the continued publication of this material violated the First Amendment. Interestingly, the newspapers did not argue that under all circumstances prior restraint is in conflict with the First Amendment. Defense Attorney Professor Alexander Bickel argued that under some circumstances prior restraint is acceptable, for example, when the publication of a document has a direct link with a grave event which is immediate and visible. Former Justice William O. Douglas noted that this is a strange argument for newspapers to make—and it is. Apparently both newspapers decided that a victory in that immediate case was far more imporant than to establish a definitive and long-lasting constitutional principle. They therefore concentrated on winning the case, acknowledging that in future cases prior restraint might be permissible.

On June 30 the high Court ruled six to three in favor of the *New York Times* and the *Washington Post.* The Court did not grant a permanent injunction against the publication of the Pentagon Papers, but the ruling was hardly the kind which strengthened the First Amendment. In a very short per curiam opinion the majority said that in a case involving the prior restraint of a publication the government bears a heavy burden to justify such a restraint. In this case the government failed to show the Court why such a restraint should be imposed upon the two newspapers. In other words, the government failed to justify its request for the permanent restraining order.

The decision rested upon a First Amendment doctrine called the preferred position doctrine. Normally, when a legislature passes a law, or the government takes some action based upon a law, it is presumed that these laws or actions are constitutional. In other words, the laws or actions do not violate the Constitution. Therefore when the constitutionality of a law or a government action is challenged, the Court presumes constitutionality, and the challenger bears the burden of proof to show that the law or action is not constitutional. For example, if someone challenges the constitutionality of laws making it a crime to transport dangerous drugs across state lines on the grounds that Congress has no power to regulate such material, it is up to the challenger to prove that Congress in fact has no power. All the government technically has to do is say that Congress does have the power. The challenger must prove that it does not. This principle is called the presumption of constitutionality.

However, when the issue involved is freedom of expression, the presumption of constitutionality does not apply. In 1938 in *U.S.* v. *Carolene Products Co.*, Justice Harlan Fiske Stone suggested obliquely that when the government passes a law or takes an action involving basic civil liberties, when it does something which appears on the face to be prohibited by the Bill of Rights, the government bears the burden of justifying its action. A citizen should not have to prove that what the government did is unconstitutional. This principle is called the preferred-position doctrine, and while it applies to all rights guaranteed by the first ten amendments to the Constitution, the doctrine has been fully developed with regard to the First Amendment.

Applying that doctrine in *New York Times Co.* v. *U.S.*, the Supreme Court simply said that the government failed to show the Court why its request for an injunction was not a violation of the First Amendment. The Court did not say that in all similar cases an injunction would violate the First Amendment; it did not even say that in this case an injunction was a violation of the First Amendment. It merely said that the government had not shown why the injunction was not a violation of freedom of the press. The decision is not what you would call a ringing defense of the right of free expression.

In addition to the brief unsigned opinion from the majority, the Chief Justice and each of the eight associate justices wrote short individual opinions. They were not very instructive, but should be noted anyway.

Justices Black and Douglas clung to their absolute position and argued that they could conceive of no circumstance under which the government can properly interfere with freedom of expression. Debate on public questions must be open and robust, Justice Douglas wrote. Justice William Brennan echoed the Court's opinion: there was no proof that the publication of the papers would damage the national security or the nation. Justice Potter Stewart agreed and attacked the notion of classifying public documents and excessive secrecy in government. "For when everything is classified," he wrote, "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."

Justice Byron White supported the notion that the government lacked the evidence needed to sustain an injunction. But Justice White added that he believed the publication of the material would damage the national interest, and if the government chose to bring the newspapers back to court for criminal prosecution for violating an espionage statute, he could surely support a conviction. These last remarks are another example of dicta. The last member of the majority, Justice Thurgood Marshall, said he did not believe the president has the right to classify documents in the first place, that Congress has consistently rejected giving the executive this power, and that consequently the Court should not support such questionable authority.

All three of the dissenters, Chief Justice Warren Burger, Justice John M. Harlan, and Justice Harry Blackmun, complained that there had not been sufficient time to properly consider the case. The issues were too important for such a rush to judgment, Justice Burger said, noting his dissent was not based upon the merits of the case. Harlan and Blackmun did dissent on the merits. Harlan argued that foreign relations and national security are both concerns of other branches of the government, and the Court should accept the government's assertions in this case—even without evidence—that disclosure of the material in the Pentagon Papers would substantially harm the government. Justice Blackmun wanted to send the case back to the trial courts for fuller exposition of the facts and to allow the government more time to prepare its case.

What many people at first called the case of the century ended in a fizzle, at least with regard to developing First Amendment law. The press won the day; the Pentagon Papers were published. But thoughtful observers expressed concern over the ruling. A majority of the Court had not ruled that such prior restraint was unconstitutional—only that the government had failed to meet the heavy burden of showing such restraint was necessary in this case.

Progressive Magazine Case

The fragile nature of the Court's holding became clear in early 1979 when the government again went to court to block the publication of material it claimed could endanger the national security (*U.S.* v. *Progressive*, 1979). Free-lance writer Howard Morland had prepared an article entitled "The H-Bomb Secret: How We Got It, Why We're Telling It." The piece was scheduled to be published in the April edition of the *Progressive* magazine, a seventy-year-old political digest founded by Robert M. LaFollette as a voice of the progressive movement.

Morland had gathered the material for the article from unclassified sources. After completing an early draft of the piece, he sought technical criticism from various scholars. Somehow a copy found its way to officials in the federal government. With the cat out of the bag, *Progressive* editor Erwin Knoll sent a final draft to the government for prepublication comments on technical accuracy. The government said the piece was too accurate and moved into federal court to stop the magazine from publishing the story.

The defendants in the case argued that all the information in the article was in the public domain, that any citizen could have gotten the same material by going to the Department of Energy, federal libraries, and the like. Other nations already had this information or could easily get it. Experts testifying in behalf of the magazine argued that the article was a harmless exposition of some exotic nuclear technology.

The government disagreed. It said that while some of the material was in the public domain much of the data were not publicly available. Prosecutors and a battery of technical experts argued that the article contained a core of information that had never before been published. The United States also

argued that it was immaterial where Morland had got his information and whether it had come from classified or public documents. Prosecutors argued that the nation's national security interest permitted the classification and censorship of even information originating in the public domain if, when such information is drawn together, synthesized, and collated, it acquires the character "of presenting immediate, direct and irreparable harm to the interests of the United States." The United States was arguing, then, that some material is automatically classified as soon as it is created if it has the potential to cause harm to the nation. The information in Morland's article met this description, prosecutors argued.

It fell to United States District Judge Robert Warren to evaluate the conflicting claims and reach a decision on the government's request to enjoin the publication of the piece. In a thoughtful opinion in which Warren attempted to sort out the issues in the case, he agreed with the government that there were concepts in the article not found in the public realm—concepts vital to the operation of a thermonuclear bomb. Was the piece a do-it-yourself-guide for a hydrogen bomb? No, Warren said, it was not. "A number of affidavits make quite clear that a sine qua non to thermonuclear capability is a large, sophisticated industrial capability coupled with a coterie of imaginative, resourceful scientists and technicians." But the article could provide some nations with a ticket to bypass blind alleys and help a medium-sized nation to move faster in developing a hydrogen bomb.

To the *Progressive*'s argument that the publication of the article would provide people with the information needed to make an informed decision on nuclear issues, Warren wrote, "This Court can find no plausible reason why the public needs to know the technical details about hydrogen bomb construction to carry on an informed debate on this issue."

Looking to the legal issues in the case Warren said he saw three differences between this case and the *Pentagon Papers* ruling of 1971. The Pentagon Papers themselves were a historical study; the Morland article was of immediate concern. In the *Pentagon Papers* case there had been no cogent national security reasons advanced by the government when it sought to enjoin the publication of the study. The national security interest is considerably more apparent in the *Progressive* case, Warren noted. Finally, the government lacked substantial legal authority to stop the publication of the Pentagon Papers. The laws raised by the government were vague, not at all appropriate. But Section 2274 of the Atomic Energy Act of 1954 is quite specific in prohibiting anyone from communicating or disclosing any restricted data to any persons "with reasons to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation." Section 2014 of the same act defined restricted data to include information on the design, manufacture, or utilization of atomic weapons.

Warren concluded that the government had met the heavy burden of showing justification for prior restraint. The judge added that he was not convinced that suppression of the objected-to technical portions of the article would impede the *Progressive* in its crusade to stimulate public debate on the issue of nuclear armament. "What is involved here," Warren concluded, "is information dealing with the most destructive weapon in the history of mankind, information of sufficient destructive potential to nullify the right to free speech and to endanger the right to life itself."

When the injunction was issued, the editors of the *Progressive* and their supporters inside and outside the press vowed to appeal the ruling—to the Supreme Court if necessary. Yet there was a distinct uneasiness among even many persons who sided with the publication. Judge Warren had done a professional job of distinguishing this case from the *Pentagon Papers* ruling. There were important differences. The membership on the high Court had changed as well. Black and Douglas, who both voted against the government in 1971, had left the Court, as had Harlan who voted with the government. Some newspapers, the *Washington Post* and the *New York Times*, for example, expressed the fear that a damaging precedent could emerge from the Supreme Court if the *Progressive* case ultimately reached the high tribunal.

Then in September of 1979, as the *Progressive* case began its slow ascent up the appellate ladder, a small newspaper in Madison, Wisconsin, published a story containing much of the same information in the Morland article. When this occurred, the Department of Justice unhappily withdrew its suit against the *Progressive* (*U.S.* v. *Progressive*, 1979). The confrontation between the press and the government in the Supreme Court was averted. Many journalists expressed relief.

But the victory in the *Progressive* case was bittersweet at best. The publication of the article had been enjoined. A considerable body of legal opinion supported the notion that the injunction would have been sustained by the Supreme Court, rightly or wrongly. Prior restraint, which had seemed quite distant in the years succeeding *Near* v. *Minnesota* and in the afterglow of the press victory in the *Pentagon Papers* case, took on realistic and frightening new proportions.

"Fighting-Words" Doctrine

While national security issues are frequently the source of prior restraint problems, other issues can provoke authorities to the application of restraint. In 1942, in the case of *Chaplinsky* v. *New Hampshire*, the Supreme Court identified one category of speech in which the application of prior censorship is not necessarily a violation of the First Amendment. Justice Frank Murphy wrote:

> There are certain well-defined and narrowly limited classes of speech, the *prevention* [emphasis added] and punishment of which have never been thought to raise any constitutional problems. These include . . . fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the

> peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

In the *Chaplinsky* case a Jehovah's Witness, who sought to distribute pamphlets denouncing religion as a fraud in Rochester, New Hampshire, angered citizens. When warned by a law officer of the danger to his safety, the Witness called the marshal a "God-damned racketeer" and a "damned Facist." He was convicted of violating a state statute which forbid any person to "address any offensive, derisive, or annoying words, to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name."

The prohibition of this kind of verbal assault is permissible so long as the statutes are carefully drawn and do not permit the application of the law to protected speech. Also, the "fighting words" must be used in a personal, face-to-face encounter—a true verbal assault. In 1972 the Supreme Court ruled that laws on the subject must be limited to words "that have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed" (*Gooding* v. *Wilson*, 1972).

The 1977 confrontation in Skokie, Illinois, between Nazi protesters and city officials presents a contemporary example of a multitude of free-speech problems including the so-called fighting-words doctrine. In 1976 members of the National Socialist party said they planned to peacefully demonstrate in Skokie, a community with a large Jewish population, to protest the racial integration of nearby Chicago schools. The protest was prohibited by village officials who said the Nazis had failed to obtain $350,000 worth of liability and property damage insurance as required by a Skokie Park District ordinance.

After the Nazis announced that they planned to protest against the insurance ordinance, the village obtained a temporary restraining order blocking the demonstration and then adopted three new ordinances regarding public marches and protests. In addition to the insurance requirements, the village ruled that a member of a political party cannot march in a military-style uniform and ruled that it is not permissible to disseminate material intended to incite racial hatred. State and federal courts in Illinois invalidated all the ordinances, ruling that they were discriminatory or abridged constitutionally protected rights of free speech (*Collin* v. *Smith*, 1978; *Village of Skokie* v. *Nationalist Socialist Party*, 1978).

The Illinois Supreme Court, in refusing to enjoin the display of the swastika and other Nazi symbols, rejected the contention that such display constituted "fighting words" sufficient "to overcome the heavy presumption against the constitutional validity of a prior restraint" (*Village of Skokie* v. *National Socialist Party*, 1978). "Peaceful demonstrations cannot be totally

precluded solely because that display [of the swastika] may provoke a violent reaction by those who view it. . . . A speaker who gives prior notice of his message has not compelled a confrontation with those who voluntarily listen."

In the *Handbook of Free Speech and Free Press*, authors Jerome Barron and C. Thomas Dienes suggest two key questions in determining whether so-called fighting words might be suppressed. First, is there imminent danger of disorder? Second, does the speaker use provocative language which constitutes fighting words or which incites his audience to a clear and present danger of disorder? Both questions must be answered in the affirmative before the speech can reasonably be restrained.

Free Speech in Schools

The prior restraint of speech and press in schools is also permissible in circumstances that run parallel to the fighting-words doctrine, but fall far short of its ultimate protection of free expression. The unequivocal regulation of expression in the schools—high schools, colleges, universities—was the rule in this country until the 1960s.

In 1967 a federal district court in Alabama ruled that suspension from school of the editor of the Troy State College campus newspaper for publishing an editorial critical of state legislators was a violation of the student's First Amendment rights. The court ruled that the First Amendment provides protection for the expression of students and school children. School officials cannot infringe upon such rights unless the student publications or speeches "materially and substantially interfere with requirements of appropriate discipline in the operation of the school" (*Dickey* v. *Alabama*, 1967). In a subsequent case, *Tinker* v. *Des Moines School District* (1969), in which the expression at issue was the wearing of an armband as a symbolic protest, the United States Supreme Court accepted the rule as established in the *Dickey* case.

Yet recent cases have made it clear that prior restraint of student expression is clearly acceptable, provided there is sufficient reason to believe that disruption or other harm might result. In 1977 a federal appeals court in New York ruled that school officials can stop students from surveying their classmates' attitudes on certain sexual matters if the school officials showed they have a reasonable basis for believing the survey would cause significant psychological harm to some students. The court said both the distribution of the voluntary survey and the subsequent publication of an article in the high school newspaper on findings elicited by the survey could be stopped so long as school officials showed that *some* psychological experts predicted that *some* students would experience *some* level of stress from confronting *some* of the questions which were asked in the questionnaire. The court added that school officials might be legitimately concerned that the proposed interpretive article would draw misleading conclusions about the sexual behavior of the students at the school (*Trachtman* v. *Anker*, 1977).

The following year a federal district court in New York upheld the restraint by the principal of an entire edition of the Sewanhaka High School newspaper on the grounds that he (the principal) believed that two letters published in the paper might substantially disrupt school activities and might harm the personal reputation of a student. The principal said he feared that one letter, which was vulgar but clearly not obscene, might provoke a violent confrontation between members of the paper's staff and the lacrosse team. The second letter, which criticized the conduct of a student government leader, could have been libelous or a violation of the student's right to privacy, the principal said.

Later examination and investigation proved that the principal's fears were probably groundless, but the court ruled that the judiciary cannot be in the business of second guessing school authorities after the fact. The question to be asked was: Did school authorities demonstrate a substantial basis for their conclusion that harm might result? The principal apparently consulted with members of his staff as well as with students at the time he seized the copies of the newspaper and concluded that distribution of the edition could cause a substantial risk of disruption and harm. "It is not terribly important what can be proved about the truth or falsity of material after the fact," the court said. The crucial question is whether the principal made a reasonable determination based on the information he had at the time (*Frasca* v. *Andrews*, 1978).

School officials, then, are granted significantly more leeway in applying prior restraints than are civil authorities outside the educational setting. Some authorities believe that the decisions in both the *Trachtman* and *Frasca* cases substantially undercut what was seen as a broad protection for student expression following *Dickey* and *Tinker*. As courts consider more specific instances of school censorship, the broadly drawn rules of *Dickey* and *Tinker* will probably be tightened.

Time, Place, and Manner Restrictions

Justification of the previously-noted instances of prior restraint—both inside and outside the schools—was based on the content of the article or the speech. That is, what was written or said provoked the prior censorship. Prior censorship can also be justified, however, on the basis of **where or when** a particular expression is scheduled to occur. In these instances the content of the publication or speech is not considered material in determining whether the prior restraint is justified or whether it is prohibited by the First Amendment. Such rules are called "time, place, and manner restrictions" and focus on when, where, or how the expression is to be made public. Sometimes these rules involve the need for licenses prior to the public distribution of printed matter; sometimes restrictions on door-to-door solicitation are concerned. In all cases, however, courts insist that such rules be applied without regard to

the content of the publication or message. For example, when the city of Brentwood, Tennessee, adopted a rule which said that commercial handbills could not be delivered in any public place, but that newspapers, political, and religious material could be delivered in this manner, the Tennessee Supreme Court invalidated the ordinance because it was not content neutral (*H & L Messengers* v. *Brentwood*, 1979). Similarly, a federal district court in New Mexico ruled that an Alamogordo city ordinance which exempted religious and charitable organizations from a general ban on door-to-door solicitation was invalid because it allowed the city manager discretion in determining what is and what is not a religious cause. This is a content consideration (*Weissman* v. *Alamogordo*, 1979).

Consideration of such time, place, and manner rules by the Supreme Court dates to the 1930s.

Public Forums

The preeminent judicial ruling on the question of the validity of licensing laws is the case of *Lovell* v. *Griffin* decided by the nation's high Court in 1938. The city of Griffin, Georgia, had an ordinance which prohibited distribution of circulars, handbooks, advertising, and literature of any kind without first obtaining written permission from the city manager. Under the law, the city manager had considerable discretion as to whether he gave permission. Alma Lovell was a member of the Jehovah's Witnesses religious sect, an intense and ruggedly evangelical order which suffered severe persecutions in the first half of this century. But the Witnesses doggedly continued to spread the Word, passing out millions of leaflets and pamphlets and attempting to proselytize anyone who would listen. Laws like the distribution ordinance were common in many communities in the United States and were directed at stopping the distribution of material by groups such as the Witnesses.

Alma Lovell didn't even attempt to get a license before she circulated pamphlets, and she was arrested, convicted, and fined fifty dollars for violating the city ordinance. When she refused to pay the fine, she was sentenced to fifty days in jail. At the trial the Jehovah's Witnesses freely admitted the illegal distribution, but argued that the statute was invalid on its face because it violated the First Amendment guarantees of freedom of the press and freedom of religion.

On appeal the Supreme Court agreed that the law did indeed violate freedom of the press. Chief Justice Charles Evans Hughes wrote, "We think that the ordinance is invalid on its face" because it strikes at the very foundation of freedom of the press by subjecting it to license and censorship. The city argued that the First Amendment applies only to newspapers and regularly published materials like magazines. The high Court disagreed, ruling that the amendment applies to pamphlets and leaflets as well: "These indeed have been historic weapons in the defense of liberty, as the pamphlets of

Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."

Lawyers for Griffin also argued that the First Amendment was not applicable because the licensing law said nothing about publishing, but only concerned distribution. Again the high Court disagreed, noting that liberty of circulation is as essential to freedom of expression as liberty of publication. Chief Justice Hughes wrote, "Without the circulation, the publication would be of little value."

Nineteen months after the *Lovell* decision the Supreme Court decided a second distribution case, a case which involved licensing laws in four different cities. The four cases were decided as one (*Schneider* v. *New Jersey*, 1939). A Los Angeles ordinance prohibited the distribution of handbills on public streets on the grounds that distribution contributed to the litter problem. Ordinances in Milwaukee, Wisconsin, and Worcester, Massachusetts, were justified on the same basis—keeping the city streets clean.

An Irvington, New Jersey, law was far broader, prohibiting street distribution or house-to-house calls unless permission was first obtained from the local police chief. The police department asked distributors for considerable personal information and could reject applicants the law officers deemed not of good character. This action was ostensibly to protect the public against criminals.

Justice Owen Roberts delivered the opinion of the Court which struck down each of the four laws. Justice Roberts said that a city can enact regulations in the interest of public safety, health, and welfare, but not regulations which interfere with the liberty of the press or freedom of expression. He then gave some examples of what he meant, examples which have proved most helpful in framing such ordinances. Cities, he said, have the responsibility to keep the public streets open and available for the movement of people and property, and laws to regulate the conduct of those who would interfere with this legitimate public problem are constitutional (*Schneider* v. *New Jersey*, 1939):

> For example, a person could not exercise this liberty [of free expression] by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature in the streets.

These kinds of activities, Roberts said, bear no relationship to the freedom to speak, write, print, or distribute information or opinion. The justice closed by saying that the high Court characterized freedom of speech and freedom of the press as fundamental personal rights and liberties: "The phrase is not

an empty one and was not lightly used. . . . It stresses, as do many opinions of this Court, the importance of preventing the restriction of enjoyment of these liberties."

A somewhat different dimension of this same problem arose in a Connecticut case in which, again, members of Jehovah's Witnesses faced criminal prosecution under an ordinance which limited the solicitation of funds (*Cantwell* v. *Connecticut*, 1940). Jesse Cantwell and his two sons attempted to carry their religious message along the streets of a heavily Catholic neighborhood in New Haven, Connecticut. They were arrested for violating a state law which prohibited the solicitation of money by a religious group without first gaining approval from the local public official whose job it was to decide whether the religious cause in question was a "bona fide object of charity" and whether it conformed to "reasonable standards of efficiency and integrity." The Supreme Court tossed out the law as a violation of the First Amendment. For the unanimous Court, Justice Roberts wrote that the state could, in order to protect its citizens from fraudulent solicitations, require strangers in the community to establish identity and authority to act for the cause he purports to represent before permitting any solicitation in the community. And the state could pass rules setting reasonable regulatory limits on the time of day solicitations could be made (no solicitations before 9 A.M. or after 10 P.M., for example):

> But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.

Each of these three cases concerned restrictions of expression in the so-called public forum—public streets and parks. Other recent cases have focused on this same problem. Airports, for example, have become a popular place for solicitors for various religious and political causes. Milwaukee County was one of many governing bodies which tried to restrict such solicitation on the grounds that the passageways and corridors at General Billy Mitchell Field were too narrow and crowded to allow such activity. The United States District Court for Eastern Wisconsin ruled that the county airport is a public forum and that county rules which require prior permission before any solicitation can take place violate the First Amendment: "Crowded conditions may require restrictions to ensure the efficient operation of the airport," the court ruled. But such conditions did not justify sweeping rules which totally excluded solicitation by many persons and groups (*International Society for Krishna Consciousness* v. *Wolke*, 1978). Other courts have made similar rulings with regard to airport regulations.

Restrictions regarding the placement of news racks on city streets have also been scrutinized by the courts in recent years. So long as these rules do not discriminate unfairly against one particular publication or one kind of publication, rules which limit the number of racks on any one corner are generally considered permissible time, place, and manner restrictions. Glendale, California, for example, adopted an ordinance which said that no more than eight news racks could be on a public sidewalk in a space of 200 feet in any direction within the same block of the same street. In setting priorities to determine which publications could use the limited number of news racks, the city gave preference to "newspapers of general circulation for Los Angeles County." The county code defined a newspaper of general circulation as one with a subscription list of paying customers that has been published at least weekly within the district for at least three years. Also, according to the code, a newspaper of general circulation must have substantial distribution and contain at least 25 percent news in each edition. Papers not meeting this description were given a lower priority under the city ordinance. Because its paper did not contain at least 25 percent news, the Socialist Labor party challenged the ordinance as a violation of the First Amendment. The California Court of Appeals rejected the challenge. The court said:

> When the law, ordinance, or other rule is aimed directly at pure speech or content, it is examined for constitutionality by strait and narrow measures and almost no interference is allowed. On the other hand, when only the mechanical means or particular time or place of dissemination is involved, some reasonable limitation is recognized.

The court said sidewalk space is limited; the city has an obligation to allocate it. The ordinance was not intentionally aimed at the Socialist Labor party paper, but at any publication which did not contain 25 percent news. The preference for newspapers of general circulation is "simply a means of balancing the problem of public demand and its supply" (*Socialist Labor Party* v. *Glendale*, 1978).

Finally, the Washington State Supreme Court recently upheld a state law which banned billboards along highways for safety and aesthetic reasons. The court ruled that the measure did not violate the First Amendment since the interest in public safety outweighed the minimal restraints on expression. The law did not control content, but was aimed at all billboards—and as such was an acceptable place and manner restriction on speech (*Washington* v. *Lotze*, 1979).

Private Forums

The cases just discussed concern public forums. Courts have generally tolerated more restrictions upon expression exercised in private forums, shopping centers and private residences, for example. Residential distribution and solicitation have consistently been a vexing problem, as the rights of freedom of expression are measured against the rights of privacy and private property.

In 1943 the Supreme Court faced an unusual ordinance adopted by the city of Struthers, Ohio, which totally prohibited door-to-door distribution of handbills, circulars, and other advertising materials.

The law also barred anyone from ringing doorbells to summon householders for the purpose of distributing literature or pamphlets. Justice Hugo Black wrote the opinion for the majority in the divided Court. He said the arrest of Thelma Martin, another Jehovah's Witness, for ringing doorbells in behalf of her religious cause was a violation of her First Amendment rights. Door-to-door distributors can be a nuisance and can even be a front for criminal activities, Justice Black acknowledged. Further, door-to-door distribution can surely be regulated, but it cannot be altogether banned. It is a valuable and useful means of the dissemination of ideas and is especially important to those groups which are too poorly financed to use other expensive means of communicating with the people. Black said a law which makes it an offense for a person to ring the doorbell of householders who have appropriately indicated that they are unwilling to be disturbed would be lawful and constitutional. However, the city of Struthers cannot by ordinance make this decision on behalf of all its citizens—especially when such a rule clearly interferes with the freedom of speech and of the press. "The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance" (***Martin*** v. ***Struthers***, 1943).

Nearly ten years later, in 1951, the high Court was confronted with still another case of door-to-door solicitation. This case, however, concerned solicitation of subscriptions for nationally circulated magazines (***Breard*** v. ***Alexandria***, 1951). The Alexandria, Louisiana, ordinance in question prohibited door-to-door solicitation for sale of goods, wares, or merchandise without the prior consent or invitation of the homeowner. Jack H. Breard, who was employed by a Pennsylvania magazine subscription company, appealed his conviction all the way to the Supreme Court on the grounds that the law violated his First Amendment rights. This time the divided Court ruled against the solicitor, stating that the restriction was not a violation of the First Amendment.

Justice Stanley Reed distinguished the early cases from the ***Breard*** case by arguing that ***Breard*** was a case of door-to-door sale of wares, not of propagation of ideas or religious faith. "This kind of distribution is said to be protected because the mere fact that money is made out of the distribution does not bar the publications from First Amendment protection. We agree that the fact that periodicals are sold does not put them beyond the protection of the First Amendment. The selling, however, brings into the transaction a commercial feature," Reed wrote. He added that there are many other ways

to sell magazines besides intruding upon the privacy of a householder through door-to-door techniques. Justices Black, Douglas, and Vinson disagreed with Justice Reed, arguing that the high Court turned its back on earlier free expression decisions. "The constitutional sanctuary for the press must necessarily include liberty to publish and circulate. In view of our economic system, it must also include freedom to solicit paying subscribers," Black wrote. The jurist added that homeowners could themselves place the solicitor on notice by using a sign that they do not wish to be disturbed.

The majority opinion in the *Breard* case which distinguishes commercial solicitation and distribution from noncommercial solicitation and distribution has been seriously undercut recently by the Supreme Court's rulings that commercial speech is also entitled to the protection of the First Amendment (these rulings are discussed in chapter 10). Still, a properly drafted ordinance can withstand judicial scrutiny. A federal district court in Pennsylvania recently upheld a township ordinance which prohibited the distribution of advertising material at residences without the consent of the owners. The restriction was adopted to stop the accumulation of advertising material at the doorstep or in the mailbox of persons who were on vacation or away from home for several days. The accumulation of such material can signal thieves as to whether someone is home. The court said where there are adequate and reasonable alternatives for advertisers to reach homeowners, limiting door-to-door distribution is permissible when it protects a significant community interest (*Pennsylvania* v. *Sterlace*, 1978).

The problem of dealing with distribution of materials at privately owned shopping centers has also been a troubling one. In 1968, in *Amalgamated Food Employees Local 590* v. *Logan Valley Plaza*, the Supreme Court ruled that the shopping center was the functional equivalent of a town's business district and permitted informational picketing by persons who had a grievance against one of the stores in the shopping center. Four years later in *Lloyd Corp.* v. *Tanner* (1972), the high Court ruled that a shopping center can prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center operation. Protesters against nuclear power, for example, cannot use the shopping center as a forum. Persons protesting against the policies of one of the stores in the center, however, can use the center to distribute materials.

In 1976 the Supreme Court recognized the distinctions it had drawn between the rules in the *Logan Valley* case and the rules in the *Lloyd Center* case for what they were—restrictions based on content. The distribution of messages of one kind was permitted, while the distribution of messages about something else was banned. In *Hudgens* v. *NLRB* (1976), the high Court ruled that if in fact the shopping center is the functional equivalent of a municipal street, then restrictions based on content cannot stand. But rather

than to open the shopping center to the distribution of all kinds of material, *Logan Valley* was overruled, and the high Court announced that "only when . . . property has taken all the attributes of a town" can property be treated as public. Distribution of materials at private shopping centers can be prohibited.

But just because the First Amendment does not include within its protection of freedom of expression the right to circulate material at a privately owned shopping center does not mean that such distribution might not be protected by legislation, or by state constitution. The California Constitution explicitly authorizes individuals to exercise their free speech rights on privately owned shopping center property. In 1980 the United States Supreme Court ruled that such a provision was valid and did not violate the property rights of the owners of the shopping center (*Pruneyard Shopping Center* v. *Robins*, 1980).

It is only with great difficulty that generalizations regarding time, place, and manner restrictions can be drawn. Each specific ordinance needs to be examined closely. The guidelines the courts have provided suggest that such rules must be drawn reasonably in an effort to protect a community interest such as safety or crime prevention. Such rules must be content neutral—that is, their application cannot be based on the content of the materials or messages. And they must be applied in an evenhanded manner to all persons seeking to use a particular forum. Such rules must be narrow and must restrict only to the extent needed to protect the community interest. Distribution cannot be totally banned, for example, simply to reduce the congestion in an airport corridor. Finally, communities can probably draw somewhat tighter rules regarding commercial solicitation than regarding noncommercial solicitation, but only if these rules serve a significant governmental interest and if ample alternative channels of communication for the advertiser are available. The rules on commercial speech are evolving slowly.

As noted previously, other examples of prior restraint can be found within the law. Films may be censored before they are shown, for example (see chapter 9). Under certain circumstances the press may be prohibited from publishing material which might prejudice a defendant's chance for a fair trial (see chapter 8). Such examples will be noted as other aspects of mass media law are discussed.

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3 Gathering News and Information

One of the truly revolutionary changes in American journalism in the past two hundred years has been the fundamental shift in emphasis in the American press from journals of opinion, commentary, and some small bits of "intelligence" to the predominance of publications which offer readers a steady diet of news and information. The "news" paper as we know it simply did not exist in the era of the founding of the Republic. And the significant legal battles which faced the eighteenth-century editor developed over the right to criticize, ridicule, and even libel the government and government officials. Sedition law was the primary legal problem faced by leading journalists who used their newspapers and pamphlets to form and lead political opinion.

To the editor of the 1980s the law of sedition is about as relevant as a hand-operated printing press. News and information are today the lifeblood of most newspapers, many magazines, and significant sections of the radio and television industry. Gathering and publishing news about government and government officials has become the central task of many journalists. As the emphasis on the information-gathering functions of journalism increased, the legal problems associated with information gathering increased as well. Today, many editors list limitations upon news gathering as the primary governmental restraint upon the press.

Most journalists consider the press in the United States as the eyes and ears of the people with regard to their government, a function often referred to as "a watchdog role." It is the responsibility of the press to inform the people about their government—whether it is operating efficiently, whether it is living up to its constitutional requirements, whether it is treating its citizens fairly, whether its officials are acting responsibly and honestly. This interest in reporting on the activities of government has grown markedly since

the 1930s, most particularly since the social and political upheavals of the late sixties and early seventies. Paradoxically, as the journalist's appetite for reporting news of government has grown, so too has grown the societal interest in government secrecy and the right to privacy. The modern reporter who seeks to scrutinize the operation of government at any level is frequently faced with legal impediments which stem from the countervailing interests in secrecy and privacy.

Government secrecy is not a new idea, but it has blossomed with new vigor since World War II. Secrecy results from many conditions. The cold war of the fifties provoked government to actions inconsistent with an open, democratic society. In the name of national security thousands and thousands of documents are classified as confidential or secret. In 1977 *Science* magazine reported that nearly 14,000 persons in the federal government had the power to classify material. More than 4 million documents were classified each year, and the Departments of Defense, State, and Energy and the Central Intelligence Agency were the most prolific classifiers. Scientific data which relate in obscure ways to sophisticated weapon systems, military plans and procedures, maps, photographs, documents and papers relating to foreign policy and strategic materials—all are sifted, stamped, and filed away beyond the view of the press or the public.

The tremendous growth of bureaucracy at all levels of government has also resulted in cutting off public access to many governmental processes and operations. In his classic analysis of bureaucracy as a form of social organization, Max Weber argued that preoccupation with secrecy is an inherent characteristic of administrative organizations. Weber asserted that this preoccupation is based partially on the functional need to keep certain phases of administrative operation a secret to maintain a competitive edge over rival administrative units. Weber also noted that it is not uncommon that this secrecy is transformed into an obsession, that is, an action began simply as a means to achieve organizational objectives often becomes an end in itself.

The ineptness, dishonesty, and stupidity of some government officials are also conditions which provoke secrecy in government. An inefficient, unethical, or dishonest government official can find the cloak of secrecy a convenient means of covering up misfeasance or malfeasance in office.

The emergence of the right to privacy as an obstacle to gathering news and information about government is an even more recent phenomenon. Citizens of the United States have used the law of privacy as a means of redressing excesses by the press and others for nearly eight decades (this dimension of privacy is fully explored in chapter 5). As our government at all levels has become more entwined in our personal lives through massive programs of public assistance, education, financial aid, and health care, the amount of information the government possesses about individual citizens has dramatically increased. Similarly, as the scope of government regulation of business,

industry, financial institutions, transportation, and other activities has enlarged, government knowledge about confidential business practices, manufacturing processes, and related matters has grown as well. And as this storehouse of information about both people and institutions has grown, government has more often raised the right of privacy of these citizens or institutions as a barrier to the scrutiny of its own operations.

The purpose of this chapter is to explore the problems of gathering news and information in a society which manifests a growing interest in secrecy and privacy, but which at the same time gives at least lip service to a growing interest in watching government more closely than ever before. Several individual aspects of these problems will be explored.

Initially, the history of both common law and constitutional law regarding news-gathering functions is outlined briefly. Because these information-gathering problems are relatively new, neither the common law nor the United States Constitution—both with roots in earlier eras—offers the journalist much solace.

Four different aspects of the relationship between the law and the process of news gathering will be examined:

1. The protection of the identity of a reporter's sources of information
2. The rights and responsibilities of a journalist who has committed an illegal or tortious act while gathering news
3. Affirmative news gathering rights under the Constitution and federal and state statutes
4. Statutes which directly inhibit the information gathering process

The area of press law discussed is perhaps the most active area of press law today. And the confrontations between the press and the government—especially the courts—on these questions have often been turbulent.

COMMON LAW AND CONSTITUTIONAL RIGHTS TO GATHER NEWS

Persons unacquainted with the legal problems involved in news gathering are usually startled to discover that there is no clear common law right to gather news or information. Despite the tradition of open government both in this country and in Great Britain, the common law provides only bare access to government documents and to meetings of public agencies. In Great Britain, where the common law developed, complete and total access to Parliament, for example, was not guaranteed until 1874, and even then the House of Commons could exclude the public by a majority vote. Initially the public was excluded because members of Parliament feared reprisal from the crown for statements made during floor debate. Later this fear subsided, but secret meetings continued in order to prevent voters from finding out that many members of the legislative body were not faithful in keeping promises to constituents.

Secrecy in England had a direct impact upon how colonial legislatures conducted their business. The Constitutional Convention of 1787 in Philadelphia was conducted in secret. The public and the press had almost immediate access to sessions in the United States House of Representatives, but it was not until 1794 that spectators and reporters were allowed into the Senate chamber. While today access is guaranteed to nearly all sessions of Congress, much (maybe even most) congressional business is conducted by committees which frequently meet in secret. It can only be concluded that as an aid in the process of news gathering the common law must be found wanting.

As will become clear as specific case problems are discussed, the First Amendment plays a rather insignificant role in defining the rights of a journalist in the news-gathering process. The Amendment was drafted in an age when news gathering was not a primary function of the press. Neither the records of the drafting and passage of the guarantees of freedom of speech and press by the Congress, the adoption of its antecedents such as the free-speech provisions in the Virginia Declaration of Rights, nor the letters and publications of the so-called Founding Fathers such as Madison, Adams, and Jefferson, support the notion that the protection of the news-gathering process was meant to be included within the scope of freedom of the press. On August 15, 1789, during the House debate on the adoption of the First Amendment, James Madison, its principal author in the Congress, stated that if freedom of expression means nothing more than that "the people have a right to express and communicate their sentiments and wishes, we have provided for it already" in what was to become the First Amendment. "The right of freedom of speech is secured; the liberty of free press is expressly declared to be beyond the reach of this government; the people may therefore publicly address their representatives, may privately address them, or declare sentiments by petition to the whole body," Madison added. While not terribly illuminating, one is hard pressed to find within this description of the First Amendment guarantee of freedom of expression expansive notions about the right to gather news and information. The First Amendment was seen as a means by which the public could confront its government, not necessarily report on its activities.

A peripheral dimension of the relationship between the First Amendment and information gathering was raised by Justice Potter Stewart in 1974 when he asserted in a speech at Yale University that the free-press clause of the First Amendment was intended as a protection of the "publishing business"; the press as an "institution outside of Government" designed to act as a check upon the three official branches of government. The general right of freedom of expression which all members of the society share was guaranteed under the free-speech clause of the First Amendment according to Stewart.

It is tempting for the press to applaud the remarks of Justice Stewart. If Stewart is right and the free-press clause was designed to give the press, as an institution, special protection in its function as a watchdog, then freedom of the press must include the right of the press to scrutinize very closely the government it is supposed to watch. Such scrutiny would surely include the right to an almost unimpeded access to information about the government.

But Stewart offers no proof to support his contention that those who drafted the Bill of Rights intended to distinguish between the rights guaranteed under the freedom-of-speech clause and the rights protected under the free-press provision. There simply is no historical evidence to support this notion. A close study of the records of the period suggests if anything that the words *speech* and *press* were used almost interchangeably and were intended only to distinguish between those who sought to disseminate their ideas by print and those who sought to disseminate their ideas orally. Indeed, one is hard pressed to describe the printed press of the 1780s as a "publishing business" or an "organized private business," terms used by Justice Stewart in his argument.

The argument made by Justice Stewart highlights one of the key difficulties in the recognition of constitutional news-gathering rights. Most persons presume, Justice Stewart notwithstanding, that the constitutional rights of freedom of expression are equally applicable to all persons. To recognize a constitutional right to gather information, then, would be to recognize the rights of all citizens to gather information. Frequently, practical considerations make this impossible. Not everyone can see all the records held by a particular government agency without creating havoc, it is argued. But to recognize less than a general societal right is not only to elevate the press to a special position with regard to freedom of expression, but also to force someone to make the very difficult determination of who is and who is not a part of the press for purposes of applying this special protection. This problem becomes evident as the discussion of the case law develops. It will also be seen that the nation's courts—especially the Supreme Court—have taken no more than hesitant first steps in providing a special protection for journalists. In no area is this more clearly noted than in those instances in which reporters have sought legal remedies to protect the identity of their sources. This is the first major area to be explored in the discussion of news gathering and the law.

PROTECTION OF NEWS SOURCES

If news and information are the lifeblood of the press, then news sources are one of the wells from which that lifeblood springs. Many journalists, especially those who consider themselves investigative journalists, are often no better than the sources they can cultivate. News sources come in all shapes and sizes. Frequently their willingness to cooperate with a reporter is dependent upon assurances from the journalist that their identity will not be revealed. Why would a news source wish to remain anonymous? There are undoubtedly many

reasons. Often the source of a story about criminal activities has participated in criminal activities himself. He has no desire to publicize this fact. Frequently the source of a story about government mismanagement or dishonesty is an employee of that government agency, and revelation of her identity could result in the loss of her job for informing against her superiors. Some persons simply don't want to get involved in all the hassle that frequently results when an explosive story is published; by remaining anonymous they can remain out of the limelight.

Journalists have probably always used confidential sources, but it is only relatively recently that they have been frequently called upon to reveal the identity of their anonymous sources. In seemingly more and more instances today the journalist who has published or broadcast a story based upon information gained from an anonymous source is confronted with more or less official inquiries from the government regarding the identity of that source. If the journalist is subpoenaed to testify before a grand jury or at a trial, the options open to the reporter are remarkably limited. He can tell the authorities what they wish to know, he can attempt to attack the validity of the subpoena and seek to have it quashed, or he can refuse to testify—and very likely go to jail.

Why have such problems begun to plague journalists more in recent years?

Two or three factors are probably responsible. First is the changing social climate in the United States. The agitation and violence first of the civil rights movement, then of the antiwar movement, and finally of the various radical movements have led to an increase in grand jury probes and secret investigations. The drug culture which blossomed during the sixties placed new pressures on the police and other law enforcement agencies. They were pushed to control the consumption of substances which many people believe to be harmless.

Second is the key role the press plays in these controversies. The press can often gain access to information that law enforcement officials cannot. Reporters frequently are in direct contact with persons the law defines as fugitives or criminals. To the government, reporters frequently appear to be prime sources of potentially useful information in solving crimes, capturing felons, and stemming violence.

To some extent the press itself changed. Some newspapers—small underground papers—actually took a role in promoting drug use and radicalism. Other newspapers publicized such activities widely. Many reporters seemed less content to report only what the authorities told them; they felt compelled to talk to the persons who made the news—radicals, demonstrators, rioters, bomb throwers, and drug sellers and users. The press gained the confidence of these societal outs and became a valuable channel of information for the public. Again, legal authorities saw reporters as being able to get information that they were denied.

Therefore the press, which had long enjoyed its imagined role as spectator of the legal process, suddenly became a participant with increasing regularity. Reporters throughout the United States were told to reveal what they knew about the activities of radicals or potheads or bombers, and the choice was most often to talk or to go to jail.

The interests involved in this problem are very basic to our system of government. No easy solutions are at hand. After his Senate committee had studied the issues involved in the controversy surrounding the reporter's claim of privilege for more than two months, former Senator Sam Ervin said that never had he dealt with a more difficult problem during his years in Congress.

It is every citizen's duty to testify before the proper authorities. This concept was so well established by the early eighteenth century that it had become a maxim. Wigmore, in his classic treatise on evidence (*A Treatise on the Anglo-American System of Evidence*), cites the concept thus: "The public has a right to everyman's evidence." The right to have witnesses and to compel them to testify is one of our cherished constitutional guarantees. The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him; and have compulsory process for obtaining witnesses in his favor." This is an important guarantee.

Suppose you were arrested for a crime you did not commit and that you had a witness who could prove you were fifty miles away at the time the crime was committed. How would you feel if your witness decided that he really didn't have time to go to court and testify? that he was too busy? that he didn't want to get involved? Your right to compel his testimony could be crucial to your freedom.

The Supreme Court has said on many occasions that it is a citizen's duty to testify. In 1919 the Court wrote as follows on the duties and rights of witnesses (*Blair* v. *U.S.*):

> [I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which everyone within the jurisdiction of the government is bound to perform upon being properly summoned, . . . the personal sacrifice involved is a part of the necessary contribution to the public welfare.

Most journalists do not dispute the immense societal value of the power to compel testimony, but they do argue that in most cases involving a reporter's sources society will benefit more if the reporter is not compelled to testify. Briefly the argument is this. The press is the eyes and ears of the people. Nothing should interfere with this role. The people must be informed; they must have access to the fullest information possible in order to operate properly as citizens in a democracy. Sometimes the only way a reporter can gain crucial information is to get it from an anonymous source. When a reporter is forced to reveal the name of a source, other potential sources will refuse to cooperate

with journalists for fear that their identity will be made public as well. In the end it is society which will lose, as it is deprived of the information which these sources might provide. At least this is the argument made by journalists.

Many reporters insist that news sources have dried up and will continue to dry up so long as there exists the potential that their identity might somehow be revealed. They cite studies by organizations such as the Reporters Committee of Freedom of the Press to support their argument. Other persons inside and outside the press dispute such evidence and note that only a small number of journalists use confidential sources regularly and that an even smaller number are ever called upon to reveal the identity of these sources. While recognizing the existence of a problem, these persons consider it a fairly small problem (Chamberlin, Protection of Confidential News Sources: An Unresolved Issue).

But whether the problem is small or large, journalists are sometimes asked to reveal the names of sources. In their attempts to defend themselves in these situations reporters have sought protection of the law. The common law in many states provides doctors, lawyers, clergymen, and even accountants with the privilege to refuse to testify about confidential matters between them and their patients or clients or parishioners. But there is no recognition of such a common law privilege for journalists. The reporter who seeks to use the law as a protection in these matters must instead look to the federal constitution or to state statutes.

Constitutional Rights

The argument that the United States Constitution protects a reporter from government action for refusing to reveal the names of confidential sources is not a complicated one. The First Amendment guarantees freedom of the press in order that the press may publish information for society. Publication is dependent upon the ability of the press to gain information. When a reporter is forced to reveal the identity of a source, the revelation has a detrimental impact upon the news-gathering process. Sources will dry up and refuse to cooperate. This impediment to news gathering will affect what material can be published, so the right to publish has been diminished by this government action, a violation of the freedom of the press guaranteed by the First Amendment.

Analysis of this constitutional argument quickly leads to the 1972 ruling by the Supreme Court in *Branzburg* v. *Hayes*, which is the first and only really significant ruling by the high Court on this question. Moreover, it is the manner in which lower courts have interpreted the *Branzburg* ruling that today determines the extent of any First Amendment protection. But first the *Branzburg* case itself.

Branzburg Ruling

The case was really three cases, *Branzburg* v. *Hayes*, in re *Pappas*, and *U.S.* v. *Caldwell*. Today, the Court's decisions are referred to collectively as the *Branzburg* ruling.

Paul Branzburg was a staff reporter for the *Louisville Courier-Journal.* In 1969 and 1971 he wrote two stories about drug use in Jefferson County, Kentucky. In the first story he described in detail his observations of two young men synthesizing hashish. When he was called before a grand jury, he refused to identify the two individuals in his story, citing both the Kentucky reporters' privilege statute, which he claimed exempted him from having to give testimony, and the First Amendment. A Kentucky appellate court rejected his First Amendment argument and ruled that while the state's statute afforded a reporter the privilege of refusing to divulge the identity of a confidential source it did not give the reporter the right to refuse to testify about events he had witnessed personally. The second story was about drug use in Frankfort County, Kentucky, and the court rejected Branzburg's arguments a second time when he refused to testify before a Frankfort County grand jury. He appealed to the Supreme Court.

Paul Pappas was a reporter for a New Bedford, Massachusetts, television station. In July 1970 he was assigned to cover civil disturbances in an area near the headquarters of the local Black Panther organization. That afternoon he gained access to the Panther's headquarters and recorded and photographed a prepared statement read by one of the Black Panthers. He returned to Panther headquarters that evening and was allowed to spend three hours with members of the black militant organization as they waited for an anticipated police raid upon their headquarters—a raid which failed to materialize. As a condition of entry into Panther headquarters Pappas agreed not to disclose anything he saw or heard there. He was called to testify before a Bristol County grand jury, but he refused to answer questions about what took place inside the Panther headquarters, citing his privilege under the First Amendment. Massachusetts courts rejected his argument.

Earl Caldwell worked for the *New York Times* in 1970, an era in which there was significant public concern about the militancy of the Black Panthers. The press succeeded in fueling this fear by publishing masses of misinformation. Earl Caldwell, who was black, had gained the confidence of Black Panther leaders in Oakland, California, and consistently provided readers of the *Times* with accurate, illuminating accounts of the organization. It was probably natural, then, that when a federal grand jury began investigating the Panthers Earl Caldwell was subpoenaed and told to bring his notes and audiotapes. Caldwell refused, arguing that giving information to the government would destroy his ability to report on the Black Panthers, that none of the leaders would ever again take him into their confidence or even talk with him.

A federal district court partially supported Caldwell's plea. It said that he would not have to answer questions unless in each case the government could demonstrate that "a compelling and overriding national interest" would

be served by Caldwell's answer to a question and that no alternative means of getting the information was available. The court based its ruling on the strong First Amendment interests which it said were at the core of the issue.

Caldwell and the *New York Times* were not satisfied, for the ruling still required the reporter to answer some questions. Since the proceedings were secret, the Panthers would never know which questions Caldwell answered and which questions he did not answer. Caldwell appealed to the Ninth Circuit Court of New York and again won. This time the court ruled that when it is shown that the public's First Amendment right to be informed will be jeopardized by requiring a journalist to submit to a secret grand jury interrogation the government must respond by demonstrating a compelling need for even the witness's presence before attendance can be required. The court added that this case was very unusual, since most news sources aren't as sensitive as the Black Panther organization and most reporters don't enjoy such unique trust and confidence of news sources. Still, the ruling was a significant First Amendment victory for the press. Such a victory, in fact, that the government appealed the ruling to the Supreme Court.

The Court was badly split in its decision on the three cases. Four justices voted against the constitutional privilege, four voted in favor of the constitutional privilege, and Justice Lewis Powell voted in favor of the constitutional privilege in some circumstances, but not in these cases. Let us look first at the votes against the privilege.

Justice Byron White wrote the opinion of the court to which Chief Justice Warren Burger, Justice William Rehnquist, and Justice Harry Blackmun subscribed. White said that while the Court was sensitive to First Amendment considerations the case did not present any such considerations. There were no prior restraint, no limitations on what the press may publish, and no order for the press to publish information it did not wish to. No penalty for publishing certain content was imposed. White wrote (*Branzburg* v. *Hayes*, 1972):

> The use of confidential sources by the press is not forbidden or restricted. . . . The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and answer questions relevant to an investigation into the commission of crime. Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor other constitutional provisions protect the average citizen from the disclosing to a grand jury information that he has received in confidence.

Reporters are no better than average citizens, White concluded.

The four dissenters differed sharply with the other justices. Justice Potter Stewart wrote, "The Court's crabbed view of the First Amendment reflects a disturbing insensitivity to the crucial role of an independent press in our society."

Justice Douglas took the view that the First Amendment protection provides the press with an absolute and unqualified privilege. But Justice Stewart, Justice William Brennan, and Justice Thurgood Marshall offered a kind of qualified privilege. They said that before a reporter can be forced to testify the government should fulfill the following requirements:

1. Show that there is probable cause to believe that the reporter has information that is clearly relevant to a specific probable violation of the law
2. Demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights
3. Demonstrate a compelling and overriding interest in the information

When the government cannot fulfill all three requirements, Justice Stewart wrote for the dissenters, the journalist should not be forced to testify.

With four votes against a constitutional privilege for journalists called to testify before a grand jury and four votes in favor of at least a limited privilege in such a circumstance, the vote of Justice Lewis Powell—the ninth member of the court—became critical. Powell concurred with Justices White, Rehnquist, and Blackmun and Chief Justice Burger in concluding that in the cases presented to the court no First Amendment privilege existed. But Powell refused to accept the notion that the First Amendment might not provide the journalist with a privilege in other instances in which the reporter was asked to reveal the identity of a source. Powell said that no harrassment of news reporters could be allowed. A balance must be struck between freedom of the press and the obligation of all citizens to give relevant testimony. "The Court," Powell added, "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." In short, Justice Powell added, "The courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection." Justice Powell noted two years later in a footnote in another case (*Saxbe* v. *Washington Post*, 1974) that the Court's ruling in *Branzburg* had been an extremely narrow one and that news reporters were not without First Amendment rights to protect the identity of their sources.

The initial key to understanding the application of the *Branzburg* decision, then, is Powell's concurring opinion. A lower court judge, faced with a government request that a reporter reveal the names of news sources, can look to the associate justice's concurrence for guidance. If Justice Powell would agree that a legitimate First Amendment interest exists, then Powell, plus Marshall, Douglas, Brennan, and Stewart, made a five-man majority in favor of granting the privilege. If Justice Powell would not recognize the First Amendment privilege, then the majority in the *Branzburg* ruling—Powell, Burger, Rehnquist, Blackmun, and White—would carry the day. On this basis

lower court judges can make a decision with some assurance that they will not later be overruled by the high Court.

This is more or less what has happened, although probably not in the simplistic way just outlined. Lower courts have been reading the *Branzburg* ruling closely, and it is safe to say they have established a limited First Amendment privilege for journalists in some specific instances. In other kinds of cases the First Amendment protection has been rejected.

In deciding whether the privilege will apply in a specific case, lower courts appear to be focusing upon two considerations. First, the court considers the nature of the specific circumstance under which a journalist is asked to reveal the identity of the source. Is it a grand jury proceeding? a criminal case? a civil suit? Second, many courts are using the three-part test enunciated by Justice Stewart in his dissenting opinion in the *Branzburg* case. Justice Stewart said, it will be recalled, that the First Amendment privilege should apply unless the government can fulfill the following conditions:

1. That there is probable cause to believe that the reporter has information clearly relevant to a specific probable violation of the law
2. That the information sought cannot be obtained by alternative means less destructive of First Amendment rights
3. That a compelling and overriding interest in the information can be shown

Examination of lower court rulings seems to indicate that some patterns are emerging.

Grand Jury Proceedings

In cases in which journalists have been called to testify before a grand jury, lower courts have generally required such testimony, rejecting the argument that a First Amendment privilege to protect the reporter exists.

Brenda Presley and Sherrie Bursey were reporters for the Black Panther newspaper. They wrote a story about a speech by Panther leader David Hilliard in which he either did or did not threaten former President Richard Nixon. They were called to testify before several grand juries. Although the reporters always answered some of the questions, they refused to answer all queries regarding confidential information and information regarding management of the Panther paper. The government presented sufficient evidence to convince the district court that there was a compelling and overriding national interest, and the women were called to testify. They refused to answer fifty-six different questions. On appeal, the United States Ninth Circuit Court of Appeals of California ruled that the two reporters had to answer seventeen of the fifty-six questions (*Bursey* v. *U.S.*, 1972). The court said the women did not have to answer queries about the people who worked at the newspaper or about how the paper was edited, but they did have to answer questions about whether they had seen firearms and explosives at Panther headquarters

and about whether the Panther leaders conducted discussions concerning violent activities. The government interests were legitimate and compelling, the court said, and infringement upon the First Amendment was incidental.

In a case related to the disappearance of Patty Hearst, the manager of radio station KPFK in Los Angeles was held in contempt for refusing to surrender to a grand jury investigating the matter the original tapes and letters received from the Symbionese Liberation Army. Will Lewis gave authorities copies of the tapes and letters, but refused to surrender the original tapes. The United States Ninth Circuit Court of Appeals ruled that the grand jury was conducting a legitimate law enforcement investigation and that fact outweighed the First Amendment considerations (in re *Lewis*, 1974).

In 1978 a Vermont court required the appearance and testimony of a reporter before a state inquest judge following the publication of the journalist's story regarding the sale of potentially contaminated marijuana. The court noted that the inquest was similar to a grand jury and that the inquiry was a good faith criminal investigation conducted under judicial supervision (in re *Powers*, 1979). The First Amendment has not functioned well to protect journalists from such inquiries.

Criminal Trials

It is more difficult to frame a general rule regarding those instances when a reporter is called to testify in a criminal trial. In most instances the courts have attempted to balance the First Amendment interests with the defendant's interest in a fair trial. The case of *Kansas* v. *Sandstrom* in 1978 provides a good example.

Milda Sandstrom was charged with murder in connection with the death of her husband. Reporter Joe Pennington testified at the trial that a confidential source had revealed to him that at a party shortly before Thad Sandstrom was killed one of the state's witnesses had threatened to kill Sandstrom. Pennington said the informant had heard about the threat from another person who attended the party, but refused to reveal the name of the informant. The Kansas Supreme Cout ruled that Pennington did not enjoy a First Amendment privilege in this instance to refuse to identify the confidential informant.

The state's high court noted that lower courts which had applied the *Branzburg* ruling to criminal cases had generally concluded that the proper test for determining the existence of a reporter's privilege in a particular criminal case was to balance *the need of the defendant for a fair trial against the reporter's need for confidentiality* (my italics). "As a general rule, disclosure has been required only in those criminal cases where it is shown the information in possession of the news reporter is material to prove an element of the offense, to prove a defense asserted by the defendant, to reduce the classification or gradation of the offense charged, or to mitigate or lessen the sentence imposed," the court noted. In this case the trial court felt that the identity of the confidential informant could lead to information relevant to Mrs. Sandstrom's defense, the high court said. That is a reasonable position to adopt, it was concluded.

Numerous other examples buttress the Sandstrom ruling. The California Court of Appeals refused to quash a subpoena against the Columbia Broadcasting System (CBS) for media materials in a criminal prosecution against drug dealers. The material involved clandestine videotapes and audiotapes made by the network (in cooperation with the Santa Clara sheriff's department) of meetings between narcotics officers and the criminal defendants (*CBS* v. *Superior Court*, 1978). Similarly, the First Amendment arguments made by reporter Myron Farber of the *New York Times* when he was called upon to produce material relevant to the defense in a New Jersey murder case were rejected by various state and federal courts (in re *Farber*, 1978).

As might be expected, there are exceptions to the general rule. The supreme courts in both Vermont and Virginia ruled that even in criminal cases the First Amendment grants a limited privilege to journalists. In the Vermont case (*State* v. *St. Peter*, 1974) reporter John Gladding refused to reveal the confidential source who tipped him off in advance about a police drug raid and was not forced to testify. In Virginia the state supreme court permitted a reporter to refuse to reveal the name of a confidential source of a story he wrote about a murder case. The defendant in this case wanted to use the reporter's source in an attempt to impeach a witness for the state. The supreme court ruled that since the information sought was not at the heart of the issue in the trial the First Amendment took precedence (*Brown* v. *Commonwealth*, 1974). Florida courts have also found it useful to apply Justice Stewart's three-part test in criminal cases. In *Florida* v. *Morel* in 1979 a district court quashed a subpoena issued against a reporter in a criminal trial when the criminal defendant failed to meet the requirements of the Stewart test: that the information the reporter held was relevant to the defense, that there was a compelling need for disclosure, and that the defendant had attempted unsuccessfully to get the information elsewhere. A similar result was reached in another Florida case, *Florida* v. *Beattie*, (1979).

In summary, if the information sought is relevant to the case—especially if it is important to the defense—the tendency has been for courts to reject the argument that the First Amendment protects a journalist. As just noted, however, there are exceptions.

Civil Cases

The First Amendment privilege against being forced to reveal the name of a confidential source seems to work most successfully when applied in civil suits, especially those in which the reporter is not a party to the case.

In 1973 the Democratic party brought a civil action to win damages for the Watergate break-in. Ten reporters from the *New York Times, Washington Post, Washington Star-News*, and *Time* magazine and other publications were subpoenaed and told to bring their tapes, notes, letters, documents, and all other materials obtained during their reporting of the Watergate break-in.

Upon a motion by the reporters the district court quashed the subpoena, noting that the press is entitled to at least a qualified privilege under the First Amendment (*Democratic National Committee* v. *McCord*, 1973):

> There has been no showing by the parties that alternative sources of evidence have been exhausted or even approached as to the possible gleaning of facts alternatively available from the Movants [reporters] herein. Nor has there been any positive showing of the materiality of the documents and other materials sought by the subpoenas.

A Florida state court cited the *McCord* decision a few weeks later when it quashed a subpoena against the *Miami News* in which the defendants in a civil suit sought confidential materials used by the newspaper to prepare an editorial blast against them. In *Spiva* v. *Francouer* (1973) the court said enforcement of the subpoena has a chilling effect on freedom of the press and can cause the newspaper's sources to dry up.

In 1977 the Tenth United States Circuit Court of Appeals refused to force filmmaker Arthur Hirsch to reveal confidential information he had obtained in connection with a civil action by the estate of Karen Silkwood against the Kerr-McGee Corporation. Hirsch was preparing a documentary film on the mysterious death of the young woman when he was subpoenaed by Kerr-McGee. The Tenth Circuit Court ruled that a limited First Amendment privilege protected the filmmaker and that before he could be required to answer questions the trial court was bound to consider whether the party seeking the information had independently attempted to obtain the information elsewhere and had been unsuccessful, whether the information sought from the reporter went to the heart of the matter before the court, and whether the information was of certain relevance in the case. In this case Hirsch did not have to testify, (*Silkwood* v. *Kerr-McGee*, 1977). Florida courts adopted similar guidelines in civil cases in *Amato* v. *Fellner* (1978) and *Florida* v. *Petrantoni* (1978). A federal district court in New York adopted a comparable standard when it ruled in 1978 that the Consumers Union did not have to reveal confidential test data and other information it had gathered on drain cleaners when subpoenaed by a plaintiff in a personal injury action against a manufacturer of drain cleaners (in re *Consumers Union*). The First Amendment can act as a potent force in quashing a subpoena directed against a journalist stemming from a civil action in which the journalist is not a party.

One cannot be so optimistic in those instances in which the reporter is a party to the action before the court. When columnist Jack Anderson attempted to sue Richard Nixon and other former government officials for allegedly conspiring to deprive him of his civil rights, he refused to cooperate with the defendants seeking from him the names of confidential sources who gave the columnist information regarding the activities of Nixon and his White House associates. Citing the First Amendment, Anderson refused to reveal the names sought. But a federal district judge ordered him to give the information to the

court if he hoped to continue his suit. The judge ruled that Anderson was attempting to use the First Amendment simultaneously "as a sword and a shield. . . . He cannot have it both ways. Plaintiff is not a bystander in the process, but a principal. He cannot ask for justice and deny it to those he accuses." Anderson was forced to withdraw his suit (*Anderson* v. *Nixon et al.*, 1978).

Libel suits In libel suits in which a journalist is the defendant the lower courts have ruled both for and against a qualified First Amendment privilege.

Cervantes v. *Time* (1972) involved a $12-million libel action against *Life* magazine for publishing a story which suggested that the mayor of St. Louis, Alfonso Cervantes, had underworld connections. The mayor wanted to know the names of the sources in the Federal Bureau of Investigation and Justice Department who supplied the information to reporter Denny Walsh. Cervantes said he could not prove malice without these names.

However, the information about the mayor was a small part of the story, which was extremely well documented. The charges against Cervantes comprised only four paragraphs of the eighty-seven-paragraph story. The court of appeals ruled, "To compel a newsman to breach a confidential relationship merely because a libel suit has been filed against him would seem inevitably to lead to an excessive restraint on the scope of legitimate news-gathering activity." The court said that if the plaintiff was able to provide persuasive evidence that this information was crucial to the question of malice the privilege might then have to give way. However, in this case, "The mayor has wholly failed to demonstrate with convincing clarity that either the defendant acted with knowledge of falsity or reckless disregard of the truth." There was just no reasonable probability that the plaintiff would succeed in proving malice.

The same conclusion was reached in *Baker* v. *F & F Investment* (1972). In this case Alfred Balk, a former writer on the *Saturday Evening Post*, had written an article on blockbusting in Chicago. In an action filed in federal court charging a real estate firm with discrimination, Balk was called as a witness and asked to reveal the sources of information for his article. He refused, and the federal court of appeals upheld his refusal. The court said the plaintiff in the civil suit had not exhausted other sources of information, that the disclosure by Balk was not essential to protection of the public interest, and that the material sought did not go to the heart of the matter at issue in the case. Judge Kaufman wrote (*Baker* v. *F & F Investment*, 1972):

> While we recognize that there are cases—few in number to be sure—where First Amendment rights must yield, we are still mindful of the preferred position which the First Amendment occupies in the pantheon of freedoms. Accordingly, though a journalist's right to protect confidential sources may not take precedence over that rare overriding and compelling interest, we are of the view that there

> are circumstances, at the very least in civil cases, in which the public interest in non-disclosure of a journalist's confidential sources outweighs the public and the private interest in compelled testimony.

The privilege has also failed in libel suits. In 1974 Edward Carey, a former general counsel for the United Mine Workers, sued Jack Anderson for libel in regard to a column in which Anderson alleged that Carey and former United Mine Workers president Tony Boyle were seen taking records improperly from Boyle's office. Britt Hume, one of Anderson's reporters, testified that he had got the information from an employee of the United Mine Workers, but refused to reveal the employee's name. The court of appeals said in this case the information went to the heart of the plaintiff's suit and was critical to the claim of malice. The court said it was unreasonable to ask the plaintiff to interview all the United Mine Workers employees to get the information (*Carey* v. *Hume*, 1974). In distinguishing this case from the *Cervantes* case the court said it was not unlikely that Mr. Carey would win his suit.

In a libel suit against the *Wall Street Journal*, the Massachusetts Supreme Judicial Court ruled that there was no privilege to protect the newspaper from revealing the name of the source of its story charging that a local land developer had a bad reputation because he wanted to build an apartment house in an area zoned residential. The court ruled in *Dow Jones* v. *Superior Court* (1973), "The obligation of newsmen, we think, is that of every citizen, viz., to appear when summoned, with relevant written or other material when required, and to answer relevant and reasonable inquiries."

The Iowa Supreme Court ruled in 1977 that the reporter's privilege not to disclose confidential information was outweighed when the libel plaintiff can show that the information was critical to the cause of action, that other reasonable and available means of gaining the information have been exhausted, and that the libel action is not patently frivilous (*Winegard* v. *Oxberger*, 1977).

Probably the sharpest attack upon the privilege came from the Idaho Supreme Court which refused to apply even limited protection for reporter Jay Shelledy in a lawsuit against the *Lewiston Tribune*. A libel suit resulted when a *Tribune* story questioned the propriety of a police officer's shooting of a suspect in a narcotics investigation. Shelledy's story was based on an evaluation of the physical evidence in the case by an anonymous technical expert. When asked to reveal the name of this expert at the trial, Shelledy refused and cited the First Amendment privilege. In a blistering opinion, the state's high court refused to acknowledge the existence of a privilege (*Caldero* v. *Tribune Publishing Co.*, 1977):

> The underlying rationale of the First Amendment protection of freedom of the press is clear. In a society so organized as ours, the public must know the truth in order to make value judgments, not the least of which regard its government

> and "officialdom." The only reliable source of that truth is a "press" (which is to say everyone—pamphleteers, nonconformists, undergrounders)—which is free to publish that truth without government censorship. We cannot accept the premise that the public's right to know is somehow enhanced by prohibiting the disclosure of truth in the courts of the public.

As can be seen by a review of the case law since *Branzburg*, the First Amendment has been of limited value in protecting the press from government demands that it reveal confidential information. But on the other hand, the guarantee of free expression has undoubtedly been more useful than many authorities predicted in the days immediately following the Supreme Court's ruling in *Branzburg*. Depending upon the nature of the legal problem before it and the willingness of a court to apply the guidelines developed in Justice Stewart's dissent in *Branzburg*, a journalist may or may not succeed in quashing a subpoena. In some states the press can seek additional assistance from statutes which have been adopted in an effort to shield reporters from government inquiries. These so-called shield laws are the next topic to consider.

Legislative Rights

In 1896 Maryland granted journalists a limited privilege to refuse to testify in court proceedings. Since then more than half of the fifty states have passed what the press refers to as "shield laws." These laws set down in specific terms what the privilege entails, who may use it, and when it may be used. Some laws are nearly absolute. For example, the Alabama Shield Law provides:

> No person engaged in, connected with, or employed on any newspaper (or radio broadcasting station or television station) while engaged in a news gathering capacity shall be compelled to disclose, in any legal proceeding or trial, before any court or before a grand jury of any court, or before the presiding officers of any tribunal or his agent or agents, or before any committee of the legislature, or elsewhere, the sources of any information procured or obtained by him and published in the newspaper (or broadcast by any broadcasting station or televised by any television station) on which he is engaged, connected with, or employed.

The laws in some states are far more qualified and prohibit use of the privilege in libel suits, for example, where the information might be material to the proof of malice. The privilege might also be denied in cases in which it is essential to prevent justice going astray, in which an overriding public interest is at stake, and in which reporters witness a crime. In some states the statutes are so filled with exceptions that at best the protection is of minimal value.

While shield laws can be effective in warding off unwanted and unnecessary subpoenas, they often create problems rather than provide protection.

Problems with Shield Laws

Two recent examples suffice to demonstrate these problems. In New York State an author who was preparing a book on organized crime was subpoenaed to produce the notes and tapes of his conversations with a witness in a murder prosecution. When he raised the state's shield law as a defense, the trial judge

ruled that the law was inapplicable because the author of the book was not "a journalist engaged in gathering, preparing, or editing of news for newspapers, magazines, news agencies, press associations or wire service." The decision was later upheld by the state appellate court (*New York* v. *LeGrand*, 1979).

In Montana a reporter for the Associated Press telephoned a home where a gunman was holding two hostages. In a conversation with the reporter which was tape recorded the gunman admitted shooting a policeman. The audiotape was subpoenaed by the state, but the Associated Press refused to surrender it, citing the Montana shield law which stipulates that no person employed by any news service for the purpose of gathering news may be required to disclose information gained through news gathering. A Montana district court ruled that the law protected only the reporter—not the Associated Press, which is an organization. The wire service had to surrender the tape (in re *Investigative File*, 1978).

There is a distinct lack of consistency among the shield laws in the approximately twenty-six states having such laws.

In California, for example, the manager of an FM radio station refused to answer questions before a grand jury concerning the murder of Marcus Foster, Oakland school superintendent. The station became involved in the case when it received a letter from the Symbionese Liberation Army claiming credit for the killing. The California Supreme Court ruled that the state's shield law protected the broadcaster and he did not have to testify (in re *Foster*, 1974). In a similar case in New York City radio station WBAI was forced to give up a letter it had received from a radical group. The New York court said the state's shield law did not protect the station employees (in re *WBAI-FM* v. *Proskin*, 1973).

Enactment of a federal shield law is one way many people suggest to solve the problen of inconsistency. Congress would pass a law displacing all state laws in order to ensure protection of Fourteenth Amendment rights, that is, freedom of the press. This solution seems unlikely, however, since Congress has been considering a shield law which covers only federal courts and other federal proceedings for several years and has not yet voted on the law.

The problem of inconsistency is especially vexing to news organizations like television networks and major newspapers whose reporters frequently work in many different states on a single assignment. Knowledge of the law is an important dimension of self-protection, and requiring a reporter to understand the subtleties and nuances of two dozen different laws is a significant difficulty.

Shield laws also suffer from definitional problems. That is, what a specific section of a law means depends upon the court interpreting it. Look at the

Alabama law, for example. In the first sentence note the reference to newspapers: "No person engaged in, connected with or employed on any newspaper." What is a newspaper? The *New York Times* is a newspaper. A suburban weekly which covers the village government and schools is a newspaper. What about a militant propaganda sheet published by a radical group? Is it a newspaper? In Los Angeles among the requirements to qualify as a newspaper and have reporters get police press passes, according to the police and sheriff's departments, a publication must undertake "regular gathering and distribution of hard-core news generated through police and fire activities." The police say that the coverage of what they call "sociological news—riots, demonstrations, assassinations, news conferences" does not qualify a publication to be a newspaper.

Not all communities define a newspaper so narrowly. Defining a newspaper and its function is a real issue, however. Is the man who mimeographs a four-page newsletter and distributes it on street corners once a week publishing a newspaper? What about pamphlets? Do they qualify as newspapers? Many people say no before they remember the important role of pamphlets in our history, especially during the revolutionary period.

Even the so-called absolute shield laws are rarely absolute. Exceptions that can trap journalists are always present. Most shield laws protect reporters only with regard to information gained while they are engaged in "a news-gathering capacity." If reporters are given information on their day off, or if someone approaches them with a tip after working hours, the law probably would not protect them. Doctors may be on duty twenty-four hours a day, but reporters are generally not believed to be that dedicated.

Frequently reporters are protected by the law only when they receive information secondhand. Reporters who are witness to criminal activity are required by law to testify.

In Maryland, home of the nation's oldest shield law, a reporter wrote a story about being offered a joint of marijuana by a clerk in a store. He was called by the grand jury and asked the name of the clerk and of the store. He refused to give the names and argued that the shield law protected him. The court said no, that in this case he had witnessed a crime and *he* was the source. The story was based on his firsthand account (*Lightman* v. *State,* 1972). Paul Branzburg got into trouble the same way, for Kentucky had a shield law. The courts ruled that Branzburg was a witness to a crime when he watched the hashish being synthesized. There was no other source. Two reporters in New York State found out the same thing. Stewart Dan and Roland Barnes of television station WGR-TV were inside Attica during the prison riots in 1972. They were questioned by a grand jury and asked what they saw. They refused to tell, using the state's shield law as a defense. They lost. The court said the New York law protects news sources, not reporters who witness crimes (*People v. Dan,* 1973).

Finally, many courts don't like shield laws and therefore interpret the laws as narrowly as possible to force reporters to comply with subpoenas or with judges' instructions. For example, in New Jersey reporter Peter Bridge was called before a grand jury and ordered to give the unpublished details of his interview with a housing commissioner in Newark, New Jersey, who claimed she had been offered a bribe. Bridge attempted to use the state's shield law, but was unsuccessful. The court said that since the source of the story was already known and since Bridge had already revealed some information about the interview he had waived his right to use the privilege. Bridge spent twenty days in jail (in re *Bridge,* 1972).

One of the most perplexing of all the shield law cases is the case of William Farr. The case is a classic example of how a shield law can sometimes prove to be absolutely worthless. In 1970 Farr, a reporter for the *Los Angeles Herald-Examiner,* was assigned to cover the trial of Charles Manson and his followers. A restrictive order was in effect during the trial prohibiting trial participants from releasing the contents or nature of all testimony given at the trial. During the trial a witness gave a member of the prosecution a written statement that one of the defendants in the case, Susan Atkins, had confessed to the crimes for which she and the rest of the Manson clan were being tried. Copies of the statement were prepared and given to each of the attorneys in the trial. One of them gave a copy to Farr who published it as part of a story in the *Herald-Examiner.* At the conclusion of the trial the judge convened a special hearing to determine the source of Farr's story. Called as a witness, Farr refused to identify the attorney who had given him the copy of the statement. Farr argued that he did not have to testify because of the California shield law, but the court ruled that the privilege did not apply to Farr because at the time of the hearing he was no longer a reporter but worked as a press aide to the Los Angeles district attorney. In addition, the California district court of appeals ruled that even though Farr was a working journalist the shield law was inapplicable because its use would interfere with the right of the trial court to enforce its edicts and control the conduct of participants at the trial: "To construe the statute as granting immunity to petitioner, Farr, in the face of the facts here present would be to countenance an unconstitutional interference by the legislative branch with an inherent and vital power of the court to control its own proceedings and officers" (*Farr v. Superior Court,* 1971). In other words, the people of California have no business giving journalists this privilege if it interferes with the work of the courts. In 1980 the people of California added reporter's testimonial shield protection to the state constitution, thus precluding such judicial manhandling of legislative sentiments in the future.

Many persons argue that shield laws give the reporter an illusion of protection rather than real protection. Yet such laws have been used successfully to thwart official investigations. In addition, the number of subpoenas which were never sent to journalists simply because of the existence of a shield law cannot be calculated. Still, many reporters find it more to their liking to work to develop the limited First Amendment protection than to ask the government—the same government upon which they are expected to report—for a special protection. When push comes to shove, many reporters note, the government can strip away any protection it has given to the press. That cannot happen so easily with a privilege grounded in the First Amendment.

Federal Shield Law Guidelines

As a kind of corollary to a shield law, the Department of Justice has adopted rules which define when and how a United States attorney can obtain a subpoena against a working reporter. Here is a summary of the guidelines.

1. There must be prior negotiation with the journalist before the subpoena is issued.

2. If the negotiations fail (if the reporter won't provide the material voluntarily), the attorney general must approve the subpoena based on the following guidelines:

a. There must be sufficient evidence of a crime from a nonpress source. The Department does not approve of using reporters as springboards for investigation.

b. The information the reporter has must be essential to a successful investigation—not peripheral or speculative.

c. The government must have unsuccessfully attempted to get the information from an alternative nonpress source.

d. Great caution must be exercised with respect to subpoenas for unpublished information or where confidentiality is alleged.

e. Even subpoenas for published information must be treated with care because reporters have encountered harrassment on the grounds that information collected will be available to the government.

f. The subpoena must be directed to specific information.

The guidelines have worked fairly well. In a thirty-month period following initiation of the guidelines the justice department sought thirteen subpoenas. The attorney general denied their request seven times because of noncompliance with the guidelines. The guidelines apply only to criminal cases, not to civil suits and not to legislative and administrative hearings. Nevertheless, they are better than nothing. In several states, local prosecutors have also adopted similar rules to guide the issuance of subpoenas in their communities.

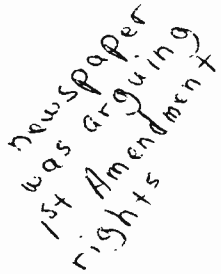
Newsroom Search

While subpoenas directed specifically against the journalist remain the central threat to reporters with regard to their confidential relationship with sources, two parallel problems developed in the late seventies. The first concerned the

search of newsrooms by police officers; the second focused upon journalists' long-distance telephone records.

In April of 1971 police were asked to remove student demonstrators who were occupying the administrative offices of Stanford University Hospital. When police entered the west end of the building, demonstrators poured out of the east end, and during the ensuing melee outside the building several police officers were hurt, two seriously. The battle between the police and the students was photographed by a student, and the following day pictures of the incident were published in the *Stanford Daily* student newspaper. In an effort to discover which students had attacked the injured police officers, law enforcement officials fron Santa Clara County secured a warrant for a search of the *Daily*'s newsroom, hoping to find more pictures taken by the student photographer. It was hoped the pictures might provide visual evidence of which students had battered the lawmen. There was no allegation that anyone of the *Daily* staff was involved in the attack or other unlawful acts. No evidence was discovered during the thorough search.

This type of search is known as an innocent third-party search, or simply a third-party search. Police search the premises or a room for evidence relating to a crime, even though there is no reason to suspect that the owner of the premises or the occupant of the room is involved in the crime which is being investigated. Such searches are not uncommon, but in the lawsuit that followed the student newspaper argued that this kind of search threatened the freedom of the press and should not be permitted unless police officials first obtain a subpoena—which is more difficult for lawmen to get than is a simple search warrant. The subpoena process would also provide the press with notice prior to the search and allow editors and reporters to challenge the issuance of the subpoena.



The newspaper argued that the unannounced third-party search of a newsroom seriously threatened the ability of the press to gather, analyze, and disseminate news. The searches could be physically disruptive for a craft in which meeting deadlines is essential. Confidential sources—fearful that some evidence which would reveal their identity might surface in such a search—would refuse to cooperate with reporters. Reporters would be deterred from keeping notes and tapes if such material could be seized in a search. All of this and more could have a chilling effect on the press, lawyers for the newspaper argued.

The Supreme Court, in a five-to-three ruling, disagreed with the newspaper. Justice Byron White ruled that the problem was essentially a Fourth Amendment question (i.e., was the search permissible under the Fourth Amendment?), not a First Amendment question, and that under existing law a warrant may be issued to search any property if there is reason to believe that evidence of a crime will be found. "The Fourth Amendment has itself

struck the balance between privacy and public need and there is no occasion or justification for a court to revise the Amendment and strike a new balance. . . ." White wrote. The associate justice conceded that "where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.' " He added, "Where presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion of the officer in the field." But Justice White rejected the notion that such unannounced searches are a threat to the freedom of the press, arguing that the framers of the constitution were certainly aware of the struggle between the press and the crown in the seventeenth and eighteenth centuries when the general search warrant was a serious problem for the press. Yet the framers did not forbid the use of search warrants where the press was involved, White asserted. They obviously believed the protections of the Fourth Amendment would sufficiently protect the press (*Zurcher* v. *Stanford Daily,* 1978).

The decision by the Supreme Court reinforced existing law on the question and did not represent a dramatic change in policy. Nevertheless it was assailed by the press in some of the sharpest criticism leveled against the court in the past two decades. A few observers within the press noted that newsroom searches are a rarity in this nation. *New York Times* columnist Anthony Lewis cited a survey which found only fifteen police searches of pressrooms in this country, ever. And twelve of them had been conducted in California. He suggested that by protesting the decision so vigorously editors might simply be advertising to police across the United States that such searches are indeed permissible.

Others looked to the ruling to see what, if anything, Justice White had given to the press. Legislation is a possible means of limiting such searches, White had said. By the end of 1979 laws limiting the ability of police to search newsrooms and reporters' homes had been passed in at least two states, Illinois and California, and were under consideration in many more. In late 1980 Congress adopted a law that provided to journalists a limited protection from third-party searches by state authorities and a broader protection against searches conducted by federal authorities.

Similarly Justice White had used language which if applied properly could offer the press some protection. Paul Conrad, executive director of the Allied Daily Newspapers of Washington, pointed out to member editors key language in the White opinion which can assist the press (emphasis added):

> Valid warrants to search property may be issued *when it is satisfactorily demonstrated to the magistrate that . . . evidence of a crime is located on the premises.*
>
> The warrant application *shall describe with particularity the individuals or places to be searched and the . . . things to be seized . . .*

> The warrant requirement *should be administered to leave as little as possible to the discretion or whim of the officer in the field.*
>
> Where materials sought to be seized may be protected by the First Amendment, *the requirements of the Fourth Amendment must be applied with scrupulous exactitude.*
>
> There is no reason to believe . . . that magistrates cannot guard against searches of the type, scope and intrusiveness that would actually interfere with the timely publication of a newspaper.

Similarly, Justice Powell's concurring opinion (and as in *Branzburg*, Powell was the fifth man in a majority of five) stressed that judges issuing search warrants "take cognizance of the independent values protected by the First Amendment." As one authority said, "To read *Zurcher* as a blanket approval of newsroom searches would be a mistake." It is recommended that editors and reporters know their rights and that attorneys for the newspapers take great pains to ensure that the requirements outlined by White and Powell are closely followed when a search warrant is issued or served.

Telephone Records

It was the United States Circuit Court in the District of Columbia which was forced to confront the question of whether a journalist's toll telephone records should be immune from scrutiny by government agents.

The telephone company maintains subscriber records for toll telephone calls for about six months. For long-distance calls billed to the subscriber's telephone number these records indicate the telephone number called, as well as the date, time, and duration of the call. The records are no secret; a copy of the monthly toll-call record is provided to each subscriber with each month's bill.

In 1974 the American Telephone and Telegraph Company (AT&T) announced that in the future it would not release these records to the government without a subpoena and as a general policy would seek to notify subscribers immediately when their individual records had been subpoenaed by a government agency. However, when records are subpoenaed pursuant to a felony investigation, the telephone company said it will not notify the subscriber of the subpoena so long as the government certifies that an official investigation is being conducted, and that notification to the subscriber can impede the investigation.

The Reporter's Committee for Freedom of the Press challenged the telephone company's policy of releasing *any* records to the government, arguing that the government could use such records to determine reporters' sources. Journalists raised both the Fourth Amendment and the First Amendment as bars to this cooperation between AT&T and the government.

The court of appeals seemed unpersuaded that this cooperation created a real problem and ruled against the Reporter's Committee. The Fourth Amendment claim lacked merit, the court said, because the constitutional

prohibition against illegal search and seizure "does not insulate all personal activity from official scrutiny." The First Amendment claim was similarly rejected. Citing the Supreme Court's ruling the *Zurcher* case, the court asserted that the First Amendment offers no additional protections against good faith criminal investigations beyond that afforded by the Fourth and Fifth Amendments (*Reporter's Committee* v. *AT&T*, 1978):

> The principle is clear. To the extent individuals desire to excercise their First Amendment rights in private, free from possible good faith law enforcement investigation, they must operate within the zone of privacy secured by the Fourth Amendment. When individuals expose their activities to third parties, they similarly expose these activities to possible government scrutiny.

Neither *Zurcher* nor the *AT&T* decision represents changes in how deeply the government can scrutinize the news-gathering process and news sources. In both instances the press asked that the courts bar one kind of governmental activity that had been going on for a considerable period of time. There was no change in the law in either case. Yet both instances demonstrate the vulnerability of the editorial process to government inspection and represent examples of the fragility of the independence of the press.

Through the reporter-source cases, courts have fashioned at least a limited recognition of a First Amendment privilege which can be used to protect the process of gathering news and information. Certainly the press would like a broader privilege, given its choice. However, in the next issue to be considered, the rights of the press to break the law or commit civil wrongs while gathering the news, reporters have got even significantly less from the courts.

STOP

CIVIL WRONGS AND CRIMINAL ACTS IN NEWS GATHERING

Breaking the law to get the news is not a common occurrence in journalism. Seventy-five to eighty years ago in the raucous days of newspapering described by writers like Ben Hecht in *A Child of the Century* reporters seemed to often skate a thin line between what was legal and what was not. But the developing professionalization of the craft of journalism in the midtwentieth century put such behavior out of bounds. Reporters generally worked as best they could to get the news without committing a civil wrong or a crime.

It has been only within the past two decades that some members of the press have attempted to defend this questionable news-gathering behavior by raising their status as journalists and the First Amendment as a shield against prosecution or civil suit. This defense has not worked at all for the press. Courts simply refuse to recognize that reporters are serving a higher purpose when they break the law while gathering news.

For example, photographer Ron Galella argued that the First Amendment immunized him from any liability for his actions in seeking to take pictures of Jacqueline Kennedy Onassis and her children. Mrs. Onassis sued Galella for invasion of privacy, assault and battery, intentional infliction of emotional

distress, and harrassment. The Court of Appeals for the Second Circuit dismissed the contention that the First Amendment shielded Galella from responsibility and granted Onassis injunctive relief that sharply limited the distance at which Galella could approach her or her children (*Galella* v. *Onassis,* 1973).

In a privacy suit (more fully discussed in chapter 5) the Ninth Circuit Court of Appeals refused to excuse the invasion of the privacy of a herb healer by a journalist because the invasion took place in order to prepare a news story. Two *Life* magazine reporters posed as man and wife and visited the herb healer at his home in Los Angeles in an effort to gather information for a story on medical quackery. The woman complained of a lump on her breast. While the healer examined the female reporter and diagnosed her ailment, the male member of the pair took secret pictures with a camera hidden in a cigarette lighter. In addition, the conversations of the three were transmitted through a microphone hidden in the woman's purse to a tape recorder operated by police with whom the reporters were working. The herb healer, A. A. Dietemann, was later arrested and charged with practicing medicine without a license, and *Life* published its story on medical quackery which included the material on Dietemann.

Dietemann sued the magazine for invasion of privacy, claiming that by posing as man and wife, by gaining entry to his home under false pretenses, and by secretly recording and photographing what took place, the two reporters intruded upon his solitude. Dietemann prevailed despite a strong First Amendment argument by the defendants. The Ninth Circuit Court stressed the fact that the plaintiff's home was "a sphere from which he could reasonably expect to exclude eavesdropping newspersons." Judge Shirley Hufstedler added (*Dietemann* v. *Time,* 1971):

> One who invites another into his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves. But he does not and should not be required to take the risk that what is heard and seen will be transmitted by photography or recording, or in our modern world, in full living color and hi-fi to the public at large or any segment of it that the visitor might select.

Recognizing that news gathering is an integral part of news dissemination, Judge Hufstedler said she still did not believe there was a need to use mechanical devices in gathering information:

> The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.

In Florida a photographer and reporter were invited by police and fire officials into a house that had been gutted by fire. The owner of the house,

who was not on the premises at the time of the fire, later brought suit for trespass against the journalists. The journalists were exonerated in this instance, but only because the homeowner had not objected at the time the newspaper people entered the home. The Florida Supreme Court said it was common custom for the press to inspect private premises after a serious fire or a crime and that this common custom constituted a kind of indirect consent to the trespass. But it was clear from the court's opinion that had the homeowner been at the scene of the fire and objected to the reporter and photographer coming on the property, common custom or not, the journalists would have been guilty of trespass (*Florida Publishing Co.* v. *Fletcher,* 1976).

As if to emphasize what could have happened to the reporters in Florida, a state court in New York sustained a trespass action against a broadcasting film crew stemming from an incident at an exclusive New York City restaurant. The news crew had been sent to visit various restaurants cited by local authorities for health code violations. The crew entered the restaurant with its cameras rolling and floodlights on. Although the proprietor of the restaurant commanded the reporters to leave, the journalists stayed with the cameras and continued to film until they were physically escorted from the premises. In the meantime, customers ducked under tables, and some fled without paying their bills.

The broadcasting company, CBS, attempted to defend its action by using the First Amendment as a shield to protect itself from the trespass suit. The court disagreed. "Clearly, the First Amendment is not a shibboleth before which all other rights must succumb," the judge ruled (*Le Mistral, Inc.* v. *CBS,* 1978):

> This Court recognizes that the exercise of the right of free speech and free press demands and even mandates the observance of the co-equal duty not to abuse such right, but to utilize it with right reason and dignity. Vain lip service to "duties" in a vacuous reality wherein "rights" exist, sovereign and independent of any balancing moral or social factor, creates a semantical mockery of the very foundation of our laws and legal system.

Most recently the New Jersey Supreme Court upheld the disorderly person conviction of a press photographer who was charged with impeding a police officer in the performance of his duty at the scene of a serious traffic accident. The photographer was standing near the wreckage when the state trooper, who feared a fire might begin and who also wanted to preserve the accident scene for investigation, ordered the area cleared of spectators. The news photographer moved back five feet, but when he refused to move any farther, he was arrested.

The journalist Harvey J. Lashinsky argued that the state's disorderly person statute was inapplicable to him because he was a member of the press. The state's high court disagreed, noting that "the constitutional prerogatives of the press must yield under appropriate circumstances to other important

and legitimate interests." Acknowledging that the press did play a special role in society, the court nevertheless said that the photographer clearly impeded the officer by refusing his request to leave the area. While the officer was arguing with the journalist, he could have been giving assistance to the accident victims and beginning the investigation of the crash (*State* v. *Lashinsky*, 1979).

The brief discussion of these cases makes it clear that the courts will insist that reporters obey the law like all other citizens; their status as members of the press which is granted protection under the First Amendment is immaterial when they are called upon to account for their behavior while gathering news for publication and broadcast.

ACCESS TO INFORMATION UNDER THE LAW

The focus of the discussion thus far has been on the law as a kind of shield for the news-gathering process. But the law can play a different kind of role in the problems journalists face in gathering news and informaton; it can provide a positive mandate which assures reporters of their right to collect the news. A right of access to information can be developed under the law.

Both the constitution and legislation hold potential as such a positive mandate, but in fact only statutory provisions have provided much assistance to the press in this regard. Courts have been generally unwilling to read the right of access to information into the First Amendment. For example, in 1950 in Rhode Island a federal district judge ruled that when public records are restricted from examination and publication "the attempt to prohibit their publication is an abridgement of the freedom of the speech and press" (*Providence Journal Co.* et al. v. *McCoy* et al., 1950). The case involved two newspapers seeking to examine tax cancellation and abatement records. The Pawtucket city council gave permission to one newspaper (the paper which supported the city government in power), but refused to give similar access to an opposition newspaper. In addition to ruling that denial of access was an abridgement of freedom of the press, the federal court ruled this kind of action to be a denial of equal protection of the law. The court of appeals upheld the lower court ruling, but solely on the grounds of equal protection. The lower court ruling that denial of access is a violation of the First Amendment is therefore of limited value. Yet this case stands as one of the very few times when a court of any kind ruled that freedom of the press is somehow diminished when access to information is denied.

There are obvious reasons why courts might be reluctant to interpret the First Amendment as permitting a broad right of access to meetings and public records. The consequences of establishing such a principle it is **thought**, would be to arm the press with a key which it would use to unlock ***all*** doors and thereby gain access to material restricted for the welfare and protection of society. This is a very weak argument and is based on the notion that the press is totally irresponsible and that the law is the only factor keeping newspapers and broadcasting stations from destroying this country.

eviscerated. to deprive of content or force

There is another argument for the judiciary's unwillingness to establish a constitutional right of access.

"The reluctance of the courts to recognize distinctly a news-gathering right in the press," writes Lynn C. Malmgren in the *Villanova Law Review* (1974), "stems from a valid concern with the administrative problems and from the logical necessity of making the determination of what constitutes the press for the purposes of constitutional protection." If the right of the press to gather news is merely the same as the right of the public to gather news, the commentator adds, then the press may go only where the public may go. But if the press has a special right, reporters would have access to many more areas than does the public. The problem then is this: Who is a reporter? or What is the press? As noted in the discussion of the shield law controversy, there is a long tradition that freedom of the press protects everyone, that its provisions apply equally to a citizen who publishes a mimeographed newsletter and to the publisher of the *New York Times*. If the courts declare that the press has the constitutional right of access, they must either also delineate what comprises "the press" or be prepared to face the potential onslaught of all the citizenry seeking access to records and meetings. The courts have found it far easier just to refuse to acknowledge that the First Amendment protects the right to gather the news.

In 1964 the Supreme Court ruled in a case concerning the right of a United States citizen to travel to Cuba in violation of a State Department ban on such travel that the right to speak and publish does not carry with it the unrestrained right to gather information (*Zemel* v. *Rusk*, 1964). This decision was generally regarded to be the law until the early 1970s when a few lower courts suggested that the First Amendment might indeed protect the right to gain access to information. In *Branzburg* v. *Hayes* (1972), a newsman's privilege case, the high Court itself dropped a kind of bombshell. "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," the majority opinion stated.

In the summer of 1980 the United States Supreme Court ruled that the First Amendment *did* provide a right of access to all citizens—press and public alike—to criminal trials. The ruling in the *Richmond Newspapers* v. *Virginia* case (see chapter 8 for a full outline of the facts and opinions of the case) was not at all clear regarding the issue of a constitutional right of access to information, or a First Amendment right to gather news. Chief Justice Warren Burger's opinion for the high Court was ambiguous on this point. On the one hand, the opinion could be read as narrowly reaching only the facts in this case and establishing a specific and distinct First Amendment right to attend criminal trials and only criminal trials. On the other hand, the Chief Justice's language could be read as suggesting that a broader right of access to government-held information is contained within the First Amendment.

The breadth of opinion in the five concurring opinions in the seven-to-one ruling complicated the question even more. It is important to recognize two unambiguous points within the *Richmond Newspapers* ruling. All seven justices within the majority agreed that the right to attend criminal trials was a right which belonged to both journalists and nonjournalists. The ruling did not establish a special right of access for reporters and other members of the press. Also, Chief Justice Burger made it clear that he did not believe the First Amendment right to attend criminal trials was absolute Some limits could be applied to such access. The ultimate meaning of this ruling will undoubtedly emerge only after subsequent cases are decided by the high Court. Nothing in the ruling, however, seemed to overturn the reluctance of the high Court to outline a special right of access for journalists and others engaged in the craft of news gathering. As such, the vitality of three precedents which focus upon requests by reporters for special access rights to prison facilities seems unaffected by the 1980 ruling.

In *Pell* v. *Procunier* (1974) reporters in California attempted to interview specific inmates at California prisons. In *Saxbe* v. *Washington Post* (1974) reporters from that newspaper sought to interview specific inmates at federal prisons at Lewisburg, Pennsylvania, and Danbury, Connecticut. In both instances the press was barred from conducting the interviews. The United States Bureau of Prisons rule, which is similar to the California regulation, states:

> Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview.

At issue was not access to the prison system. The press could tour and photograph prison facilities, conduct brief conversations with randomly encountered inmates, and correspond with inmates through the mails. Outgoing correspondence from inmates was neither censored nor inspected, and incoming mail was inspected only for contraband and statements which might incite illegal action. In addition, the federal rules had been interpreted to permit journalists to conduct lengthy interviews with randomly selected groups of inmates. In fact, a reporter in the *Washington Post* case did go to Lewisburg and interview a group of prisoners.

The argument of the press in both cases was that to ban interviews with specific inmates abridged the First Amendment protection afforded the news-gathering activity of a free press.

The Supreme Court disagreed in a five-to-four decision in both cases. Justice Stewart's opinion was subscribed to by the chief justice, and Justices Blackmun, White, and Rehnquist. Justice Stewart wrote that the press already had substantial access to the prisons and that there was no evidence that prison officials were hiding things from reporters. Stewart rejected the notion

that the First Amendment gave newsmen a special right of access to the prisons. "Newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public," the Justice wrote. Since members of the general public have no right to interview specific prisoners, the denial of this right to the press does not infringe upon the First Amendment.

The high Court did not disagree with the findings of the district court in the *Saxbe* case that face-to-face interviews with specific inmates are essential to accurate and effective reporting about prisoners and prisons. What the Court seemed to say was that while the First Amendment guarantees freedom of expression it does not guarantee effective and accurate reporting. In fact, about five months after the *Saxbe* and *Pell* decisions on November 2, in a speech at the Yale Law School Sesquicentennial Convocation, Justice Stewart made this exact point:

> The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular governmental information, or to require openness from the bureaucracy. The public's interest in knowing about its government is protected by the guarantee of a free press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act. The Constitution, in other words, establishes the contest, not its resolution.

In 1978 the high Court split along similar lines on a case involving press access rights to a county jail. An inmate at the Santa Rita County, California, jail committed suicide in 1975. Following the death and a report by a psychiatrist that jail conditions were bad, KQED television in San Francisco sought permission to inspect and take pictures in the jail. Sheriff Houchins announced that the media could certainly participate in one of the six tours of the jail facility which were given to the public each year. However, the tours did not visit the disciplinary cells nor the portion of the jail in which the suicide had taken place. No cameras or tape recorders were allowed, but photographs of some parts of the jail were supplied by the sheriff's office.

Reporters at KQED took a jail tour, but were not happy at the limits placed upon them. Sheriff Houchins contended that unregulated visits through the jail by the press would infringe on the inmates right of privacy, could create jail celebrities out of inmates that would in turn cause problems for jailers, and disrupt jail operations. Houchins noted that reporters did have access to inmates—they could visit individual prisoners, could visit with inmates awaiting trial, could talk by telephone with inmates, could write letters to prisoners, and so forth. But KQED argued that it had a constitutionally protected right to gather news and challenged the limits (*Houchins* v. *KQED,* 1978).

Chief Justice Burger wrote the opinion for the court in the four-to-three decision in which neither Justice Blackmun nor Justice Marshall took part. "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control," Burger asserted. The Chief Justice seemed troubled by the argument of KQED that only through access to the jail could the press perform its public responsibility (*Houchins* v. *KQED,* 1978):

> Unarticulated but implicit in the assertion that the media access to jail is essential for an informed public debate on jail conditions is the assumption that the media personnel are the best qualified persons for the task of discovering malfeasance in public institutions. . . . The media are not a substitute for or an adjunct of government. . . . We must not confuse the role of the media with that of government. . . .

Looking back at the dictum in *Branzburg* that "news gathering is not without its First Amendment protections," Burger said this must be looked at in its context—forcing a reporter to disclose to a grand jury information received in confidence. "There is an undoubted right to gather news 'from any source within the law . . .' but that affords no basis for the claim that the First Amendment compels others—private persons or government—to supply information." Problems at the jail can be investigated by citizens' task forces or grand juries, Burger said, public bodies which can be coerced to disclose what they have discovered. There is no way to force a journalist who has been given special access to the jail to publish the information gained in such an inspection.

In his concurrence Justice Stewart agreed with Chief Justice Burger that the press should not be given special access rights, but added that the press should be given opportunities to inform others of what they have seen. Stewart, then, supported limited use of cameras and tape recorders in the jail by the journalists. Dissenters Stevens, Brennan, and Powell argued that it was the public which suffered in this case by not getting complete information about the jail conditions. The right of the people to receive information is implied in the First Amendment, the dissenters argued; consequently information gathering by the public, not just by the press, is entitled to some measure of constitutional protection. There must be better access to inspect the jail for all persons, not just for the press, the dissenters concluded.

Freedom of Information Laws

With strong support from neither the common law nor the constitution, our right of access to government-held information has been determined largely by federal and state statutes. Such statutes are of relatively recent vintage and reflect citizen frustration with both the growth of government and the growth of secrecy in government. It is most appropriate to look at federal legislation first.

The Freedom of Information Act

Between 1789 and 1966 access to the records of the federal government was largely an unsettled question. Various housekeeping laws, administrative procedure statutes, had been passed by Congress, but none were aimed at providing the kind of access to government records that both the press and a large segment of the population believed necessary for the efficient operation of our democracy. Before 1966 the laws Congress passed were really laws authorizing information to be withheld, rather than laws forcing government agencies to open their files. Also, reporters could do little when requests for information were denied. In 1966 after many years of hearings and testimony and work, Congress adopted the Freedom of Information Act (FOIA) which was ostensibly designed to open up records and files long closed to public inspection.

One can write an open records law in two basic ways. The first way is to declare that all of the following kinds or records are to be open for public inspection and then list the kinds of records which are open. The second way is to proclaim that all government records are open for public inspection except the following kinds of records and then list the exceptions. Congress approved the second kind of law in 1966, and it went into effect in 1967. The law was substantially amended in 1974 and again in 1976.

In broad language the measure ensured that all persons will have access to all "agency records" except those listed in nine categories of exceptions. What are "agency records"? The *Stanford Law Review* recently provided some useful guidelines to answer that question. While Congress did not specify the physical characteristics of a record, an "agency record" includes not only documents written on paper, but also films, tapes, and probably even three-dimensional materials such as murder weapons. The Ninth Circuit Court of Appeals recently ruled that computer tapes are records for purposes of the law (*Long* v. *IRS*, 1979). An "agency" under the law includes all the independent regulatory commissions (such as the Federal Trade Commission, the Securities and Exchange Commission and the Federal Aviation Agency) as well as units within the executive branch. A 1974 amendment to the FOIA defined *agency* as follows:

> Any executive department, military department, government corporation, government controlled corporation or other establishment in the executive branch of government (including the Executive Office of the President), or any independent regulatory agency.

In order for a record to be considered an "agency record' under the law, there must be some connection between the agency and the record. If a record is created by the agency and retained by it, then it is an agency record. If the record is created by someone outside the agency (a consultant, for example) but possessed by the agency, it is probably an agency record. But in two 1980 rulings the Supreme Court determined that a record must be in the possession of the agency before the Freedom of Information Act becomes applicable. In *Forsham* v. *Harris*, records produced for the National Institute of Arthritis,

Metabolism and Digestive Diseases by a private research group and possessed by the private group, were determined outside the reach of the federal records law. Justice William Rehnquist wrote that "data generated by a privately controlled organization which has received federal grants, but which data has not at anytime been obtained by the agency, are not agency records under FOIA."

On the same day the high Court ruled that transcripts and summaries of Henry Kissinger's telephone conversations made while he was secretary of state were not accessible via the Freedom of Information Act. Reporters brought a Freedom of Information Act suit against the State Department to gain access to the records, which had been donated to the Library of Congress by Kissinger when he left office. Admitting that the documents probably belonged to the State Department, the high Court nevertheless ruled that "the FOIA is only directed at requiring agencies to disclose those 'agency records' for which they have chosen to retain possession or control" (*Kissinger* v. *Reporter's Committee*, 1980).

But even if an agency possesses a record, it may not be an "agency record" in terms of the law. If the record was created by someone else (an outside consultant, for example) but possessed by the agency, it is probably an agency record. However, if the record is created by a group which Congress has excluded fron the aegis of the FOIA—such as the courts—possession of the record by the agency might not be sufficient to make the record an "agency record" under the law. In *Goland* v. *CIA*, (1978) a court ruled that a transcript of a congressional committee hearing (which is normally exempt from the FOIA) in the possession of the Central Intelligence Agency for thirty years was not an "agency record."

Exempt information Even if a document is an agency record, the FOIA lists nine categories of information which can be excluded from the general rule of disclosure. Comments in parentheses in the listing and discussion of the categories that follow are my attempt to clarify the kinds of records in each category:

1. Matters specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and in fact properly classified pursuant to such an executive order (defense and diplomatic secrets)
2. Matters related solely to the internal personnel rules and practice of any agency (vacation schedules, coffee-break rules, parking lot assignments, etc.)
3. Matters specifically exempted from disclosure by statute (other than section 552b of this title) provided that such statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the

issue, or establishes particular criteria for withholding or refers to particular types of matters to be withheld (social security and income tax records)

4. Trade secrets and commercial and financial information obtained from any person and privileged or confidential (financial data from homeowners the Federal Housing Administration needs before guaranteeing loans, patent applications, etc.)

5. Interagency and intraagency memorandums and letters which would not be available by law to a private party in litigation with the agency (working papers, not final decisions)

6. Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy

7. Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (a) interfere with enforcement proceedings, (b) deprive a person of the right to a fair trial or an impartial adjudication, (c) constitute an unwarranted invasion of personal privacy, (d) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (e) disclose investigative techniques and procedures, or (f) endanger the life or physical safety of law enforcement personnel

8. Matters contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation and supervision of financial institutions (reports on financial condition of banks for agencies like the Federal Reserve Board)

9. Geological and geophysical information and data (including maps) concerning oil wells

Government departments must answer requests for records and documents within ten days. If an appeal is filed after a denial, the agency has only twenty days to rule upon the appeal. Each agency must publish quarterly, or more frequently, an index of the documents and records it keeps. If an agency charges for searching out records or for duplicating them, it must have a uniform schedule of fees (everyone is charged the same amount) and the charges must be fair and reasonable.

The cost factor has been used by agencies in an attempt to thwart FOIA requests. Attempts have been made to place heavy financial burden on persons seeking information. When Philip and Sue Long sought certain records from the Internal Revenue Service (IRS) the agency said that identifying data would have to be edited from the records and that the Longs would be billed for the editing costs—some $160,000. The Ninth Circuit Court ruled against the taxing agency and said that while it was permissible to charge persons seeking records for the cost of searching out the documents or duplicating them the agency had to bear the costs of segregating the identifying data from

the material that must be released under the law. As it turned out, the Longs wanted far fewer records than the IRS asserted, and the cost of editing was only a fraction of the initial estimate of $160,000 (*Long* v. *IRS,* 1979).

Agencies are required to report to Congress each year and must include in the report a list of the materials to which access was granted and to which access was denied and the costs incurred. If a citizen or a reporter has to go to court to get the agency to release materials and the agency loses the case, the agency may be assessed the cost of the complainant's legal fees and court costs. Finally, agency personnel are now personally responsible for granting or denying access, a requirement federal agencies object to strenuously. An employee of an agency who denies a request for information must be identified to the person who seeks the material, and if the access is denied in an arbitrary or capricious manner, the employee can be disciplined by the Civil Service Commission. While the nine exemptions seem clear enough on their face, some explanation and discussion of court interpretations is useful in understanding their implications. The first exemption is a good place to begin.

As passed in 1966 the national security exemption stated, "matters specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy" will not be open to inspection. The intent of the exemption was good, but in practice the exemption was badly abused, especially by the Nixon administration. In simple translation the exemption meant that any material classified confidential, secret, or top secret did not have to be revealed. In March 1973 when former President Nixon realized that testimony at the trial of Daniel Ellsberg in Los Angeles would reveal that White House security agents had rifled confidential files in the office of Ellsberg's psychiatrist, Nixon and his aides decided to cloak the raid in a national security label, classifying all information about the break-in and thereby ensuring that this information could not be revealed. This action was clearly a violation of the spirit, if not of the letter, of the FOIA. Furthermore the courts provided small recourse.

Federal courts took the position that once information is classified the classification cannot be challenged. In 1970 when scholars attempted to gain access to classified files on Operation Keelhaul, the forced repatriation of anti-Communist Russians after World War II, the court of appeals ruled that it did not have the authority to review an agency's decision to classify material (*Epstein* v. *Resor,* 1970). No justification for the classification was needed: all the agency need do was to go to court and assert that the material was confidential or secret. The United States Supreme Court took the same position three years later in *EPA* v. *Mink* (1973) when Congresswoman Patsy Mink sought classified documents from the Environmental Protection Agency that supposedly justified the decision to conduct a nuclear test on Amchitka Island, Alaska. Congresswoman Mink argued that the Court should review

the documents in private and determine whether they were classified properly or whether the government was merely attempting to hide controversial material from the public. Justice White, and a majority of the high Court, disagreed, stating that in wording exemption one as it did Congress specifically precluded judicial inspection of the contents of classified documents:

> We do not believe that Exemption 1 permits compelled disclosure of documents . . . that were classified pursuant to this Executive Order. Nor does the exemption permit in camera [private or something that is done in the judges chambers] 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.

Once a document is classified, the Court argued, no further inquiry can be made into its contents. By spring 1973 the time was ripe for amendment of the law. As one commentator said, "The Nixon administration was subjecting the national security label to abuse, the courts hesitated to expand their own scope of review, and the Supreme Court hinted in *Mink* that an appropriate solution would have to come from the legislative branch." The exemption was revised in 1974. Courts now have the power to inspect classified documents in private to determine whether they are classified properly. That is, the executive branch must establish criteria for classification (for example, it may declare that all material dealing with United States troop strength in Europe will be classified), and the court can then determine whether the classified documents meet the criteria set down by the government. The new law also permits a court to review decisions by government agencies to withhold requested material to determine whether decisions were properly arrived at or whether they are arbitrary and capricious.

It is important to note in respect to these changes that they are actions courts *can* take, not actions they *must* take. The Fourth Circuit Court of Appeals turned down a request that it privately examine specific secret materials to see whether the documents were classified properly. The court claimed it lacked the expertise to make such a judgment and told the complainant to file a complaint with the agency denying access originally (*Knopf* v. *Colby,* 1975).

In taking this tack the courts seemed to reflect the reluctance of Congress itself to view the FOIA as a means to reform the classification process or to bring about systematic review of individual decisions. The Senate-House conference committee report on the 1974 amendment, for example, noted:

> The executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects may occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that federal courts . . . will accord substantial weight to an agency's affidavits concerning the details of the classified status of a disputed record.

The conference committee suggested, then, that the court really doesn't need to examine the records. A decision hopefully can be reached by the judiciary based upon affidavits from the agency which outline its reason for refusing to disclose the material. In fact agencies have seized upon this language and are, with judicial approval, sugggesting that the courts rely upon their affidavits rather than examine the disputed records. As we have seen earlier in this book, the claim of national security can be an important argument in denying both access to and the publication of information held by the government.

In applying the third exemption under the FOIA, courts generally use three criteria to determine whether a record must be disclosed.

First, there must be a specific statute that authorizes or requires the withholding of information. Next, the statute must designate specific kinds of information which fit the criteria for withholding. Finally, the information requested under the FOIA must fit within the scope of the information which is authorized to be withheld. Tax laws are a good example. They contain numerous confidentiality provisions. Persons seeking to find out, for example, how much income tax various business leaders in a community pay could legally be denied this information since there are specific regulations which make such information confidential.

A 1974 Supreme Court ruling added important interpretation to the meaning of the fifth exemption, which protects from disclosure interagency and intraagency memorandums and letters. The case was *U.S.* v. *Nixon* (1974) and concerned the famous Nixon White House tapes of conversations in the Oval Office.

Since 1794 beginning with President George Washington, American chief executives have asserted that the president enjoys a common law privilege to keep presidential papers, records, and other documents secret. This right is called executive privilege. Washington asserted the privilege when Congress called for all papers and records in the possession of the president which would facilitate its investigation of the negotiation of the Jay Treaty, a controversial agreement with Great Britain. Washington refused to comply with the congressional demand, citing executive privilege. Andrew Jackson refused to give Congress information relating to a boundary dispute in Maine. Millard Fillmore refused a request from the Senate that he provide that body with information regarding negotiations with the Sandwich (Hawaiian) Islands.

In modern times, however, the heads of agencies within the executive branch have asserted that they also enjoy a kind of limited executive privilege. Exemption five covers the kinds of documents—working papers, memorandums, and so forth—traditionally claimed exempt from public scrutiny by executive privilege. The purpose of the exemption is to protect the confidentiality of the decision-making process. However exemption five is often used as a shield to avoid disclosing all manner of material totally unrelated to

decision making. Legal memorandums, correspondence, minutes and transcripts, staff analyses, interpretations and opinions, and recommendations of experts and consultants have all been at one time or another declared to fall within the boundaries of exemption five.

In 1974 in *U.S.* v. *Nixon,* the Supreme Court sharply limited the boundaries of the traditional executive privilege. In this case several of the famous White House tapes were subpoenaed by the special prosecutor for use in the criminal trial of some of the Nixon aides. The former president argued that the tapes were protected by executive privilege. He said that revelation of the material on the tapes would damage the integrity of the decision-making process, and that under our system of separation of powers the courts were precluded from reviewing his claim of privilege. He also argued that even if his claim of absolute executive privilege should fail the court should at least hold as a matter of constitutional law that his privilege superseded the subpoena.

However, in a unanimous opinion (eight to nothing since Justice Rehnquist did not participate in the decision) the Burger Court rejected the notion of absolute privilege in this case. The Court said that an absolute privilege can only be asserted when the material in question consists of military or diplomatic secrets. When other kinds of information are involved, privilege of the president must be balanced against other values, in this case, against the operation of the criminal justice system. The need for the privilege must be weighed against the need for the information. Courts will have to make these decisions from private examination of the materials in question.

How does this decision affect exemption five? Since exemption five is based on the notion of the executive privilege, and since the courts have said such an absolute privilege does not exist in the absence of military or diplomatic secrets, agencies which claim exemption five as reason to deny access will have to allow the courts to scrutinize the material in question and evaluate whether the need for secrecy outweighs the benefits of disclosure. The mechanical process of the past under which agencies could gain the exemption merely by asserting that the material in question fell under the purview of the fifth exemption is probably gone. Now, when they are challenged, agencies will have to prove to a judge that the material does in fact come within the fifth exemption. Disclosure of much such material withheld in the past should be ensured.

Finally, a recent Supreme Court opinion provided considerable clarification of exemption six, which provides that agencies need not disclose "personnel and medical and similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Many agencies attempt to use this exemption to preclude the release of material, and two important questions developed in the interpretation of the exemption. First, did Congress intend

to distinguish between personnel and medical files on the one hand and similar files on the other? In other words, did Congress intend that under no circumstance could information in a personnel or medical file be disclosed, but only that information in "similar" files which would constitute a clearly unwarranted invasion of privacy could be withheld? Or did Congress intend that the information in all three types of files could be released so long as it did not constitute an invasion of privacy. Second, what did Congress intend by the phrase "clearly unwarranted invasion of privacy"? Two courts of appeals applied the phrase differently. In *Robles* v. *EPA* (1973) the Fourth Circuit Court ruled that the only test to be applied in determining whether something can be released is whether the release of the information constitutes an invasion of privacy. But the Court of Appeals for the District of Columbia ruled in *NLRB* v. *Getman* (1971) that a court has to make two considerations: first, will the release of the information result in an invasion of privacy? second, if there is an invasion of privacy, is it warranted? In other words, does the public interest in having the material disclosed outweigh the individual's interest in privacy?

From the standpoint of open government it is better that the privacy criteria be applied to all files, not just to similar files, with medical and personnel files completely closed. Similarly the two-step application of the privacy criteria from the *Getman* case provided for more access to information. In 1976 the Supreme Court answered both questions in a proaccess fashion in *Department of the Air Force* v. *Rose*. In the *Rose* case the student editors of the *New York University Law Review* sought access to the summaries of cadet honor and ethics hearings conducted at the Air Force Academy. Even though all personal references which might have identified the cadets were deleted, and despite the fact that the summaries were circulated with some regularity and posted on squadron bulletin boards at the academy, the Air Force raised the sixth exemption—the privacy exemption—as a bar to the release of the material.

The Supreme Court, speaking through Justice Brennan, cited the legislative history of the exemption and said that it was clear that Congress did not intend to completely exempt all personnel and medical files, but only those "similar" files the disclosure of which would constitute an invasion of privacy. In every case, whether the information was from a medical, personnel, or "similar" file, a balance will have to be struck between the right to privacy and the public interest, Brennan ruled.

In adopting the two-step privacy test from *Getman,* Justice Brennan noted that exemption six does not protect from disclosure every incidental invasion of privacy, but rather "only such disclosures as constitute 'clearly unwarranted' invasions of personal privacy." Further, the public benefit to be derived from permitting public access to the information held by the government is an important factor in determining whether a particular invasion of privacy is warranted.

Brennan's interpretation of exemptions will be of significant assistance to the press and public, since all evidence points to an increasing use of the privacy argument by government agencies as a means of blocking access to important information. The right to privacy has become a kind of powerful talisman recently to which even federal judges do not seem immune.

The other exemptions under the FOIA more or less speak for themselves. What is needed to make the act more meaningful is more litigation by the public and the press to clear away the vague nature of some of the language which agencies now hide behind when confronted with legitimate FOIA requests. The law is not difficult to use. In 1977, in an informative article in the *Columbia Journalism Review* ("The Revised F.O.I. Law and How to Use It"), longtime right-of-access proponent Sam Archibald offers some suggestions to journalists on making the law work.

1. Find out which agencies have the material in which you are interested. The *United States Government Manual* lists all federal agencies (Archibald writes), explains what they are supposed to do, and usually lists local addresses and telephone numbers.
2. Call or write the agency to get background information about the material and information in which you are interested.
3. When you have determined what records you seek, write an official request for the material. Address it to the head of the agency, describe as specifically as possible the material you seek, and state that the request is made under the Freedom of Information Act: 5 United States Code, Section 552.
4. If your request is rejected, file an appeal with the head of the agency. Send along the copy of the rejection letter and make a strong argument why you think the material is not exempt.
5. If the appeal is rejected—and you really want to get the material—go to court. This final point, more than any other, needs to be emphasized. So long as government agencies are confident that the press and public won't bother with lawsuits, the tendency to withhold information will be reinforced. But strong sanctions can be applied against government officials who are found to have deliberately withheld material illegally. Sanctions can only be applied, however, after judicial determination of the matter. The application of this kind of pressure on a regular basis by the press and the public can have generally positive impact in the battle for open government.

Federal Open Meeting Law

Gaining access to the records held by government is one thing; gaining access to the meetings of public bodies is another. Certainly one of the greatest access problems faced by both the public and the press is the fact that Congress conducts much of its important business behind closed doors. And there is little likelihood that anything will be done to change the situation.

In 1976 Congress passed and the president signed into law the Government in Sunshine Law, a statute which requires that approximately fifty federal boards, commissions, and agencies conduct their business meetings in public. Notice of public meetings must be given one week in advance, and the agencies are required to keep careful records of what occurs at closed meetings. The law also prohibits informal communication between officials of an agency and representatives of companies and other interested persons with whom the agency does business unless this communication is recorded and made a part of the public record.

The 1976 law lists ten conditions or exemptions under which closed meetings might be held; the first nine conditions mirror the exemptions in the FOIA. The tenth exemption focuses upon situations in which the agency is participating in arbitration or is in the process of adjudicating or otherwise disposing of a case.

The law is not without its problems, and compliance is not good at this point. Fred Graham, a CBS correspondent, reported in a recent speech that in the early months of the operation of the law only about one-third of the meetings held by agencies covered by the law were open to the public. Undoubtedly it will take several years of pressure by the press and the public—as happened with the FOIA—to make the law work.

State Statutes and Open Meetings and Open Records

It is not as easy to talk about access at the state level as it is at the federal level, for we are dealing with hundreds of different statutes. (Most states have multiple laws dealing with access to meetings, access to records, and other access situations.) We can at best make a few generalizations. Harold Cross made some of the most astute generalizations in 1953 in his pioneering book *The People's Right to Know.* Cross was really the first scholar to present a comprehensive report on access problems. In his book he listed four issues or questions common to every case of access.

1. Is the particular record or proceeding public? Many records and meetings kept or conducted by public officers in public offices are not really public at all. Much of the work of the police, though they are public officers and work in public buildings, is not open to public scrutiny.

2. Is public material public in the sense that records are open to public inspection and sessions are open to public attendance? Hearings in juvenile courts are considered public hearings for purposes of the law, but they are rarely open to the public.

3. Who can view the records and who can attend the meetings open to the public? Many records, for example, might be open to specific segments of the public, but not to all segments. Automobile accident reports by police departments are open to insurance company adjusters and lawyers, but such records are not usually open to the general public.

4. When records and meetings are open to the general public and the press, will the courts provide legal remedy for citizens and reporters if access is denied?

The last question is probably not as important today as it was when Cross wrote his book in 1953, for at that time access to many public records and meetings in the states was based on the common law. Today this fact is no longer true. Access to meetings and records is nearly always governed by statute, and these statutes usually, but not always, provide a remedy for citizens who are denied access. This provision is more widespread in open meeting laws, which tend to be more efficient in providing access, than in open records laws, which are still weak and vague in many jurisdictions.

Virtually all states have some kind of constitutional or legislative provision regarding the need for open meetings. At least forty-seven states have specific statutes which mandate open meetings, and these laws range from good to awful. The need for open meeting laws is obvious. There never was a solid common law right to attend the meetings of public bodies, and as noted earlier, the constitutional provisions regarding freedom of expression have proved inadequate with regard to access.

Many states have good laws with strong sanctions to be used against public officials who fail to live up to the legislative mandate.

William R. Wright II, writing in a recent edition of the *Mississippi Law Review* ("Open Meeting Laws: An Analysis and a Proposal"), outlined the basic provisions of state open meeting laws. According to Wright, the most vital provision of such a law is a strong, clear statement by the legislature to open up the deliberations and actions of the government to the people. If a provision of the law is questioned in court, a strong legislative declaration in favor of open access can be used to persuade a judge that if a section of the law is vague it should be interpreted to grant access rather than to restrict access, since that is what the legislature wants.

In Washington the state's open meeting law begins as follows:

> The legislature finds and declares that all . . . public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.

State legislatures have usually written their open meeting laws in one of two ways. Some state legislatures have declared that all meetings will be open except specific meetings and then list the meetings to be open. Other states list the agencies which must hold open meetings. Generally excluded from the provisions of an open meeting law in either case are meetings of the legislature itself, of legislative committees, of parole and pardon boards, of law enforcement agencies, of military agencies like the national guard, of public hospital boards, and so forth.

Wright says that a good law should specifically define a meeting by giving the number of members of the board or commission who must be present to constitute a public meeting (a quorum? at least two? etc.), by stating that all deliberative stages of the decision-making process are considered meetings and must be open to the public, and by stating that social gatherings and chance encounters are not considered meetings and are therefore excluded from the provisions of the law. Some laws are not this specific and merely refer to all meetings, all regular or special meetings, all formal meetings, or whatever.

The exclusion of chance meetings and social gatherings is often troublesome to the press, especially in small towns. It is not uncommon that all members of the school board or the city council happen to have dinner at the same restaurant just before a meeting. If the dinner is obviously a ploy to avoid the law, a suit can be brought against the members. Often it is difficult to prove that the dinner is anything other than a chance encounter or a social gathering.

Most open meeting laws provide for closed or executive sessions in certain kinds of cases. Meetings at which personnel problems are discussed is an obvious example. A public airing of a teacher's personal problems could be an unwarranted invasion of privacy. The discussion of real estate transactions is another obvious example. When a school board considers buying a parcel of land for a new high school, premature public disclosure of this fact could cost the taxpayers money should the owner raise the price of the property or speculators buy it and force the school district to pay far more than it is worth. Meetings involving public safety are also often best conducted in private rather than in public. Virtually every open meeting law has the provision that no final action can be taken at an executive session, that the board or commission must reconvene in public before a final determination can be made on any issue.

Most open meeting statutes require not only that meetings be open to the public, but also that the public be notified of both regular and special meetings far enough in advance that they can attend if they wish. Time requirements vary, but normally a special meeting cannot be held without an announcement a day or two in advance.

The laws in twenty-one states provide procedures for enforcement. In other states complainants must muddle through on their own in the courts. In fourteen states any action taken at a meeting which was not public, but should have been public, is null and void. The action must be taken again at a proper meeting. Most laws provide fines and short jail terms for public officers who knowingly violate the law, but prosecution is rare.

While a few laws date from the nineteenth century, the open meeting laws in most states are a relatively new phenomenon. Such laws, which owe

their passage to strong, forceful pressure from the press, have developed largely since 1950. In 1959 only twenty states had such laws. Formation in the early 1970s of the public lobby Common Cause gave great impetus to the passage of open meeting laws. In 1972 and 1973, alone, nine states passed such statutes. But after it had evaluated all of the nation's open meeting laws in 1973, the organization concluded that only eight states have laws which are adequate. Common Cause defined an adequate law as one which covers both the legislative and executive branches, permits executive sessions only in extremely limited circumstances, and also includes provisions which void actions taken at illegally closed sessions.

One commentator recently noted that the lack of effectiveness of these laws "means that the reporter's most marketable skill is still very much in demand for covering local government. His or her special talent has been to ferret news from unexpected or well-cultivated sources." There is much truth in this statement with regard to open meeting laws. Despite open meeting legislation, one informal remedy is still very effective: to subject the commission or board which decides to meet in secret to public embarrassment. Reporters should never voluntarily leave a meeting which they believe should be public. Rather, they should force public officials to escort them to an exit. Resistance is not advised, for criminal charges then might be levied against the reporter. If possible, a photographer should record the removal from the meeting. The photograph and the story can then be prominently featured on page one the next day. Public officials don't really like to meet in public, but they like even less to be pictured conducting "the public's business" behind closed doors. Voters begin to wonder what goes on in secret meetings.

Laws regarding access to public records are far less easy to categorize than are open meeting laws. Virtually all states have some kind of freedom of information act. This is not to say that public access to documents and records is guaranteed in every state, for the laws vary widely and are sometimes ineffectual. Common law rules regarding access still play a large role in many jurisdictions. In some states access laws are limited to only a few kinds of public records and access to other documents is available only through the courts. In other states, statutes pretty much reflect the old common law rules on access. The basic common law principle regarding access to records was well stated in 1961 by the Oregon Supreme Court in the case of *MacEwan* v. *Holm:*

> In determining whether records should be made available for inspection in any particular instance, the court must balance the interest of the citizen in knowing what the servants of government are doing and his proprietary interest in public property against the public interest in having the business of government carried out efficiently and without undue interference.

Why a person wants to see a record is often a key element in the case, and normally the burden rests upon the state agency to prove that the record should not be disclosed.

Generally, access laws either follow the federal formula—all records are open except the following—or list the kinds of records which the public does have the right to inspect. Some laws merely define what constitutes a public record, but fail to provide for the specific right of inspection. Some statutes merely provide for the right of inspection of public records and fail to outline what constitutes a public record. In most states when access to records is denied, the complainant has to go to court. But two states, Connecticut and New York, have introduced innovations which could improve access to records.

Connecticut has established an independent commission to handle citizen appeals on denial of information requests. The three-member commission must meet within twenty days after receiving an appeal, hear the matter, and issue a ruling within fifteen days. The body can uphold the denial or make the agency provide access to the material. Either citizens or government agencies can appeal any decision by the commission to a court.

New York State's new access law established a Committee on Public Access to Records. This committee has wide authority to issue regulations for the use of records and implementation of the new statute. There are seven members on the committee—three government officials and four persons appointed by the governor, two of whom must be from the media. The committee's function is different from the Connecticut commission which acts as a review board. In New York the committee advises agencies and local government on access questions through guidelines, opinions, and regulations. It is supposed to recommend changes in the law when problems arise. In addition, to make the new law work more efficiently the commission issues rules and guidelines: rules regarding the time and place records must be available, fees for copying, persons responsible for divulging records, and so forth. Finally, it is the job of the committee to ensure that the right of privacy of New York citizens is protected in connection with public access to the state's records. Some people criticize this last function, arguing that it makes little sense to make the same agency in charge of facilitating public access responsible for protecting the right of privacy. Something about foxes guarding chicken houses was mentioned. The law is so new that it is difficult to assess whether this potential conflict will develop.

New York has chosen not to follow the model of the FOIA, and instead its law lists the kinds of records which must be available for public inspection. In summary, the law requires the following kinds of records to be open:

1. Final opinions and concurring and dissenting opinions in litigation
2. Policy statements and supporting factual data
3. Minutes of meetings and hearings

4. Audits and supporting data
5. Staff instructions and manuals
6. Name, address, title, and salary of government officers, except law enforcement officers
7. Final determinations and dissenting opinions of governing bodies

This trend toward establishing public committees or commissions to handle access problems, to help interpret the law, and to issue guidelines is a very good one. It is far easier to complain to a commission when access is denied than to file a court suit. Committees like the New York Committee on Public Access to Records will make a state law far more meaningful and useful when a local government is dealt with. Access laws passed by states are often ignored at the local level because of ignorance or because citizens and press are unlikely to complain until a big issue arises. By providing guidelines and rules for local communities, a committee on public access immediately breathes life into an access law.

It is incumbent on all journalists and broadcasters to be as familiar as possible with the laws regarding access in their state. Knowledge of these kinds of laws is vital to efficient and complete reporting on government activities. Employees of public agencies are often as uninformed as average citizens about their responsibility to provide access to meetings, especially to records. Because of the normal adversary relationship between press and government, the natural tendency is to want to keep the reporter out of public documents and public meetings. Too often reporters are buffaloed by stubborn, uninformed, untruthful public employees who insist that they are not permitted by law to allow public inspection of certain records. If reporters know the law, they can recognize such bluffs on the spot and fulfill their responsibility to keep the public fully informed on the business and activities of government.

FEDERAL REGULATIONS OF GOVERNMENT INFORMATION

Just as there are laws which provide for public access to government-held documents, there are laws which specifically preclude access to government-held information. There are provisions in scores of federal laws alone which limit the right of access. Tax statutes, espionage laws, legislation on atomic energy, and dozens of other kinds of laws are filled with limitations on the dissemination of information, (i.e., personal information on taxes, national security questions, and matters relating to nuclear weapons). But in addition to these kinds of laws the federal government has adopted in the past decade at least three rather broad sets of regulations regarding information held by the government. All three were adopted in the name of protecting the right to privacy, a value which seems to have replaced national security as the most commonly asserted reason the government uses to keep things secret. While these regulations cannot here be considered in a comprehensive sense, persons who gather information for a living need to be aware of their implications.

General Education Provisions Act

An amendment to the General Education Provisions Act (1974) is aimed at increasing both the parental access to and the confidentiality of educational records. On the one hand, the law forces all federally funded schools and educational agencies to permit parents to inspect and review their children's educational records. On the other hand, the statute prohibits the distribution of personally identifiable information, excluding what is called directory data, to unauthorized persons without consent of the parents. The result is that student records or files must be kept confidential. This goal is hardly a hardship on the press in most instances. However, because of the stiff penalty in the law—possible loss to the school of federal funds—educators have occasionally overreacted and declared data that are actually unprotected by the statute to be confidential. In one absurd case a reporter-photographer indicated that school officials chased him off school property when he attempted to photograph children playing outside at recess. The officials cited the 1974 law as a reason that picture taking was no longer permitted on school property. Of course, instances like that are rare, and the significance of the law is its indication of the extreme interest in privacy today rather than its threat to the legitimate news-gathering tasks of the press.

The Federal Privacy Law

The Privacy Act of 1974 has two basic thrusts. First, it attempts to check the misuse of personal data obtained by the federal government, the quantity of which has, of course, reached staggering proportions. Second, the law is intended to provide access for individuals to records about themselves that are held by federal agencies. The first objective of the law could be the most troublesome to the press.

The act requires that each federal agency limit the collection of information to that which is relevant and necessary, to collect information directly from the subject concerned when possible, and to allow individuals to review and amend their personal records and information. Also, under the act agencies are forbidden from disclosing what is called "a personally identifiable record" without the written consent of the individual to whom the record pertains. Since this section of the law is seemingly contradictory to the spirit of the federal FOIA, Congress was forced to clarify the responsibilities of federal agencies with regard to the law. A provision was added to the Privacy Act that declares that records required to be disclosed under the FOIA are not subject to the provisions of the Privacy Act and consequently cannot be withheld from inspection. To the government official with control of information, however, neither the Privacy Act nor the FOIA is unambiguous. The

Discussion of the General Education Provisions Act and the Federal Privacy Law, pages 135–36, is adapted from Don R. Pember, "The Burgeoning Scope of 'Access Privacy' and the Portent for a Free Press," 64 *Iowa Law Review* 1155, 1979.

laws have yet to be definitely interpreted; it remains unclear which specific records or documents fall under the disclosure mandate of the FOIA, which are covered by one of the exemptions in that law, and which are within the scope of provisions of the Privacy Act.

The Privacy Act imposes a cost on an agency if it releases a file that should have remained private. To the bureaucrat, that presents a real dilemma, as was emphasized in the *Harvard Civil Rights Civil Liberties Law Review* (1976):

> If government officials refuse to disclose the material, they risk being sued by the party who requested the file under the Freedom of Information Act. Under the FOIA the court may award to a successful plaintiff his costs and attorney's fees. If, on the other hand, agencies release material, they risk being sued under the Privacy Act by the person who is the subject of the file. In that case, the plaintiff might win by showing that the file was exempt from disclosure under FOIA. A successful Privacy Act plaintiff can collect not only his costs and attorney's fees, but also actual damage sustained because of disclosure.

Given this distinction between the statutes, it is easy to recognize that bureaucrats will choose to err on the side of caution—it is wiser to withhold the information and risk suit under the FOIA than possibly incur Privacy Act penalties.

Other conflicts exist in the administration of the two laws. Before passage of the Privacy Act, materials that were not required to be disclosed under the FOIA were nevertheless disclosable at the discretion of a government agency. Now, information falling under a FOIA exemption and thus not required to be disclosed will routinely be withheld out of fear of violating the Privacy Act. The dimensions of the problems that could be caused to news gatherers because of the conflicts in these laws have yet to be charted. At present this seems to be fertile ground for the growth of serious problems.

Criminal History Privacy Laws

In accordance with the broad scope of the Omnibus Crime Control and Safe Streets Act of 1968, the federal Law Enforcement Assistance Administration, an agency created by the Nixon administration to help local police forces fight crime, sought to develop a national computerized record-keeping system. The system that was established permits any police department in the nation to have access to the records of virtually all other police departments.

Congressional concern about the misuse of this record system led to limitations on access to the data. Police records have always contained a considerable amount of misinformation, information that is out of date, and information that is private. The centralized record-keeping system presents a problem referred to by some writers as the "dossier effect." The contrast between these computerized and centrally maintained records immediately

Discussion of Criminal History Privacy Laws, pages 136–38, is adapted from Pember, "Access Privacy and Free Press."

accessible across the country and those police records of the past was sharp and immediately evident: fragmented, original-source records kept by a single police agency for a limited geographical area were not readily accessible because of their bulk and associated indexing problems. Hence, federal rules were adopted that require states, if they wish to participate in the national record-keeping system, to adopt rules that, among other things, limit the dissemination of some criminal history nonconviction data.

The *Code of Federal Regulations* ("Criminal Justice Information Systems") defines nonconviction data as follows:

> . . . arrest information without disposition if an interval of one year has elapsed from the date of arrest and no active prosecution of the charge is pending, or information disclosing that the police have elected not to refer a matter to a prosecutor, or that a prosecutor has elected not to commence criminal proceedings, or that proceedings have been indefinitely postponed, as well as all acquittals and all dismissals.

As a result of the state laws, press access to criminal history records kept by the police has been virtually eliminated unless data sought pertain to an incident for which a person is currently being processed by the criminal justice system, are conviction records, or are original records of entry, such as arrest records, that are maintained chronologically and are accessible only on that basis. Reporters can also obtain information about arrests not resulting in conviction, however, if they are aware of the specific dates of the arrests. The new laws have been in effect too short a time to determine whether they will substantially affect the press's ability to meet its societal responsibility to scrutinize and report on the criminal justice system. Nevertheless, potential problems are apparent. In commenting on the social desirability of press access to criminal records Higgins ("Press and Criminal Record Privacy") recently noted:

> On the one hand, the uncontrolled dissemination and publication of certain criminal history records can adversely affect the individual himself. On the other hand, the public and the press must have access to basic records of official action if they are to effectively scrutinize and evaluate the operations of the police, the prosecuting agencies, and the courts.

The ability to achieve that scrutiny is important. For example, it is possible to envision a situation in which a prosecutor is accused of favoring friends or certain ethnic or racial groups when deciding whether to prosecute arrested persons. Without access to arrest records that can be compared with prosecution records, such a charge would be difficult to investigate. Persons within the criminal justice system could gain access to the needed records, but history indicates that these people must be prodded before they take action. And, of course, prodding is the function of the press.

There is another related, more serious problem that should be of great concern to persons earnestly worried about invasions of privacy. If the press cannot obtain official criminal history records, which admittedly are sometimes incorrect, journalists will rely on their own record-keeping systems, which are much more frequently inaccurate. Newspapers and broadcasting stations usually build record systems—called morgues—by saving clippings from newspapers and film from newscasts. Errors in these original stories are seldom corrected. For example, suppose Jones was arrested in 1965 and charged with driving a stolen car. The local newspaper published incorrectly that he was arrested for car theft. Jones was never prosecuted. Fifteen years later he runs for the school board. The newspaper goes back into its own records—which it cannot verify with the police—and republishes its original error, that Jones was arrested for car theft. In such circumstances everyone—Jones, the press, the public—suffers.

To avoid such consequences, society would probably be served better if laws were passed that force law enforcement agencies to continually monitor, update, and correct their criminal records, but that nevertheless permitted public access to the records. Such laws could require, for instance, that when arrest data are released disposition data must accompany the arrest data. There is, of course, no guarantee that the press or other agencies would publish the complete story—the arrest and the dismissal, for example, or the arrest and the subsequent acquittal—but no system that depends on a human element is risk free. In the end, public access to complete and accurate information is much to be preferred to a growing dependence on "private" media data banks.

Gaining public access to government-held information has been a problem for about as long as democracy has existed as a form of government. With the development of a corps of professional information and news gatherers in this century, the problem has become more visible. Couple this fact with the enormous growth of government in the past half-century, and a problem of rather large proportions develops. Until the last twenty years most journalists depended upon friendship with sources, skill, and wile to get the news from governments. Many reporters argue that this is still the best way to find out what is going on. The law plays an ever-increasing role today in gathering news and information. Much of the process of getting the news and keeping it has been institutionalized by statute and court decisions. At the same time the law has raised serious impediments to information gathering which the press has thus far had difficulty in hurdling. Many of the most important press-government battles in the next decade will be fought over these issues, and at present the question of who will be the winner—the press, the government, or the public—is far from being answered.

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4 Libel

Defamation, or libel, is probably the most common legal problem most journalists face in the 1980s. Not that there are a great many libel suits. There are not. Reporters and newspapers and broadcasting stations are rarely sued for libel. Still, the potential for libel exists with virtually every story that is published or broadcast. Consequently, libel is an ever-present, if not always obvious, danger in the newsroom.

Probably considerably more defamation is published and broadcast than editors like to imagine. Still, a lawsuit is rare. The chances of success in winning a libel suit are often very low. Many attorneys advise their clients that a lawsuit often only publicizes the original defamation far beyond the original audience. A defamatory falsehood published in a small gossip magazine or obscure newspaper column has a limited audience. A lawsuit based on such publication draws attention to the defamation, and many persons who did not originally see the story are drawn to it. Other lawyers argue that the truth rarely catches up with a lie, and it is best just to ignore the defamation because the public will soon forget it. Finally, while many defamatory statements may be partially false, they may be partially true as well. The injured person may be reluctant to admit that a portion of the defamation is true in order to prosecute the untrue portion in a lawsuit.

Hesitancy to sue, however, is sometimes offset by the possibility and hope of a large money judgment. To the press losing a major libel suit, or sometimes even winning one, can be financially devastating. In past years libel judgments amounting to hundreds of thousands of dollars have not been uncommon. In a few cases more than one million dollars has been awarded. Time, Inc.—which has had more than twenty major libel suits since 1969—can afford to pay a $500,000 libel judgment. The *Texas Observer* and the *New Republic*

cannot. Judgments like this can kill small publications. Even if the publication wins, victory can be costly. Drew Pearson's biography asserts that he was sued for libel approximately 275 times for a total of $200 million during the years that he wrote the column "Washington Merry-Go-Round." Pearson won all suits but one, which he settled out of court for $40,000. At the same time, however, he paid out hundreds of thousands of dollars in legal fees to defend himself in these suits. Small publications cannot afford such fees. In the face of such enormous libel judgments and costly legal fees, the great temptation for the editor is to pull back, to not take the chance, to censor his own publication or news broadcast. This situation is discussed more fully at the end of the chapter.

Many lawyers are often troubled by libel because of the immense inconsistencies in the law. The roots of libel law are in the common law. In some states libel law is codified, and statutes have been approved by various state legislatures. Regardless, differences exist from state to state. Even within states many areas of the law remain unsettled. Libel attorney and author Paul Ashley wrote in his handbook *Say It Safely*:

> Significant segments of the law of libel are unique—dissimilar from legal rules with which lawyers and judges are most familiar. Libel cases are relatively few in number. Judges are not ordinarily experienced in the practical application of the esoteric concepts of privilege and fair comment essential to the preservation of freedom of speech and, in turn, of a free society. And so it is that here and there will be found maverick decisions which distort the law of libel.

No editor wants his newspaper to become the victim of one of these maverick decisions. The impetus toward self-censorship is strong.

Libel, therefore, remains a very important consideration for publishers and broadcasters. Despite the libel protections for the press which have evolved in the past few years through constitutional law, the threat of a libel suit still works against the kind of free and robust communication system envisioned by many philosophers of the First Amendment.

The law of defamation is ancient; its roots can be traced back several centuries. Initially the law was an attempt by government to establish a forum for persons involved in a dispute brought about by an insult or by what we today call a defamatory remark. One man called another a robber and a villain. The injured party sought to avenge his damaged reputation. A fight or duel of some kind was the only means of gaining vengeance before the development of libel law. It was obvious that fights and duels were not satisfactory ways to settle such disputes, so government offered its "good offices" to solve these problems. Slowly the law of defamation evolved.

Today, the process of going to court to avenge one's honor is highly institutionalized. In addition, some scholars in the field suggest that the purpose of the law has subtly changed as well. While protection of reputation

still remains a primary objective of the law of defamation, the law is also seen as a means of gaining press accountability. Standards of responsible journalism and professional conduct are frequently applied to the press in determining liability, and in this way society and the government, via the court system, are taking a role in defining acceptable journalistic practices.

In other parts of the world different schemes are used to accomplish similar ends. In continental Europe libel suits are uncommon. When a newspaper defames a person, that person has the right—under law—to strike back, using the columns of the same newspaper, to tell his side of the story, so to speak, to blast the writer or the editor. This right is called the right of reply, and it exists in the United States in a far less advanced form, as is noted near the end of this chapter. Many people favor the notion, that is, letting the parties fight it out in print or by broadcast. They say it is far better to set out after the truth in this fashion than to rattle the chains on the courthouse door every time an insult is flung in the public press.

Over the centuries the law of defamation has become very complex and very confusing. Parts of the law, however, do not really concern journalists. In this chapter the discussion of the law of libel is generally confined to those areas of the law which are important to reporters, editors, and broadcasters, and some aspects of libel law are not included. For example, the law of defamation regarding private communications as opposed to public communications differs somewhat. What a newspaper can legally do is somewhat different from what an employer writing a job evaluation for an employee can legally do. Defamation contained in personal letters, credit reports, job evaluations—a whole range of relatively private communications—is treated somewhat differently in the eyes of the law. The focus of this chapter is defamation in the mass media, that is, public communication libel.

Additionally, it must be remembered that libel law is essentially state law. It is possible to describe the dimensions of the law in broad terms that transcend state boundaries, and that is what this chapter attempts to do. But important variations in the law from state to state exist as will be demonstrated later in this chapter in the discussion of fault requirements. It is important for students to focus on the specific elements of the law in their states after gaining an understanding of the general boundaries of the law.

Another complex problem in the law has to do with whether a communication is a libel (written defamation) or a slander (an oral defamation). The law in many states distinguishes between the two. The problem was simple one hundred years ago. Because of the state of technology, a public communication, one meant for a wide audience, was a printed communication—a newspaper, magazine, or handbill. Therefore a law which dealt with libel more harshly than with slander made sense: libel caused more severe damage. A libel lasted longer than a slander since a libel was printed, more people saw

it, and it was generally considered to be planned defamation, not words accidentally spoken in the heat of argument. Film, radio, and television have made these distinctions meaningless. If a performer defames someone on "The Tonight Show," despite the fact that the defamation is not printed, the defamation still has immense impact and is heard by millions. A great many states continue to wrestle with the problem of whether defamatory radio and television broadcasts are libel or slander. We are going to take the position—supported by several authorities—that a published defamation, whether it is in a newspaper, on radio or television, in the movies, or what have you, is a libel. And libel rules apply.

The purpose of this chapter is to give journalists guidance and rules to apply in the process of gathering, writing, and publishing, and broadcasting the news. People who want to learn to litigate a lawsuit should go to law school. This author's goal is to keep reporters and broadcasters out of libel suits or at least to keep them from losing a libel suit.

The chapter is divided into two basic parts. The first section deals with the nature of a defamation suit: definitions of libel, what a plaintiff must prove in a libel suit, words that tend to be defamatory, and so forth. The second section outlines the various defenses—legal excuses for publishing defamatory matter—for a libel suit.

ELEMENTS OF LIBEL

There are many definitions of defamation, and they are all about the same. A few typical definitions follow.

In their book *Libel* Phelps and Hamilton include this definition:

> Defamation is a communication which exposes a person to hatred, ridicule, or contempt, lowers him in the esteem of his fellows, causes him to be shunned, or injures him in his business or calling.

The legal encyclopedia *Corpus Juris* defines libelous words as follows:

> . . . words which have a tendency to disgrace or degrade the person or hold him up to public hatred, contempt, ridicule or cause him to be shunned and avoided; the words must reflect on his integrity, his character, and his good name and standing in the community. . . . The imputation must be one which tends to affect the plaintiff in a class of society whose standard of opinion the court can recognize. It is not sufficient, standing alone, that the language is unpleasant and annoys and irks plaintiff and subjects him to jests or banter, so as to affect his feelings.

The new edition of the *Restatement of Torts* (2nd ed.), a compilation by the American Law Institute of what it thinks the common law says, defines libel this way:

> . . . a communication which has the tendency to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating with him.

Here's a shorter definition: Defamation is any communication which holds a man up to contempt, hatred, ridicule, or scorn.

Each of the four preceding definitions reveals common and important elements of defamation.

1. Defamation is an action which damages the reputation of a person, but not necessarily the individual's character. Your character is what you are; your reputation is what people think you are. Reputation is what the law protects.

2. To be actionable defamation, the words must actually damage a reputation. There must be some harm done to the individual's reputation. Without proof of this harm the party who claims injury will not be able to recover damages for the injury.

3. At least a significant minority of the community must believe that the plaintiff's reputation has been damaged, but the minority must not be an unrepresentative minority. A Delaware superior court recently ruled that it was not defamatory for a television newscaster to refer to a convict as "an alleged FBI informant." The plaintiff complained that the statement hurt his reputation among his fellow prisoners at the state penitentiary. Conceding that the "informant" label might harm his prison reputation, the court ruled that "it is not one's reputation in a limited community in which attitudes and social values may depart substantially from those prevailing generally which an action for defamation is designed to protect." The public in general would not think any less of the plaintiff for being an informant for the FBI (*Saunders* v. *WHYY-TV*, 1978). To summarize this point: The defamation must lower a person's reputation in the eyes of a significant number of people, and unless unusual circumstances exist, these people must fairly reflect representative views.

Persons can be injured through a libel in numerous ways. The statement may simply hurt their reputation, or it may be that lowering their reputation deprives them of their right to enjoy social contacts, which is a fancy way of saying that their friends don't like them any more or their friends want to avoid them. A man or woman's ability to work or hold a job or make a living may be injured. A person need only be injured in *one* of these three ways to have a cause of action for libel. If plaintiffs can show actual harm in any one of these areas, chances are good they will recover some damages. That is one of the reasons libel law exists—to compensate the plaintiff for injury. There are other reasons. A libel suit can help vindicate the plaintiff, help restore the damaged reputation. A victorious plaintiff can point a finger at the newspaper or television station and say, "See, they were wrong, they lied, they made an error." A damage judgment is also considered punishment for the defendant. Hopefully, having to pay a sum of money will remind the editor or broadcaster to be more cautious in the future. It can stand also as an example to other journalists to avoid such behavior.

Any living person can bring a suit for civil libel. If a dead person is libeled, relatives cannot sue in the name of the deceased However, as noted in the last section of this chapter, it is possible (but highly improbable) for the state to bring a criminal libel action against the publisher of a defamation against a person who has died. A business corporation can sue for libel, as can a nonprofit corporation, if it can show that it has lost public support and contributions because of the defamation. There is a division in judicial opinion about whether unincorporated associations like labor unions and political action groups can sue for libel. Some court rulings say no, others say yes. Find out what the law is in your state or play it safe. Cities, counties, agencies of government, and governments in general cannot bring a civil libel suit. This question was decided years ago and is settled law (see *City of Chicago* v. *Tribune Co.*, 1923). Nevertheless, every now and then an angry public official brings an action against the media in the name of the city or state rather than sue as an individual. In 1970 *Life* magazine reported that organized crime strongly influenced the government of Louisiana. The governor of the state brought an action against *Life* in the name of the state. The case was quickly thrown out by a state appeals court which ruled that a government is composed of temporary representatives and has no cause of action for defamation (*State* v. *Time, Inc.*, 1971). Neither can relatives of defamed persons sue simply because they are relatives. If you call John Smith a fraud, John's brother Homer cannot sue just because he is related to John.* It is a different story if Homer can show that the libel reflects on him. For example, if you call John Smith illegitimate, the charge reflects directly on his parents, and they can sue.

THE PLAINTIFF'S CASE

In a libel suit, as in any kind of lawsuit, certain tasks fall to the plaintiff and certain tasks fall to the defendant. Since the plaintiff initiates the suit, he or she bears the burden of getting the case started. In a libel suit the plaintiff is charged with establishing four elements, and without proof of these elements the case will be dismissed even before it really starts. The four conditions which the plaintiff must prove are.

1. That the libelous communication was published
2. That the plaintiff was identified in the communication
3. That the communication is defamatory in some way
4. That the libelous matter was published due to neglect or disregard or carelessness, that its publication is not the result simply of an honest error

*John Smith, Jane Adams, Frank Jones, Professor LeBlanc, KLOP, the *River City Sentinel*, *Scam* magazine, and the like, are my fictional creations and are used to illustrate specific points I wish to make when actual case law either does not exist or is unknown to me.

This last element, known as the fault requirement, is applicable only to those libel suits brought against mass media defendants—newspapers, magazines, broadcasting stations, motion-picture companies, and so forth. Since mass media law is the focus of this book, the fault requirement can be considered an essential element in all libel suits discussed in this chapter. The fault requirement is also the most complicated of the four elements. The kind of fault which must be proved by the plaintiff, whether the defamation results from simple negligence by the reporter or from deliberate disregard of the plaintiff's reputation, depends upon who the plaintiff is and in which state the lawsuit is filed. Many persons consider the fault requirement to be a libel defense. But since the burden of proving fault rests with the plaintiff, it is more properly considered an element of the plaintiff's case than a part of the defendant's case. The defendant's obligations do not technically begin until the injured party has established publication, identification, defamation, and fault. The fault requirement and all its extraneous components are thoroughly discussed after the first three elements of the plaintiff's lawsuit are considered.

Publication

Before the law recognizes a statement or comment as a civil libel (criminal libel is different; see page 216), the statement must be published. In the eyes of the law publication occurs when one person, in addition to the writer and the person who is defamed, sees or hears the material.* Think of the situation as a kind of triangle. The writer or broadcaster (ultimately the defendant) is at the first point, the subject of the defamatory statement (ultimately the plaintiff) is at the second point, and a third person is at the third point. All three are necessary for a libel suit. The issue of publication becomes a real problem in defamation via private communication. You send a nasty letter to someone and his secretary opens it first by mistake. Is that publication? You dictate a letter to your secretary. Is that publication? (In both instances the law answers with a resounding "it depends.") In defamation by the mass media, publication is virtually presumed, however. In fact, some cases are on record in which courts ruled that if a statement was published in a newspaper or broadcast over television it is presumed that a third party saw it or heard it (*Hornby* v. *Hunter*, 1964).

*This statement may confuse some people who see it as a contradiction of an earlier statement that to be defamatory something must lower an individual's reputation in the eyes of a significant minority of the community. It is not a contradiction. Publication is what is being discussed here: how many people must see something before the law considers it to have been published. The earlier remark refers to damage to an individual: how many people must think less of a person upon hearing or reading the statement. It is necessary for the plaintiff to convince the court that a significant number of people in the community think less of him because of the libelous remark, but it is not necessary that the plaintiff show that these people have actually seen the libelous remark, only that they would think less of him if they had seen it.

Technically, every republication of a libel is a new libel. Judge Leon Yankwich (*It's Libel or Contempt If You Print It*) wrote more than two decades ago:

> In brief, the person who repeats a libel assumes responsibility for the statement and vouches for its truth as though it had been of his own making or on his own information, no matter how emphatically the qualifying words show that the statement is made on the basis of a source other than the writer himself.

If the *River City Sentinel* is being sued for libel for calling John Smith a Communist and the *Ames Daily Gazette* informs its readers about the suit and notes that the *Sentinel* called Smith a Communist, the *Gazette* has republished the libel. A more common problem under republication has to do with one of the great myths of American journalism called attribution. A great many people erroneously presume that a publication is not responsible for a libelous statement so long as the statement is attributed to a third person. For example, it is clear that it is libelous for a newspaper to say that John Smith shot and killed his wife's lover. It is just as libelous, however, for a newscaster to report that "according to police Smith shot and killed his wife's lover," or that "Captain Jack Jones or Prosecutor Webley Webster said that Smith shot and killed his wife's lover." The attribution does not help. The newscaster has republished the libel, and the law treats the bearer of tales in the same manner that it treats the author of tales.

Because of the republication rule nearly everybody in the chain of production of a news s ory is liable in a lawsuit. The reporter is liable: he wrote the story and published it when he gave it to the editor. The editor passes it along after checking it (another publication); the copy editor does the same. The story goes to the composing room, and the printers and the delivery boys—every one of them—are technically republishing the libelous remark. The law releases vendors of publications from liability unless it can be shown they had knowledge of the defamatory contents. The other people at the newspaper really aren't worth suing; they don't have any money to speak of. So the publication is sued. Sometimes reporters are also named as defendants, but rarely do they have to pay anything.

Identification

The second element in a libel suit is identification: the injured party must be identified. All sorts of nasty things can be published about anonymous people, but as soon as someone is named, or identified in some other way, a libel suit can result. Not all readers have to recognize the person about whom you write. Not even the majority of readers need know to whom you refer. Some

authorities say it is sufficient if only a single person can identify the subject of the story.*

A person can be identified in a number of ways. He can be named; the Knave of Hearts stole the tarts. A photograph without a name is considered identification. A person can be identified by his pen name, by his nickname, by his initials, and even by a pencil or pen drawing. Circumstances can sometimes point the finger at someone. Several years ago a New York gossip columnist wrote, "Palm Beach is buzzing with the story that one of the resort's richest men caught his blond wife in a compromising spot the other day with a former FBI agent." A man named Frederick Hope sued the Hearst Corporation (for whom the columnist worked) for libel. Hope, who was a former member of the Federal Bureau of Investigation (FBI), convinced the jury that the article identified him. He had recently joined the county attorney's staff and had been given considerable local publicity. His background as a former FBI man was given special prominence. He was also able to show that he was the only former G-man who ran with Palm Beach high society. Hope claimed that many of his friends would put these two facts together and know that the columnist referred to him. Hope won a $58,000 judgment (*Hope* v. *Hearst Corp.*, 1961).

It is also possible to put two stories together to make an identification. Imagine that this story was broadcast on Monday: "A fugitive wanted by the FBI for bank robbery was injured today when the automobile in which he was riding was struck by a train." No name appears here, so there is no problem. Tuesday's story appears to be safe as well: "John Smith who was severely injured yesterday when the automobile in which he was riding was struck by a train. . . ." Smith can put two stories together and claim that he has been identified as the fugitive and bank robber.

If a libelous statement does not explicitly identify the plaintiff, then the plaintiff must prove that the defamatory words refer to him. This is not usually an insurmountable burden, and reporters must be extremely careful when making identification in a news story, especially if business affiliations are included in a story. Comments about an executive of a corporation, the president, for example, may reflect on the prestige of the firm and give rise to cause of action by the corporation. The corporation must prove, however, that the comments about the management discredit the business in some way.

*This situation should not be confused with damage to the plaintiff. Only one person has to see a story for it to have been published. Some authorities (e.g., Phelps and Hamilton) also say that only one person has to identify the plaintiff. However, when a judge and jury consider whether the material is defamatory and damaging to the plaintiff, they must decide whether the statement can lower the plaintiff's reputation in the eyes of a significant minority of the community.

One of the most common problems in libel is careless identification which results in a case of mistaken identity. Years ago the *Washington Post* ran a story about a District of Columbia attorney named Harry Kennedy who was brought back from Detroit to face charges of forging a client's name. The attorney charged was Harry P. L. Kennedy, a man who used his middle initials when he gave his name. The *Post* left out the middle initials. Harry F. Kennedy, another District of Columbia attorney who did not use his middle initial in business, sued the newspaper and won a substantial judgment (*Washington Post* v. *Kennedy*, 1924). That was sloppy journalism.

Most journalists learn early that complete identification is required when an individual in a news story is discussed. The identification should include the name, John Smith; the address, 2185 Pine Street; the age, 34; and if possible the occupation, carpenter. This complete identification clearly separates this John Smith from any other John Smith in the area. The number of suits which result from mistaken identity is high, and most are preventable. One thing a young reporter should learn immediately is to not take anyone's word for an identification. If the police tell you they have arrested John Smith of Pine Street, you should double-check their statement. Numerous means of checking are available: city directories, utility company records, and so forth. Newspapers, broadcasting stations, and magazines are sometimes held responsible even for errors which result from official blunders because they compound the error.

The most troublesome question regarding identification is group identification. Can the members of a group sue when the group as a whole is libeled? The answer to this question is not completely clear. If the group is massive—let's say the charge is that all lawyers are thieves—there can be no suit. The group is too big for the comment to reflect on any single member of the group. If the group is small—the three-man zoning board is corrupt—each member can sue. The group is small enough so that each member can be clearly identified. What about the middle-sized group? The *Restatement of Torts* (2nd ed.) says this:

> One who publishes defamatory matter concerning a group or class of persons is subject to liability to an individual member of it, but only if (A) the group or class is so small that the matter can reasonably be understood to refer to the individual or (B) the circumstances of publication reasonably give rise to the conclusion that there is particular reference to him.

According to the *Restatement,* publication of defamatory statements about groups having more than twenty-five members is safe. However, at least one case of a group with sixty members—the University of Oklahoma football team—suing because of derogatory statements is on record. The members of the team successfully sued *True* magazine after it charged that some members

of the team used drugs (*Fawcett Publications* v. *Morris*, 1962). Other authorities put the number at one hundred. If the group is smaller, there can be trouble.

Circumstances and what is said play a big part in this question. Several years ago employees of Neiman-Marcus department store in Dallas sued the publisher of a book entitled *USA Confidential* for statements in the book about the store's sales staff and models. The author of the book charged that the models and salesgirls were call girls and that most of the salesmen in the menswear department were homosexual. Only nine models were employed in the store, and that suit was uncontested. The store had twenty-five menswear salesmen. The article said most were "fairies," and the court allowed recovery for several individual salesmen. However, there were more than three hundred salesgirls in the store, and the federal court said the group was too large. "No reasonable man would take the writer seriously and conclude from the publication a reference to any individual saleswomen," the judge ruled (*Neiman-Marcus* v. *Lait*, 1952).

Recent case law on the issue of group identification tends to support the notion that courts seem reluctant to find liability unless it is quite clear the specific plaintiff has been identified, as the following four cases show.

In Washington State, courts ruled that comments about the sale of Bicentennial junk, including bootleg products and counterfeit official seals by "local souvenir shops" were not specific enough to identify plaintiff Richard Sims, who operated a Bicentennial Shop at the Seattle Center (*Sims* v. *KIRO*, 1978).

The question in a Massachusetts newspaper, "Is it true that a Bellingham cop locked himself and a female companion in the back of a cruiser in a town sandpit and had to radio for help?" did not specifically identify any single member of the community's twenty-one-member police department (*Arcand* v. *Evening Call*, 1977).

A franchised Kentucky Fried Chicken dealer in Bowling Green, Kentucky, lost his suit against Colonel Harland Sanders after the colonel made disparaging remarks about the Kentucky fried chicken, mashed potatoes, and gravy. The state court ruled that there are more than 5,000 outlets selling Kentucky Fried Chicken products around the world, and there was nothing in the article which identified the Bowling Green restaurant as the object of the remarks (*KFC of Bowling Green* v. *Sanders*, 1978).

Finally, a *Time* magazine description of Butte, Montana, which included the sentence "Arson has become common as people who are unable to sell their devalued buildings burn them for the insurance" was ruled not actionable by the Montana Supreme Court. The plaintiff, who had an interest in two buildings which were destroyed by fire, was unable to show that the arson charge, which was applicable on its face to a very large group of people, was

understood to be applicable specifically to him. In this case the court noted that as many as 480 people could be said to own devalued buildings in the community, and even though the plaintiff's buildings had burned down, there was no indication anywhere that his buildings had been devalued before the fires. The plaintiff simply failed to meet the requirements of even a very vague description (*Granger* v. *Time*, 1977).

Despite these victories by the press, caution is urged upon reporters who describe even a very large group in a defamatory manner. Caution is especially appropriate if only a small number of the defamed group live in the community. If the charge is made that all astrologers are frauds and there is but one astrologer in the community, the remark can be dangerous. The plaintiff could convince a sympathetic jury that he or she has been severely harmed by the remark. Saying "all" members of a group are corrupt is worse than saying "most" members are corrupt. Saying "most" is worse than saying "some," and saying "some" is worse than saying "one or two." This is a particularly unsettled area of the law, and the journalist must remember that ultimately the suit will be decided by a judge and jury who may neither look at the issue in the same manner as the journalist, nor be particularly sympathetic to the charges made by the journalist.

Defamation

The third element in the plaintiff's case are the words themselves. There are two kinds of defamatory words. The first kind are words which are libelous on their face, words which obviously can damage the reputation of any person. Words like *thief, cheat,* and *Communist*—there is no question that they are defamatory.

The second kind of words are innocent on their face and become defamatory only if the reader or viewer knows other facts. To say that Jane Adams had a baby appears safe enough. But if the reader knows that Ms. Adams isn't married, then the words are libelous.

The distinction between these two kinds of words used to be more important than it is now. At one time plaintiffs had to prove they were specifically harmed by the words in the second category, sometimes called "libel per quod." Damage was presumed from the words in the first category, often called "libel per se." All libel plaintiffs must prove harm of some kind today. Yet in some states today the plaintiff suing for the so-called libel per quod must meet a more rigorous fault requirement than the plaintiff suing for libel per se. For example, in some jurisdictions the libel plaintiff suing on the basis of words that appear innocent on their face (libel per quod) must prove that the defendant was grossly negligent in publishing the statement, whereas the plaintiff suing for words which are plainly defamatory must show only simple negligence. (The meanings of the various fault requirements are discussed on pages 164–89.)

A description of the kinds of words that are libelous is codified (by statute) in most states. These laws are most general, however, describing kinds of words (words which hold someone up to ridicule, hatred, scorn, etc.), rather than specific words. Only by looking at the numerous court decisions in libel law can one get a fairly good picture of the specific kinds of words which can be libelous. Even then the process is imprecise. The common law is a lot like a connect-the-dot picture. Connect the dot from one to fifty and you make a picture. That is what we do when we make generalizations about libel—draw lines between the various cases to make a picture. This procedure is fine so long as there are enough dots. If there aren't enough dots, the picture takes on a rather nebulous shape and is often hard to distinguish. Some parts of libel have lots of dots and are consequently well defined. Other parts don't have enough dots, and the picture is fuzzy.

There is another problem. The picture frequently changes. The meanings people attach to words change over time. Socialists were once feared and hated, and the word was defamatory. It is doubtful that calling someone a Socialist today would be libelous. Labeling someone a Communist was and is defamatory, except during the period between 1942 and 1945 when Communists were our allies in World War II. The term *slacker* seems harmless enough today, but in World War I *slacker* had a derogatory meaning: the word described someone who sought to avoid military service. Today in various subcultures in the United States some ordinary words have special meanings. Street language is a language all its own, and when a Black Panther leader proclaimed several years ago that the president should be "killed," the term *killed* had a different meaning for his audience than for the population.

At a libel trial a judge and a jury are supposed to consider words in light of their ordinary meaning unless the evidence is persuasive that the defendant meant something else when he published the statement In Illinois in 1977 the State Appeals Court ruled that the term *political hack* could have a derogatory meaning, but when it was used in an editorial criticizing the circuit court clerk Fred Cooper, the term was not intended to suggest such a negative meaning. The court ruled that when the entire article was read "the natural and obvious meaning" of the phrase was to describe someone whose job was based upon political selection, and was not meant to suggest that Cooper was incompetent (*Cooper* v. *Rockford Newspapers* , 1977). It is for the judge to decide whether an ambiguous statement can convey a defamatory meaning and for the jury to decide whether in fact the statement does convey that meaning. A judge can dismiss a suit without a trial if he or she believes the words cannot be considered defamatory. By letting a case go to the jury the judge is only ruling that a jury could find that the words are defamatory.

A person may be defamed in any number of ways. Simply saying that Robert Smith is the illegitimate child of John and Mary Smith is defamatory.

The parents have been defamed. Implication can be used: John and Mary Smith have been married for six years and have a seven-year-old son named Robert. Some journalists think that if they don't spell a situation out, just drop subtle hints, they are on safe ground. In Massachusetts a libel case resulted when a newspaper reporter thought he smelled a rat and tried to say so subtly. Here is part of the story:

> The Veterans Hospital here suspected that 39-year-old George M. Perry of North Truro, whose death is being probed by federal and state authorities, was suffering from chronic arsenic poisoning.
>
> State police said the body of Perry, and of his brother, Arthur, who is buried near him, would probably be exhumed from St. Peter's Cemetery in Provincetown.
>
> George Perry died in the VA hospital last June 9, 48 hours after his tenth admission there. . . . His brother, who lived in Connecticut and spent two days here during George's funeral, died approximately a month later. About two months later, in September, George's mother-in-law, 74-year-old Mrs. Mary F. Mott, who had come to live with her daughter, died too. Her remains were cremated.

While the story lacked a good deal in journalistic clarity, an Ellery Queen or a Perry Mason isn't needed to get the gist of what the reporter was saying. Mrs. Perry murdered her husband, her brother-in-law, and her mother. Lizzie Borden strikes again! The insinuations are that Arthur died after visiting the plaintiff's home and that the mother had "died too." Isn't it too bad that her remains were cremated. This story cost the Hearst Corporation, publishers of the *Boston Record*, $25,000 (*Perry* v. *Hearst Corp.*, 1964).

A libel suit cannot be based on an isolated phrase wrenched out of context. The article as a whole must be considered. A story about baseball's legendary base stealer Maury Wills might contain the sentence "Wills might be the best thief of all time," referring to his base-stealing ability. Wills can't sue on the basis of that single sentence. The story itself makes it clear the kind of thievery the writer is discussing. Nevertheless, a libelous remark in a headline—even though it is cleared up in the story which follows—can be the basis for a libel suit.

Also, a headline cannot go beyond the story and say more than the story says. For example, a consulting engineer was asked to prepare plans and specifications for a sound system for a Louisiana state school for the blind. In a letter describing the engineer's report, a state official said that the proposal was good, but that the bid specifications "seem somewhat proprietary to certain manufacturers." Something which is proprietary is something associated with a specific manufacturer. In its story on the report the *New Orleans Times-Picayune* said that the specifications seemed proprietary according to state officials. The headline, however, said, "Bid Specs Reported Rigged." This statement went far beyond any charge in the engineer's report or story, and a $10,000 libel judgment was affirmed against the newspaper by the state court of appeals (*Forrest* v. *Lynch and Times-Picayune Co.*, 1977).

Recently a federal court in Seattle ruled that reader habits can also be material in a libel case. Suit was brought against the *Seattle Post-Intelligencer* for a story it published about the redemption of a home mortgage by a local attorney. The headline and the first four or five paragraphs suggested that the attorney had done something illegal or unethical. The remainder of the story—which was about fifty paragraphs long and jumped from page to page after leaving the front page—explained that what the attorney had done was not illegal or unethical, that his actions were fair and aboveboard. The court admitted expert testimony on reader habits which indicated that people tend not to finish such long stories, that many people stop reading as soon as the story is continued on the inside pages of a newspaper. The plaintiff argued that in the minds of most readers the libelous opinion created by the first part of the story was not corrected since they did not finish the story. The jury awarded the attorney $100,000 in damages (*McNair* v. *Hearst Corp.*, 1974).

Factual statements can obviously be defamatory. What about an opinion? "I think John Smith is a rotten actor." Is that statement defamatory? Such an opinion statement clearly would have been defamatory until only a few years ago in nearly all jurisdictions. But because of recent Supreme Court decisions, which will be noted later in this chapter, many authorities believe that statements which contain only opinion are not actionable. The newest draft revision of the *Restatement of Torts* states that an opinion statement can be defamatory only if "it also expresses, or implies the assertion of a false and defamatory fact which is not known or assumed by both parties to the communication." Other experts suggest the same rule.

The next one hundred pages could be a kind of Sears Roebuck catalog of defamatory words, but such an enumeration here is a waste of time. Instead, we will consider specific examples of the kinds of words which in the past were held to be defamatory. These examples should permit you to generalize about specific remarks. Simply ask this question when you evaluate whether something is defamatory: Will the people in the community think less of this person after I publish this story than they do before I publish it? If the answer is yes, then the statement, remark, or comment is probably defamatory.

Criminal Imputation

Probably the category of words responsible more than any other for the greatest number of libel suits pertains to crime and criminal acts. Any imputation that a man or woman has done something illegal—from murder to jaywalking—is libelous. The statement can be a straightforward charge: John Smith is an arsonist or John Smith was convicted of arson. The imputation can be indirect: John Smith makes his living using matches and gasoline. The statement might note only that John Smith has spent much of his life in jail because fire fascinates him A description might be used: John Smith went to the Fuddle Paint Company, poured gasoline on an outside wall, and then lit

a match. Maybe John has a nickname—John the Torch. Each of these statements and many more which you can think of accomplish the same end: they defame poor John Smith.

It is also libelous to call John an "alleged arsonist," which points out another great myth of journalism. According to the dictionary, to allege means "to assert without proof." The police assert that John is an arsonist, and by calling him an alleged arsonist the journalist republishes the libel the police officer uttered. Republication of a libel is a new libel.

A serious problem faced by the reporter who writes or broadcasts about crime is lack of knowledge about the meaning of criminal terms. Not every killing is a homicide or murder. When John Smith kills his wife he might be acting in self-defense. Calling him a murderer creates a problem. Be certain the term used does not go beyond the action.

The *Calvin Chronicle* (Oklahoma) was angered when a federal district judge, fearful of the impact of intense prejudicial publicity, changed the venue for the trial of a state official. In an editorial the newspaper noted that "State Treasurer Leo Winters and all the other people are just as guilty in Guymon on the panhandle, Idabel in Southeastern Oklahoma, Bartlesville in the Northeast, Lawton in the Southwest, or right smack in downtown Oklahoma City." Winters sued for libel and the state supreme court ruled that the charge that he was guilty of a crime was libelous per se (*Winters* v. *Morgan*, 1978).

Sexual Slurs

It has been said that the United States is a nation overly concerned with sex. Sexual references, comments about sexual morality, sexual abnormality, and so forth, all constitute bases for libel suits. Supposedly, we are in the midst of a sexual revolution, but many people are not aware of the fact. For a woman to be sleeping with a man to whom she is not married may be perfectly normal in some parts of our society, but is still not acceptable behavior in other parts of our society. If such a charge were made against a woman, a libel suit would probably stand. Woman's virtue is strongly protected by our courts via the libel suit. In the past to merely mention that a woman worked at a place where women of loose morals usually worked, like a dance hall or a saloon, was held to be defamatory. Standards are somewhat less rigid today, but any charge made in any fashion that a woman may be unchaste or may not be virtuous is dealt with harshly by a court. Charges of rape come within this category as well.

Similarly, comments about sexual abnormality are dangerous. John is gay or John is queer, Jane is a lesbian, Frank is an exhibitionist: all are defamatory remarks. Again, while we are supposedly in the throes of a new maturity with regard to homosexuality, bisexuality, trisexuality, autosexuality, and so forth, to most Americans—at least those found on most juries—such sexual behavior is repugnant, and a charge of such conduct is very damaging. Caution must be exercised as well in stories about less exotic sexual

concerns: calling a man impotent can be libelous. Charges of wife swapping and failure to fulfill "marital obligations" are also defamatory. Why newspapers, broadcasters, and magazines get into discussion of these topics is a mystery to many persons. When it happens, be careful!

About Personal Habits and Characteristics

Much of a person's reputation is concerned with his personal habits. Is he honest, ethical, and kind? Does he pay his bills on time or is he a deadbeat? Is she clean, does she drink too much liquor, does she use dope, does she smoke pot? Statements regarding all such behavior have been and will continue to be the subject of libel suits. To call a man dishonest is defamatory. Likewise are charges that he is unkind to his children and unethical in the way he conducts his financial affairs. She drinks too much, she's a drunkard, she is always potted or smashed, she is an alcoholic, she is a member of Alcoholics Anonymous, she is on the juice, she was arrested for drunken driving: all of these charges are libelous. The same is true of statements regarding the use of drugs and marijuana. A good credit rating is very important today; therefore any charge that reflects on financial standing—the Smiths live beyond their means, they are broke, they don't pay their bills, they owe money all over town—is defamatory.

Reporters must be wary of many other aspects of personal characteristics. Imputation that a person has a certain kind of disease can be dangerous. What kinds of diseases? Not a cold or the flu: anyone can have these disorders. Syphilis and gonorrhea—euphemistically called social diseases—suggest a kind of loose sexual behavior and uncleanliness frowned upon by many people. Any disease which causes a person to be shunned—contagious diseases such as smallpox and infectious hepatitis—are examples.

In an interesting decision by the United States Circuit Court of Appeals a former Philadelphia Eagles football player lost a libel suit based on the published erroneous assertion that he had contracted polycythemia vera, an abnormal cell condition which can precipitate dangerous clotting of blood. The court ruled that polycythemia vera is not a loathesome disease, not contagious, and not attributed in any way to socially repugnant conduct. As such, the charge was not defamatory (*Chuy* v. *Philadelphia Eagles*, 1979).

One of the ways in which plaintiffs can prove damage to a reputation is by demonstrating that they have lost the ability to have personal contact with friends and other people. Mental illness is another dangerous area. To say that someone is crazy or insane or nuts is defamatory. We are becoming a bit more sophisticated in this area. While fifty years ago the charge that someone had a nervous breakdown was probably defamatory, today such a charge is probably safe unless the plaintiff can prove that the charge caused some special harm such as the loss of a job. The gray area between a specific charge of insanity—he is schizophrenic—and the imputation of a nervous breakdown is broad and largely uncharted. Smith goes to a psychiatrist. Libel? Possibly.

Smith has mental problems. Smith acted very strangely—Smith stood on top of a table in the cafeteria and read the Declaration of Independence. All can be problem statements. As in all areas of libel, the greatest difficulty lies in the land between clearly defamatory and clearly not defamatory. A judge decides whether the words can be considered damaging to a reputation; a jury considers whether they did damage the reputation.

About Religious Beliefs and Political Affiliations

If a person professes to belong to a specific faith, a charge which reflects on his or her commitment to or acceptance by that faith can be defamatory. To say that a Catholic was denied the right of Holy Communion is a serious charge, for to most people it suggests some ghastly kind of behavior by the excommunicant. The same rule applies to political and patriotic affiliations. To charge that a person had been stripped of his or her citizenship is defamatory. Charging someone with being a traitor or a spy or with urging sedition or anarchy or revolution are all defamatory statements. Political and patriotic values change the most rapidly of all matters regarding reputation. In 1965 some persons regarded statements urging American troops to be pulled out of Vietnam as almost traitorous. (It is doubtful, however, that being labeled such an advocate would have stood as cause of action for a libel suit without proof of special harm.) Seven or eight years later almost everyone advocated that exact idea. To call someone pro-German in 1918 and 1943 was a serious and defamatory charge. It is perfectly safe to make the same charge today. What about derogatory nationalistic references? John is a polack or a spic or a dago. These terms are probably not libelous. However, in some backwater regions of the United States to mistakenly identify a white person as being a black is still probably considered libelous. No suits of the opposite nature—a black suing for being called a white—are on record.

A person's affiliations frequently suggest a good deal about the person. Consequently, persons can be defamed by merely naming them members of a certain group. Adams is a member of the Ku Klux Klan, the Nazi party, the Weather Underground, the Communist party, or any group currently thought to be repugnant. In some cases judgments were awarded when the charge was simply that the plaintiff was employed by a group. In the 1940s the *Reader's Digest* was successfully sued because it published that an attorney was a legislative representative for the Communist party, not that he was a Communist, but that he was employed by the party. The court ruled that this subtle distinction was meaningless to most readers who would assume that the attorney espoused Communist beliefs (*Grant* v. *Reader's Digest Association,* 1945).

It can be libelous to ridicule someone, to make him appear foolish. Ridicule is a difficult area to describe because not all ridicule is defamatory. Many humorous stories about people have been ruled to be safe. Newspapers are

frequently the victims of false obituaries, and generally courts rule that such stories are not libelous to the person alleged to have died (*Cohen* v. *New York Times*, 1912). In one case the false obituary had the deceased lying in state in a saloon (*Cardiff* v. *Brooklyn Eagle*, 1948). Other humorous kinds of accounts are generally protected.

Ridicule which can be libelous is that which makes the plaintiff appear to be uncommonly foolish, which carries a kind of sting that hurts. Everyone must die, and therefore a false obituary really says nothing derogatory about the plaintiff. It is just a joke at his expense. But a story in a New England newspaper about a man so thrifty that he built his own casket and dug his own grave was ruled to be libelous ridicule. The story made the man appear to be foolish, weird, and unnatural. A fifty dollar judgment was awarded (*Powers* v. *Durgin-Snow Publishing Co.*, 1958). How can reporters tell the difference between the two kinds of stories? The distinction is often very difficult. Extreme care is needed to avoid problems.

About Business Reputation

Thus far the kinds of charges that can injure almost all persons, hurt their reputation, cause them to lose friends, have been discussed. The law goes beyond these limits in protecting some individuals; it goes to the point of protecting both men and women in their business or occupation. Any comment which injures a person's ability to conduct a business or occupation successfully can be considered defamatory. For example, comments about business ethics can be defamatory. Sid, a butcher, sells tainted meat. Archie, a mechanic, overcharges his customers. Similarly, statements about competence to do a job can be defamatory. Milton lacks the skill to be an architect. Doris, a nurse, can't tell a bedpan from a baby bottle. Comments about honesty, about the financial solvency of a businessman—anything which tends to impair an individual's means of making a livelihood or discredits him in his business or profession—can be the basis for a successful libel suit.

Because reputation is an essential element in the success of many professional persons, such a person is probably more easily defamed than a typical working man or woman. Saying that a switchboard operator is almost illiterate is not nearly so damaging as saying a teacher or a doctor is almost illiterate. Calling a physician a quack, a charlatan, a butcher, or an incompetent is clearly defamatory. Reporting that a surgeon operated unnecessarily on a patient suggests either incompetence or lack of ethics. Referring to an attorney as a shyster or an ambulance chaser is equally dangerous. Teachers, doctors, journalists, businessmen, lawyers, and many other persons are very easily defamed by comments about their business or occupation. Yet such persons are not above honest criticism; journalists should not totally abdicate their role as consumer protectors. James Southard, an antique automobile dealer and the creator of something called Classic Car Investments, sued *Forbes*

magazine for what he said amounted to questioning his integrity as a businessman. *Forbes* did an article on the growing field of investment in classic cars which was critical of speculators and promoters. It discussed Southard's plan to develop an investment program in classic automobiles which he hoped to sell to doctors, lawyers, and corporations. The magazine quoted Southard as saying, "The value of those cars never goes down, so you're guaranteed to make money." Writer Alvin Butkus then noted, "If he made claims like that for stocks, Southard would be in the soup. But there is no Securities and Exchange Commission for classic cars." Southard said Butkus's statement implied he was unethical, that he had violated federal securities laws, that he was selling unregistered securities. The Fifth Circuit Court of Appeals disagreed and said that the meaning placed on the statement by Southard was farfetched. The article at worst, the court ruled, suggested that the plaintiff was puffing the value of an investment in classic cars to an extent beyond what was permitted in marketing securities. "The fundamental message was caveat emptor [buyer beware] to potential customers of Southard and others in his business. . . . It lacks the element of personal disgrace necessary for defamation" (*Southard* v. *Forbes*, 1979).

The law also provides some other exceptions. For example, the law does not presume that people think that business or professional people are perfect. Therefore, to report that a professional person or a business person has made an error is not always defamatory. It depends upon how the statement is made. If the statement merely suggests that the individual made an isolated mistake—Dr. John Smith operated on Jane Adams yesterday to remove a sponge he failed to remove during an earlier operation on Ms. Adams—it is probably not libelous. However, if the published comment suggests a pattern of incompetence—this is the fifth time in the past two years Dr. Smith has had to operate a second time to remove a surgical tool left in a patient—the statement clearly is defamatory. Be careful in this area. Recourse to this rule is never an excuse for clumsy or careless journalism. This rule (called by some the single-mistake rule) is not constructed upon an unassailable foundation.

Also, if a person practices his profession *illegally*, reference to him as unskilled or incompetent is not defamatory. A person who practices medicine without a license can be called a quack with little danger. Finally, a journalist can be critical of a person who engages in an *illegal* occupation. If John Smith is a hit man for the local crime syndicate, it is not libelous to call him an *incompetent* hit man, a lousy killer, or whatever.

One other kind of "businessmen" can sue if they are improperly criticized: government officials and politicians. It is much harder to libel government officials and candidates for elective office than, say, doctors. Nevertheless charges of corruption, bribery, vote buying, gross dereliction of duty, and graft can all stand as the basis for a successful libel action. Accusing a judge of

being biased and unfair, accusing the head of the street department of improperly maintaining the public roads, and accusing a public official of selling out to the mob are all defamatory charges.

While a person's general reputation is fairly nebulous, the individual's right to earn a living, practice a profession, successfully operate a business, and so forth, are quite specific. Courts are prone to protect such individuals from unwarranted attack. Journalists and broadcasters must exercise caution in dealing with such subjects lest they inadvertently damage that right.

About a Business

In addition to damaging a person, a defamatory statement can injure a business or corporation. A corporation can maintain a lawsuit when it believes its credit has been damaged or its reputation has been hurt. The same kinds of words that can defame an individual can also defame a corporation or business. Any assertion that the corporation has engaged in criminal activity, is dishonest, has ties to organized crime, lacks integrity, fails to pay its bills on time, and so forth, can be libelous. Corporations can be hurt in other ways as well.

An assertion that the corporation makes unsafe products—not that the products are unsafe, but that the corporation deliberately produces unsafe products to cut costs—can result in a libel suit. Statements which reflect on the company's labor policies—management runs a real sweatshop, takes advantage of its workers, violates labor laws—are libelous. Attacks on fiscal integrity (better not buy a car from Acme Motors because chances are good that the company won't be around next year to fix the car when it breaks down) are defamatory. An assertion that DooDad Industries does not maintain safe working conditions, or that the company makes illegal political contributions, or that it cheats its customers is libelous to that business.

Some authorities assert that making derogatory statements about persons who manage a business, who work at a business, or who are customers of a business can also be used as the basis for a defamation suit. The law is not settled in this area. Publishing nasty things about the president and vice-president of DooDad Industries will not give the corporation the right to sue unless it can be proved that such statements actually damaged the reputation of the company. Reporting that DooDad employees are "a bunch of louts" might also serve as the basis for a damage suit if the company can prove that the charge somehow reflects on the corporation's ability to hire the proper people.

There is little chance, however, that a corporation can sue merely because of actions or behavior of its customers. Several years ago Louis Stillman sued Paramount Pictures for the remark in the motion picture *Country Girl* that punch-drunk fighters frequented Stillman's Gym in New York City. Stillman argued that the remark reflected upon him and his business. The court disagreed (*Stillman* v. *Paramount Pictures*, 1957). Proprietors of public businesses have no control over the kinds of persons who use their establishments.

Therefore, readers should not think anything less of Stillman because punch-drunk fighters might be training in his gym. Another example of the problem is a story saying that for the second time in two weeks a fight broke out at a local tavern last night. Again, the proprietor does not have much control over who drinks in his tavern and what happens when they drink. Any implication that the owner of the place encourages this kind of behavior, condones it, fails to call authorties after it starts, and so forth, will of course change the nature of the remark and can be libelous.

What about remarks concerning a private club? There is no good answer to this question. There is clearly more danger in discussing a private club which can control membership than in reporting about a public club which cannot. Probably the nature of the remark is what counts. The danger of libel lurks here.

About a Product

Criticism of a product falls into a different legal category called "disparagement of property." While such criticism is often called trade libel, it is not really libel at all, but product disparagement. What is the difference? A plaintiff finds it significantly harder to win a trade libel case than to win a garden-variety libel suit. First, consider some examples of trade libel. Bango Rifles fail to eject empty cartridges. Crumo Bread gets stale in one day. DooDad Motorcycles fail to stop within a safe distance. The remarks are aimed at the products, not at the companies. There is no implication that the manufacturer intentionally makes a bad product, tries to cheat customers, or conducts its business fraudulently. DooDad may make the best motorcycles it can make; they just turn out to be unsafe.

Since the company itself is not presumed to be hurt, the law raises some stiff barriers to a successful trade libel suit First, the plaintiff, the manufacturer of the product, must prove that the statement is untrue. Proof is difficult, but not too difficult for the kinds of statements just given. If DooDad is able to demonstrate to the court that some of its motorcycles brake to a stop within a safe distance, the company then shows the falsity of the charge. It is much safer to refer to individual products. For example, rather than say that DooDad Motorcycles don't stop safely, report that of the ten motorcycles tested none stopped safely, or that of the Bango Rifles tested none ejected cartridges properly. The manufacturer will then have to refute this evidence, not merely find examples of the product which are in good working order.

Next, the plaintiff will have to show special damage—actual monetary loss because of the comments. Loss of orders attributable to the unfavorable report is such evidence, and testimony from potential customers who failed to purchase the maligned product because of the comment can be used to support the damage claim. Finally, the plaintiff has to prove that the false remarks were motivated by ill will, bad feeling, or gross carelessness. The

plaintiff can prove this if he can show that the negative remarks were published "to get him" and that the writer doesn't like him. The plaintiff might also be able to prove that the writer was grossly negligent in checking the truth of the statement. Before the plaintiff can collect for trade libel, it must prove all three charges: falsity, damage, and malicious motives or extreme carelessness.

Evaluate the following three statements on the basis of the foregoing discussion of trade libel:

1. DooDad autos are superior to Acme cars.
2. Acme cars stop running after about one year.
3. Acme cars stop running after about one year because the company has a plan to force customers to buy a new car every year.

Is statement one libelous? It contains no libel, no disparagement, no anything. Nothing negative was said about Acme; only a positive statement about DooDad cars was made. Statement two? This statement is trade libel, an attack upon the product. Statement three? Here we have garden-variety libel. The comment states that Acme purposefully sells automobiles that break down after one year and reflects upon the integrity of the business itself.

About Banks and Insurance Companies

One other point should be made before we leave this topic. In addition to the protections businesses and corporations have against libel, many states have laws which prohibit critical and untrue comments about banks, insurance companies, and other such organizations. What these laws are designed to do is to protect such organizations from attack upon their fiscal integrity to avoid turning customers against them and destroying them. After all, a bank has only its fiscal integrity and other people's money to sell.

Suits under such statutes are rare, but occasionally they do occur. And then the newspaper or broadcasting station soon discovers that the many protections the press enjoys in a libel suit often do not apply when a suit is brought under such a law. Check the insurance laws and the banking laws in your state. If such laws exist, find out how the courts interpreted the laws. This check might save a lot of grief some time in the future.

The Fault Requirement

The fault requirement, the fourth element in the plaintiff's case, is a relatively new element in libel litigation. Since the mid-1960s public persons—that is, persons in the public eye—have had to prove an element of fault when they sued mass media defendants. Private persons have had to prove fault since 1974.

The fault requirement has a kind of dual nature which makes it both indispensable to the plaintiff's libel case and a privilege used by the defense. In some regards it can be considered to fit naturally as a requisite which must be met by the plaintiff along with the demonstration of publication, identification, and defamation. Yet it is also a prerogative raised by defendants to

protect themselves from a libel suit. In this regard it has many of the characteristics of a defense to libel. The dual nature of this requirement is recognized in this book by placing the discussion of fault between the outline of the plaintiff's case and the defenses to libel. It must be remembered that in proving fault by a defendant in a libel suit, that is, in proving that the newspaper or magazine was careless or reckless in allowing the libelous report to be published, both the plaintiff and the defendant have a role. The plaintiff must convince the judge and/or jury that the publication or broadcasting station was indeed at fault, that it was negligent. The defendant, on the other hand, must attempt to convince the court either that there was no negligence or that the highest possible level of negligence needs to be proved. That is, the newspaper will argue that the plaintiff needs to prove that the publication of the story resulted from something more serious than simple carelessness—that it was published because of reckless disregard for the truth. The defendant wants to make the plaintiff's task as difficult as possible. Given this perspective, two sets of questions need to be considered. First, what is the fault requirement for private persons? what is the fault requirement for public persons? and how does the law distinguish between private and public persons? Second, how have the courts defined the various levels of fault? and how can such fault be proved by plaintiffs?

Two generalizations are useful as guidelines in the understanding of fault.

1. Private persons who sue the media for defamation must prove that the material was published through negligence. Negligence is defined in the law as conduct which creates an unreasonable risk of harm. Another way of describing this concept is that something published negligently was published *without* the exercise of reasonable care by the defendant.

2. Public persons who sue the media for defamation must prove that there was *at least* negligence in publication of the matter, but they may also very often be required to prove that the defendant exhibited actual malice when the material was published. Actual malice is defined in the law as publishing the material with the knowledge that it is false, or publishing the material with a reckless disregard for the truth.

Both of these generalizations need important qualification and clarification, and that is the purpose of the bulk of this section.

Throughout almost its entire history the tort of libel has been governed by a standard called "strict liability." Strict liability means that if you harm someone you are responsible for that harm, regardless of how it happened to come about. You could have undertaken every possible effort to ensure that no harm would result from your action; nevertheless, if someone is hurt, the responsibility is yours. In the law of libel this meant that even though editors

attempted to verify a story in every possible way, even though they exercised every caution normally exercised by careful journalists, even though there was no doubt at all in their mind that the story was accurate and truthful, if the story defamed someone the newspaper was liable for damages.

In 1964 the Supreme Court of the United States ruled that in libel law the doctrine of strict liability violated the First Amendment insofar as the defamatory statement concerned government officials and focused upon their official conduct. The dispute from which the ruling sprang was played against the vivid backdrop of the civil rights struggle in the South. In some ways the results of the lawsuit was a recognition by the Supreme Court that while for all practical purposes the law of sedition had become impotent by the last half of the twentieth century government leaders could use civil libel actions to accomplish the goals of sedition law: to quiet criticism of the government.

In the early 1960s important segments of the American press took a strong stand in support of the passage and enforcement of civil rights laws. In Alabama five government officials attempted to retaliate against the press by filing a series of lawsuits against the *New York Times* for three million dollars.

The material upon which the suits were based was not even a news article; it was an editorial advertisement (an advertisement which promoted an idea rather than a product or commercial service). A civil rights group, the Committee to Defend Martin Luther King and the Struggle for Freedom in the South, had placed the advertisement. In the narrative part of the full-page advertisement charges were leveled at various Alabama government leaders. While it was basically true, the advertisement was nevertheless peppered with small factual errors. These errors proved to be the downfall of the *Times* in an Alabama state court where the newspaper lost the first suit brought by Montgomery, Alabama, Police Commissioner L. B. Sullivan. Sullivan won a $500,000 judgment—all that he asked for—and this ruling was affirmed by the state supreme court. One must remember that as much as anything the case against the *Times* allowed Alabamians to vent their pipes which had been filling with steam ever since that (according to prevailing Southern thought) "damned, liberal [radical, Communist] New York scandal sheet" had taken a leadership role in seeking passage and enforcement of federal civil rights guidelines in the South. The political implications of this case are beyond the scope of this text, but should not be overlooked.

The *New York Times* appealed the decision to the Supreme Court of the United States and won a unanimous reversal of the judgment. In reversing the Alabama state courts in the case of *New York Times Co.* v. *Sullivan* (1964), the Supreme Court changed the law of libel forever.

Before the significance of the high Court's decision in this case is explained, it is important to explain why the Court made the ruling, or at least the reasons the justices gave for their decision, for this rationale remains today the basic foundation of the important First Amendment libel defense.

Only with the benefit of hindsight is it possible to get at what the Supreme Court said in the 1964 *Sullivan* ruling, and some points still remain less than crystal clear. Under the traditional law of libel the newspaper was in serious trouble. There had been publication and identification, and the words were clearly defamatory. The *Times* could not use truth as a defense; the publication contained numerous errors. Other libel defenses were equally inapplicable.

But Justice William Brennan and his eight colleagues on the high Court did not apply the traditional law of libel. Sullivan was not a typical plaintiff; he was a government officer. The defamation did not concern his private life; it focused on his role as police commissioner. The high Court ruled therefore that because of the nature of this suit, because of the immense First Amendment implications, plaintiff Sullivan was forced to carry an added burden of proof. He had to show that the publication of the advertisement was made with actual malice. Actual malice was defined as knowledge of falsity or reckless disregard of whether the story was truthful. Sullivan, then, had to show that the *New York Times* published the advertisement with knowledge that some of its charges were false, or that the newspaper exhibited reckless disregard as to whether the charges were true.

The Court's decision can be explained on three bases. First, and perhaps least important in the long run although it appeared important initially, is the notion that this was in fact a kind of sedition case, a case of punishment of government criticism. One is hard pressed to deny that it was such a case, but that is hardly sufficient reason for rearranging the law of libel in the way the Court did via the *Sullivan* ruling. There are other ways to cope with sedition that are far less traumatic to the law.

Second, and this is a philosophical justification, the court was concerned that these kinds of lawsuits might have an impact upon debate about political issues. Quoting numerous earlier high Court opinions, Brennan wrote (*New York Times Co.* v. *Sullivan,* 1964):

> 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, as we have said, "was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by our 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. . . . "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."

Thus, Brennan wrote, this case is considered against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.

Turning to the fact that there were errors in the publication, Brennan asserted, "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." Whatever is added to the field of libel, the associate justice noted, is taken from the field of free debate. This concept—traditional concern with maintaining free debate—formed the philosophical basis for the decision.

The third rationale for the ruling probably appeared least important at the time, but has since emerged as perhaps equal to the philosophical justification. As a public official, a government leader, Sullivan voluntarily took a position for which criticism was common, usual, and, indeed, expected. As a servant of the public one must expect to be criticized, sometimes quite strongly. In a way, he had asked for criticism. Also, as a public official and a politician he had easy access to the press to respond to criticism. Whereas a private person whose reputation has been damaged may have no recourse but to go to court to win vindication, Sullivan could give as good as he got. He could deny the charges in the public press; he could make countercharges. In short, he had access to an effective means of rebuilding his damaged reputation without relying upon a libel suit which, as we have noted, can have a serious impact upon the freedom of expression.

These reasons are the pillars upon which the *Sullivan* decision rested. In taking this stand the high Court followed a course of action which a handful of other states adopted years earlier. In 1908 the Kansas Supreme Court ruled that public officials and candidates for public office must carry a more rigorous burden of proof than private citizens to sustain a libel judgment in order to preserve the immense public benefit gained from free and robust debate (*Coleman* v. *MacLennan*, 1908). The *Sullivan* case amplified and extended this ruling to every state in the Union. Henceforth, public officials had to prove actual malice in order to sustain a civil libel suit.

In 1966 a federal court extended much of the reasoning of the *Sullivan* ruling to persons it called "public figures" in the case of *Pauling* v. *Globe-Democrat*. The plaintiff in this case was Linus Pauling, a Nobel Prize-winning physicist who was very active in the movement to ban atmospheric testing of nuclear weapons. Pauling had never held public office and could not in any sense be considered a public official. Yet in the libel suit which resulted when the *St. Louis Globe-Democrat* incorrectly published that the Nobel laureate had been convicted of contempt of Congress, the United States Eighth Court of Appeals ruled that as a "public figure" Pauling must prove that the story was published with actual malice (*Pauling* v. *Globe-Democrat*, 1966). The rationale?

> Professor Pauling, by his public statements and actions, was projecting himself into the arena of public controversy and into the very vortex of the discussion of a question of pressing public concern. He was attempting to influence the

> resolution of an issue which was important, which was of profound effect, which was public, and which was internationally controversial.

Conscious that important public debate frequently involves persons not in government, and that the threat of a libel suit could interfere with such debate, the Court ruled that the first Amendment protects this kind of discussion. One year later in *AP* v. *Walker* and *Curtis Publishing Co.* v. *Butts*, the Supreme Court accepted this argument and made the actual malice fault requirement applicable to public figures as well.

It was not until 1974 that the Supreme Court completed the development of the fault requirement. In a case which will be discussed often for other reasons, *Gertz* v. *Welch*, the high Court ruled that henceforth private persons would no longer be able to sue for libel unless they, too, were able to demonstrate that the media was in some way at fault in publishing the story. Justice Lewis Powell said that states must require that nonpublic persons prove that the defendant is, at the very least, negligent. States can, however, ask private persons to prove a greater degree of fault. That is, under the ruling in *Gertz*, states can insist that all libel plaintiffs—not just public officials and public figures—prove actual malice, or anything in between simple negligence and actual malice. Negligence is the minimum requirement, but state courts can ask for proof of a higher degree of fault.

Since 1974 the courts in not quite half of the states have decided which level of fault is applicable when a private person sues a media defendant for libel. Seventeen states have decided to use the simple negligence standard for private-person plaintiffs. Those states are:

Arizona	*Peagler* v. *Phoenix Newspapers, Inc.* (1977)
Connecticut	*Corbett* v. *Register Publishing Co.* (1975)
Florida	*Firestone* v. *Time, Inc.* (1974)
Georgia	*Retail Credit Co.* v. *Russell* (1975)
Hawaii	*Cahill* v. *Hawaiian Paradise Park Corp.*, (1975)
Illinois	*Troman* v. *Wood* (1975)
Kansas	*Gobin* v. *Globe Publishing Co.* (1975)
Louisiana	*Wilson* v. *Capital City Press* (1975)
Maryland	*Jacron Sales Co.* v. *Sindorf* (1976)
Massachusetts	*Stone* v. *Essex County Newspapers* (1975)
Montana	*Madison* v. *Yunker* (1978)
North Carolina	*Walters* v. *Sanford Herald, Inc.* (1976)
Ohio	*Maloney and Sons, Inc.* v. *E. W. Scripps* (1974)
Oklahoma	*Martin* v. *Griffin Television, Inc.* (1976)
Tennessee	*Memphis Pub. Co.* v. *Nichols* (1978)
Texas	*Foster* v. *Laredo Newspapers, Inc.* (1976)
Washington	*Taskett* v. *King Broadcasting Co.* (1976)

In addition, the simple negligence requirement for private-person litigants was also adopted in the prestigious *Restatement of Torts* (2nd ed.).

The state of New York adopted a slightly higher level of fault for private-person plaintiffs, but only in those instances when the defamatory material concerned matters of "legitimate public concern." In such instances plaintiffs will be asked to prove that "the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties" (*Chapadeau* v. *Utica Observer-Dispatch, Inc.*, 1975). This standard is called "gross negligence."

Finally, four states have said that when a story focuses upon a matter of legitimate public concern or interest, the private-person plaintiff must prove the same level of fault as the public-person plaintiff—actual malice. In these four states, Colorado (*Walker* v. *Colorado Springs Sun*, 1975), Indiana (*AAFCO Heating and Air Conditioning* v. *Northwest Publications*, 1974), Michigan (*Peisner* v. *Free Press*, 1978), and Alaska (*Gay* v. *Williams*, 1979), private persons suing the press because of stories dealing with matters of legitimate public interest must demonstrate that the defendant knew the story was false when it was published or exhibited reckless disregard of the truth. In all five states just listed—New York, Colorado, Indiana, Michigan, and Alaska—private persons suing because of stories not focusing upon matters of public concern need only prove simple negligence, as in the seventeen states listed previously (page 169).

As of early 1980 courts in the remaining twenty-nine states have not yet decided which level of fault private-person litigants should be required to prove. Students are encouraged to investigate this question with regard to the state in which they practice journalism, since state supreme courts are moving to resolve this question as appropriate cases are presented. It should also be noted that all of these types of fault—negligence, gross negligence, and actual malice—are discussed in much greater detail later in this section (see pages 182–89).

Private Persons Versus Public Persons

Whenever a court takes a common description and attempts to shape it into a legal concept, much confusion results. Such is the case with the private-person-versus-public-person dichotomy in the law of libel. A majority of the United States Supreme Court has seemingly settled upon a rationale which has been cited consistently over the past two or three years to justify the distinction the Court has drawn in applying the fault requirement differently to private persons than to public persons. The rationale has two parts. First, public persons are somewhat less vulnerable to injury from defamatory statements because they enjoy a much higher degree of access to the press to rebut or deny the libelous statements. The only recourse for a private person is a lawsuit; a public person can use the press to respond and deny the charges,

to correct the errors. Hence, private persons need more protection; the press needs to be more careful when it writes about private persons.

Second, and probably more important, public persons are less deserving of protection than other persons because public persons have voluntarily exposed themselves to the increased risk of injury by moving into the public spotlight. Public persons do this by running for government office, attempting to lead public opinion upon important issues, or working publicly toward the resolution of important societal issues. The avowed goal of the Supreme Court is to protect the integrity of the debate which results when society attempts to resolve important issues; in order that such debate be open and free, the threat of libel actions must be minimized. Hence, because of the higher fault requirements, it is more difficult for a public person to win a libel suit (see *Gertz* v. *Welch*, 1974; *Time, Inc.* v. *Firestone*, 1976; *Wolston* v. *Reader's Digest*, 1979; and *Hutchinson* v. *Proxmire*, 1979).

Stating the rationale for the distinction is considerably easier, however, than clearly outlining the legal distinction between private persons and public persons. For our purpose it is simplest to describe the kinds of individuals the courts have determined to be public persons; everyone else is considered to be a private person.

The category of public persons can be divided into three subcategories: public officials, all-purpose public figures, and limited public figures. Each subcategory deserves separate consideration.

Public officials A public official is someone who works for a government and draws a salary from the public payroll. Included are persons from the president of the United States to a patrolman on the beat. Yet not all persons who are government employees qualify as public officials under the law of libel. In 1966 when the Supreme Court was confronted with a lawsuit from a former director of a county ski area, Justice Brennan attempted to define those persons in government who would fall under the rubric public official. "It is clear," he wrote, "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" (*Rosenblatt* v. *Baer*, 1966). Brennan added that the person must hold a position that invites public scrutiny of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in the controversy.

This latter dimension is terribly important. The Supreme Court demonstrated this in 1979 when it refused to consider the research director of a public mental hospital to be a public official. There could be little doubt that Ronald Hutchinson was a well-paid public employee. In addition to his state salary he was the recipient of about a half-million dollars in public funds for

his research on aggression in animals. Senator William Proxmire, who apparently thought the expenditure of public money on such research was wasteful and foolish, named the public agencies which funded the scientist's research recipients of one of his Golden Fleece awards for making a "monkey out of the American taxpayer." In the libel suit that followed the Supreme Court ruled that there was little public interest in Hutchinson's job before he was made the butt of Proxmire's joke. Chief Justice Burger said that those charged with defamation cannot by their own conduct create their own defense by making the plaintiff a public person (*Hutchinson* v. *Proxmire*, 1979). In other words, Hutchinson's position was not one that invited public scrutiny apart from the scrutiny and discussion caused by the defamatory charges.

State courts have not always followed this rule to the letter. In *Press* v. *Verran*, (1978) the Tennessee Supreme Court ruled that a junior state social worker was a public official because her job carried with it "duties and responsibilities affecting the lives, liberty, money or property of a citizen or that may enhance or disrupt his enjoyment of life. . . ." The Washington Supreme Court in 1979 said that the administrator of a small county motor pool who worked without direct supervision, had two assistants, and could independently spend up to $500 of county money on open charge accounts at several local parts dealers was a public official. "The public quite naturally has a legitimate and continuing interest in how local tax revenues are spent by those county employees vested with the power to utilize the public purse," wrote Chief Justice Robert Utter for the court (*Clawson* v. *Longview Publishing Co.*, 1979). The defamation in this case was an allegation that the plaintiff had used small amounts of county funds to repair private vehicles. Similarly, police officers, who are relatively low-level government employees, have frequently been held to be public officials because they hold the power of life and death over the citizens in a community (see *Malerba* v. *Newsday*, 1978).

It is safe to conclude that any government employee who stands for election periodically is a public official in the eyes of the law. As just noted, appointed officials can also meet the established criteria. The appointed Attorney General of the United States is undoubtedly a public person; similarly, the appointed head of a large public utility qualifies. Since 1964 courts have held that judges, senators, state legislators, mayors, school board members, teachers, city tax assessors, and many others are public officials.

The context in which the defamation occurs is often important. A planner with a state geological survey office might not normally hold a position that invites public scrutiny. But if this person is appointed by the governor to conduct a study of the feasibility of constructing three nuclear power plants near the state capital, this special assignment brings with it closer public scrutiny. In such a case a person who was not a public official might suddenly become one in terms of libel law.

Persons who can be classified public officials are not always forced to prove actual malice in a lawsuit. The malice rule applies only if the defamatory story focuses upon one of two conditions:

1. The plaintiff's official conduct, or the way in which the official conducts the public official role
2. The plaintiff's general fitness to hold public office

The second category is the most troubling for the journalist. If the mayor is drunk when he attempts to preside at a meeting of the city council, his personal habits directly affect his fitness for office. But what if the mayor has a serious drinking problem that does not visibly affect his work? And what if a newspaper erroneously reports following the mayor's arrest for drunken driving that it was the third arrest for such an offense? Will the mayor be forced to prove actual malice in the libel suit that follows? This is a tough question. As a rule of thumb, the lower persons are on the scale of public officialdom the more their private life will be protected by the law. Because of the immense responsibilities, almost everything the president of the United States does reflects upon his fitness to hold the job. The private life of a United States senator is probably less open to public scrutiny than the private life of a president, but more investigation of the senator's private life will be permitted than of the life of an elected prosecutor of Clinton County, Michigan.

In summary, when a public official sues for defamation based on statements which focus upon the way the public office is conducted or the general fitness to hold that office, the official will have to prove actual malice.

Public figures The concept of the public figure was introduced into libel law in the mid-1960s. However it was not until 1974 that the category was divided into two subcategories by the Supreme Court. Initially, in his opinion in *Gertz* v. *Welch* (1974), Justice Lewis Powell attempted to outline the essence of the public-figure category:

> 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.

Powell then noted that there were two separate categories of persons who might be classified public figures:

> Some [persons] 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.

While Justice Powell's dichotomy makes sense on paper, the courts have had a devil of a time identifying persons who fall into Justice Powell's first category. Television personality Johnny Carson was considered a total public figure in a lawsuit (*Carson* v. *Allied News*, 1976); so was conservative writer and gadfly William F. Buckley (*Buckley* v. *Littel*, 1976). It has been speculated that Jacqueline Kennedy Onassis and Ralph Nader *might* be total public figures. In the *Handbook of Free Speech and Free Press*, Barron and Dienes suggest: "It is almost as if the courts are saying that a plaintiff will have to be totally exposed to constant media attention in order to be classified as a total public figure." The two authors suggest the key to be instant national recognition and constant media exposure.

On a national level this definition of a public figure is probably true. But there is another way of looking at the problem. It is quite probable that there are persons in small communities who might have the status of a total public figure. Consider the woman who lives in a community of 6,500 persons. She was formerly the mayor, has served on the school board in the past, and has been a perennial choice for president of the Parent-Teacher Association. She is the president of the largest real estate company in town, is a director on the board of the local bank, and owns the local pharmacy and dry cleaners. She is active in numerous service clubs, is a leader in various civic projects, and is instantly recognizable on the street by virtually all of the town's residents. Her family founded the town 150 years earlier. If she is libeled in a community newspaper whose circulation remains almost exclusively in the community, it could be argued persuasively that this woman is a total public figure in the community. (See *Steere* v. *Cupp*, 1979; where Kansas Supreme Court ruled such an individual was a total or all-purpose public figure.) As in the case of public officials, context can play an important role. The status of the plaintiff in the community in which the libel is circulated might arguably be a factor in the determination that an individual is a total public figure. Finally, at least one court has ruled that a large corporation was a total public figure because of its immense assets, its control of insurance companies which are publicly regulated, and its common stock which is publicly traded on the New York Stock Exchange (*Martin-Marietta Corp.* v. *Evening Star*, 1976).

Regardless of these examples, few persons fall into the category of total public figure. Far more important for journalists is Justice Powell's second category, the limited public figure.

Limited public figures Since its 1974 ruling outlining the concept of the limited public figure, the Supreme Court has spent more time on the problem of defining such a person than on any other aspect of libel law. The high Court wrote opinions in four libel suits following the *Gertz* ruling in 1974, and in three of the four cases a central question was whether the plaintiff was a limited public figure (*Time, Inc.* v. *Firestone*, 1976; *Wolston* v. *Reader's*

Digest, 1979; and *Hutchinson* v. *Proxmire*, 1979). The fourth case was *Herbert* v. *Lando* (1979) which focused upon the discovery procedures in a libel action. When the essential elements are extracted from *Gertz* and the three subsequent public figure cases, certain basic criteria in the definition of a limited public figure emerge.

In *Gertz* v. *Welch*, plaintiff Elmer Gertz was a well-known and widely respected Chicago attorney who had gained prominence in civil rights disputes in that city. He had written several books and articles and on many occasions served on commissions and committees in Chicago and Cook County. When a young man was slain by a Chicago police officer, Gertz agreed to represent the family in a civil action against the officer. The policeman had been tried and convicted of murder in the shooting, but Gertz played no role in that criminal action. His only role in the entire matter was as an attorney representing the family in the action for civil damages. He became the subject of a vicious attack by *American Opinion*, a magazine published by the John Birch Society, which accused him of being a Communist fronter, a Leninist, and the architect of a frame-up against the police officer. It also charged that Gertz had a long police record.

In the libel suit that followed, the Supreme Court ruled that despite his prominence in the civil rights area Elmer Gertz was not a public figure for the purposes of this lawsuit. The words of Justice Powell stand as an important guideline (*Gertz* v. *Welch*, 1974):

> 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.

The key phrase is "extent of an individual's participation in the particular controversy giving rise to the defamation." To be a limited public figure, the plaintiff must be shown to have played a prominent role in the particular controversy giving rise to the defamation, the controversy prompting publication of the defamatory statement or comment. Gertz would have been a limited public figure if the dispute in the case had involved civil rights in Chicago. He would have had to prove actual malice in such circumstances. But the particular controversy which gave rise to the article in *American Opinion* was the murder of the young man and the subsequent trial of the police officer. Gertz was not an important participant in that issue. He was simply acting as an attorney—which is his profession—in representing the family of the youth in a civil action He was acting as a private individual and as such had only to prove simple negligence.

Two years later the high Court ruled that a socially prominent Palm Beach woman was not a public figure with regard to the divorce action in which she was involved. The case, *Time, Inc.* v. *Firestone* (1976), resulted from a short notice published in *Time* magazine that Russell Firestone was granted a divorce from his wife on grounds of extreme cruelty and adultery.

Firestone was in fact granted a divorce from his wife, but on grounds that neither member of the couple was "domesticated." Mary Alice Firestone sued *Time* for libel, claiming she had been called an adultress. *Time* argued that her prominence in the Palm Beach community made her a public figure. On the record she clearly appeared to be a public figure, a leading member of the "Four Hundred of Palm Beach society," an "active member of the sporting set," a person whose activities attracted considerable public attention. She even maintained a clipping service to keep track of her publicity. The divorce case became a *cause célèbre* in the community, prompting forty-three articles in a Miami newspaper and forty-five stories in the Palm Beach newspapers. She held several press conferences during the course of the seventeen-month legal dispute. Nevertheless, the Supreme Court refused to acknowledge that Mary Alice Firestone was a public figure in the context of the divorce case, the subject of the *Time* article which was defamatory. Justice William Rehnquist wrote:

> Respondent did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it.

Time argued that because the trial was well publicized it must be considered a public controversy and Mary Alice Firestone a public person. "But in doing so," Justice Rehnquist wrote, "petitioner seeks to equate 'public controversy' with all controversies of interest to the public." The Justice said that a divorce proceeding is not the kind of public controversy referred to in *Gertz*. While there was public interest in the proceedings, the case was not an important public question.

Rehnquist also pointed out that Mrs. Firestone was not a voluntary participant in the divorce proceeding. She was forced to go into public court to dissolve her marriage. Whether individuals have voluntarily thrust themselves into the public spotlight is probably not a controlling issue in most cases. But Justice Powell did write in the *Gertz* decision, "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* [author's emphasis]."

The meaning of *Gertz* and *Firestone* was reemphasized in 1979 in two rulings by the Supreme Court which clearly indicated that the high Court intended the limited-public-figure category to be narrow. In both cases, *Hutchinson* v. *Proxmire* and *Wolston* v. *Reader's Digest*, the Supreme Court reversed rulings by lower federal courts which had declared that the plaintiffs were in fact limited public figures.

The facts in the *Hutchinson* case were mentioned earlier. The plaintiff was the research director at a public mental hospital in Michigan. He was also the recipient of about $500,000 in federal grants to support his research on animal aggression. Believing that such research was unimportant, Senator William Proxmire bestowed his monthly Golden Fleece Award on several federal agencies which had funded Hutchinson's research for nearly seven years. In the process the Wisconsin lawmaker accused Hutchinson of putting the "bite" on the American taxpayer and making "a monkey" out of the American people. Hutchinson sued.

Chief Justice Burger refused to consider the plaintiff a public figure. He said there was no controversy about the research until Proxmire's defamatory comments about Dr. Hutchinson. The scientist did not thrust himself or his views into a public display or issue. In fact, Burger said, the defendants "have not identified such a particular controversy; at most they point to concern about general public expenditures." Hutchinson, the Chief Justice noted, at no time assumed any role of public prominence in the broad question of concern about expenditures. The researcher, then, had no part in the controversy that gave rise to the defamation, according to Burger. Simply taking public money to do research is not enough to make a person like Hutchinson into a public figure, the court ruled. "If it were, everyone who received or benefited from the myriad public grants for research could be classified as a public figure. . . ."

Finally, the Chief Justice drew upon the basic rationale for the distinction between private and public persons and said that "we cannot agree that Hutchinson had such access to the media that he should be classified as a public figure." His access, Burger noted, was limited to responding to Proxmire's announcement of the Golden Fleece Award. The decision of the court was eight to one in favor of Hutchinson, and the single dissenting vote by Justice Brennan was based solely on how the court responded to another question, not to the public-figure issue.

The facts in the *Wolston* case are somewhat more complicated. Ilya Wolston was identified in a 1974 book, *KGB: The Secret World of Soviet Agents,* as a Soviet agent. His description as such stemmed from events which had taken place nearly twenty years earlier when a federal grand jury in New York State was investigating the activities of Soviet agents in the United States. Wolston's aunt and uncle, Myra and Joe Soble, were well-publicized American Communists who were arrested in January 1957 and charged with spying. Wolston himself was interviewed by the Federal Bureau of Investigation (FBI) and testified several times before the New York grand jury. In July 1958 he failed to respond to yet another grand jury subpoena. His failure to appear was publicized in the press. He said he hadn't testified because he was in a state of mental depression. Later he changed his mind and offered to give testimony. He subsequently pleaded guilty to a charge of contempt

and was sentenced to three years probation. During the six weeks between the time he refused to testify and his sentencing, fifteen news stories were published about Ilya Wolston in New York and Washington newspapers. He was never indicted for espionage.

His libel suit was based on his misidentification in the *KGB* book published by *Reader's Digest.* The publication argued that because of his contempt conviction in 1958 Wolston was a limited public figure for purposes of a discussion of Soviet agents and espionage. Eight members of the Supreme Court disagreed. Justice William Rehnquist, writing for the majority, argued that Wolston did not "inject" himself into any controversy, that he was dragged into the controversy when the government pursued him during the investigation of Soviet agents. "The mere fact that petitioner voluntarily chose not to appear before the grand jury, knowing that his action might be attended by publicity, is not decisive on the status of public figure," Rehnquist said. The justice noted that Wolston played a minor role in whatever controversy there might have been over Soviet espionage, that he had never talked about this matter with the press. "We decline to hold that his mere citation for contempt rendered him a public figure for purposes of comment on the investigation of Soviet espionage."

Rehnquist stressed that Wolston had made no effort to influence the public on the resolution of any issue. The plaintiff did not in any way seek to arouse public sentiment in his favor or against the investigation. Quoting his own opinion in the *Firestone* (1976) case, Rehnquist wrote:

> While participants in some litigation may be legitimate "public figures," either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent [Mary Firestone or Ilya Wolston], drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the state or by others.

The question now is, What can we learn from the language in these Supreme Court rulings? Three basic points seem to emerge.

1. Limited public figures normally must voluntarily step into the public spotlight. The court said it would be exceedingly rare for someone to be an involuntary public figure. Such instances as rising to deny charges made against you and going to court to end a marriage or to defend yourself from government charges do not represent voluntary behavior. They represent a response to the behavior of someone or something else.

2. A limited public figure is someone who plays a role in the resolution of an important public or social issue. A messy divorce, an investigation of aggression in animals, a charge of contempt for failure to testify before a grand jury are not the kinds of "affairs of society" which the Court considers to be important. One gets the impression that the justices are looking to the

discussion of social issues (abortion, discrimination), economic issues (taxpayers' revolt, city budget), educational problems (busing, minimum competency requirements), governmental rulings (censorship, arms control), and the like, to find the kinds of persons they would consider limited public figures.

3. There must have been some attempt by the plaintiff to influence public opinion in the resolution of these issues. This speaks to the basic point made by **Justice** Powell in the *Gertz* case—the nature and extent of the individual's participation in the particular controversy giving rise to the defamation. In *Hutchinson* the issue was wasteful expenditures, but Dr. Hutchinson had said little if anything about that before being libeled by Senator Proxmire. Similarly, Ilya Wolston had said nothing about the issue of Soviet agents in this country—which is what the defendant contended was the issue in *Wolston* v. *Reader's Digest* (1979). The media cannot create the controversy by defaming the plaintiff and then argue that the role of the plaintiff is important to the resolution of the issue. In summary, there must be an important public controversy, the defamation must result from reporting about that controversy, and plaintiffs must have voluntarily injected themselves into the controversy in order to influence the resolution of the issue. All three elements appear to be needed before the Supreme Court is willing to agree that an individual is a limited public figure.

Lower courts have often had difficulty in applying this definition of a limited public figure. In *Steaks Unlimited* v. *Deaner* (1980) the Third United States Court of Appeals ruled that a company accused of misrepresentation because it advertised for a low price inspected, ungraded, frozen, tenderized boxed beef was a limited public figure because it voluntarily marketed its product in a somewhat unusual fashion. The court said there was great public interest in the matter, "defendants cannot create a 'public controversy' over a matter that does not involve public interest."

An attorney who was a former state legislator and who was appointed the guardian of an estate that became the center of controversy was deemed to be a limited public figure by the Idaho Supreme Court. A trial judge ruled that the plaintiff's management of the estate had been negligent. Consequently, the state's high court ruled, Glenn Bandelin was "a pivotal figure in the controversy regarding the accounting of the estate that gave rise to the defamation . . ." (*Bandelin* v. *Pietsch* 1977).

The United States District Court in the District of Columbia ruled that the question of protein supplements in the human diet was a question of public concern, and consequently the president of a firm selling such tablets was a limited public figure for the purposes of a libel suit. An article in the *Washington Post* identified the plaintiff as someone who was making a considerable amount of money selling the expensive tablets to athletes. When the plaintiff

promoted and sold the dietary supplements, he was voluntarily injecting himself into a public controversy, the court ruled (*Hoffman* v. *Washington Post*, 1977).

In *Rosanova* v. *Playboy Enterprises* (1978) a federal court ruled that the plaintiff, who was the subject of newspaper reports concerning organized crime, was a limited public figure. Citing his activities and his associates, the Fifth Circuit Court of Appeals ruled that "Mr. Rosanova voluntarily engaged in a course that was bound to invite attention and comment."

In 1980 the United States Court of Appeals in the District of Columbia ruled that Eric Waldbaum, former head of the nation's second largest consumer cooperative, was a public figure regarding a story about his dismissal as president of that organization. The court ruled that Waldbaum had played an active role in attempting to bring consumer-related issues before the public through the media and was a limited public figure in his role with the cooperative (*Waldbaum* v. *Fairchild Pubs.*, 1980). The Second United States Court of Appeals ruled in 1980 that John Yiamouyiannis, long an outspoken foe of the fluoridation of public water supplies, was a limited public figure in a lawsuit he brought against Consumers Union for criticizing him and his research on the subject (*Yiamouyiannis* v. *Consumers Union*, 1980).

But a federal district Judge in Michigan refused to label Leonard Shultz a public figure when he sued *Reader's Digest* for linking him with members of organized crime and the death of Jimmy Hoffa. Hoffa had said on the day he disappeared that he was supposed to meet "Anthony 'Tony Jack' Giacalone, Tony Provenzano, and a man named Lenny." After describing the first two men as members of organized crime, the *Digest* wrote; "Lenny was probably Lenny Shultz, an exconvict associated with Giacalone." Later in the story it was suggested the meeting was a trap which ultimately led to Hoffa's disappearance and probable death.

Shultz had been frequently mentioned in newspaper articles prior to this incident, had been convicted of receiving stolen property, had associated with persons linked with organized crime, had not been shy about appearing on television and radio, and had been widely publicized in 1974 concerning his connection with a murder case, the robbery of his home, and the Hoffa disappearance. But the court ruled that Shultz had not voluntarily injected himself into the controversy—it was Hoffa who said he was going to meet Shultz. "Leonard Shultz has done very little to attract attention to himself regarding the Hoffa controversy. . . . Where the plaintiff's only voluntary actions are more or less in response to publicity which he did nothing to create, he cannot become a limited public figure," the trial judge noted, citing the *Firestone* decision (*Shultz* v. *Reader's Digest*, 1979).

Two additional cases are worth noting. An attorney in Arkansas was suspended from practice for a year for the misuse of clients' funds. His reinstatement to practice depended upon his passing the bar examination. Louis

Dodrill retook the examination, but when the board of examiners announced the names of those who passed, Dodrill's name was not on the list. The *Arkansas Democrat* published a story with the headline "Suspended Lawyer Fails Bar Examination." But Dodrill had passed the examination; the examiners had simply failed to list his name. The attorney sued, and the state supreme court ruled that because he was seeking restoration of a license revoked because of his unethical conduct, Dodrill was a limited public figure for the purposes of that story. But the court reheard the case in July 1979, one week following the Supreme Court decisions in *Wolston* and *Hutchinson,* and changed its mind (*Dodrill* v. *Arkansas Democrat,* 1979). Dodrill was not a public figure. "He had not thrown himself into the vortex of public controversy," nor had he "taken any steps to attract public attention." As a private person he must only show negligence—that the newspaper failed to exercise ordinary care.

Finally, in August 1979 the New York Supreme Court ruled that a doctor who had been named in a "Sixty Minutes" program as someone who irresponsibly dispensed amphetamines for the treatment of obesity was not a limited public figure. The broadcasting company, CBS, attempted to argue that the doctor had published many articles and even written books; consequently he was attempting to draw attention to his work. But the court disagreed, noting that the subject matter in the articles and books was not the same as the subject matter of the program. "We believe that the focus of this argument is misplaced," the court asserted. "It is not extensiveness of the activities which is the critical factor; rather it is the breadth of the audience coupled with the appeal of the topic, upon which the emphasis should be placed." The court concluded that Dr. Greenberg "simply did not invite or attempt to attract public attention" (*Greenberg* v. *CBS,* 1979).

When we look at this small sample of cases, it is painfully obvious that there remain significant differences in the manner in which state and lower federal courts determine who is and who is not a limited public figure. Yet it should be noted that some of this case law occurred prior to the 1979 Supreme Court rulings in *Wolston* and *Hutchinson.* In both those cases the members of the high Court appeared to work hard to clarify the standard. Many journalists saw those decisions as limiting the category of persons who might be considered public figures. That is possibly true. At the same time, it was the first time the Court had focused upon the question since 1976. It is possible that members of the Supreme Court were unhappy with the manner in which the lower courts had handled the definition of public figure and wanted to reemphasize its narrowness. Regardless, the Supreme Court has the last word in this question, and the vote in both *Hutchinson* and *Wolston* was only one short of being unanimous. There are lower court judges who will continue to

be more generous about whom they consider to be public figures. But journalists should not count on this.

We have attempted to establish which persons must prove negligence and which persons must prove actual malice. It is now time to explore the meaning of those terms. What is negligence? What is actual malice?

Negligence

Negligence is a term that has been commonly used in tort law for centuries, but has only recently been applied to libel law. In simple terms, negligence implies the failure to exercise ordinary care. In deciding whether to adopt the negligence or the stricter actual malice fault requirements, state courts are providing their own definitions of the standard. Washington State adopted a "reasonable care" standard. Defendants are considered negligent if they do not exercise reasonable care in determining whether a statement is false or will create a false impression (*Taskett* v. *King Broadcasting,* 1976). The Tennessee Supreme Court has adopted a "reasonably prudent person test": What would a reasonably prudent person have done or not have done in the same circumstance? Would a reasonably prudent reporter have checked the truth of a story more fully? Would such a reporter have waited a day or so to get more information? Would a reasonably prudent reporter have worked harder in trying to reach the plaintiff before publishing the charges? (See *Memphis Publishing Co.* v. *Nichols,* 1978.) In Arizona, negligence has been defined as conduct which creates unreasonable risk of harm. "It is the failure to use that amount of care which a reasonably prudent person would use under like circumstances," the Arizona Supreme Court ruled (*Peagler* v. *Phoenix Newspapers,* 1976).

What kinds of measures are used to determine negligence? What is reasonable care? Courts are just beginning to struggle with these questions, and the answers are not coming easily. Given the breadth of journalism, few professional standards exist, as they do in law and medicine. Its few codes of ethics, promulgated by such groups as the American Society of Newspaper Editors and the Society of Professional Journalists, are vague and have no sanctions. At best, journalism can be called a craft, and its standards vary from medium to medium and among individual units within a medium. The *New York Times* probably has higher standards than most American newspapers. The television network news departments probably have higher standards than do news departments at most local stations. The situation is due partly to wealth: the richer media can afford to do more checking. A magazine editor has more time to check a story than a daily newspaper editor has. A television documentary team has more time to verify details than does the producer of the nightly news. The question becomes this: The standard of conduct will be that of reasonable care. But what is reasonable journalistic care? What standards do we use? Perhaps the courts will measure the conduct

of media defendants against the conduct of other persons in the same medium—the stories of one magazine editor against those of another, the films of one television documentary team against those of another team. Courts will probably use expert testimony to evaluate some of these matters, but there is little agreement on matters in some areas. In law, for example, the lawyer is obligated to investigate if he thinks his client's claim in a lawsuit is fraudulent. Furthermore, the lawyer has the time to investigate. What about the editor who, the day before an election, gets a report—attested to by two independent sources—that a candidate for mayor has taken bribes? Does he publish the story? Should he check it further? What is the editor's obligation to the candidate? What is the editor's obligation to the public? to the voters? What is reasonable care?

While there have been numerous judicial decisions on the question, it is hard to see meaningful guidelines. The case law does, however, provide some examples. Courts have been reluctant to find negligence when a reporter bases a story on the report of a normally reliable "official" source. A Florida court of appeals ruled that a story based upon an inaccurate report from an immigration officer was not published negligently. The same officer had provided consistently accurate information in the past (*Karp* v. *Miami Herald,* 1978). In 1977 the Philadelphia Police Department arrested two brothers, John and Tyrone Mathis, for attempted bank robbery. The police supplied pictures of the suspects to the *Philadelphia Daily News,* but the photograph identified as John Mathis by the police was not the same John Mathis arrested in connection with the attempted bank robbery. The John Mathis incorrectly identified as an attempted bank robber sued for libel, but the United States District Court for Eastern Pennsylvania ruled that there was no evidence that the newspaper was negligent—the publication was an accurate report of an inaccurate government report (*Mathis* v. *Philadelphia Newspapers,* 1978).

The North Carolina Court of Appeals ruled that failure to retract a libelous statement is not evidence of fault of any kind (*Walters* v. *Sanford Herald,* 1976). But the Arizona Supreme Court ruled that it was reasonable to expect a reporter to attempt to verify charges made by two former employees of the Phoenix Better Business Bureau about a local automobile dealer. The former employees charged the businessman with misrepresentation in advertising. The reporter did not attempt to verify the statements by calling the Better Business Bureau to determine the truth of the charges. This was negligent conduct, the court ruled (*Peagler* v. *Phoenix Newspapers,* 1976).

The definition of the term *negligence* will undoubtedly vary from state to state and possibly from judge to judge within a state. It is going to be some time before any kind of broad, consistently applied guidelines emerge. The United States Supreme Court will be of little help in this case, as it appears to be the intention of the court to leave the matter to the states.

While the uncertainty in this area of the law exists, reporters and editors need to put a premium on *reasonable caution.* Newspapers and broadcasting stations should attempt to develop their own standards of care, and these should be applied in publishing and broadcasting the news. The Tennessee Supreme Court noted in 1978 that the negligence standard **was *not*** a "journalistic malpractice test" (*Memphis Publishing Co.* v. *Nichols,* 1978). Liability will be based upon a departure from supposed standards of care set by publishers themselves. Reporters need to become better bookkeepers and undertake to keep records on how and when they investigate the veracity of libelous charges. The key term is "good faith effort." So long as the press makes a good faith effort to establish the truth or falsity of libelous charges, it does not appear that negligence will be a serious problem.

As noted previously, other states have chosen to adopt other standards. The gross irresponsibility or gross negligence standard of New York falls somewhere between simple negligence and actual malice, which will be discussed shortly. Courts in New York have defined gross irresponsibility as acting with a degree of awareness of the probable falsity of the published statements (*Chapadeau* v. *Utica Observer-Dispatch, Inc.,* 1975). That is, the reporter or editor or broadcaster probably had some degree of knowledge that the material which was going to be published or broadcast was false. This would be harder for a plaintiff to prove, obviously, than that the defendant did not exercise reasonable care. At present only New York has subscribed to the gross irresponsibility standard for private-person plaintiffs, and then the standard is applied only in those instances when the story focuses upon a matter of public concern. If it is a story having little public concern, a private person plaintiff need prove only simple negligence.

Actual Malice

Defining actual malice is somewhat easier than defining who is and who is not a public figure or public official. **In *New York Times Co.* v. *Sullivan*** (1964) Justice Brennan defined actual **malice as** "knowledge of falsity or reckless disregard of whether the material was false or not." The two parts of this definition should be considered separately.

Knowledge of falsity "Knowledge of falsity" is a fancy way of saying "lie." If the defendant lied, and the plaintiff can prove it, actual malice has then been shown. But plaintiffs are rarely in a position to show that the defendant lied. Furthermore, not many defendants, at least not many mass media defendants, lie. On at least two occasions libel plaintiffs have in fact demonstrated knowledge of falsity. In 1969 Barry Goldwater was able to convince a federal court that Ralph Ginzburg published knowing falsehoods about him during the 1964 presidential campaign in a "psychobiography" carried in Ginzburg's *Fact* magazine. Ginzburg sent questionnaires to hundreds of psychiatrists asking them to analyze Goldwater's mental condition. Ginzburg published only those responses that agreed with the magazine's

predisposition that Goldwater was mentally ill and changed the responses on other questionnaires to reflect this point of view. Proof of this conduct plus evidence of other kinds of similar practices led the court of appeals to conclude that Ginzburg had published the defamatory material with knowledge of its falsity (*Goldwater* v. *Ginzburg,* 1969; see also *Morgan* v. *Dun & Bradstreet, Inc.,* 1970).

Reckless disregard for the truth A few months after the initial decision in the *Sullivan* case, the Supreme Court defined reckless disregard in a criminal libel action (***Garrison*** v. *Louisiana,* 1964) as "a high degree of awareness of probable falsity" of the material or statements. In 1968, in *St. Amant* v. *Thompson,* the high Court said that before a court can conclude that reckless disregard for the truth exists "there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." Failure to investigate in and of itself is not sufficient evidence to prove actual malice, wrote Justice White.

defendant doubted whether the pub. was true

Both are good definitions of reckless disregard for the truth, but they are not much help to the working journalist who needs a more practical measure of reckless disregard. The Supreme Court has to an extent provided that as well. Look at *New York Times Co.* v. *Sullivan,* for example. All that was required to check the truth of the charges made in the advertisement that ultimately became the basis for the libel suit was for someone to compare the assertions in the advertisement with clippings in the newspaper's files, a simple matter. Yet the Court in that case did not indicate that such a check was really called for. There was no reason for the advertising staff to doubt the veracity of the claims in the document. The newspaper had every reason to believe that the charges contained in the advertisement were true.

A better practical definition of reckless disregard evolved from the cases of *Curtis Publishing Co.* v. *Butts* and *AP* v. *Walker* (1967). In developing the criteria that follow, Justice Harlan said he was attempting to determine whether the plaintiffs in these cases had seriously departed from the standards of responsible reporting. He did not call his opinion a definition of reckless disregard. Some of the other members of the court did, however, refer to these standards as a measure of reckless disregard, and so have many lower federal and state courts.

These two appeals came before the Supreme Court at about the same time and were joined and decided as one case. In the first case Wally Butts, the athletic director at the University of Georgia, brought suit against the *Saturday Evening Post* for an article it published which alleged that Butts and University of Alabama football coach Paul "Bear" Bryant had conspired prior to the annual Georgia-Alabama football game to "fix" the contest. The *Post* obtained its information from a man who said that while making a

telephone call he had been accidentally plugged into a phone conversation between Butts and Bryant. George Burnett, who had a criminal record, told the *Post* editors that he had taken careful notes. The story was based on these notes.

In the other case Major General (retired) Edwin Walker, a political conservative and segregationist from Texas, brought suit against the Associated Press (AP) and a score of publications and broadcasting stations for publishing the charge that he led a mob of white citizens against federal marshals who were attempting to preserve order at the University of Mississippi during the crisis over the enrollment of James Meredith. The AP report, which was wrong, was filed by a young AP correspondent on the scene.

The court ruled that in the *Butts* case the *Post* had exhibited highly unreasonable conduct in publishing the story, but that in the *Walker* case no such evidence was present. Again, it is important to note that while Justice John Marshall Harlan did not call the conduct reckless disregard at the time, most authorities accept these cases as good indicators of what the court means by reckless disregard. Look at the details of each case.

In the *Butts* case the story was not what would be called a hot news item. It was published months after the game occurred. The magazine had ample time to check the report. The source of the story was not a trained reporter, but a layman who happened to be on probation on a bad-check charge. The *Post* made no attempt to investigate the story further, to screen game films to see if either team made changes in accord with what Bryant and Butts supposedly discussed. Many persons were supposedly with Burnett when he magically overheard this conversation and none were questioned by the *Post*. The magazine did little, then, to check the story, despite evidence presented at the trial that one or two of the editors acknowledged that Burnett's story needed careful examination.

In the *Walker* case different circumstances were present. It was a hot story, one that had to get out on the wires right away. It was prepared in the "heat of battle" by a young, but trained, reporter who in the past had given every indication of being trustworthy. All but one of the dispatches from the correspondent said the same thing: Walker led the mob. So there was internal consistency. Finally, when General Walker's previous actions and statements are considered, the story that he led a mob at Ole Miss was not terribly out of line with his prior behavior. There was nothing to cause AP to suspect that the story was wrong as, for example, would be a report that the Archbishop of New York led a mob down Fifth Avenue. A red light should signal those kinds of instances which should suggest further checking because the story doesn't sound very likely.

Sorting all this out, we find that three key factors emerge. Was publication of the story urgent or was there sufficient time to check it fully? How reliable was the source? Was the source a trained journalist? Finally, was the story probable or was it a tale which suggested the need for further checking?

These factors make up a fairly good operational definition of reckless disregard and are the kinds of considerations a court might take a close look at in determining the reasonableness of the conduct of an editor or a broadcaster.

By combining the two conceptual definitions from *Garrison* and *St. Amant* and the practical guidelines from *Butts* and *Walker*, you should have a pretty good idea of the meaning of actual malice. The standard from *St. Amant*, the requirement of evidence that the defendant in fact entertained serious doubts as to the truth of the material, is a significant burden for the plaintiff to overcome. In addition, in bringing forward evidence to prove to the jury that the defendant did "entertain serious doubts," the plaintiff must meet a rigorous burden of proof. The normal evidentiary test in civil suits—the plaintiff must prove with a preponderance of evidence—has been abandoned in cases involving the *Times* rule. Instead the plaintiff must prove with "convincing clarity," must bring forth "clear and convincing evidence," that there was reckless disregard. If there is doubt in the juror's mind, the vote must be for the defendant. This standard strengthens the *Times* rule additionally.

Lower courts have had some of the same kinds of difficulties applying the actual-malice guidelines as they have had in applying the limited-public-figure guidelines. But standards do exist—even though contradictory decisions, especially from state courts, are not uncommon. It is obvious, for example, that reckless disregard for the truth is not the same thing as a sloppy journalistic error. When the *St. Louis Globe-Democrat* inadvertently attributed a city alderwoman's admission that she had had two abortions to another alderwoman who was a strong opponent of abortion, the Missouri Supreme Court ruled the error negligent, but not actual malice. The reporter gave the correct facts to a rewrite man over the telephone, but somehow the rewrite man, who was working on a close deadline, botched the facts. The emphasis placed on the close deadline by the Missouri court reflects Justice Harlan's opinions in the *Butts* and *Walker* cases (*Glover* v. *Herald Co.*, 1977). Other courts have focused upon these dimensions as well.

A New Mexico radio station broadcast false charges against a deputy sheriff which it had gained from interviews with confidential informants. The state's court of appeals ruled that the failure to investigate these charges before broadcasting them did not itself demonstrate actual malice (*Ammerman* v. *Hubbard*, 1977). Quoting the *Restatement of Torts* (2nd ed.) the court said:

> Availability of sufficient time and opportunity to investigate the truth of the statement is a significant factor in determining whether the publisher was negligent, and it may have some relevance in determining whether the publisher acted with reckless disregard as to truth or falsity.

When an Oklahoma newspaper published a libelous letter to the editor without checking the truth of serious charges made against a candidate for sheriff, the state's high court ruled that the total failure to make inquiry into the truth of *inherently improbable statements* could be evidence of reckless disregard for the truth (*Weaver* v. *Pryor-Jeffersonian,* 1977). This of course was another of the guidelines used by Justice Harlan in *Butts* and *Walker.* Similarly, the South Carolina Supreme Court ruled that malice was evident when a newspaper published charges that a stockholder in a large land development was being manipulated by his brother, whom the newspaper described as a "con man." In ruling for the plaintiff in the case, the court emphasized that the story was not a hot news item, and that despite obvious reasons to investigate the charges, the paper did little checking into the matter before publication (*Stevens* v. *Sun Publishing,* 1978).

However, other courts have emphasized that, by itself, the failure to investigate a story is not evidence of actual malice. Other parts of the record in the case must also be considered. The Vermont Supreme Court ruled in 1977 that failure to properly investigate a contradicted story in itself did not establish reckless disregard for the truth (*Columbo* v. *Times-Argus Association,* 1977). And the New York Supreme Court said that a reporter's failure to check the newspaper clipping file before writing an article in which he falsely stated that a former judge had been convicted of perjury is not evidence of actual malice. It was a serious oversight, the court ruled, but did not demonstrate that the journalist entertained serious doubts as to the truth or falsity of the charge (*Dilorenzo* v. *New York Times,* 1979).

In Louisiana, the supreme court overturned a jury verdict in a case in which a newspaper had depicted an acting police chief as using his office for personal gain. The jury ruled that the newspaper had demonstrated reckless disregard for the truth, because it had relied upon statements from disgruntled police officers and other unreliable sources. But the bias of the informant should not be persuasive in determining malice, the court said in reversing the jury verdict. The credibility of the informants must be judged, not on the basis of sworn testimony at a trial, but rather on the basis of information available to the reporter at the time of publication. What is important, the court noted, is whether the informant was in a position to know the truth about the material published, and whether there is clear and convincing evidence that the person publishing the material had any personal knowledge "unequivocally indicating the unreliability of the informant" (*Kidder* v. *Anderson,* 1978).

These contradictory rulings are not presented simply to confuse the issue of actual malice. They demonstrate that any determination of whether reckless disregard for the truth is apparent is a fairly complex matter, and that the courts will consider a variety of circumstances and conditions in any given

case. They also show, however, that the guidelines from the *Butts* and *Walker* cases are important: That deadline pressure will be considered, that the credibility of the source is material, and that whether the libelous charges appeared probable or outrageous will all be considered in determining the need for investigation. These are useful guidelines for the media.

The fault requirement has done much in the past decade and a half to ease the burden of libel suits. This is especially true with regard to publication about persons in government and persons who attempt to lead or shape public opinion. The presumed function of the press, after all, is to educate and inform the public on such issues. Freedom to undertake this role is important, and simple relief from the threat of libel action will enhance the undertaking.

Since 1964 public officials have been asked to prove actual malice when suing for libel. Three years later so-called public figures were asked to meet the same standard. In 1974 the Supreme Court limited to a certain extent those persons falling into the public figure realm, but insisted that private persons who sue the media must also prove at least simple negligence to sustain their suits. States are free to place a higher level of fault upon private persons, and a handful have done so. Negligence has been defined as the lack of ordinary or reasonable care; actual malice means publishing material with the knowledge that it is false or with reckless disregard of whether it is truthful. As we have seen, all of these concepts are what might be called "terms of art," subject to the nuances and differences in meaning which judges across the land might apply. Our consideration of the plaintiff's case is here concluded. Before moving into the discussion of libel defenses, it is useful to explore one small issue—the notion of the summary judgment.

SUMMARY JUDGMENT

No attempt is made in this book to teach anyone how to try a libel suit; students need to go to law school to find that out. But even journalists should know about one procedural matter in a libel suit. This is called "a motion for summary judgment." After plaintiffs have made all their allegations in a lawsuit but before the actual trial has begun, defendants can ask the court for a summary judgment. The United States Court of Appeals for the District of Columbia described a summary judgment in this way (*Nader* v. *deToledano*, 1979):

> . . . a summary judgment should be granted if (1) taking all reasonable inferences in the light most favorable to the nonmoving party [the plaintiff in this case], (2) a reasonable juror, acting reasonably, could not find for the nonmoving party, (3) under the appropriate burden of proof.

This is a good outline, but by using an example we can assist in translating it for nonlawyers. John Smith is sued by Jane Adams for libel. After Ms. Adams has presented all her allegations and arguments to the court, and after the court gives her the benefit of the doubt in any instance which might be

questionable, if the judge believes that a juror could not possibly rule in her favor, the judge can grant a summary judgment for the defendant. The defendant would win without going to trial.

The summary judgment has proved especially useful in libel suits since 1964 when the Supreme Court raised the constitutionally mandated "actual malice" fault requirement for public persons. Whether or not there was actual malice in a case was considered a "constitutional fact" that could be determined by a judge. This was not necessarily a jury question. Therefore, if the plaintiff in the lawsuit could bring forth no evidence at all of actual malice, the judge could dismiss the suit on a motion for summary judgment. As more and more persons fell under the rubric of public person and more and more cases hinged upon the finding of actual malice, motions for summary judgments became commonplace in libel suits. And they were granted with some regularity. This worked out well for the press; a costly trial was avoided in a lawsuit that the newspaper or broadcasting station would have ultimately won anyway. In fact, because of the importance placed upon freedom of expression, the summary judgment seemingly became the rule in a libel suit. Judge Skelly Wright of the Court of Appeals in Washington, D.C., wrote in 1970 that "unless the court finds, on the basis of pretrial affadavits, depostions, or other documentary evidence that the plaintiff can prove actual malice in the *Times* [*New York Times* v. *Sullivan*] sense, it should grant summary judgment for the judgment for the defendant" (*Wasserman* v. *Time, Inc.*, 1970). In the United States district court which first heard the *Hutchinson* v. *Proxmire* case (noted previously), the trial judge referred to granting summary judgment in such cases as "the rule and not the exception."

It was this latter comment that prompted Chief Justice Burger to add a footnote to the Supreme Court's majority opinion in the *Hutchinson* appeal that "proof of actual malice calls a defendant's state of mind into question . . . and does not lend itself to summary disposition." It was only a footnote, but footnotes written by members of the Supreme Court in majority opinions are frequently warnings of things to come. The legal community regarded Chief Justice Burger's comment as a warning to trial judges to pass out summary judgments more sparingly in the future. Burger's concern is undoubtedly a real one. Can a court adequately determine the defendant's state of mind—whether he or she in fact entertained serious doubts as to the truth of the material—without a trial in which the adversary process can be conducted to hopefully unearth the material facts? Apparently the Chief Justice doesn't believe this to be the case, at least not very often. Consequently, as this book was being written there were predictions by lawyers for the press that in the future summary judgments might be far harder to come by.

What this means for the press is that costs due to more trials will increase. And ultimately reporters and editors will spend more time both in court and in working with attorneys in preparation for court. The cost of a libel suit is

high enough—even without a full trial. The fear of losing a libel suit has always been effective in restraining the press in some ways. This is what the law intends. But the fear of even having to go to trial, to have to pay the cost of winning a suit, can have a kind of perverse effect by stopping the kind of controversial and important communication that the First Amendment is intended to protect. The smaller, frequently more active and vocal publications will suffer the most. Undoubtedly the Gannett newspaper chain will not be deterred; it can afford to defend itself in a lawsuit. But the *Texas Observer,* an outspoken publication from the Lone Star State, and the *Bay Guardian,* a vocal California journal, are the kinds of publications that don't have the financial resources to constantly go to court—even if they were to win. Professor David Anderson of the University of Texas Law School estimated five years ago that it costs a newspaper about $20,000 to take a libel suit through a full-blown trial. This price tag applies to both winning and losing. If the case is lost, damages are in addition to the $20,000 (probably $25,000 today). The demise or lessening of the summary judgment will be critical to such small, aggressive publications just noted and certainly will have an impact upon all but the very few richest publications and broadcasting stations.

DEFENSES OF LIBEL SUITS

Now it is time to turn to the subject of the defenses of libel suits. A libel defense can be defined as a legally acceptable reason for publishing something which is defamatory. There are many different kinds of defenses, some very old and some relatively new. The applicability of each defense in a particular case is determined by the facts in the case—what the story is about, how the information was gained, the manner in which it was published. Before looking at the substantive defenses, it is appropriate to consider one other remedy offering a defendant complete immunity in a libel action—the statute of limitations.

Statute of Limitations

For nearly all crimes and most civil actions there is a statute of limitations. Courts don't like stale legal claims. They have plenty of fresh ones to keep them busy. Prosecution for most crimes except homicide and kidnapping must be started within a specified period of time. For example, in many states if prosecution is not started within seven years after an armed robbery is committed, the robber cannot be brought to trial. He or she is home free. (However, the robber can still be prosecuted for failing to pay income tax on money taken from a bank, but that is another story.)

The statute of limitation for libel differs from state to state, varying from one to five years. In most states the limitation is two or three years, which means the lawsuit must be started (not completed, just started) within two or three years. Assume the following events take place in a state whose statute of limitations is two years. *Scam Magazine* libels Jane Adams in its October

1975 edition. Ms. Adams must bring suit before October 1977 or the statute of limitations will preclude her suing. The republication rule plays a part here. What happens if somebody visits the *Scam* offices in August 1977 and buys a back issue, the October 1975 issue, of the magazine? In many states buying a back issue is considered new publication, and the statute of limitations starts over. More and more jurisdictions have rejected this rule and substituted the single publication rule. This rule states that the entire edition of a newspaper or magazine is a single publication and that isolated sales in the months or years to come do not constitute republication. Therefore the statute of limitations starts on the day the edition hit the newsstands and ends two or three or five years later. The statute cannot be reactivated by a later sale. About half the states have this progressive rule. Find out if your state does.

Truth

Truth is a complete defense in a libel suit. If a statement can be proved to be true, a plaintiff cannot collect libel damages because the statement was published. It is true that in a handful of states the law says that only truthful statements published for justifiable ends or with good motives are protected. As we have noted, appellate courts are overturning these laws as being in violation of the First Amendment. Such a law was declared null and void in Illinois, for example, in 1969 (*Farnsworth* v. *Tribune Co.*).

The words may be defamatory, they may harm the reputation of the plaintiff, but injured parties will lose their case if the statement is true. Sounds nice, doesn't it? But hold on a minute. In a libel suit the law presumes that the libelous statement is false, that it is not true. It is up to defendants to convince the jury that what they have published is the truth. Truth of the statement is not something that the plaintiff must refute. If the plaintiff can demonstrate there was a libel, there was publication, there was identification, and there was negligence, the defendant has to prove the truth of the statement. And that is not always easy to do. What is provable in court is often far less than what a reporter knows to be true. Judge Leon Yankwich (*It's Libel or Contempt If You Print It*) once wrote, "Libel lurks in vague general charges and inferences. Easy to make, they are the most difficult to prove." A specific charge—John stole a car—is often far easier to prove than a general statement—John is a thief. The problem of proving the truth is more complex than this, however.

Many people who are willing to tell a reporter something in confidence are frequently reluctant to repeat the charge in public. They may fear for their safety or their job. Often to reveal the truth publicly may compromise their reputation. Some people make bad courtroom witnesses. People with criminal records or other stains upon their past are often easily impeached as witnesses by clever attorneys for the plaintiff. Sometimes witnesses cannot be found; they have left the community or have died. What the reporter has seen

and heard himself is usually persuasive testimony. But remember, the plaintiff may tell the jury a different story, and the case can come down to which party is the more credible witness. Libel defendants therefore don't often rely on truth. Many other better defenses, defenses easier to use in court, are available. Nevertheless it is important to know the dimensions of this defense.

To prove the truth, the evidence presented in court must be as broad as the libelous charge. The proof must be direct and explicit; it must go to the whole charge. If there is conflicting evidence, the judge or the jury (whichever is the fact finder) decides who is telling the truth. If the *River City Sentinel* publishes that John Smith operates a fraudulent business, proving that Smith once cheated a customer will likely not convince a court of the truth of the libelous charge. The published charge suggests a pattern of cheating or continuous cheating. Similarly, if a broadcaster asserts that Mayor Smith is a wife beater, evidence that he once slapped her in a fit of rage probably will not establish the truth of the assertion.

You are not required to prove every word of the defamatory charge, just the main charge, the part that carries the sting or the gist of the libel. John Smith is a violent man, you report. He likes to beat people, to hit them with clubs and chains and rocks. It will not damage your argument if you can't prove that Smith hit people with rocks so long as you can prove that he hit them with chains and clubs.

What the court is looking for is substantial truth. For example, a Michigan newspaper published that a land developer had been "Charged in Shopping Mall Fraud." The story said Harlan Orr had been charged with fifteen counts of fraud, outlined what it called his "phony shopping mall investment scheme," and referred to his behavior as an "alleged swindle." Orr sued for libel. He admitted that the basic facts of the story were true: he had been charged with five counts of the sale of unregistered stock, with eight counts of failure to disclose information, and two acts of deceit. Orr had told potential investors in his scheme that J.C. Penney Company had already leased space in his proposed shopping center. That was not true. What Orr objected to was the use of the words "fraud," "swindle," and "phony" scheme. The United States Court of Appeals for the Sixth Circuit overturned a jury verdict in behalf of Orr and ruled that the article was substantially true. The word *fraud* is an accurate and appropriate description of a violation of the Michigan security laws, the court said. The word *swindle* is a common colloquialism for the term *defraud*. The J.C. Penney scheme was "phony." The court admitted that the words in the story could mean more; they could mean a "flimflam." But they could be used also to mean what Orr had done (*Orr* v. *Argus Press*, 1978).

Extraneous errors will not destroy the defense. A newspaper reports that Jane Adams was arrested by city police last night about nine o'clock while driving a stolen 1976 Buick on Main Street. The fact that Ms. Adams was

arrested at ten o'clock while driving a stolen 1976 Pontiac on Elm Street will probably not materially affect the defense. The gist of the charge—that she was arrested while driving a stolen car—can be proved.

How does the court evaluate whether the defendant successfully proved the truth of the charge. The jury does this with guidance from the judge. The judge will probably give the jury a test to use in evaluating the evidence against a defamatory charge. One of the commonly used tests comes from a 1934 New York case, *Fleckstein* v. *Friedman.* Defendant Benny Friedman, a former all-star professional football player, charged that some of the players in the National Football League were sadists and bullies. Friedman named names in his *Collier's* magazine story, and one of the players identified, William Fleckstein, sued.

In attempting to prove the truth of the charge, Friedman demonstrated some of the tactics used by these rough players. In instructing the jury in this case, the judge said:

> . . . a workable test of truth is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced. When truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done.

In simpler terms this is what the court said: After reading the article, readers were left with a certain opinion of William Fleckstein, a negative opinion since he was called a bully and a sadist in the story. Now, if persons who had not seen the story had a similar opinion of Fleckstein after seeing the evidence Friedman presented in court, Friedman then succeeded in proving his charges. The point here is a lot simpler than it sounds, but it is something which should be understood. The proof must be as broad as the charge; the evidence presented in court must leave the reader with the same impression of the plaintiff as did the defamatory charge.

One more point should be stressed about truth. Correctly quoting someone or accurately reporting what someone else has told you does not constitute proof of the truth of the charge. Imagine that John Smith tells a reporter that the police chief changes arrest records of certain prisoners to simplify their getting bail and winning acquittal. This charge, attributed to John Smith, is contained in the reporter's story which is subsequently published. The police chief sues for libel. It is not sufficient for the reporter to prove merely that the statement in her story was an accurate copy of what Smith said. Even if the reporter's story contained an exact duplicate of Smith's charge, truth can be sustained only by proving the substance of the charge, that the police chief has altered arrest records. A newspaper or broadcasting station is responsible for proving the truth of a libelous charge, not merely of the accuracy of the quote in the story. Accuracy, then, is not always the same thing as truth.

Privilege of the Reporter

Traditionally in the United States we value robust debate as a means of discovering those elusive truths which we continually pursue. The law takes pains to protect this debate, making sure that speakers are not unduly punished for speaking their minds. Article 1, Section 6, of the federal Constitution provides that members of the Congress are immune from suits based on their remarks on the floor of either house. This is called a privilege. The statement in question is referred to as a privileged communication.

Today, privilege attaches to a wide variety of communications and speakers. Anyone speaking in a legislative forum, congressmen, senators, state representatives, city councilpersons, and so forth, enjoy this privilege. Even the statements of witnesses at legislative hearings are privileged. But the comments must be made in the legislative forum. The Supreme Court ruled in 1979 that while a speech by a senator on the floor of the Senate would be wholly immune from a libel action, newsletters and press releases about the speech issued by the senator's office would not be protected by the privilege. Only that speech which is "essential to the deliberations of the Senate" is protected, and neither newsletters to constituents nor press releases are parts of the deliberative process (*Hutchinson* v. *Proxmire,* 1979).

Similarly, the privilege attaches to communications made in judicial forums—courtrooms, grand jury rooms, and so forth. Judges, lawyers, witnesses, defendants, plaintiffs, and all other persons are protected so long as the remark is uttered during the official portions of the hearing or the trial. Finally, persons who work in the administrative and executive branches of government enjoy privilege as well. Presidents, mayors, governors, department heads—official communications or official statements by these kinds of persons are privileged. In 1959 in *Barr* v. *Mateo* the Supreme Court suggested that the privilege applies to any publication by government officials which is in line with the discharge of their official duty. This case involved a press release from a department head explaining why two federal employees had been fired. "A publicly expressed statement of the position of the agency head," the Court ruled, "announcing personnel action which he planned to take in reference to the charges so widely disseminated to the public was an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively."

More recently the Court of Appeals in New York State ruled that a press release issued by an assistant attorney general concerning the investigation of possible fraudulent activities by fund raisers was protected from a lawsuit by privilege. The court said that since the attorney general as an executive official enjoys absolute privilege while exercising the functions of his office the same privilege applies to his subordinates who exercise delegated powers (*Gautsche* v. *New York,* 1979). The difference in the treatment of the assistant attorney general by the New York court and Senator Proxmire by the United States Supreme Court over essentially the same item—a press release—stems from

the different roots of the privilege. Congressional privilege stems directly from the United States Constitution and is limited by the constitutional language. The privilege applied to the state attorney general stems from the common law. Also, the functions of the two offices are different. Senators are supposed to deliberate and make legislative policy. Reporting to the public on the results of an official investigation is one of the legal functions of an attorney general.

The privilege just discussed is an absolute privilege. The speaker cannot be sued for defamation on the basis of such a remark.

A similar kind of a privilege applies also to certain kinds of private communications. Discussions between an employer and an employee are privileged; the report of a credit rating is privileged; a personnel recommendation by an employer about an employee is privileged. These kinds of private communications remain privileged so long as they are not disseminated beyond the sphere of those who need to know. For example, an employer can write a negative evaluation about your job skills and pass that along to another prospective employer if asked to do so. The evaluation is privileged. But the employer cannot show that evaluation to others in the office or publish it in the company newsletter. Such action destroys the privilege.

The privilege goes far beyond the absolute immunity granted to speakers at public and official meetings and the conditional immunity applied to certain types of private communication. The press is granted a qualified or conditional privilege to report what happens at official governmental meetings and other meetings open to the public. This is how the privilege is outlined in the newly adopted second edition of the *Restatement of Torts:*

> The publication of defamatory matter concerning another in a report of any official proceeding or any meeting open to the public which deals with matters of public concern is conditionally privileged if the report is accurate and complete, or a fair abridgement of what has occurred.

This means that a libel suit premised upon such a publication will not stand. While technically the press has no special privileges in the law of defamation, in actual operation of the law this privilege is invoked so infrequently on behalf of anyone other than the press that it is generally regarded to be a privilege of the press. In fact, this privilege is sometimes called the privilege of the reporter, as opposed to the absolute immunity noted earlier which is referred to as the privilege of the participant.

There is much to discuss about this privilege. Perhaps the most important point which needs to be made is that it is a *conditional* privilege. That is, the privilege of the reporter works as a defense in a libel suit only if certain conditions are met. First, the privilege applies only to reports of certain kinds of meetings, generally meetings of governmental bodies, public meetings on issues of public importance, and other public proceedings. Second, the privilege applies only to reports which are a fair and accurate or truthful summary of

what occurred at the meeting. Third, publication of a report cannot be motivated by malicious feelings such as ill will. However, if the meeting is the kind covered by the privilege, if the report is a fair and true summary of what took place at the meeting, and if there is no malice in the report, the conditional privilege then provides absolute protection for the press. It will totally defeat a libel suit.

The defendant bears the burden of proving that the privilege applies to the libelous material. The court determines whether the particular occasion (meeting or proceeding) is privileged. The jury determines whether the defendant's story is a fair and accurate report. Each of these elements needs closer scrutiny. Let us, therefore, focus now on meetings and proceedings said to be privileged.

The privilege applies at the very least to reports of all official proceedings of a governmental agency. Some authorities contend that it also applies to all public meetings at which matters of public concern are discussed (more on this in a moment). The qualified privilege applies to official proceedings of the legislative branch of government, to the judicial branch, and to the executive branch. Let's look at each briefly.

Legislatures

Quite obviously, the privilege applies to meetings of organizations like Congress, state legislatures, city councils, county councils, and so forth. The privilege also applies to the reports of meetings of committees of such organizations, as well as to stories about petitions, complaints, and other communications received by these bodies. The only requirement which must be met in regard to this aspect of the privilege is that the official body, such as a city council, must officially receive the complaint or petition before the privilege applies If the Citizens for Cleaner Streets bring a petition charging the street superintendent with incompetence and various and sundry blunders in his job to a city council meeting, publication of these charges is privileged as soon as the city council officially accepts the petition. Nothing has to be done with the document. It must merely be accepted.

Whether the privilege applies to stories about the news conferences of members of a legislative body following a session, to stories about what was said during a closed meeting by the body, and to what was said during an informal gathering of legislators before or after the regular session remains somewhat unclear. Robert Phelps and E. Douglas Hamilton in their book *Libel* suggest that if what is said or what occurs during these kinds of events is of great public interest and there is a compelling public need to know, the privilege then likely applies. This contention rests more upon "educated" common sense than upon case law, and caution should be exercised in reporting what occurred at closed meetings, informal meetings, and press conferences.

The Courts

The privilege of the reporter also applies to actions which take place in judicial forums: testimony of witnesses, arguments of attorneys, pronouncements of judges, and so forth. Stories about trials, decisions, jury verdicts, court opinions, judicial orders and decrees, and grand jury indictments are all protected by the privilege.

Probably the most serious problem a reporter on the court beat has to face is what to do when a lawsuit is initially filed. Under our legal system a lawsuit is started when a person files a complaint with a court clerk and serves a summons on the defendant. The complaint is filled with charges, most of which are usually libelous. Can a reporter use that complaint as the basis for a story?

This is a tricky question. In most states the complaint is not privileged until a judge takes action on the suit. Scheduling a hearing is sufficient. Oliver Wendell Holmes, later Justice Holmes, wrote in 1884, "It is enough to mark the plain distinction between what takes place in open court, and that which is done out of court by one party alone, or more exactly, as we have already said, the contents of a paper filed . . . in the clerk's office." This makes good sense. John Smith doesn't like Jane Adams, so he files a phony lawsuit against her in which he charges her with defrauding him of $10,000. The paper publishes the charges, and the next day Smith withdraws his suit. The only reason he filed the suit was to have his phony charges publicized. In most states the initial complaint in a civil suit is not privileged until some judicial action has been taken.

In a few states this is not the rule; the complaint is privileged as soon as it is placed on file with the clerk and the summons has been served.

One further word of caution. The privilege applies only to reports of what is said and done during the official proceeding—during the trial, for example. What the judge tells the reporter in the hallway after the trial is not privileged. Similarly what an attorney tells the journalist over a brew at the local pub is not protected either.

Stories about those parts of the judicial process which are closed to public view are also not protected by the privilege. Frequently, court sessions for juveniles and divorce proceedings are closed in order to further a public policy. The legislature or the courts feel obligated to discourage publicity about what occurs during such hearings. A few years ago the *New York Daily News* published a series of articles about a sensational divorce case, one in which the wife accused the husband of keeping a harem of women in a private plane which he used for business (and pleasure?) trips. When the husband sued the newspaper for libel, the *Daily News* argued that it had taken its report directly from court records and trial testimony.

In New York, however, divorce proceedings are closed to the public. The state's high court ruled that the legislature deemed it to be in the public

interest to close divorce proceedings to public scrutiny (*Shiles* v. *News Syndicate Co.*, 1970):

> Since, then, such matrimonial actions were and are not proceedings which the public had the right to hear and see, it follows—and it has been consistently held—that the privilege generally accorded to reports of judicial proceedings is unavailable to reports of matrimonial actions.

Governmental Executives and Administrators

Reports of the statements and proceedings conducted by mayors, department heads, and other persons in the administrative and executive branches of government are generally privileged. The law lacks the clarity here, however, that it has with regard to legislatures and courts. Some authorities suggest there is a broad privilege for the published accounts of the actions, statements, and reports of government officials. Others say the privilege is limited. Probably the best guideline is that the privilege is confined to stories about actions or statements which are official in nature, the kinds of things which are substantially "acts of state." By law administrators are required to prepare certain reports and to hold certain hearings, and the privilege certainly covers stories on these activities. Although not required by law, other actions are unmistakably part of the job. Reports on these affairs are undoubtedly protected as well. Questions arise when the executive or administrator goes off into places where he probably doesn't belong. A mayor is supposed to do many things, but he is not the public prosecutor. Therefore, a statement by the mayor at a press conference that John Smith runs a fraudulent insurance business is probably not privileged.

Reports of police activities also fall under the heading of executive actions, but the privilege is applied sparingly here. It is fairly well settled that a report that a person has been arrested and charged with a crime is privileged. The arrest and charge is a public kind of event. All the additional information the police and prosecutor are wont to give the press—how the crime was committed, statements by witnesses, circumstances surrounding the arrest—is clearly not protected by the privilege. The police really go beyond their authority in making such statements and frequently defame the suspect in the process. Remember, when the police arrest someone, they believe that he is guilty, and they believe that what they tell you is the truth. If that were really the case, we wouldn't need trials. The suspect is presumed to be innocent until proved guilty. A statement published by a newspaper or broadcast over a television station that the defendant "shot and killed the bank manager, according to police" is libelous and practically indefensible if the defendant is acquitted of the crime. You have to prove what the state cannot, that the plaintiff who is suing you is a killer.

The law is somewhat benevolent with the press when it comes to problems involving official actions which have all the appearances of legality, but which turn out to be illegal: a hearing that is improperly conducted and turns out

to be illegal, a trial in which the presiding judge lacks jurisdiction, an arrest that is illegally made, and so forth. Journalists are not expected to know more than the public officials about whom they write, and consequently reports of such activities remain privileged, despite the fact the proceeding or the event turned out to be less than official.

Other Public Concerns

The privilege of the reporter is not confined only to those instances of reporting official government proceedings. How far beyond such proceedings the privilege does apply is by no means settled. Books published no more than ten or fifteen years ago declared quite authoritatively that the privilege was limited to reports about official governmental proceedings. There were a few court decisions to the contrary. In 1956, for example, an Idaho court ruled that the privilege applied to a story about a meeting called by citizens to protest the actions of a judge. It clearly was not an official meeting, but concerned important public business, the conduct of a public official. The court said, "There is a general doctrine that what is said at a public meeting, at which any person of the community or communities involved might have attended and heard and seen for himself, is conditionally privileged for publication" (*Borg* v. *Boas,* 1956). That might have been a general doctrine in Idaho in 1956. It was not a general doctrine in most of the nation.

Since then the authorities—those mysterious beings who tell us what the law says—have moved much closer to the Idaho position. The *Restatement of Torts* (2nd ed.), which traditionally takes a conservative position on the law, says flatly that reports of what occurs at meetings open to the public at which matters of public concern are discussed are privileged. Paul Ashley, libel authority and author of *Say It Safely* (1976), wrote that the privilege probably applies to a public meeting even though admission is charged, so long as everyone is free to pay the price. "By supplying them with information about public events," Ashley writes, "the publisher is acting as the 'eyes and ears' of people who did not attend."

In such a circumstance, the report of a public meeting, the key element undoubtedly is the subject of debate. Was it of public concern? Was it of limited public concern? Was it a purely private matter" Using the standard of public concern, we can look at some kinds of nonofficial public meetings and try to determine whether the privilege applies.

1. Meeting of local Rotary Club: probably of private concern; not privileged
2. Meeting of board of directors of United Fund: of public concern; privileged
3. Meetings of local bar association or medical society: of limited public concern; privileged
4. Meeting of stockholders of General Motors Company: about private business and of private concern; not privileged
5. Meeting of county Democratic party: of public concern; privileged

At this point how far the privilege will extend in protecting nonofficial public meetings cannot be said. Traditionally each state handles this problem differently, and therefore you should seek guidance from local statutes and court decisions. The privilege is clearly being extended to gatherings outside the official governmental sphere.

"Neutral Reportage"

The privilege has seemingly grown in another direction in some parts of the country with the development of what many libel authorities call the defense of "neutral reportage." One thing which must be remembered about neutral reportage is that it is by no means accepted as a legitimate defense in all states, or even in most states. But it is an example of the creativity of the law.

This aspect of the privilege of reporting stems most directly from an interesting suit in New York State concerning the annual Audubon Society Christmas bird count. The *New York Times* printed charges made by an official of the Audubon Society that any scientist who argues that the continued use of the pesticide DDT has not taken a serious toll of bird life is "someone who is being paid to lie about it or is parroting something he knows little about." The implication was, of course, that certain scientists were being paid by the pesticide industry to lie about the impact of the chemicals on wildlife. The *Times* story included the names of several scientists given to the reporter by Robert Arbib, the official at the Audubon Society. Some of these scientists sued for libel, but the Second Circuit Court of Appeals ruled the story published by the *Times* containing the libelous charges was privileged, even though reporter John Devlin might have believed the charges made by Arbib were false when he published them. The court called the privilege "neutral reportage" and described it in the following manner (*Edwards* v. *National Audubon Society,* 1977):

> When a responsible prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity. What is newsworthy about such accusations is that they were made. . . . The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them. We must provide immunity from defamation where the journalist believes, reasonably and in good faith, that his report accurately conveys the charges made.

In simple terms the neutral reportage rule may be stated this way: publication of an accurate account of information about a public figure from a reliable source by a reporter who doubts the truth of the assertions is still privileged. When charges are made by responsible agencies or persons, the public should hear these charges, even if the journalist doubts their veracity. It is newsworthy that the charges have been made; that fact alone might add materially to the public debate on the issue. In the *Edwards* case the plaintiffs

were limited public figures, and the issue was a matter of genuine public concern. Those two factors undoubtedly played a part in the ruling.

But thus far the neutral reportage privilege remains a phenomenon of a limited geographic area. The case has been cited approvingly by lower New York State courts (see *Orr* v. *Lynch,* 1978) and by an intermediate appellate court in Illinois (*Krauss* v. *Champaign News Gazette,* 1978). It has been flatly rejected by the United States Court of Appeals for the Third Circuit in a ruling on a Pennsylvania case (*Dickey* v. *CBS,* 1978). Supporters of the doctrine note that plaintiff Edwards appealed the Second Circuit ruling to the United States Supreme Court, but the Court refused to hear the appeal. Any number of things could be meant here. It could mean the Supreme Court supports the test devised by federal Judge Irving Kaufman in the case. Or it could mean that the Supreme Court does not accept the neutral reportage test, but refused to hear the appeal because plaintiff Edwards deserved to lose the suit on other grounds. Or it could mean that the high Court was simply too busy with other matters to consider the case. Number two is probably closest to the truth. It is doubtful that Edwards, as a limited public figure in the case, could have proved actual malice against the *New York Times* and the Audubon Society. He would have lost even without the application of the defense of neutral reportage.

Journalists should recall that the concept of neutral reportage flies in the face of the conservative decisions rendered by the high Court in the area of libel. It seems unlikely that while the Court works so hard to define the limits of who is or who is not a limited public figure and what is and what is not reckless disregard it would approve a defense that seemingly disregards both concepts and permits the press unrestrained freedom to print libelous charges so long as they deal with public issues. Neutral reportage is a nice idea for the press; that it will grow significantly as a defense is unlikely.

Abuse of Privilege

Whether qualified privilege applies to a particular story is only part of the problem. There is also the question of whether the privilege was abused.

A jury might find that abuse occurred in one of two ways: (1) the publisher used the privilege as a shield in order to attack the plaintiff or (2) the story was not really a fair and accurate account of what took place at the meeting, was not a fair summary of the court's ruling, or did not give a fair and accurate account of the conclusion of the official report.

The purpose of the privilege is to foster public understanding of what is happening, to allow wide public exposure of what takes place at a public meeting, in a public trial, or at a public session of the legislature. If fostering public understanding was not the primary purpose of the publication, if the publisher or broadcaster instead sought to harm the person defamed at the hearing or trial or in the report, and if publication was motivated by ill will and not by serving the public good, the privilege was then abused. Once the defendant has successfully convinced the court that the privilege should apply,

it is up to the plaintiff to show its abuse. This is not an easy task, but it can be done. By showing previous ill will on the part of the publisher, the plaintiff might be able to establish an "evil" state of mind and convince a jury that publication was made to hurt him, not to inform the public. There are other ways as well.

The privilege can also be destroyed if the story in question is not a fair and accurate or true report of what took place. *Fair* means balanced. If at a public meeting speakers both attack and defend John Smith, the story should reflect both the attack and the defense. A story which just focuses on the charges is not fair, and the privilege will have been abused. Similarly, if the story concerns a continuing kind of an affair, a legislative hearing, a trial, and so forth, in which testimony is given for several days, the press is obligated to publish stories about each day's events if the privilege is to be used. If in the first day of the trial four witnesses come forth and say that John Smith raped Jane Adams, and two days later defense witnesses appear who challenge those charges, reports of both days' testimony are required before fairness can be obtained. Another way of accomplishing the same thing is to report what happened at the first day's session and include within that story comments from the defendant or his attorney which give the other side of the dispute. There has to be balance. If a story about a civil suit based upon the charges listed in the complaint is prepared, it is important to get the defendant's response as well. Balance is the key.

An accurate or true report means just that: it should honestly reflect what took place or what was said. John Smith testifies before a Congressional committee that Professor LeBlanc is a *radical*. If in the story the reporter writes that Smith called LeBlanc a *Communist*, the story is inaccurate and goes substantially beyond the charge the witness made. As with truth, little errors will not destroy the privilege. The news story says Smith testified in the morning and actually he testified in the afternoon and the story says Smith spoke extemporaneously and actually he used notes are minor mistakes and do not have impact upon the privilege. So long as the error has nothing to do with the basic defamation there is no problem. It must be remembered that the story must be substantially true. If it is an untruthful report, the privilege is lost.

The story must also be in the form of a report. If defendants fail to make it clear that they are reporting something that was said at a public meeting or repeating something that is contained in the public record, the privilege is lost. The law says the reader should be aware that the story is a report of what happened at a public meeting or at an official hearing or is taken from the official record. Readers must be aware that they could have attended the proceeding or can get a copy of the document. It must be plain that the reporter is merely a transmission belt for conveying information about what

was said in an official proceeding, at a public meeting, or in a government report or a jury verdict. These facts should be noted in the lead and in the headline if possible.

At City Council Session
MAYOR BLASTS CONTRACTOR WITH CHARGES OF FRAUD

Mayor John Smith during a city council meeting today charged the Acme Construction Co. with fraudulent dealings.

The writer should also beware of adding material to a story about a privileged meeting or hearing. The court adjourns, and the reporter prepares a fair and accurate story about what took place during the day's testimony, but at the end of the piece notes that informed sources in the prosecutor's office have reported that charges are about to be brought against John Smith for attempting to bribe a police officer. Obviously these last remarks are not privileged. Only that part of the story which deals with the trial is protected by the privilege. The extraneous matter added at the end must stand on its own.

The privilege of the reporter is a very important defense and protects the press in a large percentage of the stories which are printed or telecast. Privilege is much easier to use than truth since all the defendant must prove is that the event, meeting, or report was in fact a privileged occasion and the story was a fair and true report.

Fair Comment

Fair comment is another kind of privilege. It permits the journalist to express defamatory opinions on matters of public interest. The key words are *opinions* and *public interest*. Once again the law allows the press valuable protection when it concerns itself with matters of importance to readers and viewers. By its very nature an opinion is not subject to proof or to test by evidence. An opinion is a subjective statement which reflects the speaker's tastes, values, or sensitivities. As such, the defense of truth is worthless. The privilege of the reporter which has just been discussed is often limited in its application by the kinds of proceedings and reports to which it is applicable.

The roots of fair comment are deep. British courts long ago recognized the need for some means of permitting critical views and opinions to be aired. Lord Ellenborough summed up the basis of the defense of fair comment in the early nineteenth century (*Tabart* v. *Tipper*, 1808):

> Liberty of criticism must be allowed, or we should have neither purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I should never consider as a libel which has for its object not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature or to censure what is hostile to morality.

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More recently the Supreme Court has noted that the privilege of fair comment rests within the First Amendment as well. Writing in *Gertz* v. *Welch* Justice Powell noted:

> 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.

On the same day the *Gertz* ruling was handed down, the Supreme Court ruled that the naming of some postal workers "scabs" during a labor dispute was protected. The expression of such an opinion, even in the most perjorative terms, the court said, is protected (*Old Dominion Branch No. 496, National Association of Letter Carriers* v. *Austin,* 1974). Opinion, then, will be protected. But the application of the fair comment privilege is somewhat more complicated than that. A discussion of the requirements of the fair comment defense follows.

Legitimate Public Interest

The first requirement is that the comment must concern something of legitimate public interest. The courts have granted a wide range of topics that are fair game for comment. Educational, charitable, and religious institutions are eligible for comment, as are quasi-public organizations such as bar associations, medical societies, and other professional groups. Manufacturers who place products on the market must expect criticism; businesses which cater to the public such as restaurants, theaters, and galleries are subject to the same treatment. Any solicitation for public support such as an advertisement is fair game, as are artistic and creative efforts such as movies, plays, operas, books, paintings, recitals, comic strips, and television and radio programs. The work of journalists and broadcasters may be commented upon. The performances of those who seek to entertain the public—actors, musicians, athletes, and the like—are also considered legitimate targets for fair comment. In the 1930s a football coach sued a newspaper for its criticism of his team and his coaching abilities. The court found little sympathy for the plaintiff (*Hoeppner* v. *Dunkirk Printing Co.,* 1930):

> When the plaintiff assumed the position of . . . coach to the football team of the Dunkirk High School he was no exception to the habits and customs which have become a part of the game. His work and the play of his team were matters of keen public interest; victories would be heralded, defeats condemned. The same enthusiasm which welcomed the home-coming of the Roman conqueror now finds expression in the plaudits of the bleachers and the grandstand. The conquered now appear not in chains, but what may be far worse, amidst ridicule and derision—the boos of the crowd.

More recently, the Illinois Court of Appeals ruled that when the chairman of a university department described the scholarship of one of the faculty members in the department as "neither the quantity nor the quality of . . . work [which] justifies a grant of tenure" that it was a fair comment. It was

criticism of someone's private life is not protected under fair comment

an opinion on the man's public work. "Once published material is placed into the stream of ideas it cannot be defamation when that material is critiqued, be it by a reviewer or a superior" (*Byars* v. *Kolodziej,* 1977).

A broad range of subjects, then, come under the purview of the privilege.

As a kind of a corollary to the rule that the comment must concern something of public interest, the comment must also focus upon the public aspects of the subject. That is, while Elvis Presley's performances may have been legitimate targets of criticism, his private life was not. Similarly, while a book might be the fair subject even of scathing critical analysis, fair comment is no license to undertake scathing criticism of the author or the author's life. A very old case makes the point best. The plaintiff was a lecturer and teacher named Oscar Lovell Triggs. After a series of lectures by Triggs in New York, the *New York Sun* editorially attacked Triggs's public performance and his public pronouncements. These were fair game. But the newspaper went further and criticized the plaintiff because he and his wife took a year to name their baby. This attack was upon his personal life and could not be excused as a fair comment (*Triggs* v. *Sun Printing and Publishing Association,* 1904). To quote Lord Ellenborough about another case (*Carr* v. *Hood,* 1808), "Every man who publishes a book commits himself to the judgment of the public and any one may comment upon his performance. If the commentator does not step aside from the work, . . . he exercises a fair and legitimate right."

Another requirement of the privilege is that the opinion expressed by writers or broadcasters be their true opinion. It doesn't have to be the right opinion or the majority opinion. The jury does not have to agree with the opinion of the defendant. It just must be the author's honest opinion. Several years ago *Look* magazine wrote an article about baseball star Orlando Cepeda, who was at that time playing with the San Francisco Giants. The article noted that the Giant management was critical of Cepeda. Management said that he was not a team man, that when things went wrong he tended to blame others and not himself, that he was underproductive, and so forth. Cepeda sued, and *Look* attempted to erect the privilege of fair comment as a barrier. But the court did not allow the defense, for the opinions expressed in the articles were not those of the writer, but of other persons quoted by the writer. If Cepeda had brought suit against the Giant's management, fair comment would have applied to them, but not to the writer of the article. Similarly, if the writer had expressed these opinions himself rather than quote others, the defense of fair comment would have undoubtedly held up (*Cepeda* v. *Cowles Magazine & Broadcasting, Inc.,* 1964).

The opinion does not need to be temperate. As a federal court once noted, an opinion can be good, bad, or indifferent, immature, premature, or ill founded. A newspaper in Alaska once called the late Drew Pearson "the

garbage man of the Fourth Estate." The court permitted this comment (*Pearson* v. *Fairbanks Publishing Co.,* 1966). Decades ago the *Des Moines Leader* published this review of a vocal trio, the Cherry Sisters (*Cherry* v. *Des Moines Leader,* 1901):

> Effie is an old jade of 50 summers, Jessie is 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 wailing 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.

This review was considered fair comment.

Rex Reed recently referred to musician-composer Jerry Orbach as a "tone-deaf mediocrity" and a "nonprofessional embarrassment." The court ruled this was a fair comment. "No doubt, the writer's review was exaggerated. However, the law of libel is not concerned with questions of exaggeration, taste, or propriety in the use of language," the New York Supreme Court noted (*Orbach* v. *New York News,* 1978). When writer Jack Newfield wrote stinging criticism of a New York trial judge in his book *Cruel and Unusual Justice,* the New York high court ruled that a plaintiff may not recover for libel when the defendant has simply expressed his opinion of his judicial performance, no matter how unreasonable, extreme, or erroneous these opinions may be (*Rinaldi* v. *Holt, Rinehart and Winston,* 1977).

Finally, the Louisiana Supreme Court refused to permit recovery for libel when a devastating review of a prominent restaurant was published in the *New Orleans States Item.* Reviewer Richard Collin began his review of the Maison De Mashburn, "T'aint Creole, t'aint Cajun, t'aint French, t'aint country American, t'aint good." He said the food was hidden under a melange of "hideous sauces" and called the menu a "travesty of pretentious amateurism." He described the oysters as "a ghastly concoction," the poached trout "trout a la green plague," and said that "most of the food tastes as if the conceptions were wrong to begin with." And there was more. But the review was an opinion, the court said, and the restaurant was a public commercial establishment (*Mashburn* v. *Collin,* 1977). It was fair comment.

Factual Basis

In order to qualify as fair comment a story must have some kind of a factual basis. At the outset the reporter should remember that the facts presented must be accurate. Erroneously stating the facts generally invalidates the fair comment defense, since the injured party can sue on the basis of the misstated facts and can forget the critical opinions expressed by the writer.

The question of facts is complicated. The *Restatement of Torts* (2nd ed.), section 566, outlines three kinds of situations in which opinions might be published. In the first instance the person who makes the comments states the facts upon which the opinion is based right in the article. To wit:

> In 1975 Mayor Robert Allen bought six road graders for the city, none of which were needed or used. Two years later he spent $500,000 of the people's money upon an auditorium which stands vacant 350 nights a year. Last year he sent four of his staff to Europe to study how mass transit is operated there, and three of the cities his staff visited have no mass transit system. Mayor Allen has been squandering taxpayers' money for too long; he is wasteful and pays little heed to need for fiscal caution.

The opinion—that Allen has been squandering taxpayer money—was supported by the factual statements in the first part of the story.

But the facts don't have to be actually outlined so long as both parties to the communication—the writer and the readers, for example—know the facts or can assume their existence. This is the second kind of situation. In reference to the above story, if the paper had previously published several news stories about the expenditures made by the mayor, it could probably be assumed that readers were aware of the kind of facts the writer had in mind in criticizing the mayor for squandering city money. In another example, in 1975 when two attempts were made upon the life of then President Gerald Ford within a three-week period, it was not necessary for editorial writers to outline these facts when they criticized the Secret Service for its failure to properly protect President Ford. It could be assumed that readers knew of the well-publicized events.

The third situation noted by the *Restatement* is different. In this case the opinion appears to be based upon facts regarding the plaintiff or the plaintiff's conduct, but the facts are not stated. The "factual understanding" upon which the negative opinion is based cannot be presumed to exist between the writer and her audience or the broadcaster and his viewers. In such an instance when the facts are not well known and the defendant fails to state them in the critical story or broadcast, the defense of fair comment will likely not work. Why? It is argued that in such a case the reader or viewer is left with an impression that the writer or broadcaster knows something bad about the plaintiff—something which has not been stated. This suggestion of negative facts is defamatory; it is the defamation.

For example, the *New York Times* published a story in 1978 about entertainer Phoebe Snow. Quoting singer-writer Janis Ian, the author of the story described Ms. Snow in this way: "She is also paranoid. . . . Her record company and her manager all screwed her at once." Phoebe Snow's manager sued for defamation. The court acknowledged that the statement that Phoebe Snow was "screwed" by her manager was an opinion, a rather colorful way of saying that he treated Ms. Snow unfairly. That is fine. But the facts upon

which this conclusion was drawn were not stated in the article, nor could it be assumed that all readers knew what the writer was referring to. Saying that she had been "screwed" by her manager implied the existence of negative, defamatory facts, the court ruled. "If the author represents that he has private, firsthand knowledge which substantiates the opinions he expresses, the expression of opinion becomes as damaging as an assertion of fact," the court ruled (*Rand* v. *New York Times,* 1978).

From a journalist's standpoint it makes good sense to provide a factual context, regardless of whether the law requires it. This policy is more fair to readers and viewers who have lots of things on their mind and often forget the details of even important events and happenings.

Criticism of the arts and of public institutions must be treated in the same way. Readers and viewers should be given opportunity to come to a judgment on their own, and information—facts—is needed before they can do that.

Finally, as for the privilege of the reporter, the comment of the writer cannot be motivated by ill will. It cannot be published solely to hurt someone. It may in fact hurt someone: Critics have closed Broadway shows, ended politicians' careers, torpedoed advertising campaigns. The harm is not important. What is important is whether the comment was made for the purpose of hurting someone, not for the purpose of enlightening the public, educating readers and viewers, or warning consumers or theatergoers.

Fair comment is a valuable privilege, and writers and broadcasters must be most cautious when ascertaining the facts. The comment may be fair, but if the subject of the criticism can sustain a libel suit because the facts are untrue, the defense helps very little.

There are two additional libel defenses. Both defenses have been used on occasion to successfully ward off a libel suit, but their foundations are tenuous. They have been accepted in some courts, and rejected in other courts. Reliance upon either of them as the only defense is therefore not advised. However, both make excellent backup defenses, to be used with privilege or fair comment. The two defenses are consent and right of reply.

Consent

As one authority notes, an otherwise actionable defamation may be privileged if the plaintiff consented to its publication. Imagine that Frank Jones, a reporter for the *River City Sentinel,* hears rumors that John Smith is a leader of organized crime. Jones visits Smith and tells him that he has heard these rumors. Then Jones asks Smith if he cares if the rumors are published in the newspaper. Smith says it is OK with him, and Jones writes and publishes the story. In this instance Smith consented to publication of the defamation.

Now, this event is not too likely to happen, is it? Cases of consent are extremely rare. Courts insist that the plaintiff either know or have a good reason to know the full extent of the defamatory statement in advance of its publication before consent can be said to exist.

At least one authority (Phelps and Hamilton) has suggested that while the kind of direct consent just noted is difficult to obtain, indirect consent is a viable defense. Indirect consent means that individuals were informed of the defamatory charges against them and were asked to comment upon the charges. The logic behind this defense is that if the newspaper publishes the response to the charges it must publish the charges as well.

For example, let's look at Smith and Jones again. Frank Jones tells John Smith that the police have called Smith "a big-time gangster." Jones says he is going to print the charge, and then asks Smith, "Would you care to comment on the charge?" Smith denies the charge and claims that he is a legitimate businessman. He calls the man who made the charge a liar. Again, the logic of the defense suggests that if Smith's denial is printed the charge which he denies must also be printed.

This reasoning may be logical, but few courts have accepted it. On record are one or two cases in which this kind of indirect consent by itself worked to defeat a libel suit (*Pulverman* v. *A. S. Abell Co.,* 1956). A very imaginative judge is needed to accept these arguments.

This does not mean, however, that it is not good policy to get a comment from the defamed party before the story is published. The facts may be wrong, and the subject of the story can then point out errors and save the newspaper from a suit. Even if the story isn't incorrect, the reporter's attempt to get both sides of the story, to discover the truth, will impress a jury if a suit does result. His efforts will demonstrate that he was not malicious in printing the story, that he honestly sought the truth, and that the plaintiff was given a chance to explain the charges. This policy is far more effective than giving the plaintiff the chance to reply after he has been defamed. At that point, the offer looks like an afterthought. Similarly, even if the subject of the story can't be reached, it is good policy for the journalist to tell readers that he tried to contact the person or that the person refused to comment. A reporter can have no worse experience than to testify in a libel suit that he made no attempt to contact the plaintiff before printing the story. "You mean you didn't even try to find out from the plaintiff whether the charges were true or not? You didn't have the decency to make a simple phone call?" the plaintiff's attorney will ask as the jury sits up attentively.

Indirect consent can help in a defense, but it is rare indeed for it to defeat a libel suit when standing by itself. As with other defenses, publication of materials for malicious reasons, and not for public enlightenment, can invalidate the protection.

Right of Reply

Right of reply is a better defense than consent, is used more often, and is somewhat more substantial. The basis of right of reply is simple: The one who has been libeled may answer in kind. John Smith calls Steve Wilson a cheat, a fraud, and a common thief. Wilson has the right to answer Smith in kind. He can defame Smith in response.

The right of reply is based on the broader concept of self-defense; in fact, it is often referred to as *the* self-defense. As in self-defense, right of reply does have limitations. If a woman walks down the street and someone begins to pepper her with a peashooter, she has the right to stop her assailant, to protect herself. She does not have the right to pull out a .44-magnum pistol and pump three or four slugs into her attacker. Her defense then far exceeds the threat of the original attack. The same is true in a libel case. If a woman has been defamed, she may respond in kind. She may defame her attacker, but her reply cannot exceed the provocation: she cannot hit back harder than she was hit.

In a famous lawsuit two American journalists assailed one another in print. Newsman Quentin Reynolds suggested that columnist Westbrook Pegler had once called a third journalist, Heywood Broun, a liar. This bothered Broun, Reynolds wrote, to the extent that he couldn't sleep. Broun became ill and finally died. Pegler was incensed by this comment, claiming it charged him with moral homicide. So he attacked Reynolds, calling him sloppy, a sycophant, a coward, a slob, and a four-flusher. Pegler accused Reynolds of public nudism, of being a war profiteer, and of being an absentee war correspondent. Pegler also attacked the deceased Broun, calling him a liar and someone who made his living by controversy.

In the libel suit that followed Pegler raised the defense of right of reply. The court agreed that Pegler's comments about Broun bore a resemblance to a reply, but that the columnist had gone too far in his attack on Quentin Reynolds. This portion of the article had no conceivable relationship to a reply. Reynolds was awarded $175,000 from Pegler, the *New York Journal-American,* and the Hearst Corporation (*Reynolds* v. *Pegler,* 1955).

The right of reply works. Where does the press fit in? Many authorities argue that the press has the right to carry the reply and remain immune from suit. In several cases it was held that where the plaintiff's charge was made in a newspaper the newspaper was privileged to carry the defendant's reply (*Fowler* v. *New York Herald,* 1918). Otherwise the right of reply is of no avail to the defendant; no one would be able to see or read the reply if he were denied use of the press. Similarly, it was held that the reply can even be carried in a newspaper or a medium different from the medium used for the attack.

In *Cases and Materials on Torts,* law professor Harry Kalven writes:

> The boundaries of this privilege are not clearly established and it gives rise to questions amusingly reminiscent of those raised in connection with self-defense: How vigorous must the plaintiff's original aggression have been? Must the original attack itself have been defamatory? What if it [the original attack] is true or privileged? How much verbal force can the defendant use in reply? Can he defend third parties?

Questions like these continue to reduce the true effectiveness of the defense of right of reply. Most authorities agree that the original attack must be defamatory in order to defend a defamatory reply, and many authorities argue that the defendant can in fact defend third parties in a reply. There are so few reported cases in which this defense either stood or fell on its own accord that its substance as a defense remains quite tenuous. It is useful as a second defense, to back up either the privilege of the reporter or of fair comment, perhaps. Beyond this use its value is limited, at least at this point. Malicious motive can also invalidate this defense.

DAMAGES

If the court gets to the point in a libel suit of assessing damages, it is obvious that the plaintiff has met all requirements, including proving fault, and that none of the defenses just outlined have worked. How damages are assessed isn't an essential piece of information for a journalist to carry; yet some feeling for the subject is useful. Libel law operates with four kinds of damages today. In each instance, before any damages can be awarded, the plaintiff must prove one thing or another to the court.

Actual Damages

In present-day law the basic element in damages is what are called actual damages, or damages for actual injury. Plaintiffs have to convince the jury that they have suffered actual harm. What kind of harm? Not physical harm, obviously. The best definition of actual damages (as they are now defined) comes from the *Gertz* case. Justice Powell wrote that actual injury is not limited to out-of-pocket loss or money loss, which is how many authorities defined actual damages prior to this decision. Powell said, "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." This statement is a very broad definition of actual damage. How can someone prove that he has suffered mental anguish? What is evidence of personal humiliation? These are very hard questions to answer. Libel damages have never been precise, and the new formulation doesn't promise additional precision. The plaintiff will have to bring evidence of some kind, and as in the past, the jury will be the key factor in making the determination of how much harm and how much damage.

Special Damages

Special damages are specific items of pecuniary loss caused by published defamatory statements. Special damages must be established in precise terms, much more precise terms than those for the actual damages just outlined. If a plaintiff can prove he lost $23,567.19 because of the libel, that amount is then what he can ask for and what he will likely get if he can convince the jury of his case. Special damages represent a specific monetary, and only monetary, loss as the result of the libel. Most plaintiffs don't seek special damages. However, in some cases special damages are all that can be sought. In trade libel, for example, the only award a plaintiff can get is special damages.

Presumed Damages

Presumed damages are damages that a plaintiff can get without proof of injury or harm. The only way a plaintiff may be awarded presumed or general damages is if actual malice, knowledge of falsity, or reckless disregard of the truth is proved.

Punitive Damages

Lawyers used to call punitive damages, or exemplary damages, the "smart money." Punitive damage awards are usually very large. The other kinds of damages just discussed are designed to compensate the plaintiff for his injury. Punitive damages are designed to punish defendants for their misconduct and to warn other persons not to act in a similar manner. The only way plaintiffs can win punitive damages is if they can prove actual malice—knowledge of falsity or reckless disregard for the truth.

Punitive damages are the most onerous aspect of any libel suit, and many persons think they are grossly unfair. Consequently some state courts have abolished actual damages—regardless of a showing of actual malice. Massachusetts (see *Stone* v. *Essex County Newspapers,* 1975) and Washington (*Taskett* v. *King Broadcasting,* 1976) are two such states.

One point should be made clear about damages. When defenses were discussed earlier, it was pointed out that only public officials and public figures (and in some states private persons involved in matters of general concern) have to prove actual malice to win their case. But all plaintiffs can attempt to prove actual malice in the hope of getting punitive and presumed damages, and it is only if they meet this burden that they can collect the smart money.

RETRACTION

The phrase "I demand a retraction" is common in the folklore of libel. What is a retraction? A retraction is both an apology and an effort to set the record straight. Let's say you blow one as an editor. You report that Jane Adams was arrested for shoplifting, and you are wrong. In your retraction you first tell readers or viewers that Jane Adams was not arrested for shoplifting, that you made a mistake. Then you might also apologize for the embarrassment caused Ms. Adams. You might even say some nice things about her. At common law a prompt and honest retraction is usually relevant to the questions

of whether the article was published with malice and whether the plaintiff's reputation was actually harmed. After all, you are attempting to reconstruct that part of her reputation which you tore down just the day before. She might have difficulty proving actual harm.

A good example of correction, or retraction, occurred about five years ago and involved of all things *Playboy's Book of Wines.* The slick-paper wine book erroneously charged on page 63 that a leading Italian winery, Bolla Vineyards, doctored its wine. As one writer noted, "All hell broke loose" when the American distributor of Bolla wines saw the reference. Playboy Press reached an agreement with the vintners in which it called back all five thousand copies of the book already distributed, sliced the two offending pages out of those copies and replaced them with two new pages containing flattering references to Bolla, stopped publication of the book until corrections could be made, and issued multiple apologies. These were extreme measures, but they prevented a lawsuit.

Statutes

In the several states which have retraction statutes, a plaintiff must give the publisher an opportunity to retract the libel before a suit may be started. If the publisher promptly honors the request for a retraction and retracts the libelous material in a place in the newspaper as prominent as the place in which the libel originally appeared, the impact will reduce and in some instances cancel any damage judgment the plaintiff might later seek in a lawsuit. Failure to seek a retraction limits the plaintiff's right to bring a lawsuit against the publisher.

About twenty-four states have retraction laws of one kind or another. In one state, Nevada, the editor must publish a denial or correction within a specified period of time or face a penalty of up to $1,000 or six months in jail. It should be noted that at this writing the Nevada law has not been tested in respect to the Supreme Court ruling in *Miami Herald* v. *Tornillo* (1974). In light of that decision, the Nevada law might be unconstitutional because of the criminal penalty attached.

In addition, in an unusual case the Montana Supreme Court recently declared that state's retraction statute was unconstitutional. The court ruled that the state constitution guarantees that the state courts shall be open to every person who seeks a remedy for any injury to person, property, or character. The court ruled that a retraction is not a remedy in the terms intended in the constitution. Consequently, the state's statute, under which persons who fail to seek a retraction are not permitted to sue for libel, denied citizens the remedy promised by the state constitution (*Madison* v. *Yunker,* 1978).

Retraction laws make good sense. It is the truth we seek, after all; a successful libel suit results in lining the plaintiff's pocket, but it is not very effective in correcting the errors in people's minds resulting from publication of the defamation.

CRIMINAL LIBEL

Since this book is for persons in the media or persons who plan to work in the media, there is really little reason to spend time discussing criminal libel. But it is there and is difficult to ignore. So here are a few well-chosen words on the subject.

The bulk of this chapter deals with civil libel—one person suing another for defamation. In most states, however, libel can be a crime as well. That is, there are criminal libel statutes, laws which make certain kinds of defamation a crime. For the most part these laws go unused today. They are relics of the past. In some states, in the South especially, recent instances of criminal libel prosecution have occurred. In the 1980s most states are not very interested in taking on someone else's troubles and suing for libel. A prosecutor has very little to gain from such an action. In fact, he would probably be roundly criticized for instituting criminal libel charges. In an age when people are mugged, robbed, raped, and murdered with alarming frequency, damage to an individual's reputation, or even to the reputation of a large number of persons, somehow does not seem too serious. Moreover, individuals who have been harmed already have recourse—a civil suit. Several years ago in New York a judge stated this proposition very well (*People* v. *Quill,* 1958):

> The theory, in simplest terms, is that when an individual is libeled, he has an adequate remedy in a civil suit for damages. The public suffers no injury. Vindication for the individual and adequate compensation for the injury done him may be obtained as well in the civil courts. Thus the rule has always been that the remedy of criminal prosecution should only be sought where the wrong is of so flagrant a character as to make a criminal prosecution necessary on public grounds.

Despite the fact that they are not used, criminal libel statutes remain on the books in most states. In Louisiana the law is defined in this manner:

> Defamation is the malicious publication or expression in any manner, to any one other than the party defamed, of anything which tends:
>
> (1) To expose any person to hatred, contempt, ridicule or to deprive him of the benefit of public confidence or social intercourse; or
>
> (2) To expose the memory of one deceased to hatred, contempt or ridicule; or
>
> (3) To impair any person, corporation or association of persons in his or their business occupations.
>
> Whoever commits the crime of defamation shall be fined not more than $3,000 or imprisoned for not more than one year or both.

As you can see, the crime of defamation is very similar to the tort of defamation: a person can get into trouble in both instances by doing about the same thing. It can be seen from the statute quoted that it is possible to criminally libel a dead person. Since the deceased can't sue to protect his own

good name, it only makes sense to allow the state to intercede. Criminal libel differs from civil libel in several other ways as well.

First, in a few states criminal libel is tied to causing or potentially causing a breach of the peace. This charge used to be quite common. If a publication, speech, or handbill so provoked the readers or listeners that violence became possible or did in fact occur, criminal libel charges might result. In 1966 the United States Supreme Court undermined most of the "breach of the peace" statutes as well as the actions of those states that brought criminal libel actions under the common law. The case was *Ashton* v. *Kentucky* and involved a mining dispute in Hayard, Kentucky. An agitator was arrested for circulating a pamphlet which contained articles attacking the chief of police, the sheriff, and a newspaper editor, among others. At the criminal libel trial the judge defined the offense as "any writing calculated to create a disturbance of the peace, corrupt public morals or lead to any act, which when done, is indictable."

The Supreme Court reversed the conviction. Writing for a unanimous court Justice William O. Douglas said the crime as defined by the trial court is too general and indefinite. It left the standard of responsibility—whether something is illegal or not—wide open to the discretion of the judge. Also, Douglas noted, the crime is determined not by the character of the man's words, not by what he says or writes, but rather by the boiling point of those who listen to him or read his pamphlet. The law makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence.

This decision was an important factor, but only one factor, in the passing of "breach of the peace" as an aspect of criminal libel. It is extremely rare for such a case to occur today.

It is also possible to criminally libel a large group or race of people. The Supreme Court upheld such a law in 1952, a law which made it a crime to libel any race, color, creed, or religion. The case originated in Illinois where a white racist named Joseph Beauharnais distributed insulting literature at a time when blacks were attempting to integrate the white Chicago suburb of Cicero. Beauharnais's words were strong at a time when police and other officials had their hands full keeping the peace. He was arrested, tried, and fined $200 for his pamphleteering.

He argued that his conviction violated the First Amendment. In a five-to-four vote, the Court upheld the conviction on the grounds that libelous utterances are not within the protection of the First Amendment. Justice Felix Frankfurter wrote that if an utterance directed at an individual may be the object of criminal penalties the high Court could not then deny the right of a state to make such utterances aimed at a well-defined group criminal as well (*Beauharnais* v. *Illinois,* 1952).

The rationale for this decision was eroded by the *New York Times* decision: Libelous utterances are protected by the First Amendment in an increasing number of instances, and the *Beauharnais* case is also certainly weakened. One would be hard pressed to predict what the Court might do with such a case today.

The high Court has heard one criminal libel case since the *Sullivan* ruling. The high Court ruled in *Garrison* v. *Louisiana* (1964) that when the defamation of a public official is the basis for a criminal libel suit the state has to prove actual malice on the part of the defendant, that is, knowledge of falsity or reckless disregard for the truth or falsity of the matter. Justice Brennan wrote that the reasons which persuaded the Court to rule that the First Amendment protected criticism of public officials in a civil libel suit applies with equal force in a criminal libel suit. "The constitutional guarantees of freedom of expression compel application of the same standard to the criminal remedy," he added. However, the question of what the Court would do with a group libel suit of the kind it faced in 1952 is still not answered.

Criminal libel is not a real problem for journalists and broadcasters. Within the few criminal libel cases on record since World War II, cases in which the media were the defendant can be counted on one hand. Normally the action is brought against the writer of the article or the speaker of the words, not against the medium publishing the comments.

As was noted at the beginning of this chapter, libel is probably the most common legal problem most journalists and broadcasters face today. Unlike difficulties with courts and problems in getting information from the government, which occur infrequently, libel is something the press lives with day in and day out. Virtually every story contains the potential for a libel suit.

The press is much better protected today than it was thirteen years ago before the *New York Times* decision. The *Sullivan* ruling has helped the press in many ways. In the past plaintiffs with only the remote possibility of victory were lured to court by the possibility of a large windfall judgment. Recent cases have made the smart money tougher to get. Also, infusion of good, solid First Amendment idealism and logic into the law has made judges at all levels far more sensitive to the needs of the press. These events have been very helpful. While "freedom of the press" may be legally vague, a judge or jury who thinks about the First Amendment is likely to be more receptive to the arguments of the defense.

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5 Invasion of Privacy

Privacy is a commodity which seems to be in shorter and shorter supply each day. Every person seems to give up a little more privacy as one year passes into the next. Full participation in our buy now—pay later, opinion-research-oriented, full-insurance, credit-card, big-government society without giving up additional privacy becomes harder and harder every day. It is still possible for an individual to withdraw from this kind of society, to live in a cabin in some remote wilderness, but few persons are willing to give up the comforts that modern life provides.

Privacy is a very difficult concept to define. It has many meanings. One individual may say that he believes in the right of privacy, but also believes that the police have the right to wiretap telephone conversations. A shopkeeper may assert that she stands behind the right of privacy, but is reluctant to give up the television cameras which scan every nook and cranny of the shop in an effort to discourage shoplifting. The government is supposed to help citizens protect their privacy; yet governments at all levels seriously invade our privacy by gathering massive amounts of data on private citizens for a variety of reasons, good and bad.

In 1888 in *Treatise on the Law of Torts* Thomas M. Cooley defined privacy as "the right to be let alone." More recently privacy was defined as the right of individuals to control information about themselves. The right of privacy was first proposed as a narrow legal right in 1890. However, as Professor Edward J. Bloustein writes in "Privacy as an Aspect of Human Dignity," "What began at the turn of the century as a limited private right to prevent undue and unreasonable publicity concerning private lives has now developed into an extraordinarily broad constitutional right, the limits of which are still not clear."

Today invasion of privacy encompasses a wide range of behavior which includes wiretapping, illegal surveillance, misuse of information by retail credit agencies, use of two-way mirrors in department store dressing rooms, and collection of private information by researchers, banks, and government agencies. The mass media are also frequently accused of invasion of privacy. This chapter is about invasion of privacy by the press, by radio and television, and by the motion-picture industry.

The chapter opens with a brief history of the law of privacy. Then each of the four ways in which the media can run afoul of the law for invasion of privacy is discussed and the defenses for each kind of invasion of privacy are outlined. It is important to remember this point. Invasion of privacy by the media really involves four distinct legal wrongs: (1) appropriation of an individual's name or likeness for commercial purposes without first getting consent, (2) intrusion upon a person's solitude, (3) publication of private information about a person, and (4) publication of false information about a person, or putting someone in a false light. Each area has defenses which the press may erect in an effort to ward off a plaintiff's lawsuit. The defenses that work for one kind of invasion of privacy suit are generally not effective in defending another kind of suit for invasion of privacy. The defense of newsworthiness, for example, can be used to stop a suit for the publication of private information, but the defense won't work in a suit based upon appropriation of a likeness or name. It is best to think of invasion of privacy as four separate legal problems, each with its own defenses.

HISTORY OF THE LAW OF PRIVACY

Despite its apparent similarity to libel, the law of privacy is far less mature than its older tort cousin. In fact, from the standpoint of the centuries-old common law system, privacy is downright modern. Unlike most other areas of the law, we can say specifically that a legal remedy for invasion of privacy was first advocated less than one hundred years ago.

The concept of privacy is old, but the law of privacy is young, growing out of the dramatically changing social conditions of the late nineteenth century, the era which spawned present-day urban United States. The Industrial Revolution brought crowded cities and reduced space to a premium, and at the same time the American press changed profoundly. In the fight for circulation the mass press of the big cities undertook new schemes to attract readers. It is perhaps an understatement to note that this was not journalism's finest hour.

While privacy was something which people enjoyed and sought, it was not something with which our legal system could cope. There was no legal right to privacy, no law which guaranteed the right to be left alone. In 1890 two young lawyers proposed in the *Harvard Law Review* ("The Right to Privacy") that such a law should exist. One of the pair, the prominent Boston attorney Samuel D. Warren, was annoyed at what he described as the gossipy,

snoopy Boston press which frequently focused on the social activities of the Warren family. Warren sought the aid of his former law partner, former Harvard Law School classmate and close friend, Louis D. Brandeis, in preparing a plea for the legal recognition of the right to be let alone.

The pair argued, "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' " Warren and Brandeis said they were offended by the gossip in the press, which they said had overstepped in every direction the obvious bounds of propriety and decency:

> To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. . . .
>
> The common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?

To stop this illicit behavior the two young lawyers proposed that the courts recognize the legal right of privacy; that is, citizens should be able to go to court to stop such unwarranted intrusions and also secure money damages for the hardship they suffered from such prying and publication of private material about them.

To a modern observer, the Boston press doesn't appear to be nearly so scandalous as the charges Warren and Brandeis suggested. One gets the distinct impression that Mr. Warren was an overly sensitive individual.

The article also appears to have been Warren's idea. He sought help from Brandeis, who was indeed a legal scholar. Brandeis later went on to have a distinguished career as a jurist. Finally, despite the eloquence of their plea, the Warren and Brandeis proposal fell on somewhat deaf ears. Thirteen years passed before any state recognized the legal right of privacy. In 1903 New York passed a privacy statute which guaranteed its citizens protection from invasion of their privacy, but the statute contained a far different concept of privacy than that proposed in 1890. What the New York law did was prohibit commercial exploitation of the name or picture of any citizen.

From these rather humble beginnings more than seventy years ago, privacy law has grown until today it is an important segment of our legal rights. It has also become a serious problem for the mass media. As of today the courts in more than four-fifths of the states and in the District of Columbia have recognized the legal claim of invasion of privacy. Eight of these states

(California, New York, Oklahoma, Utah, Virginia, Wisconsin, Massachusetts, and Rhode Island) accomplished this via state statute; the remaining jurisdictions recognized the right through the common law. In one state, Nebraska, the courts say that no such right exists within their jurisdiction. And the courts in Minnesota, North Dakota, Vermont, and Wyoming have yet to make up their minds about the protection of the right of privacy. It would be foolish, however, given the public attitude toward privacy and the growing recognition of the legal right, for anyone to deny that with the proper case the courts in any one of the states are very likely to acknowledge the existence of the legal remedy for invasion of privacy.

While the law has grown, it has not grown in exactly the way Warren and Brandeis proposed. In fact, today much of the law bears no resemblance at all to the plan put forth in 1890. Like Topsy, the law of privacy just grew—in all directions. Today legal scholars, like the late William Prosser, argue that invasion of privacy really encompasses not just one, but four, legal wrongs. Let's briefly summarize the four and then study each in depth.

The first kind of invasion of privacy is called appropriation and is defined as taking a person's name, picture, photograph, or likeness and using it without his permission for commercial gain. This is technically the only right of privacy which is guaranteed in some of the states which have privacy statutes. The laws are limited to outlawing this one kind of behavior. But as a matter of fact, judicial construction of these laws has allowed them to encompass many of the other aspects of invasion of privacy as well.

Intrusion is the second type of invasion of privacy, an area of the law growing rapidly today, and is what most people think of when invasion of privacy is mentioned. Intrusion upon the solitude and into the private life of a person is prohibited.

The law prohibits publication of private information—truthful private information—about a person. What is truthful private information? Gossip, substance of private conversations, and details of a private tragedy or illness have all been used as the basis of a suit.

Finally, the publication of any false information about a person can result in a privacy suit, whether the material is defamatory or not. The fourth area of the law is an outgrowth of the first, the appropriation area. Maybe both should be in a single category, but they are probably easier to understand when they are considered separately.

Some people have said that a law of privacy is really not needed. Several years ago law professor Frederick Davis ("What Do We Mean by Right to Privacy?") wrote, "Indeed, one can logically argue that the concept of a right of privacy was never required in the first place, and that its whole history is an illustration of how well-meaning but impatient academicians can upset the normal development of the law by pushing it too hard."

One can make a persuasive argument that Davis is right. The appropriation area of the law really deals with a property right and would probably fit more comfortably as part of the law of literary property, product disparagement, trademark protection, and the like. Intrusion is really more akin to the law of trespass. False information is very close to defamation. Publication of private information—the only truly unique aspect of the law—has enjoyed such limited success that it might be abandoned altogether with little loss. Control of this kind of behavior might better be left to public opinion and the conscience of reporters and editors, as Professor Zechariah Chafee once suggested.

Regardless of whether it is legally logical, the law of privacy does exist; it is a part of our legal system. Persons in the media must be constantly aware of it. The number of privacy suits seems to increase a little each year. A considerable number of cases are settled in favor of the plaintiff. For better understanding of the law, each of the four types or kinds of invasion of privacy is discussed at length in the pages that follow.

APPROPRIATION

Appropriation is the oldest and in many ways the least ambiguous of the four types of invasion of privacy. Two of the earliest cases remain good examples of this area of the law.

1. In 1902 young Abigail Roberson of Albany, New York, awoke one morning to find her picture all over town on posters advertising Franklin Mills Flour. Twenty-five thousand copies of the advertisement were placed in stores, warehouses, saloons, and other public buildings. Abigail said she felt embarrassed and humiliated, that she suffered greatly from this commercial exploitation, and she therefore sued for invasion of privacy. But she lost her case, and the state's high court ruled (*Roberson* v. *Rochester Folding Box Co.*, 1902):

> . . . an examination of the authorities leads us to the conclusion that the so-called "right of privacy" has not yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided.

Following this decision a great controversy arose in New York, led by the press, much of which expressed outrage at the way the court had treated Abigail. The controversy settled on the state legislature which during the following year, 1903, adopted the nation's first privacy law. The statute was very narrow: that is, it prohibited a very specific kind of conduct. Use of an individual's name or likeness without his consent for advertising or trade purposes was made a minor crime. In addition to the criminal penalty, the statute allowed the injured party to seek both an injunction to stop the use of the name or picture and money damages. This was the first privacy statute.

2. Two years later Georgia became the first state to recognize the right of privacy through the common law. Paolo Pavesich, an Atlanta artist, discovered that a life insurance company had used his photograph in newspaper advertisements. Pavesich's photograph was used in a before-and-after advertisement to illustrate a contented, successful man who had bought sufficient life insurance. A testimonial statement was also ascribed to the artist. He sued for $25,000 and won his case before the Georgia Supreme Court which ruled (*Pavesich* v. *New England Life Insurance Co.*, 1905):

> . . . the form and features of the plaintiff are his own. The defendant insurance company and its agents had no more authority to display them in public for the purpose of advertising the business . . . than they would have had to compel the plaintiff to place himself upon exhibition for this purpose.

Before the ramifications of this aspect of the law are discussed, let us ask the question, For what are plaintiffs compensated in an invasion of privacy suit? What is their damage? In a libel case the reputation is damaged, a fairly invisible injury. But in a privacy suit the damage is even more invisible: the damage is the humiliation, embarrassment, and general bother that an ordinary person might experience from invasion of privacy. In other words, the damage is personal. The right of privacy is a personal right.

Use of Name or Likeness

Everybody knows what a name is, and it is therefore unnecessary to dwell on that term. It should be noted, however, that stage names, pen names, pseudonyms and so forth, count the same as real names in the eyes of the law. If the name of rock star Elton John is used in an advertisement for dental floss without his permission, the suit cannot be defended on the basis that since Elton John's real name is Reginald Kenneth Dwight his "name" was not appropriated illegally. It should also be noted that the law of privacy protects only people's names. Company names, trade names, and corporate names are not protected. Only people enjoy the right of privacy. Businesses, corporations, schools, and other "things" are not protected under the law. However, the use of a trade name like Kodak or Crest can create other serious legal problems.

What is a likeness? Obviously a photograph, a painting, and a sketch—anything that suggests to readers and viewers that the plaintiff is pictured—are likenesses. Federal courts in New York State ruled recently that a sketch of a black man sitting in the corner of a boxing ring was, for purposes of an invasion-of-privacy suit, the "likeness" of former heavyweight champion Muhammed Ali. The boxer looked a little like Ali, and the photograph was accompanied by a verse which referred to the boxer as "the Greatest" (*Ali* v. *Playgirl*, 1978). ABC Records lost a right-to-privacy suit brought by classical guitarist Jean Pierre Jumez over an album cover. As part of a promotional scheme to attract the attention of young people, ABC packaged Jumez's record in an album which depicted a bearded man playing a guitar. The hairy-legged individual, whose face was obscured, was dressed in a tuxedo jacket,

but wore no pants. Jumez contended record buyers would think the picture was of him. "Any sufficiently clear representation of a living person is violative of the [New York] statute if it is used for commercial purposes without the subject's consent," the court ruled. Since the face of the man was obscured, record buyers could not tell whether the picture was of Jumez or not. But since the artist's name was on the album cover, people might surely believe Jumez was the individual in the picture (*Jumez* v. *ABC Records,* 1978).

What are advertising and trade purposes? While minor differences exist among the states—especially among the states with statutes—a general guideline can be set down: advertising or trade purposes are commercial uses; that is, someone makes money from the use. Here are examples of the kinds of actions which clearly are commercial use:

1. Use of a person's name or photograph in an *advertisement* on television, on radio, in newspapers, in magazines, on posters, on billboards, and so forth
2. Display of a person's photograph in the window of a photographer's shop to show potential customers the quality of work done by the studio
3. A testimonial falsely suggesting that an individual eats the cereal or drives the automobile in question

In Utah recently a broadcaster announced the name of a person on the "Dialing for Dollars" television feature. The individual sued, arguing that the program was simply an advertising device used by the station to attract viewers, and that since no consent was given for the use of the name over the air the use was an invasion of privacy. The Utah Supreme Court agreed with the plaintiff, declaring that the name had been used to promote a commodity—the television station (*Jeppson* v. *United Television,* 1978).

What about this argument? A newspaper runs a photograph of John Smith on the front page after his car rolled over several times during a high-speed police pursuit. Smith sues for invasion of privacy, arguing that his picture on the front page of the newspaper attracted readers to the paper, resulted in the sale of newspapers, and therefore was used for commercial or trade purposes. Despite the arguments of many persons—even today—courts have consistently rejected this claim.

This plea was first made in 1907 by a New Yorker who objected to having his picture appear on the front page of the *New York World.* The state supreme court rejected the argument, noting that surely the intent of the state legislature was not to prohibit a newspaper or magazine from publishing a person's name or picture in a single issue without his consent (*Moser* v. *Press Publishing Co.,* 1908). Two years later another New York court reiterated this stand, ruling that advertising and trade purposes referred to commercial use, not to the dissemination of information (*Jeffries* v. *New York Evening*

Journal, 1910). The United States Supreme Court has ruled that the fact that newspapers and books and magazines are sold for profit does not deny them the protection of liberty of expression (*Time, Inc.* v. *Hill,* 1967).

The law of privacy, like all law, contains narrow exceptions to general rules, and what follows is one of them. Despite what has just been said, there is a category of advertisements in which use of a person's name or picture without consent is not an invasion of privacy. These are advertisements for media—newspapers, television, and magazines—which are otherwise protected by freedom of expression. The use of a person's name or picture in such an advertisement will not result in liability provided that the picture or name had been used earlier in a news or information story. Here is an example from a real case.

The controversy which sparked this rule involved actress Shirley Booth. She was photographed in Jamaica, and the picture was published in a feature story in *Holiday* magazine. *Holiday* then used the same picture to advertise the magazine itself. The full-page advertisement told readers that the picture was typical of the material appearing in *Holiday* magazine and urged people to advertise in the periodical or subscribe to *Holiday.* Ms. Booth did not object to her photograph in the feature story, only to its use in the subsequent advertisement. The courts, however, refused to call the use an invasion of privacy. The New York Supreme Court ruled that the strength of a free press depends upon economic support from advertisers and subscribers, and hence a publication or broadcasting station must promote itself. Since the picture in this case was first used in an information story, its subsequent use in a promotion for the magazine was really only "incidental" to its original use and was merely to show the quality and content of the magazine. The picture was not used to sell spaghetti or used cars. Hence the use did not constitute an invasion of privacy (*Booth* v. *Curtis Publishing Co.,*1962).

In advertisements promoting itself a newspaper can republish stories and photographs which contain the names and pictures of people—private citizens as well as celebrities. A television station can put together a montage of news clips from stories it has broadcast and use the montage as a promotion. The advertisements must be for the medium itself—"self ads" as they are sometimes called. A commercial firm cannot republish a news story in its advertising without liability. If there was a fire at the Acme Furniture Store, and the local newspaper wrote a long story about it which contained the names of firemen, employees, witnesses, and so forth, Acme could not republish this story in its Fire Sale advertisements unless it first deleted the names of the persons mentioned and covered up the faces of any persons identifiable in the photographs. The exception to the general rule applies only to advertisements for the mass media which contain pictures or names previously used in informational or news stories.

Consent as Defense

The law prohibits only the unauthorized use of a name or picture. In those states that have privacy statutes, the law specifically requires that the consent be a written authorization from the subject. In the remainder of the states the law is more ambiguous on the question. Nevertheless, defendants are forced to prove they do have written consent if and when a lawsuit arises. Therefore, it only makes sense to obtain written consent. An example of a standard consent or release form appears on page 230.

The problems which can arise from the defense of consent are numerous, and in each case they are more severe when written consent has not been obtained. For example, it is always possible for the person to withdraw consent after it has been given. Columbia Broadcasting System prepared a fictional television drama about the kidnapping of Jackie Gleason. Gleason played himself in the story, and an actor played the part of Gleason's manager. The manager's real name was used in the script. Suddenly the manager decided after the program was filmed that he did not want his name included in the program. Despite the fact that he had worked on the play for many weeks, planning and writing, a New York court said that inclusion of the plaintiff's name in the film against his will constituted an invasion of privacy (*Durgom* v. *CBS*, 1961). While this suit falls under category four of invasion of privacy, the rules are the same for both appropriation and falsehood. Columbia Broadcasting was therefore forced to write the plaintiff out of the script and reshoot part of the production.

Had the network gained written consent from the subject, and had it paid the plaintiff for using his name in the play, he would have found it much harder—if not impossible—to revoke consent at the last minute. Written consent has a distinct advantage. The safest rule is to always get written consent. Photographers especially are advised to carry copies of a standard release form in their gadget bags so that when that once-in-a-lifetime picture comes along, the one they are certain to sell for $10,000, they can obtain written consent from the subject on the spot.

There are times when even written consent does not work as a defense, and the media must be aware of such situations.

1. Consent given today may not be valid ten years hence, especially if it is gratuitious oral consent. In Louisiana a man named Cole McAndrews gave permission to the owner of a health spa to use his before-and-after pictures in advertisements for the gym. But the owner, Alvin Roy, waited ten years to use the photographs, and in the interim McAndrew's life had changed considerably. He sued Roy, who argued that it was McAndrews's responsibility to revoke the consent if he no longer wanted the pictures used. But a Louisiana

court of appeals agreed instead with the plaintiff. Judge Robert D. Jones wrote (*McAndrews* v. *Roy*, 1961):

> We are of the opinion that it would be placing an unreasonable burden on the plaintiff to hold he was under duty to revoke a gratuitous authorization given many years before. As the defendant was the only person to profit from the use of the pictures, then, under all the circumstances, it seems reasonable that he should have sought renewal of the permission to use the old pictures.

Reauthorization is needed when a name or photograph is used many years after consent was first given.

2. Some persons cannot give consent. A teenage girl is perfect to appear in an Acme Shampoo advertising campaign. She agrees to pose and signs a release authorizing use of her picture in the advertisements. The pictures are great, the advertisements are great, everything is great—until notice arrives that the model is suing for invasion of privacy! But she signed the permission form. Right. But she was only sixteen years old, and under the law minors cannot give consent. Parental consent is required in such instances.

Other people are unable to give consent as well, as Frederick Wiseman discovered when he filmed the documentary *Titicut Follies*. Wiseman shot the film at the Massachusetts Correctional Institute at Bridgewater, a facility housing insane persons charged with crimes. Most of the sixty-two inmates filmed were not legally competent to give consent, and the state refused to give permission to Wiseman for the inclusion of those persons in the documentary. Instead, Massachusetts obtained an injunction which restricted showing of the film to professional persons (correctional officers, psychologists, students, etc.) only (*Commonwealth* v. *Wiseman*, 1969).

It is important to know that the person from whom consent is obtained is legally able to give consent.

3. Finally, consent to use a photograph of a person in an advertisement or on a poster cannot be used as a defense if the photograph is materially altered or changed. Several years ago a well-known and well-paid New York fashion model posed for pictures to be used in an advertising campaign for a bookstore. After the photography session, model Mary Jane Russell signed this standard release form:

> The undersigned hereby irrevocably consents to the unrestricted use by Richard Avedon [the photographer], advertisers, customers, successors, and assigns, of my name, portrait, or picture for advertising purposes or purposes of trade, and I waive the right to inspect or approve such completed portraits, pictures, or advertising matter used in connection therewith.

It sounds as though she signed her life away, and with regard to the pictures Avedon took she did. However, the bookstore sold one of the photographs to a maker of bed sheets. The bedding manufacturer had a reputation for running sleazy advertising and consequently had trouble getting first-class models to pose for advertising pictures. The manufacturer substantially retouched the

Avedon photographs, changing the context. Mary Jane Russell sued for invasion of privacy, but the manufacturer answered her by telling the court that the model had given irrevocable consent for anyone to use those pictures, that she had waived her right to inspect the completed pictures and the advertising, and so forth.

The court agreed that Mary Jane had given up her right of privacy with regard to the pictures Avedon took. But the picture used by the sheet maker in its advertising was not the same picture taken by Avedon. It had been altered. And Mary Jane won her case. Justice Matthew Levy of the New York Supreme Court wrote (*Russell* v. *Marboro Books*, 1959):

> If the picture were altered sufficiently in situation, emphasis, background, or context, I should think that it would no longer be the same portrait, but a different one. And as to the changed picture, I would hold that the original written consent would not apply and that liability would arrive when the content of the picture has been so changed that it is substantially unlike the original.

What is substantial alteration? It probably means something other than minor retouching, but how much retouching is permissible before a privacy suit can accrue is difficult to say. This is one of the few cases on this legal point. Persons who want to retouch a photograph should be careful, even when they have written consent. They might change the picture sufficiently so that the consent would not apply.

Right to Publicity

In 1953, a distinguished American jurist, Jerome Frank, noted in an appropriation case that some plaintiffs might indeed be embarrassed and humiliated to see their name or face used to promote cornflakes or shampoo. Yet other plaintiffs, Frank argued, were not upset because they were humiliated; they were angry because they had not been paid for the commercial exploitation of their name or likeness (*Haelan Laboratories* v. *Topps Chewing Gum*, 1953). Judge Frank identified what he called the "right of publicity," the right of persons to control the commercial exploitation of their name or likeness. The logic behind this assertion is that persons have a property right in their name just as they can have a property right in a book or a piece of land.

Inasmuch as the right to privacy is relatively youthful and already somewhat ambiguous, the so-called new-found right to publicity announced by Judge Frank has not met with wide acceptance. In the nearly thirty years since its germination, the right remains ancillary to the appropriation category of the privacy tort. Its dimensions, however, are worth examining.

Right of publicity cases generally involve persons who have developed a significant property right in their names through their exploits. Athletes, entertainers, writers, and other celebrities have all argued that the use of their name without consent and without compensation deprived them of rightful income. In cases in 1967 and 1970 courts ruled that several professional

athletes like Arnold Palmer and Jack Nicklaus have the right to enjoy the fruits of their own industry free from unjustified interference, and that celebrities have a legitimate proprietary interest in their public personality. These cases involved the use of the athletes' names and pictures in board games without compensation or permission (*Palmer* v. *Schonhorn Enterprises,* 1967, and *Uhlaender* v. *Henricksen,* 1970). A judge noted that the celebrity's "identity, embodied in his name, likeness, statistics and other personal characteristics, is the fruit of his labors and a type of property." However, in New Jersey a court said that even noncelebrities enjoy a property right in their identity when it ruled that a real estate company could not use a family's name and picture in its advertisements without permission (*Canessa* v. *J. I. Kislak,* 1967). "However little or much plaintiff's likeness and name may be worth," the judge wrote, "defendant, who has appropriated them for his commercial benefit, should be made to pay for what he has taken. . . ."

While the right to privacy is a personal right and is normally considered to end upon the death of the individual, the right of publicity—based upon a theory of property rights—does not terminate upon death. It may be passed on to benefit heirs like any other part of an estate. The courts seem to agree, however, that the right of publicity will survive death only if it is found that the individual exploited the right during his or her lifetime. Some interesting cases develop this point.

The estate of Agatha Christie attempted to stop the presentation of the film *Agatha* on the grounds that it violated the writer's right of publicity, a right which had been passed on to the estate when Mrs. Christie died. The court agreed that Mrs. Christie had recognized the extrinsic commercial value of her name while she lived and attempted to exploit this value through various contracts with publishing companies. Hence, the right could be assigned to her estate like any other piece of property (*Hicks* v. *Casablanca Records et al.,* 1978). Because the film was obviously fictitious, however, the court ruled that the right of publicity had not been violated, and the estate lost the suit. The heirs to the late Elvis Presley have been partially successful in using the right to publicity to block others from selling promotional materials which exploit the singer's popularity. The Second United States Circuit Court of Appeals ruled in 1978 that because Elvis Presley had exploited his name and likeness in many ways while he was alive, this property right could be assigned to his heirs (*Factors, Etc.* v. *Pro Arts,* 1978). But in March 1980 the Sixth United States Circuit Court ruled in just the opposite manner in a suit brought by Presley's heirs against a Memphis company which was selling 8-inch pewter replicas of a Presley statue for $25 each. The court said the right of publicity should not be given the status of a "devisable right," even where a person has exploited that right by contract during life (*Memphis Development* v. *Factors, Etc.,* 1980).

The heirs of actor Bela Lugosi were not successful when they attempted to stop Universal Studios from exploiting the Count Dracula characterization created by Lugosi when he worked for the motion-picture company. The court ruled that because during his lifetime Bela Lugosi had not tried to exploit his name and likeness for commercial purposes he had not created a property right which could then be assigned to an heir upon his death. The estate did not enjoy the exclusive right of publicity to the image created by the horror film actor (*Lugosi* v. *Universal*, 1979).

The limitations upon the use of material about an individual who did exploit the right to publicity prior to death are not total by any means. Marilyn Monroe was astute enough to take full advantage of the publicity value of her name and likeness while she was alive. Yet the New York Supreme Court ruled in 1979 that despite her right to publicity which she passed on to heirs a publishing company could not be stopped from printing and distributing an illustrated biography of the blond motion-picture star (*Frosch* v. *Grossett & Dunlap*, 1979). More judicial review—ultimately perhaps by the Supreme Court—is needed to resolve the obvious confusion wrought by these seemingly contradictory rulings.

Some courts have simply refused to recognize the claims of the right of publicity. When comedian Pat Paulsen announced his candidacy for president in 1968, unauthorized campaign posters of the comedian were published. Paulsen sued, claiming appropriation of his likeness (*Paulsen* v. *Personality Posters*, 1968). But the court refused to compensate the entertainer, arguing that by declaring for president, even in jest, he had lost his right to privacy regarding his picture (see also *Man* v. *Warner Brothers*, 1970).

In a recent decision which left many observers bewildered, the Supreme Court of the United States ruled that it is a violation of the right to publicity for a television station to broadcast news film of an entertainer's entire performance (*Zacchini* v. *Scripps-Howard*, 1977). In a case which clearly proves the old judicial maxim that hard cases make bad law, the high Court overturned a decision by the Ohio Supreme Court and ruled that Hugo Zacchini, "The Human Cannonball," had indeed been harmed by the broadcast. The case was a hard one for at least two reasons. Zacchini's performance—being shot out of a cannon into a net—took only about fifteen seconds and consequently fit neatly into a small segment on a thirty minute newscast. Obviously such is not the case with most performers. Also, Zacchini had specifically asked the television station employees not to film the act, which was playing at a local county fair. A cameraman filmed it anyway. Zacchini argued that the television broadcast hurt his ability to make a living. Why should people pay to get into the fair to see his act if they had seen it on the television news? Justice Byron White and four other members of the high Court agreed. The broadcast of the film of Zacchini's *entire* performance posed a substantial threat to the economic value of that performance, Justice White wrote. It

went to the heart of his ability to earn a living as an entertainer, he added. Yet the ruling raised more questions than it answered. In previous right of publicity cases the defendant had gained monetarily by exploiting the plaintiff's name or likeness. Yet in this case the television station made no monetary gain from showing the short film of Zacchini being shot from a cannon. The cannon shot was a news item, like an automobile accident or a street parade.

White made an important point that the station televised the *entire act*. But what does this mean? Zacchini took several minutes to do his act—adjusting the net, preparing to get into the cannon, building the suspense. The film lasted but fifteen seconds and included only the actual cannon shot. Would a newspaper be prohibited from publishing a detailed word description of the feats of Zacchini? If Zacchini were seriously injured in performing this stunt, could the accident be safely filmed? The dissenters in the case argued strongly—but to little avail—that the important question to be decided wasn't whether Zacchini's *entire act* was broadcast, but the purpose for which the film was used. Had the station filmed the shot, promoted it, built a show around it, and got advertisers to pay money to sponsor it? Such action would clearly be exploitation of Zacchini. But this was a routine newscast, Justice Powell noted. There was no violation of any right.

The Zacchini case will probably have little impact upon the emerging—and often confusing—right of publicity. White's ruling was based largely on the fact that the television station telecast the *entire act*. Since few performers have such abbreviated acts, there seems to be few persons who could use the ruling as a precedent in a similar suit. The right of publicity is now considered ancillary to appropriation and has many of the characteristics of the right to privacy. Only time will tell whether it will develop into full-blown legal life and become a separate area of the law. Journalists and broadcasters need only remember that so long as they don't broadcast an "entire act" informational reports about the performances and lives of athletes, motion-pictures stars, and other celebrities are immune from lawsuit under the right to publicity.

In some respects the appropriation category of invasion of privacy is the simplest and easiest to understand. Use of a person's name or picture without consent for commercial purposes is an invasion of privacy. If a lawsuit results, it will probably be successful. The only defense is consent. If it can be proved that the plaintiff consented to the use of his name or picture the suit will then fail. The problems with the defense of consent were noted previously.

INTRUSION

The intrusion category is what a lot of people think of when they hear the phrase "right to privacy." Wiretapping, using cameras with telephoto lenses, peeping-Tom actions, bugging rooms, using supersensitive microphones and hidden transmitters are the kinds of behavior that many people—especially people outside the press—associate with violations of the right to privacy.

This kind of behavior does occur, people are caught, and lawsuits do result. Until recently such suits were simply not brought against mass-media defendants. Even now such litigation is relatively rare.

The press doesn't often go in for this kind of snooping or at least doesn't get caught very frequently. Probably, the earliest known intrusion case involving the press occurred in 1926 when a reporter for the *Washington* (D.C.) *Herald* stole a picture from the home of Mrs. Louise Peed, who had nearly died from asphyxiation when a gas jet was carelessly left open in the home of a friend she was visiting. The court held the newspaper responsible because it had published the plaintiff's picture, not because it had stolen the picture (*Peed* v. *Washington Times Co.*, 1927). A similar suit in Los Angeles a few years later failed altogether (*Metter* v. *Los Angeles Examiner*, 1939).

The *Peed* case points out a very important aspect of intrusion in invasion of privacy. In appropriation cases and in cases based upon publication of private information or publication of falsehoods, the legal wrong occurs when the picture or story is published. It must be published. A photographer who takes a picture of a pretty girl, enlarges it to eight-by-ten inches, and hangs it on his kitchen wall has not invaded the girl's privacy. If he were to publish the picture in an advertisement, for example, appropriation, an illegal invasion of privacy, then occurs. If a newspaper reporter uncovers private information about a teacher's life but keeps the information to himself, no invasion of privacy occurs. Only when he publishes this information might a lawsuit succeed.

In intrusion, however, the legal wrong is committed as soon as the intrusion takes place, whether or not the fruits of the intrusion are published. If your home is bugged, someone intrudes upon your privacy. Invasion of privacy occurred regardless of whether the contents of the overheard conversations are published. If a reporter breaks into a private office and copies information from a private file, his act would probably be considered an invasion of privacy, an intrusion.

The press has not often been involved in intrusion cases because it normally conducts its information-gathering processes without bugging rooms or breaking into offices. But with the recent push for "investigative journalism" some reporters have become as comfortable with hidden cameras and microphones as they are with pencil and paper. Another reason the press has not often been sued for intrusion is that when the intrusion is carried out properly the injured party is unaware of it. Awareness does not usually result until after the fruits of the intrusion are disseminated via the mass media, and then the injured party normally finds it easier to bring a suit based on the publication of the material than on the acquisition of it.

Defense Guidelines

Because of the paucity of case law not many guidelines can be provided at this time. There are a few important ones which should help you avoid trouble (or perhaps recognize trouble when you have got into it).

In two cases in the late sixties federal courts in Washington, D.C., established the principle that a news medium which publishes material obtained via intrusion by someone not connected with the medium cannot be held liable for the intrusion. In the two instances, the late newspaper columnist Drew Pearson obtained documents from private files of the Liberty Lobby, a right-wing, public-interest group in Washington, and from the files of former Connecticut Senator Thomas Dodd. Employees of both Dodd and Liberty Lobby took the files from the private offices, made copies of them (which were given to Pearson), and then returned the purloined files. In both cases the court ruled that the publishers could not be held responsible for the actions of the intruders (*Liberty Lobby* v. *Pearson,* 1968; *Pearson* v. *Dodd,* 1969).

Judge J. Skelly Wright wrote in the *Dodd* case:

> If we were to hold appellants liable for invasion of privacy on these facts, we would establish the proposition that one who receives information from an intruder, knowing it has been obtained by improper intrusion, is guilty of a tort. In an untried and developing area of tort law, we are not prepared to go so far, . . .

This principle was supported in 1978 by a Maryland Circuit Court when several former and current members of the University of Maryland basketball team sued the *Baltimore Evening Star* for publishing an article which revealed portions of their academic record. Somebody gave the newspaper the information. There was no evidence presented that the reporters had either personally inspected the records or asked someone else to do it. Consequently, no suit could be maintained by the athletes on the intrusion theory (*Bilney* v. *Evening Star,* 1978).

Possessing Stolen Property

There is, however, another aspect of intrusion which can result in a problem for a journalist. If a reporter has original files that belong to someone else, a suit based on the doctrine of conversion could possibly be maintained. Conversion means to unlawfully convert someone else's property for your own use. This is property law and would be applicable only if journalists have the actual files—someone else's property—in their possession. In both the *Dodd* and *Liberty Lobby* cases just noted the plaintiffs attempted to sue for conversion, but columnist Pearson did not have the original files, only copies of those files. Hence, no conversion had occurred.

In California the publisher and a reporter of the *Los Angeles Free Press* were found guilty of possession of stolen goods after they bought a list of names of undercover narcotic agents stolen from the attorney general's office. Art Kunkin and Robert Applebaum were freed upon appeal to the state's high court, but only because there was insufficient evidence to prove that they had known the list was stolen when they purchased it (*People* v. *Kunkin,* 1973).

If the state could have adduced any evidence at all that the pair had knowledge that the list was stolen, the conviction would have stood. As it was, the thief was a former employee of the attorney general's office, and Kunkin and Applebaum said they thought he still worked for the attorney general. The thief also asked that they return the list to him after it was copied, presumably to return it to the proper file, the two journalists said.

This whole area of the law is gray. Of course, if employees of the publication are the intruders, liability might result, depending upon whether they acted on their own or at the employer's suggestion. In any case, intruders are always liable if they are caught, regardless of what use is made of the purloined material.

Journalists should ask tough questions of their sources of documents and files. Did you steal it? Did you copy it illegally? If a jury can be convinced that the journalist knew it was obtained illegally, or should have known it was obtained illegally (secret files, for example, can normally only be obtained illegally), a suit based on property law, not on privacy, might then in fact hold up.

Clandestine News Gathering

While reporters may not engage in stealing or breaking and entering, they may undertake other kinds of intrusions. These intrusions are harder to define, and generally involve the use of snooper aids, that is, hidden cameras, telephoto lens, and hidden microphones.

No broad, general proposition can be stated here, and we must rely instead upon examples. Hopefully, as more and more cases are litigated, the gaps will be filled and a rule formulated. Reporters have the right to photograph persons in public places, even when they don't know they are being photographed. These people are present in a public, not a private, place and are visible to anyone passing by. A recent ruling by the Eighth United States Circuit Court of Appeals supports this proposition. An attorney who was jailed for drunken driving became angry when jailed and began hitting and banging on the cell door, hollering and cursing, and calling police officers names. The sounds were recorded by a TV reporter, who played them during a newscast. The attorney sued for invasion of privacy, but the appellate court ruled that there was no zone of privacy in a jail cell. The court ruled that the reporter "could not be prevented from reporting the statements he could so easily overhear aurally; use of a device to record them cannot create a claim for privacy when one would not otherwise exist." The court noted that undoubtedly the plaintiff had not made his boisterous outbursts with any expectation of privacy at all (*Holman* v. *Central Arkansas Broadcasting*, 1979).

On record is a case in which harrassment, not invasion of privacy, was charged. In another state the case might have been a privacy case, but New York does not recognize this kind of invasion of privacy. The photographer

was Ron Galella, whose whole life seemed to revolve around taking pictures of Jacqueline Kennedy Onassis. He went everywhere she went, blocked her path, made a general nuisance of himself. When he wasn't around Mrs. Onassis, he followed the Kennedy children. In one instance his penchant for getting close almost resulted in a serious accident for young John Kennedy when the horse he was riding bolted after being frightened by Galella. The Secret Service, which guards the Kennedy children and Mrs. Onassis, went to court to stop Galella. A federal court enjoined the photographer from coming within twenty-four feet of Mrs. Onassis and within thirty feet of the children, from blocking their movement in any way, from doing anything which might put them in danger or might harass, alarm, or frighten them, and from entering the children's play area at school (*Galella* v. *Onassis*, 1973). This is truly a rare case. The average photographer does not have to worry about such injunctions. Nevertheless, the case does show how the law is empowered to protect citizens.

When the photographer snoops, however, another question is at hand. Given the present propensity of the courts to protect privacy, one can think of situations in which an intrusion suit might stand up in court.

1. Using a telephoto lens to take pictures from a hill of a person sunbathing in an enclosed (and presumably private) backyard might be seen as an intrusion since most people behave differently when they think they are alone.
2. Sneaking around the outside of a home taking pictures through cracks between the draperies would probably be an intrusion.
3. Using a hidden camera and not revealing that one is a reporter could be an intrusion.

An instance similar to example three was ruled an intrusion in a California lawsuit. The plaintiff was a disabled veteran and journeyman plumber named A. A. Dietemann who practiced healing using clay, minerals, and herbs. Dietemann practiced his strange version of medicine in his home. It was there that two *Life* magazine reporters who had agreed to work with Los Angeles law enforcement people visited the healer. Jackie Metcalf and William Ray pretended they were married, and Ms. Metcalf complained of a lump in her breast. Dietemann diagnosed the ailment as due to rancid butter she had eaten eleven years, nine months, seven days previously. While the "doctor" examined Ms. Metcalf, Ray photographed him with a secret camera. The conversation between the reporters (who never revealed that they were reporters) and the healer was also broadcast via a hidden microphone to investigators waiting in a car outside.

Dietemann was arrested weeks later and charged with practicing medicine without a license. *Life* photographers took more pictures at the time of the arrest, and in an article on medical quackery included those pictures with pictures taken by the hidden camera. Dietemann sued for invasion of privacy.

Life magazine said the pictures were informational and newsworthy and were protected. The court agreed that the pictures were indeed newsworthy, but ruled that they had been obtained by intruding upon Dietemann's privacy. The magazine had the right to publish the pictures; publication did not constitute an invasion of privacy. It was the use of the secret camera and microphone that constituted the invasion of privacy. Whether they were published or destroyed, the legal wrong was committed when the two reporters invaded the healer's premises and secretly photographed him and recorded his conversations.

The magazine protested, saying the story was simply an example of good investigative reporting. Judge Shirley Hufstedler was unimpressed (*Dietemann* v. *Time, Inc.*, 1971):

> 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 news gathering.

The facts in the *Dietemann* case are significant. The reporters were in the plaintiff's home, posing as persons other than reporters, taking secret pictures and making a clandestine recording of the conversation. Two cases since 1971 have demonstrated the importance of the nature of the intrusion in the *Dietemann* case.

In 1975 Arlyn Cassidy and several other Chicago police officers were acting as undercover agents, investigating massage parlors in the city. The owner of one massage parlor where police previously had made arrests believed he was being harrassed by the lawmen and invited a television news camera crew to come in and secretly film an encounter between an undercover agent and a model at the parlor. The camera was set up behind a two-way mirror and was filming when officer Cassidy came in, paid $30 for deluxe lingerie modeling, and subsequently arrested the girl for solicitation. Three other agents came into the room at about the same time the television news crew burst through another door, filming as they left the building. The officers sued the station for intrusion, using the *Dietemann* case as precedent.

But the Illinois appellate court ruled in favor of the journalists, distinguishing the *Dietemann* case in two important ways. First, Cassidy and the other plaintiffs were public officers acting in the line of duty as the filming took place. Second, the film crew was not in a private home, but in a public business. "In our opinion," the court ruled, "no right of privacy against intrusion can be said to exist with reference to the gathering and dissemination of news concerning discharge of public duties" (*Cassidy* v. *ABC*, 1978).

In 1979 a Kentucky circuit court ruled that it was not an intrusion when a young woman, at the instigation of a newspaper, secretly recorded a conversation she had with an attorney. Kristie Frazier met with attorney John T. McCall after she was indicted on a drug charge. According to Ms. Frazier,

the attorney said he would guarantee that he could get her "off the hook" if she could come up with $10,000. He said he would return $9,000 if he failed to have her set free. Setting a fee in a criminal case in such a manner is considered unethical conduct for an attorney.

Ms. Frazier, who apparently was no stranger to legal problems, recognized the unusual fee arrangement and went to the offices of the *Louisville Courier-Journal*. Reporters were interested in Ms. Frazier's allegations against McCall, but were unwilling to take her word for what had been said in the private conversation. They gave her a small tape recorder and told her to propose a second meeting with McCall—to try to trap him into repeating what he had said earlier. McCall repeated his proposal, Ms. Frazier recorded it secretly, and the *Courier-Journal* published the transcript. McCall sued for intrusion, but lost.

The court distinguished *Dietemann* by noting that Frazier—who may or may not have been an agent of the newspaper—was in McCall's office at his invitation. There was no intrusion into McCall's private affairs because they were also the affairs of Ms. Frazier. "A lawyer, an officer of the court, discussing in a public court with a potential client, is not in seclusion within the meaning of the law," the court ruled. "Human dignity demands the rights of privacy be enforced, but when the rights of privacy encroach upon the most sacred trust the public possesses, namely, the judicial system, then those rights must give way," the judge added (*McCall* v. *Courier-Journal*, 1979). The trial court ruling for the newspaper was upheld in March 1980 by the Kentucky Court of Appeals.

Cassidy and *McCall*—admittedly lower state court rulings—have nevertheless chipped away some of the fears the press had after the *Dietemann* case. The California case must be viewed as a fairly narrow ruling which focused particularly upon the privacy of the home, mixed with the use of secret recording and photography devices. From Judge Hufstedler's language in her *Dietemann* opinion, as well as from subsequent cases, it is safe to say that reporters may pose as people other than journalists to get a story. They can maintain this pose in visiting a private home, so long as the secret tape recorders and cameras are left outside. Different rules obviously apply in a public place or a business office, especially when public officers (such as police officers and attorneys who are considered officers of the court) are being scrutinized in the performance of their duty. Beyond these generalizations it is difficult to draw other conclusions from the three cases.

Trespassing

One additional intrusionlike problem has to do with the possibility of a trespass suit being instituted against the press when reporters wander into places where they are not welcome, which was discussed in chapter 3.

While the public interest is the key to defending most privacy suits, it has very little to do with intrusion. In the eyes of the law, whether Aunt

Minnie's personal diary (which has absolutely no public value) or Senator Jones's personal papers which graphically demonstrate that he takes bribes (which has great public value) are stolen, the theft is the same. The intrusion and invasion of privacy are the same also. Public furor may be considerably less in the latter case, but the legal wrong is the same. Similarly, using a hidden camera to photograph a criminal (but private) act in a man's own home is no different from using a concealed camera to photograph a legal act in the same place. After all, Dietemann broke the law when he examined, diagnosed, and prescribed for Metcalf and Ray. Public interest, therefore, isn't really a controlling factor in these cases.

Because intrusion is such a new area of the law, no good defenses have been developed. A heavy burden rests upon the plaintiff to prove that the behavior by the reporter or cameraman was in fact an intrusion, an invasion of privacy. If invasion of privacy can be established, there are no good "legal excuses" with which to defend this behavior. In addition to the legal problems involved, members of the press themselves have begun to raise ethical questions about such behavior. Defending illegal behavior on the grounds that it is in the public interest is an excuse which the American people seemed to reject when the members of the Nixon White House used it in 1973 and 1974. There are few causes that are "good enough" to justify illegal intrusion upon the privacy of others. Intrusion as an aspect of invasion of privacy should really not be a problem to journalists who conduct their business in an ethical fashion. Still, the paucity of good guidelines at this time can be somewhat frightening. Until there is more law to guide the press, journalists are advised to be guided by the common sense, conscience, and integrity one normally expects from responsible adults.

PUBLICITY ABOUT PRIVATE FACTS

The most controversial aspect of the right of privacy in the current decade is that aspect of the law which penalizes the publication of private information about a person. The *Restatement of the Law of Torts* (2nd ed.) defines this section of the law this way:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> a would be highly offensive to a reasonable person, and
>
> b. 's not of legitimate concern to the public.

This, of course, is the kind of privacy protection that Warren and Brandeis sought in 1890. Strangely, as we will see shortly, American courts have been most reluctant to curb this kind of journalism, for it touches at the very foundation of our longheld notions about freedom of the press. This aspect is what makes invasion of privacy controversial, for even today many commentators argue that the press goes too far sometimes in publicizing the lives of persons who attempt to stay out of the public spotlight. They would limit the

protection of the press to that coverage which deals with "governing affairs," or information citizens need to vote and discuss public issues.

The courts have been reluctant to prescribe this limitation. Starting in 1895 American judges have granted the press a broad protection to publish whatever it wants about people—within very broad boundaries—so long as there is some evidence of public interest in the topic. There is probably a good explanation for this attitude of the courts. Truth is not a defense in a suit brought for the publication of private information. If the material is of an intimate nature, its truth or nontruth is immaterial. This fact is difficult for many persons to accept, including judges who have for centuries ruled that truth is a good, solid defense in a libel suit. By creating a liability for the publication of truthful material, one opens all sorts of doors, doors which are then difficult to close. If the journalist can be held responsible for publishing truthful, intimate reports, the historian can then be held liable as well. Indeed, there are some scholars who question the validity of this category of invasion of privacy on the grounds that it is unconstitutional to punish someone for publishing a truthful statement. Clearly, the language of the Supreme Court in numerous libel suits, beginning with *New York Times* v. *Sullivan* in 1964, makes dubious the notion of imposing liability for the publication of truthful comments. In a 1975 privacy ruling, *Cox* v. *Cohn*, the High court ruled that it is not possible for a person to recover damages when the press merely publicizes truthful comments that are already a part of the public record. (The *Cox* case, which will be discussed in detail later, concerned the publication of the name of a rape victim.) But the Court chose not to rule at that time on whether the publication of all truthful statements, no matter how offensive they might be, will be protected by the First Amendment.

Most courts use a two-step evaluation in considering whether this kind of invasion of privacy has occurred. This method also lends itself to presentation of a simple explanation of the law. First, the determination must be made that private facts about a person's life have indeed been publicized, which requires examination of two concepts. publicity and private facts. If there has been *no* publicity about private facts, there has been *no* invasion of privacy. If there *has been* publicity about private facts, a second evaluation must be made. The questions asked are (1) would this publicity be highly offensive to a reasonable person? and (2) was the matter published of legitimate public concern? In this second stage, a kind of balancing process normally results, with the importance to the public of the revelation of the private material being weighed against how offensive the publication is to the plaintiff. While guidelines do exist, the balancing process often tends to be quite subjective, and matters of personal taste and sensitivity frequently play a role in the outcome. Reporters should spend time in considering how to present important but sensitive material in the least offensive manner.

This category of right to privacy can be best understood by considering each of the two elements of the law individually.

Publicity

The words *publicity* and *publication* mean different things in privacy law than they do in libel law. In defamation, *publication* means to communicate the material to a single third party. The word *publicity* in privacy law implies far more. It means that the material is communicated to the public at large or to a great number of people, making it certain that the facts will shortly become public knowledge. Needless to say this kind of publicity can usually be presumed when a story is published in a newspaper or broadcast over radio and television.

Private Facts

Before there can be an invasion of privacy, it must be demonstrated that the material publicized was indeed private. What happens in public is considered public information. A fan at a Pittsburgh Steeler football game urged a news photographer to take his picture. The photographer did, but when the photograph was published in *Sports Illustrated*, the fan sued for invasion of privacy, arguing that the photograph revealed that his trousers were unzipped and that this was quite embarrassing. The District Court for Eastern Pennsylvania ruled against the plaintiff, primarily because the picture was taken in a public place with the defendant's knowledge and encouragement. It was not private information (*Neff* v. *Time, Inc.*, 1976). Similarly, the United States Court of Appeals (D.C. circuit) refused to find liability for the broadcast of news film which showed two men on a public street being escorted by police officers. Plaintiff Darryl Harrison argued that the pictures were embarrassing because they portrayed him as being a criminal. But the court ruled that an action for invasion of privacy cannot be maintained for pictures of events which take place in public view. The photographer in this case was standing on a public sidewalk while he took the pictures (*Harrison* v. *Washington Post*, 1978). In the past, courts have ruled as nonactionable pictures of women exercising in a public gymnasium (*Sweenek* v. *Pathé News*, 1936), the details of a divorce case that were revealed in public court (*Berg* v. *Minneapolis Star & Tribune*, 1948), and photographs of the victim of a tragic accident (*Kelley* v. *Post Publishing Co.*, 1951). In each instance the fact that the events occurred in public was material in determining that there had been no invasion of privacy.

In 1975 the United States Supreme Court ruled that the broadcast or publication of the name of a rape victim that was included in the public record during a criminal trial could not be considered an invasion of privacy. At that time, at least four states had statutes making the publication of such information an invasion of privacy. The rationale for such laws was generally accepted: nonpublication would save victims from embarrassment and might in turn, encourage more women to report such incidents. Decreased reporting of names might therefore result in more prosecutions of rapists. There had been at least two decisions prior to the 1975 ruling upholding these laws (see, for example, *Nappier* v. *Jefferson Standard Life Insurance Co.*, 1963). When

an Atlanta, Georgia, television station broadcast the name of a young woman who had been raped and murdered, her parents sued. In *Cox Broadcasting Co.* v. *Cohn* (1975), the United States Supreme Court overturned the Georgia state court ruling and held that the press cannot be held liable for invasion of privacy for reporting information already part of the public record. Justice Byron White noted that most persons depend upon the mass media for information about the operations of the government via public meetings and the public record. Judicial proceedings are an important part of our governmental system and are something in which the public has always expressed a great interest. By making judicial records and proceedings public, the state of Georgia must have concluded that the public interest was being served (*Cox Broadcasting Co.* v. *Cohn,* 1975):

> We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the press to inform their readers about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be put into print and that should be made available to the public.

Quoting the latest revision of the *Restatement of Torts* (2nd ed.), which attempts to summarize the law of torts, the Court said, "There is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public. Thus there is no liability for giving publicity to facts about the plaintiff's life which are matters of public record."

The single danger journalists face with regard to the public record question is that they must be certain that the document quoted is a public record and the meeting reported is a public meeting. Several years ago in Florida the *Tampa Tribune* published what really amounted only to a legal notice that a woman named Virginia Patterson had been committed to a state hospital as a narcotic addict. When Ms. Patterson sued for invasion of privacy, the newspaper argued that it obtained the information from the court progress docket, which is a public record. The paper was unaware that the legislature had passed a law specifically restricting the inspection of the records of narcotic commitment proceedings. Such records are not public records. The newspaper asked how was it to know that this part of the progress docket was not a public record, since the court clerk hadn't stopped the reporter from looking at it. This argument was unpersuasive. The Florida Supreme Court said it was the responsibility of the newspaper to know the law and not to compound the error of the court clerk (*Patterson* v. *Tribune Co.,* 1962). Reporters should make certain they are quoting a public record. Asking the court clerk or person at the desk is not always the best way to find out. Most newspapers retain or have access to legal counsel. If there is a question, call the lawyer.

Offensiveness and Public Concern

When the determination has been made that private facts about a person's life have been published, a court must then ask two subsequent questions:

1. Would the publication of the material offend a reasonable person?
2. Was the published material of legitimate public concern?

Frequently courts are faced with the real dilemma that while revelation of the material was extremely offensive and embarrassing, its publication, however, was of great importance for the public. Except in extremely unusual circumstances the press will win such decisions. The judiciary places great weight upon the role of the press as an agent to inform and enlighten the public upon matters of interest and importance. Judges have ruled time and again that it is the responsibility of the press to bring such "newsworthy" information to the people. And courts have been hesitant to define narrow limits upon what the public needs to know or upon the kinds of information in which the people have a genuine interest. Generally if journalists stick to their job—reporting what is newsworthy—there is little to worry about. But as sure as there is a general rule, there are exceptions to it. And instances have occurred when the press has been found liable for an invasion of privacy after publishing seemingly safe and newsworthy stories. Upon a closer look, however, an explanation for the adverse decisions can be found.

Several years ago a woman with a rather unusual disorder—she ate constantly, but still lost weight—was admitted to a hospital. The press was tipped off and descended upon her room, pushed past the closed door, and took pictures against the patient's will. *Time* magazine ran a story about the patient, Dorothy Barber, whom in inimitable "*Time* style" it called "the starving glutton." Mrs. Barber sued and won her case. The judge said the hospital is one place people should be able to go for privacy (*Barber* v. *Time, Inc.,* 1942). More than the privacy of the hospital visit influenced the ruling, because there are several decisions in which persons in hospitals have been considered to be the subject of legitimate concern and did not therefore enjoy the right to privacy. The material about the unusual disorder was surely offensive, almost mocking. The disorder was not contagious, and the implications for the general public were minimal. The *Time* story seemed to focus upon Mrs. Barber almost as if she were a freak and in doing so was highly offensive to any reasonable person.

A Georgia housewife took her two sons to the county fair and finally succumbed to their pressure to be taken through the fun house. As she left the building an air jet blew Mrs. Flora Bell Graham's dress up over her head, and she was exposed from the waist down except for her underclothing. As fate would have it, a local photographer was nearby and captured the moment on film. The picture was featured in the Sunday edition of the local newspaper as a publicity piece for the fair. Mrs. Graham sued. By logical analysis one could suggest that she shouldn't have won. The event took place in public.

Many people saw her. She couldn't be readily identified in the picture because her dress was over her head. Persons who knew the children, who were also in the picture, could make the connection between mother and children. Regardless, Mrs. Graham did win (*Daily Times-Democrat* v. *Graham,* 1962). She suffered an immense amount of embarrassment from the most intimate kind of revelation, and the public value of the photograph was extremely low.

Most recently a Mississippi court ruled that it was an invasion of privacy to publish an admittedly sympathetic story about mental retardation which named four children as victims of the impairment. The story focused upon special education classes at a local school. The story attempted to demonstrate both the problems faced by children who suffer from such difficulties and the steps taken by a school district to help these children overcome such problems. But the court ruled the publication was still an invasion of privacy. "It is difficult to conceive that any information can be more delicate or private in nature than the fact that a child has limited mental capabilities or is in any sense mentally retarded," the court ruled (*Deaton* v. *Delta Democrat Publishing Co.,* 1976).

While the three cases cited do not stand alone (see especially decisions from California discussed on pages 251–52), they are unusual. Far more often courts rule that public concern over the issues involved outweighs any embarrassment to plaintiffs. Several factors have been cited in weighing the public concern or interest in a particular matter.

Public Interest and Concern

In determining whether something is of public concern courts have focused upon such factors as what the story is about, who the story is about, when the incidents described in the story took place, and sometimes where they took place.

Factual stories Factual stories, reports or broadcasts which have great public interest, have generally been protected in invasion of privacy suits. The courts have been really quite liberal in defining public interest not as something people should read about, but as something they do read about, something in which people are interested.

A twelve-year-old girl who gave birth to a baby (*Meetze* v. *AP,* 1956), the suffocation of two children in an old refrigerator (*Costlow* v. *Cuismano,* 1970), the sterilization of an eighteen-year-old girl (*Howard* v. *Des Moines Register,* 1979), the death of a young man from a drug overdose (*Beresky* v. *Teschner,* 1978), the activities of a bodysurfer (*Virgil* v. *Time,* 1975), and other subjects have all been ruled to be of legitimate concern and interest to the public. The courts have been most generous to the press in their understanding of American reading and viewing habits. In a 1975 ruling in California the Ninth United States Court of Appeals noted that "in determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is

proper becomes a matter of community mores" (*Virgil* v. *Time*, 1975). Thirty-five years earlier another federal judge noted that the public enjoyed reading about the problems, misfortunes, and troubles of their neighbors and other members of the community. "When such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day," Judge Charles Clark wrote (*Sidis* v. *F-R Publishing Co.*, 1940).

Even the way a story is presented is normally not a factor: sensationalism and sensational treatment generally do not remove the protection of newsworthiness. Concerning the story of the suffocation of the two young children, the parents found the sensational treatment of the story as objectionable as the story itself. However, the court ruled that the manner in which the article was written was not relevant to whether the article was protected by the constitutional guarantees of free speech and free press—which, by the way, it was. In another case a Boston newspaper published a horrible picture of an automobile accident in which the bloodied and battered body of one of the victims was clearly visible and identifiable, and the court rejected the plaintiff's claim. The Massachusetts Supreme Court noted, "Many things which are distressing or may be lacking in propriety or good taste are not actionable" (*Kelley* v. *Post Publishing Co.*, 1951).

What the story is about, then, is an important aspect of determining whether it is newsworthy. American readers, viewers, and listeners are believed to have a wide range of interests which often focus on grotesque events and the tragedy, unhappiness, and misfortune of other persons.

Stories about public figures Who the story is about is also taken into account in determining whether the material is of legitimate public concern. As in the law of libel, stories about public officials and persons who thrust themselves into the public eye are looked at much differently than are stories about private persons. A story that Mayor John Smith has a serious drinking problem would not be considered an invasion of privacy; the same story about barber Bill Brown might in fact be an invasion of privacy. How far can the press go in publishing details of the private life of so-called public persons? That is a difficult question to answer. Certainly the status of the individual is important. Probably few details of the life of a president are considered private in terms of the law, but a circuit judge in a rural county, also an elected official, would probably enjoy considerably more privacy. In an interesting case in California, federal courts were asked to determine how far the press can go in looking into the private life of a public person.

The story focused upon Mike Virgil, widely regarded in southern California as one of the best bodysurfers along the Pacific Coast. *Sports Illustrated* decided to publish a feature on bodysurfing, and writer Curry Kirkpatrick

chose to emphasize the prowess of Virgil. Virgil was known for his almost total disregard for personal safety and talked freely with the writer about his private life, as well as about his surfing. He told Kirkpatrick that he was reckless in private as well and described several incidents to demonstrate this attitude. These incidents included putting out a burning cigarette with his mouth, burning a hole in his wrist with a cigarette, diving headfirst down a flight of stairs, and eating live insects. But after the interview Virgil had second thoughts about the story and asked *Sports Illustrated* not to include the material about his private life. The magazine published the story as Kirkpatrick had written it, and Virgil sued. The Ninth Circuit Court of Appeals ruled that the line between private and public information "is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives *for its own sake* [emphasis added]." In applying this standard to the Virgil case, the United States district court ruled that "any reasonable person reading the article would conclude that the personal facts concerning the individual were revealed in a legitimate journalistic attempt to explain his extremely daring and dangerous style of bodysurfing" (*Virgil* v. *Sports Illustrated,* 1976). Judge Thompson ruled that no one could reasonably conclude that these personal facts were included for any inherent morbid, sensational, or curiosity appeal they might have. If *Sports Illustrated* had published these personal details about Virgil without any other information, it might have been an invasion of privacy. But in the context of the story about his public life as a surfer, the publication was not an invasion of privacy.

Iowa courts recently used the same sort of standard when ruling that a story about a girl who had been sterilized when she was eighteen years old was not an invasion of privacy. The story focused upon the unusual activities at a county juvenile home. As an example of what occurred there, the *Des Moines Register* recounted the story of a girl who was sterilized against her will because a psychiatrist reported to officials that she was "impulsive" and "hair-triggered" and would probably have sexual problems in the future. The girl's name was used, but was not prominent in the story. The court ruled that the paper had not pryed into the girl's life simply to shock or outrage the community. The facts were presented to demonstrate to the community the kind of activities taking place at the home. As such, the material was of legitimate public concern (*Howard* v. *Des Moines Register,* 1979).

How far the press can go in reporting the private life of public persons, then, depends not only upon what was said—how private the information is—but also upon why the material was used. When an individual's public life is explained, many parts of that person's private life are of legitimate public concern.

Since 1929 American courts have also recognized what might be called the "involuntary public figure" in privacy law. The Kentucky Supreme Court first noted such a person and gave this definition of the status (*Jones* v. *Herald Post Co.,* 1929):

> The right of privacy is the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity. In short, it is the right to be let alone. . . . There are times, however, when one, whether willing or not, becomes an actor in an occurrence of public or general interest. When this takes place he emerges from his seclusion, and it is not an invasion of his right of privacy to publish his photograph with an account of such occurrence.

The court later noted that private citizens can become "innocent actors in great tragedies in which the public has a deep concern." The scope, therefore, of the rubric involuntary public figure is wide. In Kansas City not too long ago a young man was arrested by police outside the local courthouse on suspicion of burglary. Local television news cameramen filmed the arrest, and it was broadcast on televison that night. The young man, however, had been released by police who admitted they arrested the wrong man. An invasion of privacy suit followed, but the courts rejected it, stating that the plaintiff must show a serious, unreasonable, unwarranted, and offensive invasion of private affairs before recovery can be allowed (*Williams* v. *KCMO Broadcasting Co.,* 1971):

> In the case at bar, plaintiff was involved in a noteworthy event about which the public had a right to be informed and which the defendant [television station KCMO] had a right to publicize. This is true even though his involvement therein was purely involuntary and against his will.

An Illinois appeals court ruled in 1978 that a story which reported the death of a boy from an apparent drug overdose and then went on to outline details of the youth's life was not an invasion of privacy. The subject was of legitimate concern; in addition, the youth became an involuntary public figure by his actions within the drug culture in the community. "It is not necessary for an individual to actively seek publicity in order to be found in the public eye," the court ruled (*Beresky* v. *Teschner,* 1978).

There has been speculation that, given the opportunity, the United States Supreme Court would reject the so-called involuntary-public-figure rule in privacy law. The rationale behind this speculation rests upon the language of recent Supreme Court rulings in libel (*Firestone* v. *Time* and *Wolston* v. *Reader's Digest* among others). In those decisions members of the high Court ruled that public figures in libel law must actively thrust themselves into the forefront of a public issue. They must voluntarily choose to be public figures by attempting to lead public opinion. But while libel law and invasion of privacy are similar in many respects, the argument that the Supreme Court will ultimately apply the same rules in privacy invasion should be largely

ignored. There is a fundamental difference of crucial importance between a suit for libel and one for the publication of private facts. In the libel case the published material is false; in the privacy suit the material is truthful. This difference is critical. It is more likely that the Supreme Court would lessen the restrictions upon the publication of truthful material, as it did in the *Cox* case. The involuntary-public-figure rule has been a part of privacy law for more than fifty years, and it is unlikely the high Court would abandon it.

Persons who are thrust, even unwillingly thrust, into the public spotlight lose some of the protection of their right of privacy. How much privacy is lost? Probably only the privacy which protects that part of their life which has come into focus because of the event or incident. This line is not easy to draw. Imagine that John Smith, publisher of *The Daily Sentinel,* is arrested for violating the state unfair labor practices act. Under the guise of his status as an involuntary public figure how far into his life can the press go? Can it report his extramarital affairs? that he has a gun fetish? that he cheats at cards? All these questions are hard to answer. Probably the answers depend upon the status of the person involved, the magnitude of the event, the scope of public interest, and so forth.

Sometimes the people who are close to public figures also lose some of their privacy. In 1971 in Pennsylvania the state high court ruled that the *Saturday Evening Post* was not liable for the publication of the names of the children of an entertainer in a story relating that the entertainer, Lillian Corabi, was accused of masterminding a complex burglary (*Corabi* v. *Curtis Publishing Co.,* 1971). The court said that "Tiger Lil" Corabi was a public figure and that anyone could legitimately publish her biography without consent and could include the names of the members of her family. Other courts made similar rulings in connection with suits based on stories about the spouses of Hollywood stars. One judge wrote, "People closely related to such public figures . . . to some extent lose their right to the privacy that one unconnected with the famous or notorious would have" (*Carlisle* v. *Fawcett Publishing Co.,* 1962).

Stories about past events A great number of privacy suits have resulted from both published and broadcast stories about people who were formerly in the public eye. In these cases the plaintiffs have consistently argued that the passing of time dims the public spotlight, and a person stripped of privacy because of great notoriety regains the protection of privacy after several years. Courts have not accepted this argument very often. The general rule is that once a person becomes a public figure he pretty much remains a public figure, despite attempts to avoid publicity. Two kinds of stories fall into this category: (1) stories that merely recount a past event (fourteen years ago today Walter Denton jumped off the Golden Gate Bridge and survived) and don't tell readers what the subject of the story does today, and (2) stories that recount a past

occurrence and attempt to focus as well on what the participant does today (fourteen years ago Walter Denton jumped off the Golden Gate Bridge and survived and today he is principal of Madison High School).

Stories that fall in the first category are protected in almost every instance. In 1975 the Kansas Supreme Court, for example, ruled it was not an invasion of privacy when a newspaper republished in a "Looking Backward Column" a story that a police officer had been suspended and then fired in 1964 after a complaint from a citizen. The Court said that "official misconduct is newsworthy when it occurs, and remains so for so long as anyone thinks it worth retelling." The court added, "Once these facts entered the public domain, they remained there . . . plaintiff could not draw himself like a snail into his shell" (*Rawlins* v. *The Hutchinson Publishing Co.,* 1975). Such decisions are the rule.

The second kind of story can be a problem. While courts have gone on record permitting the where-are-they-now kind of story (again, except for California, one is hard pressed to find a ruling against the press in such suits), judges have nevertheless indicated that stories aimed at humiliating or purposely embarrassing a person because of his past conduct might not be tolerated under all circumstances (see *Kent* v. *Pittsburgh Press,* 1972; *Sidis* v. *F-R Publishing Co.,* 1940; *Bernstein* v. *NBC,* 1955). A real risk is run in broadcasting a story about a local banker which mentions that twenty years ago he was arrested for car theft. However, if the banker is running for public office the situation is different. Also, a story saying that here is a man who was down and out twenty years ago, but now see what he has accomplished, would probably pass muster. However, it would be best to first get the banker's approval. Stories which for no good reason purposely dig into a person's past in search of indiscretions are the ones likely to cause problems.

Social Value

California courts have added one additional element which is often considered in determining whether something is of legitimate public concern. This is the dimension of social utility or social value, the most subjective of all the factors considered in the process of balancing the offensive nature of the material against the public interest or concern in the matter. In 1971 the California Supreme Court raised the question of whether a story published by the *Reader's Digest* about a man who had been convicted of a crime eleven years before the magazine story was published had social utility or social value. The story focused upon the growing crime of truck hijacking. Marvin Briscoe's name was mentioned to illustrate what had happened to one hijacker who had been caught and sent to prison. But the magazine did not reveal that Briscoe had been jailed almost a decade before, and Briscoe claimed that after his release from prison he had reformed and led an exemplary life. In other jurisdictions, as noted previously in the discussion of the *Rawlins* case (above), courts would have ruled that Briscoe's problems with the law were a part of the public record of the community and subject to retelling without fear of

suit. But the courts in California asked, What value did a story have which simply destroyed the rehabilitative efforts expended by the state in bringing Marvin Briscoe from his life of crime to his current status as a productive and useful citizen? The court said ideally, the people in the community should recognize Briscoe's present worth and forget his past life of shame. "But men are not so divine as to forgive the past trespasses of others," the court noted, and consequently Briscoe's existence had been seriously harmed by the publication of these facts about what occurred in an earlier time in his life. The state supreme court sent the case back for a jury trial to determine whether the public concern about truck hijacking really outweighed the offensiveness of the publication for Briscoe (*Briscoe* v. *Reader's Digest*, 1971). However, before the jury trial could begin, *Reader's Digest* had the case removed to federal court in California on grounds of diversity of citizenship, and there a federal judge granted the magazine's motion for a summary judgment. No opinion was written in the case.

But recently the California Supreme Court seemed to limit the reach of the so-called *Briscoe* social value test to those cases which recall the past deeds of felons who had paid their price to society. In 1979 James Forsher sued the authors of the book *Helter Skelter*, a nonfiction work which focused upon the activities of the Charles Manson cult. Forsher had played a minor part in the events surrounding the trial of the cult members and was mentioned in the book. His suit alleged that the trial was an event in the past, and recounting his role in the events was an invasion of his privacy. There was no social value in retelling this story, he argued. But the Supreme Court dismissed the suit noting that "our decision in Briscoe was an exception to the more general rule that once a man has become a public figure, or news, he remains a matter of legitimate recall to the public mind to the end of his days." The high Court suggested that the Briscoe precedent would be applicable only to cases in which the facts mirrored the Briscoe case and the state's work in rehabilitating criminals was harmed by publication of a former criminal record (*Forsher* v. *Bugliosi*, 1980).

Access Privacy

The general lack of success which litigants have had in tort actions to punish the press for publicizing truthful, private information has led to the adoption throughout the nation of laws limiting access to such information. In 1975 it was reported in *Access Reports* that forty of the fifty states had statutes which provided for limitation upon access to government-held information on right-to-privacy grounds. The number is probably higher today. While these laws are not traditionally thought of in the same terms as the tort of privacy as discussed in this section, they nevertheless have a similar impact. Tort law discourages the publication of private information by penalizing the press through the assessment of money damages. These statutes permit the state

to institute civil or criminal action against the press for the publication of so-called private information or simply to bar access to this material so that it cannot be published. There is no way to fully explore this problem at this time. In chapter 3 the federal privacy measures, as well as criminal history records laws, were outlined (see pages 135–38). At this point some examples of problems being experienced in the states can be cited.

The California Public Records Act limits the dissemination of what is called "personal" information. The state newspaper association reported that the California Youth Authority refused to give out any information regarding juveniles within its jurisdiction, citing the ban on the release of "personal" information. This included even acknowledging whether a youth was in the custody of the state authority. Newspapers in Alabama can no longer get information regarding births and deaths from county officials. Citing state laws and rulings by the public health board, county officers say only persons who have a "valid and tangible interest" in these materials can gain access to them. Otherwise, publication of such information can be an invasion of personal privacy (*Birmingham News* v. *Roper,* 1978). In Vermont the press had to go to court to force the release of information relating to pardons granted several persons by a former governor of the state. Lower courts had ruled that the disclosure of such material might constitute an unwarranted invasion of the privacy of the persons pardoned. Yet it was only through the release of this information that citizens could evaluate the governor's actions in granting these pardons. The state supreme court finally opened up the records (*Doe* v. *Salmon,* 1977).

The list of cases could be much longer. In summary, access privacy problems will continue to grow alongside tort law privacy difficulties. Knowledge of state records laws is the best protection a journalist can have. Know how privacy has been defined by the courts with regard to the state laws and insist upon a showing by officials who refuse to allow access to such information that privacy in fact will be invaded by the release of the material. If need be, take the government agency to court. This is the only way to get a public airing of these problems, and often the publicity focused upon the agency or government official is enough to open up the closed file drawers.

PUBLICATION OF FALSE INFORMATION

What does publication of false information, or of a falsehood, have to do with invasion of privacy? This question is frequently asked by persons who study the law of privacy. If invasion of privacy is conceived of solely as snooping, digging into a person's past, and bugging bedrooms, publication of false information about a person then seems totally out of line with the law of privacy. This area of the law does make some sense, however, when the first category of invasion of privacy—appropriation of a person's name or likeness for commercial purposes—is recalled. The fourth category of the law of privacy is really a hybrid of the first category.

What are the origins of falsehood law? You will recall that the law of privacy began as a means to stop commercial exploitation of persons in advertising and for trade purposes. Commercial exploitation was a key in early privacy litigation. In the 1920s a film producer made a travelogue about New York City. All of the film was shot in the city and showed real people walking along the streets, selling their wares, and riding in cars just as in a true documentary travelogue. To make the movie a bit more interesting the producer hired actors and wrote a script. What had been an ordinary documentary travelogue about New York became a documentary in which two fictional New York teachers escorted two fictional out-of-town teachers on a tour of the city. Miriam Blumenthal, a bread peddler, was photographed and appeared in the film for six seconds as she hawked her baked goods near Washington Square. When the motion picture was released, Mrs. Blumenthal sued for invasion of privacy. The logic of her argument was this. The law prohibits the use of a person's name or likeness for commercial or trade purposes. When the producer fictionalized certain aspects of the documentary travelogue, he transformed the movie from an informative film (which is protected because it is newsworthy) into an entertainment film. When a film entertains, it has been created for trade purposes; the producer hopes to make a profit by entertaining people. Hence, Miriam's likeness was used for a trade purpose and was an invasion of privacy (*Blumenthal* v. *Picture Classics,* 1933).

From these propositions the following corollaries merge. If a story is fictional, it is an item of trade or commerce rather than a news item. When a true story is somehow fictionalized by the addition of dialogue or other changes, it becomes a fictional piece. Falsehoods in an otherwise true story remove the protection of newsworthiness because the piece is then a fictional piece. Consequently we have reached the point today in which many privacy suits are brought for publication of false information or for publishing material which puts someone in a false light. An amazingly large number of these suits are successful.

Before the specifics of the law in this area are considered, this very important fact must be emphasized. The false report aspect in invasion of privacy grew in a very ragged fashion. That is, there are contradictory court rulings: action that is illegal in one state is not in another. The guidelines presented here are tentative because the law remains tentative. The distressing factor is that false report suits occur more frequently today and may become increasingly more common because of the new libel restrictions requiring plaintiffs to show negligence before they can collect damages. Although some questions still need to be answered by the Supreme Court (as will be noted shortly), injured parties today may find it easier to sue for invasion of privacy than for defamation when they are the subject of an untruthful report.

Suits for publication of falsehoods generally fall into one of two categories: (1) fictionalization or (2) false light. Fictionalization occurs when an otherwise true story is embellished with little falsehoods. Examples include making up dialogue, adding drama when none exists, and changing the setting of the story to make it more interesting. False light is simpler to define and means merely to give readers a false impression by publishing facts which are not true about a person. While fictionalizing an otherwise true story generally puts someone in a false light, the reverse is not necessarily true. The simplest means of distinguishing between the two categories is to remember that fictionalization is a purposeful act, something the writer does intentionally, and false light can result from an unintentional error, an unplanned inaccuracy.

Fictionalization

Radio and television writers who dramatize true stories are the most common victims of fictionalization suits. A few years ago the National Broadcasting Company dramatized the heroism of a naval officer who, as a passenger on a flight from Honolulu to California, was responsible for saving many lives when the plane crash-landed at sea. The drama stuck to the hard facts of the story, but of course dialogue between passengers and crew was added. In addition, the naval officer was somewhat humanized: he smoked a cigarette and prayed before the crash. The court which heard the officer's privacy suit ruled that these embellishments constituted fictionalization and resulted in an invasion of privacy (*Strickler* v. *NBC,* 1958).

Newspapers and magazine writers have been caught when they dramatized true stories in the same manner by adding dialogue, changing the scene slightly, and so forth. A writer for a Philadelphia newspaper uncovered an interesting divorce suit involving a teenage couple. The boy married the girl only to spite her parents who didn't like him. The newspaper story described the couple as they secretly planned the marriage, as they walked to the justice of the peace, and so forth. Dialogue between the couple was invented. A suit resulted, and the newspaper lost the case because the story was written "in a style used almost exclusively by writers of fiction" (*Acquino* v. *Bulletin Co.,* 1959). Note, the court didn't say that the story was fiction, because it wasn't. The basic facts were true, but were presented in a fictional style.

Such opinions are not always the rule. Other courts in other cases have said that minor fictionalization, the creation of dialogue, does not constitute invasion of privacy in an otherwise true story (*Carlisle* v. *Fawcett,* 1962).

The foregoing examples point up the confused state of the law in this area noted earlier.

The style of the fiction writer—putting heavy emphasis on descriptive detail, using dialogue, narrating the story from the subject's, rather than the writer's, point of view—is used increasingly today by some journalists. Writers such as Gay Talese, Tom Wolfe, Jimmy Breslin, Joan Didion, and Norman Mailer are leading the way in the exploration of stylized nonfiction writing,

often called New Journalism. Nonfiction novels like Truman Capote's *In Cold Blood* and Joseph Wambaugh's *The Onion Field* demonstrate the journalistic power of this style. Yet, these writers clearly open themselves to lawsuits unless extreme care is taken.

The simplest way to avoid a suit for fictionalization, if the truth is embellished in any way, is to change the names of the characters in the story. This strategy will work in every case except in those stories which are about a specific person. It doesn't make much sense to do a character sketch about Mick Jagger if you must refer to him throughout the piece as John Smith because parts of the story are embellished or fictionalized.

On the opposite side of the fictionalization coin is the problem of using the name of a real person in what is clearly a work of fiction.

What happens when a novel is about a fictional character named Judy Splinters and a real Judy Splinters exists? Can the real Ms. Splinters sue for invasion of privacy? The first point to remember is that the little notice in the front of the book—all characters in this book are fictional and any resemblance to persons living or dead is purely coincidental—doesn't help much. It is impossible to escape liability by merely saying you are not liable. If a man commits an illegal act, he is responsible for his action, regardless of the notices he may have published. If someone trips on a broken piece of cement in a sidewalk, it matters not that the owner of the property has a sign on his lawn declaring that he takes good care of his property and that he is not responsible for the injuries to other persons.

Does Judy Splinters have a case? If only her name is used, she does not. The names of many people get into works of fiction. Such occurrences are coincidental. Liability doesn't accrue unless Judy can convince a jury that in fact she is the character in the book. She can do this by showing that more than her name are used, that other aspects of her identity are used as well. For example, suppose both the fictional and the real Judy are in their mid-twenties. Both are waitresses. Both were born in Michigan and moved to San Francisco. Both like fast cars and tall men. Both were the victims of brutal rape. As the similarities mount, a juror would have to be either dishonest or a fool to believe in coincidence. Judy's identity was taken, and invasion of privacy did occur. An author can even face liability if when writing a novel a character emerges that is similar to a real person with whom the author has had contact. In a Florida case an author knowlingly described a real person in a novel, but changed the name. The author was sued for invasion of privacy and lost the case—largely because the character described was so unusual that many persons recognized her even though the name had been changed (*Cason* v. *Baskin*, 1947). More recently the Second United States Court of Appeals refused to dismiss a false light suit against the author of the novel *Match Set* when Melanie Geisler sued, alleging that a character in the book—a female transsexual tennis player—had the physical description and mannerisms that mirrored her own. Ms. Geisler and the author worked together

in the same small publishing firm for more than six months. In refusing to dismiss the case the court ruled that it was possible that readers might associate the plaintiff with the character in the book. A jury trial was needed to answer these questions, the court ruled (*Geisler* v. *Petrocelli*, 1980). It should be noted that both these cases are unusual and, at this time, fall outside what is the general mainstream of case law in this area.

False Light

False light doesn't refer to lights that aren't there, but to false impressions. Many courts agree that a false impression of a person, even though the impression is not unfavorable, is an invasion of privacy. In a recent case a writer for a national newspaper told his readers that a mystery surrounded the suicide death of a mother. The woman killed herself after murdering her children, and the writer said police, family, and friends were baffled because she had been a happy, normal woman. Her husband sued, charging false light. He was able to show that the woman had a history of psychiatric care and mental illness. She was quite despondent before the incident, and her death was really not a mystery at all. The court ruled that the publication had put the woman in a false light (*Varnish* v. *Best Medium,* 1968).

Photographs are a more common source of false light cases than are stories. The late, great *Saturday Evening Post* seemed to have a penchant for false light cases, most of which involved photographs. Years ago the magazine published a picture of a little girl who was brushed by a speeding car in an intersection and lay crying in the street. The girl was the victim of a motorist who ignored a red traffic light, but in the magazine the editors implied that she caused the accident herself by darting into the street between parked cars. The editors simply needed a picture to illustrate a story on pedestrain carelessness and plucked this one out of the files. The picture was totally unrelated to the story except that both were about people being hit by cars.

Eleanor Sue Leverton sued the *Post* and won. Judge Herbert F. Goodrich ruled that the picture was clearly newsworthy in connection with Eleanor's original accident (*Leverton* v. *Curtis Publishing Co.,* 1951):

> . . . but the sum total of all this is that this particular plaintiff, the legitimate subject for publicity for one particular accident, now becomes a pictorial, frightful example of pedestrian carelessness. This, we think, exceeds the bounds of privilege.

Just before the *Post* succumbed, it faced another suit for the same action. This time the magazine used a picture taken at a gambling club in the Bahamas to illustrate a story about organized crime infiltrating the casinos on the islands. The caption said: "High rollers at Monte Carlo [the name of the club] have dropped as much as $20,000 in a single night. The U. S. Department of Justice estimates that the Casino grosses $20 million a year, and that one-third is skimmed off for American Mafia families." Included in the picture was one James Holmes, neither a high roller nor a Mafioso. He sued, claiming

that the photograph and article put him in a false light (*Holmes* v. *Curtis Publishing Co.*, 1969).

Sometimes an error simply occurs, and there is nothing anyone can do about it. One simple precaution can be taken to avoid false light suits: refrain from using unrelated pictures to illustrate news stories. When the annual Christmas story warning readers to be wary of shoplifters in department stores is prepared, control the impulse to pull from the files a picture of people shopping and run it as artwork with the story. When a story warning older men to be wary of overexertion as they shovel the first snow lest they fall victim to a heart attack is published, don't use a file picture of a sixty-year-old man clearing his driveway. In both cases the juxtaposition of the story and the photograph implies a relationship which is not necessarily true.

The Fault Requirement as Defense

The simplest way to defend a suit brought for publishing a false report is to prove the truth of the material. In addition, however, the defendant has another protection. Since 1967 plaintiffs in false-report suits have been required to carry a fault requirement much like the one applied in libel cases. In order to win a right-to privacy case based upon the publication of a false report, plaintiffs must show that the material was published with knowledge that it was false or with reckless disregard for the truth or falsity of the matter.

The case in which this fault requirement was applied to invasion of privacy was the first mass media–invasion of privacy suit ever heard by the United States Supreme Court. In the early 1950s the James Hill family were held captive in their home for nearly twenty-four hours by three escaped convicts. The fugitives were captured by police shortly after leaving the Hill home. The incident became a widely publicized story. A novel, *The Desperate Hours,* was written about a similar incident, as was a play and a motion-picture script. *Life* magazine published a feature story about the drama, stating that the play was a reenactment of the ordeal suffered by the James Hill family. The actors were even taken to the home in which the Hills had lived (but now vacant) and photographed at the scene of the original captivity.

James Hill sued for invasion of privacy. He complained that the magazine used his family's name for trade purposes, and that the story put the family in a false light. *The Desperate Hours* did follow the basic outline of the Hill family ordeal, but contained many differences. The fictional Hilliard family, for example, suffered far more physical and verbal indignities at the hands of the convicts than did the Hill family.

After the family won money damages in the state courts, the Supreme Court vacated the judgment and remanded the case to the state court for a new trial. (The trial never did take place because the Hills were sick of the entire mess.) The high Court tossed out the trade purposes portion of the complaint, reminding all concerned that despite the fact that newspapers and magazines are published for profit informative material contained in these publications is protected by constitutional guarantees of freedom of expression.

Then Justice William Brennan, who had written the decision in *New York Times* v. *Sullivan,* wrote that the standards which apply to false publication in libel suits must also apply in invasion of privacy suits based on a false report (*Time, Inc.* v. *Hill,* 1967). Hence, the Hill family must show that the editors of *Life* magazine knew that the play was not a reenactment of the family's siege with the convicts, or that the editors displayed reckless disregard as to whether their story was true or false. In all likelihood the Hills, who chose not to continue the suit, could have proved malice.

Much as in the original *New York Times* ruling, the decision in *Time, Inc.* v. *Hill* left many questions unanswered. While the high Court and various lower courts have had numerous opportunities to clarify many of the libel questions, the courts have not had much opportunity, or have not taken the opportunity, to clear the muddy waters of privacy law. Therefore, discussion of the impact of *Time, Inc.* v. *Hill* on privacy law must be somewhat tentative.

Thus far the Supreme Court has not applied a variable fault standard, as is the case in libel law. Remember, in defamation cases, private persons must prove at least negligence, while persons who have thrust themselves into the public eye (so-called voluntary public figures) and public officials must prove actual malice—knowledge of falsity or reckless disregard of whether the material is false. But all plaintiffs in false-report privacy actions since 1967 have had to prove actual malice, including several cases which have found their way to the United States Supreme Court. Included among this group of litigants were the innocent gambler in the *Saturday Evening Post* picture noted previously (page 257), a woman and her children whose husband and father was killed in a terrible bridge accident (*Cantrell* v. *Forest City Publishing Co.,* 1974), the husband of a suicide victim (*Varnish* v. *Best Medium,* 1968), and the long-time convict released from prison because a court ruled that during his trial his constitutional rights were violated (*Kent* v. *Pittsburgh Press,* 1972). There are others as well, including the aforementioned James Hill. None of these plaintiffs could be considered voluntary public persons in terms of the libel law developed in the past seven years since *Gertz* v. *Welch* (1974). But only time will answer whether the high Court will apply a relaxed fault requirement in privacy law to private persons or to persons who are thrust into the public spotlight against their will.

A plaintiff who is asked to prove actual malice in a right-to-privacy suit bears the same burden as the libel plaintiff. Malice is defined in the same fashion, and libel rulings on malice are frequently used as precedents in false-report cases. Three right-to-privacy cases demonstrate this clearly.

1. In 1967 a bridge across the Ohio River between West Virginia and Ohio collapsed, killing forty-three people. Reporter Joe Eszterhas wrote a feature story about the family of one of the victims for the *Cleveland Plain-Dealer.* A year later Eszterhas revisited the scene of the tragedy and wrote

a story about how the family managed without their husband and father. The story contained several inaccuracies about the family's poverty and other matters. In addition Eszterhas implied that he had seen and talked to the widow, described her, and told readers she said she refused money from people in town and was reluctant to talk about the tragedy. In fact, the woman was not at home when the reporter made his second visit, and he did not see her. The Supreme Court said that evidence of these "calculated falsehoods" was sufficient proof of actual malice (*Cantrell* v. *Forest City Publishing Co.*, 1974). The reporter must have known, Justice Stewart wrote, that a number of statements in his story were untrue.

2. Sixty-seven-year-old James Kent was released from prison after twenty-seven years of incarceration on a murder charge. He had won a new trial, and the state chose not to reprosecute. Therefore, in the eyes of the law, Kent was innocent of the murder he had been charged with. A story in the *Pittsburgh Press* on prison reform made a single-sentence reference to Kent as a man who had taken a life. He sued for publication of a false report, arguing that had the reporter checked with the prison officials he would have discovered the facts—that Kent's conviction for murder had been overturned. The federal district court said that the story was not reckless disregard for the truth, it was not malice (*Kent* v. *Pittsburgh Press*, 1972):

> Obviously if Grochot [the reporter] had checked the court records relating to Kent, he could have discovered the reason for his release. Obviously too, however, he had no reason in the circumstances to entertain any doubts, quite apart from serious doubts, as to the matter of Kent's release.

3. In a case mentioned earlier, a young mother killed her three children and then took her own life. In the *National Enquirer* story about the incident the victim was pictured as "the happiest mother" with no apparent reason to commit suicide. The newspaper published what it called a "cryptic" suicide note giving no hint as to the reason for the murder-suicide. The victim's husband, Melvin Varnish, sued the weekly newspaper for publishing a false report. He proved that the reporter had access to records which indicated that Mrs. Varnish was depressed and despondent before the incident. He also proved that the reporter had a copy of the entire suicide note, of which the paper published only a portion, and that the entire note clearly explained the reasons for the murder-suicide. The federal court of appeals ruled that this evidence was sufficient to support a finding of reckless disregard for the truth (*Varnish* v. *Best Medium*, 1968).

While many plaintiffs in false-report cases may have an increased burden of proof, the burden of proof is not insurmountable. In light of *Gertz*, we might speculate that in the future it is a burden that some plaintiffs will not have to meet at all.

Before the discussion of the right of privacy comes to an end, we need to recall a few points. First, remember that only people have the right of privacy. Corporations, businesses, and governments do not enjoy the legal right of privacy as such. Second, unlike libel, the law of privacy does provide that the plaintiff may seek an injunction to stop an invasion of privacy. This action is in addition to the right to seek money damages. However, it is difficult for a plaintiff to get an injunction. Courts are very hesitant to enjoin tortious conduct unless the plaintiff can show that the action will cause irreparable injury and that the tortious conduct will likely be continued. Such was the case in the *Galella-Onassis* suit. A plaintiff is far more likely to get an injunction in either an intrusion or an appropriation case than in a private-facts or false-report suit. Normally courts refuse to grant injunctions, because they believe an adequate legal remedy is available, or because they believe that the injunction could constitute prior censorship in violation of the First Amendment. The plaintiff bears an immense burden in convincing a court that prior restraint is called for. While it is possible to get an injunction, it is difficult.

Third, it is impossible to civilly libel a dead person, but a few state privacy statutes make it possible for an heir to maintain an action for invasion of privacy.

Although privacy law is not as well charted as libel law, and although there are fewer privacy cases, suits for invasion of privacy are a growing menace to journalists. If journalists stick to the job of responsibly reporting the news, they may rest assured that the chance for a successful privacy suit is slim.

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6 The Law of Copyright

When a person builds a house or a chair or makes a lamp or a new shirt, it is fairly obvious who owns those goods. The person who built the house lives in it, rents it, or sells it—in any case there is a deed, and ownership can be proved. The same is true of other material goods. The owner can possess them and guard them from theft.

But take a look at the book on the corner of your desk. Who owns that? Well, if you bought the book you own it. At least, you own the paper and cardboard and fabric used for binding. But who owns the words? Is it possible for someone to own words? Doesn't language belong to everybody? Sure it does. The words in that book, however, are not just a random selection of entries from a dictionary. Somebody has spent a lot of time organizing those words in a specific pattern so that they tell you something, give you new information, make you laugh, or maybe make you cry. Or they might tell you the way to do something, or help you understand some deep philosophical problem. The answer to the question, Who owns the words? therefore is, the author owns the words or at least owns the way the words are organized in this instance.

Copyright is an area of the law which deals with immaterial property, property that a man can't put his hands on, that can't be felt or touched or locked in a safe. Some examples of this kind of property are inventions, ideas, writing, painting, music, and drama. In this chapter the rights of authors, composers, artists, inventors, and playwrights are discussed. This area of the law seems at first glance to be terribly complicated, but when the facts are sorted out, copyright law is really not too difficult to understand.

People who work in the mass media don't need to become copyright and patent attorneys in order to avoid lawsuits in the 1980s. But writers and broadcasters should know both how to protect their own work from theft and how to avoid illegally taking the work of someone else.

Until 1976, when the Congress passed a major revision of the copyright law, this nation suffered under a statute that had been adopted in 1909 and became out of date soon afterward. Beginning in the mid-fifties, the Congress began work on revision of the 1909 law. It seemed as though each time the revision was completed new technology such as cable television and photocopying made the proposal obsolete. In addition, special interest groups lobbied long and hard to have the law framed in a way favorable to them. Publishing groups, librarians, jukebox operators, and cable television operators are just some of the kinds of interest groups which put pressure on the Congress.

Copyright law covers a great many subjects which fall outside the scope of this book, which is law affecting the mass media. Hence, we will focus on a narrow range of subjects within the broader measure. First, the conditions creating the need for copyright laws and development of the law are discussed. Second, the kinds of works that may be copyrighted and the kinds that may not are considered. Third, how authors may protect their own work is discussed. Finally, the precautions which should be taken to avoid stealing the work of other persons, either inadvertently or advertently, are outlined. Also considered briefly are free-lance and cable television copyright and damages assessed in copyright suits.

ROOTS OF COPYRIGHT

Law professor Paul Goldstein writes in the *Columbia Law Review* (1970), "Copyright is the uniquely legitimate offspring of censorship." British history from the late fifteenth century through the early eighteenth century partially substantiates this assertion. It is naive, however, to think of copyright as solely a limiting force on the production of written works. Protection of the rights of an author, after all, can give impetus to authors to write and publish more. There were really few legal problems in protecting literary property prior to the development of mechanical printing. Each hand-copied manuscript was the result of the labor of a copyist. It was an individual entity, a specific creation. As such, it was protected by the law of personal property. But the printing press, which permitted mass production of exact copies of a written work, changed the situation. The press produced both a piece of physical property—the book itself—and an immaterial property—the arrangement and organization of the words or ideas. The immaterial property was called literary property and was not protected by British law.

As noted in chapter 2, printing created many problems for the king. The crown was fearful of the power of the press to rouse the passions of the people

against the government. Therefore, in the sixteenth century the government sanctioned and supported the grant of printing privileges to certain master printers in exchange for loyalty and assistance in ferreting out antigovernment writers and publishers. In *The First Copyright Statute* Harry Ransom writes:

> The privilege had its origins in the Crown's patronage of specific printers. Warrants granting rights to print books or a specific book, usually for a certain term—two years, ten years, or the lifetime of the printer—were a natural outgrowth of the system of appointing King's printers. The grant was a recognition of confidence in his printing and a protective guarantee of his right in copy. It was a means of extending royal control of the press through official choice of printers to be encouraged by patronage.

The first recorded privilege or royal grant was given in 1518 according to Professor Ransom. About forty years later the Stationers' Company was founded for much the same purpose. This was an organization of master printers chartered by the government to control, regulate, and protect printing. The company had sufficient power to regulate who did the printing and what was printed. The crown cooperated with this guild, because it served as a useful tool for censorship. Some of the basic rudiments of copyright law were developed by the Stationers' Company. The company required printers to record the publication of their works in a registration book. While this device was used originally to keep track of what printers published, the registration book later became evidence in lawsuits over printing privileges. Registration of a book prior to publication of a pirated version substantiated a claim of ownership. It was in 1586 that a court first accepted the registration book as evidence of ownership.

Note that the protection of the rights of printers is all we have discussed thus far. What about the rights of authors, the persons who wrote the books published by the printers? In the sixteenth century authors had few rights. Generally when an author sold his manuscript to a printer or a bookseller, he sold all rights with it for a single fee. If the book sold well, the bookseller might further compensate the author, but the additional compensation stemmed from generosity, not from legal obligation. Ransom reports that many sixteenth-century authors were jailed for nonpayment of debt, others went hungry, and most had to undertake some kind of additional labor to keep body and soul together. If the author printed the work himself, he retained rights which would provide him a royalty, or he might make an agreement with a printer or bookseller to gain part of the proceeds of sales. Such arrangements were uncommon, and there was no organized royalty system.

In the seventeenth century litigation over the ownership of books increased, and with the increased litigation certain common law principles developed. A decree by the Star Chamber in 1637 asserted that all books which were published had to be registered in the Stationers' registration book, that

the name of the printer or bookseller must appear in the published book, and that there was to be no infringement on the publishing rights of persons who held the printing privilege, that is, no theft of another person's work. In 1649 the government passed a law which provided a penalty—a fine—for anyone found guilty of reprinting works entered in the Register.

More laws were passed and more cases tried in the second half of the seventeenth century. It soon became obvious, however, that problems of authors—who were becoming quite angry—and of booksellers and printers as well could not be solved by any measure short of a comprehensive law. Petitions began to appear at Parliament urging legislation to protect the rights of authors. In 1710 Parliament passed the first British copyright law: "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, during the Times therein mentioned." The law was passed in the eighth year of the reign of Queen Anne and hence became known as the Statute of Eight Anne.

The law gave the legal claim of ownership of a piece of literary property to the person who created the work or to a person who acquired the rights to the work from the author. The claim of ownership lasted for only fourteen years. The copyright could be renewed for fourteen more years, but after twenty-eight years the work fell into the public domain and could be copied by anyone. The copyright owner had to give nine copies to the government for use in libraries and had to register the book with the Stationers' Company. The most important aspect of this law was not the specific legal provisions, but the recognition by the British government that writers or authors should enjoy the right of ownership in their creations. This concept is very important, for without it we might find ourselves with far less to read today. While most authors are motivated by a desire to inform and entertain, they must also subsist. By providing them the right of ownership in their work, authors are compensated in such a way as to encourage them to continue to write.

Clearly any law giving authors the right of ownership automatically limits copying and use of the literary property. This limitation is what Professor Goldstein means when he talks of censorship. A copyright law does in fact act as censorship since it restricts the right to republish or copy books, articles, photographs, and any work that is copyrighted.

The Statute of Eight Anne did not go unchallenged. Booksellers were angered by the limit on ownership. (The law provided that the ownership in any work created before the statute was adopted would terminate in twenty-one years.) Publishers rushed into print with works the law ruled were in the public domain, but which booksellers still claimed as literary property. The booksellers sought injunctions to stop what they called pirating. They argued that under the common law their ownership of a book was perpetual—it lasted forever. The Parliament could not take this away from them, they said. This dispute finally came before Britain's highest court, the House of Lords, in

1774. The House of Lords ruled that it was true that at common law the right of first printing and publishing lasted forever, but that the statute superseded the common law, revoked the common law copyright in perpetuity for published works. The common law no longer applied. Twenty-eight years were the maximum for ownership of published literary property.

This case, *Donaldson* v. *Beckett,* established a very important point in copyright law: that the law treated an unpublished work differently from a published work. Eight Anne specifically applied to works which had been published. The House of Lords ruled that limited ownership applied to such works. However, the law did not embrace unpublished works, and hence the common law rule of ownership in perpetuity remained in force.

While our copyright laws are direct descendants of the British law, the British law had little impact in the colonies. The colonies had no separate copyright statute, but printing and publishing original books and pamphlets was not an active business prior to the Revolution. After the Revolution, of course, the British law did not apply.

Our first constitution, the Articles of Confederation, made no mention of the protection of literary property. Congress did, however, recommend that the states adopt legislation to protect the rights of authors. Several states did before our present Constitution was adopted in 1789. In Article I, Section 8, of that document lies the basic authority for modern United States copyright law:

> The Congress shall have the 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.

This provision gives the Congress the power to legislate on both copyright and patent. The Congress did in 1790 by adopting a statute similar to that of Eight Anne. The law gave authors who were United States citizens the right to protect their books, maps, and charts for a total of twenty-eight years—a fourteen-year original grant plus a fourteen-year renewal. In 1802 the law was amended to include prints as well as books, maps, and charts. In 1831 the period of protection was expanded by fourteen years. The original grant became twenty-eight years with a fourteen-year renewal. Also, musical compositions were granted protection. Photography was given protection in 1865, and works of fine art were included five years later. Translation rights were added in 1870.

A major revision of the law was enacted in 1909, and as was previously noted, our current law was adopted in 1976.

WHAT MAY AND MAY NOT BE COPYRIGHTED

The law of copyright gives to the author, or the owner of the copyright, the sole and exclusive right to reproduce the copyrighted work in any form for any reason. Before a copyrighted work may be printed, broadcast, dramatized, translated, or whatever, the consent of the copyright owner must first be obtained. The law grants this individual exclusive monopoly over the use of that material.

What kinds of works are protected? The federal statute lists a wide range of items which can be copyrighted:

1. Literary works
2. Musical works, including any accompanying words
3. Dramatic works, including any accompanying music
4. Pantomimes and choreographic works
5. Pictorial, graphic, and sculptural works
6. Motion pictures and other audiovisual works
7. Sound recordings

To quote the statute specifically, copyright extends to "original works of authorship fixed in any tangible medium of expression." The Congress has defined *fixed in a tangible medium* as that work which is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than a transitory duration." Extemporaneous speeches or improvised sketches are good examples of materials which are not fixed in a tangible medium and are not protected by the law. However, these kinds of works are undoubtedly protected by common law copyright.*

Copyright regulations are equally specific about what cannot be copyrighted, and here is a list of some of the things not covered by the law of literary property.

1. The title of a radio or television program cannot be copyrighted. Similarly, the general idea or outline for a program is not copyrightable. Copyright will protect the literary or dramatic expression of an author's ideas—such as a script—but not the ideas themselves.

*Under the 1909 law the United States had two kinds of copyright protection: common law copyright and statutory copyright. Much as it did in eighteenth-century England, the common law protected any work which had not been published. Common law protection was automatic; that is, the work was protected from the point of its creation. And it lasted forever—or until the work was published. In order to protect published works, the author, photographer, or composer had to register the book or picture or song with the United States government and place a copyright notice on the work. The 1976 statute does away with common law copyright for all practical purposes. The only kinds of works protected by the common law are works like extemporaneous speeches and sketches which have not been fixed in a tangible medium. They are still protected from the point of their creation by common law copyright. Once they are written down, recorded, filmed, or fixed in a tangible medium in any way, they come under the protection of the new law.

2. The names of the products and services; the names of businesses, organizations, and groups (even performing groups); the names of persons and the pseudonyms of individuals; the titles of works, mottoes, slogans, and short advertising expressions—none of these can be copyrighted. Some brand names, trade names, and slogans may be entitled to protection under the general rules of law relating to unfair competition or trademark laws.

3. Ideas, methods, systems, and mathematical principles, formulas, and equations cannot be copyrighted. A description, explanation, or illustration of an idea or system can be copyrighted. But in such a case the law protects the particular literary or pictorial form in which an author chooses to express himself, not the idea or plan or method itself.

Original Works

Can all books and motion pictures be copyrighted? Not really. The law specifically says that only "original" works can be copyrighted. What is an original work? In interpreting this term in the 1909 law, courts ruled that the word *original* means that the work must owe its origin to the author. In 1973 a court reporter, an employee of the court who transcribes the proceedings, attempted to claim copyright over a transcript he made of some of the proceedings during the investigation of of the death of Mary Jo Kopechne. This young woman drowned when a car driven by Senator Edward Kennedy went off a bridge and into a creek near Chappaquiddick, Massachusetts. In *Lipman* v. *Commonwealth* (1973), a federal judge ruled that the transcript could not be copyrighted. "Since transcription is by very definition a verbatim recording of other persons' statements, there can be no originality in the reporter's product."

The work must be original. Must it be of high quality or be new or novel? The answer to both questions is no. Even common and mundane works are copyrightable. Courts have consistently ruled that it is not the function of the legal system to act as literary or art critic when applying copyright law. In 1903 Justice Oliver Wendell Holmes wrote in *Bleistein* v. *Donaldson Lithographing Co.*, "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." Even the least pretentious picture can be an original, Holmes noted in reference to the posters involved in this case. Likewise, novelty is not important to copyright: the author doesn't have to be the first person to say something in order to copyright it. "All that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a merely trivial variation, something recognizably his own," one court ruled (*Amsterdam* v. *Triangle Publishing Co.*, 1951).

The key is how much of the author's own work is invested. In 1946 the *Philadelphia Inquirer* printed a copy of a map in connection with publication of a historical article. The map had been copyrighted by the Franklin Survey

Company, which promptly sued for copyright infringement. The survey company created the map by studying other maps; the company did no surveying itself. It obtained road numbers from the highway department and road names almost exclusively from other maps. There was no question that the Franklin Survey Company had spent a good deal of time assembling this material, but the fact was that the company did not create much of the material by its own labor. The court ruled that the survey company's copyright was invalid because the creative work by the plaintiff was not sufficient to make the map original (*Amsterdam* v. *Triangle Publishing Co.,* 1951). There must be at least a modicum of creative work in the map, the court said. Hadn't Franklin assembled this information in an original or unique fashion? This fact was immaterial, the court ruled. A map is protected only when the publisher gets some of the material "by the sweat of his brow." Originality is therefore the key; whether the work is novel or of artistic quality is not important.

News Events

Can an event be copyrighted? Suppose a reporter is standing next to a building which suddenly and violently collapses, killing scores of people trapped inside. Suppose the reporter is the only one who saw the building collapse. Can she write a news story about this disaster, copyright it, and then prohibit others from writing about the event as well? The answer is no.

This point was established in an interesting case. In 1917 the *New York Tribune* published a copyrighted story about the first large-scale use of submarine warfare by the Germans in World War I. The New York paper sold the republication rights for the story to the *Chicago Daily News*. Before the *Daily News* could print the story, the *Chicago Record-Herald* printed its own version of the story. The initial paragraph of the *Herald* version began, "The *Tribune* this morning in a copyrighted article of Louis Durant Edwards, a correspondent in Germany, says that Germany to make the final effort against Great Britain has plunged 300 or more submersibles into the North Sea."

The remainder of the *Herald* story was comprised of five additional paragraphs, each of which was almost an exact duplication of a paragraph from the much longer *Tribune* story. The *Tribune* sued for infringement of copyright. The *Herald* answered by saying that a newspaper cannot copyright the news. Lawyers for the defendant argued that all the newspaper did was made use of facts which were in the public domain.

The circuit court of appeals agreed that as such news is not copyrightable. If the *Herald* story had been merely a summary or statement of the *Tribune* story, the *Tribune* would then have no case. However, the *Herald* did not stick to just a summary of the facts, but used parts of the article including the literary style and quality. The article itself, the way the words were organized, the style—the creative aspects of the report—can be (and in this

case were) protected by copyright. The court said (*Chicago Record-Herald* v. *Tribune Association,* 1921):

> This is plainly more than a mere chronicle of facts or news. It reveals a peculiar power of portrayal and a felicity of wording and phrasing, well calculated to seize and hold the interest of the reader, which is quite beyond and apart from the mere setting forth of facts. But if the whole of it were considered as stating news or facts, yet, the arrangement and manner of statement plainly discloses a distinct literary flavor and individuality of expression peculiar to the authorship, bringing the article clearly within the purview and protection of the copyright law.

The court ruled that the fact that the *Herald* gave the *Tribune* credit did not alleviate the theft. On the contrary, the court said, it might have conveyed to the public the incorrect idea that the *Herald* had got permission from the *Tribune* to use the story.

News cannot be copyrighted. But the style or manner of presentation can be protected. Consider the imaginary building-disaster story again. If reporter Jane Adams is the only one to witness the building collapse and publishes a copyrighted story about it, no one else can publish that story without permission. Other news media can report that Jane Adams reported in a copyrighted story that a building collapsed, killing many people. These news media can also summarize—note, summarize—the facts given by Adams in her story. This summary is not an infringement of copyright.

A case in Florida recently added an interesting dimension to the problem of facts and the law of copyright. Gene Miller, a Pulitizer-Prize-winning reporter for the *Miami Herald,* wrote a book entitled *83 Hours Till Dawn,* an account of the kidnapping of Barbara Mackle. Miller said he had spent more than 2,500 hours on the book, and many aspects of the kidnapping case were uncovered by the journalist and reported only in his book.

Universal Studios wanted to film a dramatization of the 1971 incident, but was unable to come to terms with Miller on payment for the rights. Through a series of errors and bad judgments, the studio produced the so-called docudrama anyway, and Miller sued for infringement of copyright. The similarities between Miller's book and the Universal script were striking—even some of the errors Miller had made in preparing the book were found in the film. But Universal argued that it was simply telling a story of a news event, and as such the research that Miller had done in digging out the facts regarding the story was not protected by copyright law. The United States Federal District Court agreed that facts are not copyrightable, but, "The court views the labor and expense of the research involved in the obtaining of those uncopyrightable facts to be intellectually distinct from those facts, and more similar to the expression of the facts than the facts themselves." The

judge ruled that it was necessary to reward the effort and ingenuity involved in giving expression to a fact and added (*Miller* v. *Universal Studios,* 1978):

> In the age of television "docudrama" to hold other than research is copyrightable is to violate the spirit of the copyright law and to provide to those persons and corporations lacking in requisite diligence and ingenuity a license to steal.

What the court seemed to say in *Miller* was that while a fact cannot be protected under the copyright statute the law will protect the labor and intellectual ingenuity requisite to assemble those facts. There is a danger of reading too much into the decision. It was a lower-court ruling. Also, the infringement by Universal was blatant.

Already the reasoning in *Miller* has been rejected by the Second United States Circuit Court of Appeals. In March 1980 that court ruled that Universal Studios did not infringe upon the copyright of author A. A. Hoehling, who wrote *Who Destroyed the Hindenberg?* when it produced a film on the 1937 airship disaster. In writing his opinion Chief Judge Irving Kaufman noted that "there is little consolation in relying on cases in other circuits holding that the fruits of original research are copyrightable." The jurist noted that the Second Circuit Court had in the past refused "to subscribe to the view that an author is absolutely precluded from saving time and effort by referring to and relying upon prior published material. . . . It is just such wasted effort that the proscription against the copyright of ideas and facts . . . are designed to prevent"(*Hoehling* v. *Universal Studios,* 1980). It is obvious that this question is far from settled, and as the so-called docudrama genre of motion pictures proliferates, more litigation will undoubtedly result.

Misappropriation

While this chapter focuses upon copyright, an ancillary area of the law needs to be briefly mentioned as it too guards against the theft of immaterial property. Misappropriation or unfair competition is sometimes invoked as an additional legal remedy in suits for copyright infringement. Unlike copyright, which springs largely from federal statute today, misappropriation or unfair competition remains a creature of the common law. One of the most important media-oriented misappropriation cases was decided by the Supreme Court more than sixty years ago and stemmed from a dispute between the Associated Press (AP) and the International News Service (INS), a rival press association owned by William Randolph Hearst. (INS merged with the United Press in 1958 and today represents the *I* in *UPI.*)

The Associated Press charged that the International News Service pirated its news, saying that INS bribed AP employees to gain access to news before it was sent to AP member newspapers. The press agency also charged that the Hearst wire service copied news from bulletin boards and early editions of newspapers which carried AP dispatches. Sometimes INS editors rewrote

the news, and other times they sent the news as written by AP. Copyright was not the question, because AP did not copyright its material. The agency said it couldn't copyright all its dispatches because there were too many and they had to be transmitted too fast. The International News Service argued that because the material was not copyrighted it was in the public domain and could be used by anyone.

Justice Mahlon Pitney wrote the opinion in the seven-to-one decision. He said there can be no property right in the news itself, the events, the happenings, which are publici juris, the common property of all, the history of the day. However, the jurist went on to say (*Associated Press* v. *International News Service,* 1918):

> Although we may and do assume that neither party [AP or INS] has any remaining property interest as against the public in uncopyrighted 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.

Pitney said there was a distinct difference between taking the news collected by AP and publishing it for use by readers and taking the news and transmitting that news for commercial use, in competition with the plaintiff. This action is unfair competition, he said—interference with the business of the AP precisely at the point where profit is to be reaped.

The decision in the *AP* case was based on the doctrine of unfair competition, or misappropriation. Courts have applied the doctrine in various instances of fraudulent or dishonest competitive business practices, but particularly in those instances where one seller attempts to substitute his own products for those of a well-known competitor by counterfeiting a trade name, package design, or trademark. For example, the owner of the Acme Motel remodels his building in the guise of a Holiday Inn, calls his remodeled creation Holiday Inn, and attempts to lure weary travelers into his establishment on the basis of the reputation of the real Holiday Inn. This practice is considered unfair competition. In *Associated Press* v. *International News Service* the Hearst wire service attempted to pass off Associated Press news as its own, and the court said the deception was unfair.

Another more recent case explores a different dimension of the problem. Orion Pictures bought the film rights to a French novel entitled $E=MC^2$ and prepared to make a film of the story entitled *A Little Romance.* Dell Publishing Company bought the translation rights to the same book and attempted to negotiate with Orion for a tie-in publicity campaign heralding the release of both the movie and the book. But Orion refused, claiming that the story had been changed so much in the film that it no longer resembled the book. Dell pushed on anyway and published the book using the movie title—*A Little Romance*—and the cover of book stated "Now A Major Motion Picture." The promotional material for the book emphasized the tie in with the film and was an attempt to boost sales of the book. Orion sued for unfair compe-

tition, arguing that the sale of the book could hurt the film. A federal judge agreed, noting that after he had read the book and seen the film he considered the motion picture to be substantially better than the novel. "It is the Court's belief that if one were to read the book first, the entertaining achievement of the film would not be anticipated." The court said that the Dell book, through its title and cover promotion, gives the impression that it is the "official novel" version of the film and therefore has similar content. This misleads the public and constitutes unfair competition (*Orion Pictures* v. *Dell Publishing,* 1979). The book company was attempting to trade on the name of the picture in promoting the book. This practice is illegal, even though the title of a film cannot be copyrighted.

COPYRIGHT PROTECTION

The most significant change in the 1976 Copyright Act is the substantial increase in the duration of copyright protection, as the discussion that follows will make plain.

Duration of Copyright Protection

Any work created after January 1, 1978, will be protected for the life of the creator, plus fifty years. This allows creators to enjoy the fruits of their labor until death and then allows the heirs to profit from the work of their fathers, mothers, sisters, or brothers for an additional one-half century. After fifty years the work goes into what is called public domain. At that point it may be copied by any person for any reason without the payment of royalty to the original owner.

Prior to 1978 works could be copyrighted for a term of twenty-eight years and then renewed for twenty-eight more years for a total of fifty-six years. The 1976 copyright revision prolongs the protection of works copyrighted before 1978 for a total of seventy-five years.

If the work is in its initial term of copyright, it is protected for the remainder of that term plus forty-seven years. That is, the owner of the copyright on a book which expires in 1985 can retain ownership of that book from the present time until 1985 plus forty-seven years. However, in order to gain this additional forty-seven years of protection, copyright holders must seek renewal as was required under the previous statute. Without renewal, copyright owners forfeit their ownership of the work, which will move into the public domain.

If the copyrighted work is in its renewal term—the second twenty-eight years under the old law—the work is protected for a total of seventy-five years. For example, a book which is in the fifteenth year of its second, or renewal, term has already been protected for one full term, twenty-eight years, and for fifteen years of the renewal term—a total of forty-three years. That book is protected for thirty-two more years from today, or a total of seventy-five years. No renewal request is needed.*

*Additional information concerning duration of copyright is available in circulars *R15A* and *R15T*, which are published by The Copyright Office, Library of Congress, Washington, D.C., 20559.

Limitations on Copyright Protection: Fair Use

Owners of a copyright are granted almost exclusive monopoly over the use of their creations. The word "almost" must be used, for there are really four limitations upon this monopoly. Three of the limitations have been discussed already. First, the work must be something that can be copyrighted. There can be no legal monopoly on the use of something that can't be protected by the law. Second, the monopoly only protects original authorship or creation. If the creation is not original, it cannot be protected. Third, copyright protection does not last forever. At some point the protection ceases and the work falls into the public domain.

The fourth limitation upon exclusive monopoly is broader than the other three and certainly more controversial. This is the doctrine of fair use, a provision of the copyright statute which permits limited copying of an original creation that has been properly copyrighted and has not yet fallen into the public domain.

Under previous copyright laws all copying of a copyrighted work was against the law. This absolute prohibition on copying constituted a hardship for scholars, critics, and teachers seeking to use small parts of copyrighted materials in their work. A judicial remedy for this problem was sought. It was argued that since the purpose of the original copyright statute was to promote art and science the copyright law should not be administered in such a way as to frustrate artists and scientists who publish scholarly materials. In 1879 the United States Supreme Court ruled in *Baker* v. *Selden:*

> The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the useful knowledge could not be used without incurring the guilt of piracy of the book.

The doctrine of fair use emerged from the courts, and under this judicial doctrine small amounts of copying were permitted so long as the publication of the material advanced science, the arts, criticism, and so forth.

The 1976 copyright law contains the common law doctrine of fair use. Section 107 of the new measure declares, "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research is not an infringement of copyright."

In determining whether the use of a particular work is a fair use, the statute says that courts should consider the following factors:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes
2. The nature of the copyrighted work
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole
4. The effect of the use upon the potential market for or value of the copyrighted work

These, then, are the factors that judges will take into account in determining whether a use is an infringement or a fair use. Fair use is perhaps the most confusing and complex part of the law, and the section of the law dealing with fair use became a major battleground for disputes between librarians and publishers. The librarians and other persons interested in photocopying of published works sought liberal rules under fair use. Publishers and copyright holders wanted tight rules against photocopying. The law seems to be a compromise, allowing for the photocopying of a single copy of a work for library use, but with several qualifications of the general rule.

Purpose and Character of Use

Interestingly, the fair use criteria included in the statute and just listed (1 through 4) on page 276 are very close to the criteria that courts used under the old common law fair use doctrine. This is no accident. In a report issued by committees in the House and the Senate on Section 107, the legislators said that the new law "endorses the purpose and general scope of the judicial doctrine of fair use," but did not intend that the law be frozen as it existed in 1976. "The courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."

Fair use is easiest to understand by looking at each of the four elements individually, as a judge would do in determining whether a particular use is a fair use. It is dangerous to assign relative weight to each of these elements, as in any given case a court may place more weight upon one than upon another because of the facts in the case, biases of the court, or any number of other reasons.

The purpose and charcter of the use—how the copyrighted material will be used—is very important. Courts look far more favorably upon noncommercial or nonprofit uses. The law specifically lists several categories of use which normally fall under fair use: criticism, comment, news reports, teaching, scholarship, and research. A book reviewer, for example, is clearly protected when quoting even long passages from a work being evaluated. A journalist could undoubtedly publish one or two stanzas from a poem by a poet named winner of a Pulitzer Prize. Yet if a poster publisher took the same two stanzas of poetry, printed them in large type on eleven-by-fourteen stock, and tried to sell them for $2.50 each, the publisher would be guilty of an infringement of copyright. The purpose of the use in the case of the journalist was to give readers an example of the poet's work, but the poster publisher simply wanted to make a few bucks.

Another dimension of purpose or character focuses upon the material itself and the public interest. In 1966 the Second Circuit Court of Appeals erected the public interest dimension of fair use in a complex copyright suit involving America's best-known recluse, the late Howard Hughes. Random

House planned to publish a biography of Hughes in which a series of articles about Hughes in *Look* magazine were quoted rather extensively. When he learned of the Random House project, Hughes, who manifested almost a compulsion about his privacy, formed a corporation called Rosemont which bought the rights to the *Look* magazine story. Rosemont then sued Random House for using material from the series. All these events took place even before the book was published.

Judge Lumbard ruled in favor of Random House, noting that the purpose of the copyright laws was not to stop dissemination of information about publicity-shy public figures. It would be contrary to the public interest, he said, to allow a man to buy up the rights to anything written about him to stop authors from using the material. Lumbard said that at least the spirit of the First Amendment applied to the copyright laws, and that the courts should not tolerate the use of the copyright laws to interfere with the public's right to be informed regarding matters of general interest. Rosemont (Hughes) protested that such copying might be appropriate if the work in question were a scholarly biography of Hughes, but that the Random House venture was commercial. Judge Lumbard said this fact was immaterial (*Rosemont* v. *Random House*, 1966):

> Whether an author or publisher reaps economic benefits from the sale of a biographical work, or whether its publication is motivated in part by desire for commercial gain, or whether it is designed for the popular market, i.e., the average citizen rather than the college professor, has no bearing on whether a public benefit may be derived from such a work. . . . Thus, we conclude that 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.

The decision in *Rosemont* represented a bold new step forward in copyright law, a step which many authorities felt was long overdue. On its face the case could not have been equitably decided any other way. Hughes's attempt to buy up his own life story was so patently obvious that the entire suit was really a farce—a mild diversion for the idle rich. Many persons asked, Will the public interest ruling stand?

Two years later a federal district court in New York used the standard to allow the copying of several frames of very famous motion-picture film. An amateur photographer named Abraham Zapruder happened to be filming President John F. Kennedy when he was shot by an assassin in Dallas in 1963. The film is crude, but is the only film available. *Life* magazine bought the rights to the film from Zapruder for $15,000 with the stipulation that the magazine would allow government agencies to use it in connection with investigation of the president's death. *Life* had a tendency to buy the rights to important events, for example, signing contracts with all the astronauts for

exclusive stories. The Zapruder film became (and remains) a central piece of evidence in the death of John Kennedy, and many persons who believe that the Warren Commission was wrong, that there was a conspiracy, that there was more than one gunman, use the Zapruder film to attempt to prove their thesis. In this case the defendant wanted to publish several frames of the film in his book proposing a multiassassin theory. When *Life* refused permission to use the film, the author used the frames anyway. Was this fair use?

Life said no, but the court disagreed. The judge said that there was little damage to the magazine as a result of publication of the pictures, that customers purchased the book because of its thesis, not because of its pictures, and that without the photographs the author's thesis was at best difficult to explain. "There is a public interest in having the fullest information available on the murder of President Kennedy. Thompson [the author] did serious work on the subject and had a theory entitled to public consideration." The public interest won out over the magazine's property rights (*Time, Inc.* v. *Bernard Geis Associates*, 1968).

In 1978 a federal district court in Florida went one step further and identified the public interest component as freedom of expression. The Knight-Ridder Newspapers developed a television program supplement for the *Miami Herald* that contained television schedules, articles on performers, and so forth. In its advertising for the news program guide, Knight-Ridder compared its new magazine to *TV Guide*. The advertisements named *TV Guide* and even included a photograph of an issue of *TV Guide*. Triangle Publications argued that since each issue of *TV Guide* is fully copyrighted, the inclusion of the name of the publication and a picture of it in the advertisement is an infringement of the copyright. The court rejected this argument, noting that to construe the copyright law in such a way would be to cause it to infringe upon the guarantees of the First Amendment. The court said that the kind of comparative advertising that provoked the lawsuit was in harmony with the fundamental objectives of free speech and free enterprise in a free society (*Triangle Publications* v. *Knight-Ridder Newspapers, Inc.*, 1978). The purpose and character of the use of the copyrighted material are important considerations in determining whether something is a fair use.

Nature of Copyrighted Work

When the nature of the copyrighted work is considered, at least two important considerations of the protected work must be made. First, is the work still available? If a copyrighted book is out of print, unavailable for purchase, the user may have more justification for copying a portion of it than if it is readily available. The lack of the availability of the work cannot be used as an excuse for copying a work which has never been formally published. Second, what kind of work is it? Copying consumable materials like workbooks, exercise

books, standardized tests, and so forth, is rarely if ever a fair use. If such materials could be copied freely, only a single workbook, for example, would ever have to be purchased. Copies could be made continuously, and the author would be deprived of justly earned royalties. The use of materials from publications like newspapers, news magazines, and reference books is less likely to be an infringement. Use of materials from these sorts of works is rarely harmful to the publisher—unless the copying is a persistent occurrence.

Amount of a Work Used

The amount and the substantiality of the portion used in relation to the copyrighted work as a whole—as stated—is a relative standard. Word counts, for example, don't mean very much. The use of 500 words from a 450-page book is far less damaging than the use of 3 lines from a 5-line poem. The question is always how much was used in comparison to the total size of the work. A court of appeals ruled that a novelist who copied 24 passages from a biography of the life of Hans Christian Andersen exceeded fair use. The passages were translations of Danish documents, and while the documents were in the public domain, the biographer had translated them into English. While 24 passages doesn't sound like very much, the court ruled that the defendant, who used the material in a novel based upon the life of Andersen, appropriated too much material to be considered a fair use. By using the fruits of the biographer's work, the translation of the Danish documents, the novelist was able to finish her work in far less time. She got much value from the plaintiff's work (*Toksvig* v. *Bruce Publishing Co.*, 1950).

It was the massive appropriation of copyrighted films that resulted in a successful suit for infringement against an educational services board in Erie County, New York. The educational board was sued by three corporations, including the Encyclopaedia Britannica, which made, acquired, and leased educational films. The defendant in the case rented films from various companies and then made videotapes of them for future use by the schools. Films broadcast on television were also videotaped for classroom use. Despite the nonprofit nature of the use of these materials, the court ruled that such activity was not a fair use. An important factor in the court's decision was that the educational services board used from five to eight full-time employees to do the copying and had made as many as ten thousand tapes per year since 1966. This was high-volume copying, and the court ruled it was not a fair use (*Encyclopaedia Britannica* v. *Crocks*, 1977).

It is important to remember that the amount of material which may be fairly copied is not an absolute, but is always relative to the size of the total work from which the material is taken.

Effect of Use on Market

The effect of the use upon the potential market for or value of the copyrighted work is the fourth criterion. While a cautionary note has been sounded against assigning relative weight to the four criteria, this final one—harm to the plaintiff—is probably given greater weight by most courts than any of the

other three. In a Congressional Committee report on the 1976 law, the legislators noted that "with certain special exceptions . . . a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement." There is a considerable amount of both pre-1976 and post-1976 case law which focuses upon this point.

A group of song writers once sued *Mad* magazine for publishing parody song lyrics of their compositions. The publication appeared in the special bonus to the *Fourth Annual Edition of Mad* and was described by the magazine as "a collection of parody lyrics to fifty-seven old standards which reflect the idiotic world in which we live." The parody lyrics were written in the meter of the original songs and were to be sung to the melody of the standard versions. The parody lyrics to the song "The Last Time I Saw Paris" concerned a sports hero turned television pitchman, and the song was called "The First Time I Saw Maris." A song about a woman hypochondriac was sung to the tune of "A Pretty Girl is Like a Melody" and was called "Louella Schwartz Describes her Malady."

The judge asked, "How were the songwriters hurt?" In a negligible way, the court concluded. The parody of lyrics was not a theft. They were not about the same topic and did not have the same rhyme scheme. The parody lyrics were in the same meter as the original lyrics, which was necessary if the original songs were to be recognized and the lyrics were to fit the melodies. "We doubt," the court added, "that even so eminent a composer as plaintiff Irving Berlin should be permitted to claim a property interest in the iambic pentameter." The use by *Mad* of the song titles and references to their melodies was fair use the court ruled (*Berlin* v. *E. C. Publications, Inc.*, 1964).

In 1977 a federal district court refused to grant a temporary order enjoining the publication of a cumulative 111-year name index of the 111 annually issued volumes of the *New York Times Index*. The *Times* index is organized alphabetically within each annual volume. The *Roxbury Index* of the annual *New York Times Indexes* was to be organized alphabetically over the 111 years from 1863 to 1974. The index of the *Times* index would be of great benefit to researchers. For example, using only the *New York Times Index* for material on Charles Evans Hughes, a researcher would have to look in more than 40 annual volumes spanning the late Chief Justice's life. But with the *Roxbury Index*, a researcher would need only to look in a single volume under Hughes's name for all the references during the 45-year period. While this would be a great boon to researchers, there was no question that by its very nature the *Roxbury Index* included much material copied from the copyrighted *New York Times Index*. The court ruled, however, that the effect of the personal-name index on the market for the *New York Times Index* appeared "slight or nonexistent." As a matter of fact, persons could not use the *Roxbury Index* without also using the *New York Times Index*,

so rather than being in competition with the annual index, the cumulative name index enhanced the value of the *New York Times* publication (*New York Times* v. *Roxbury Data Interface,* 1977).

Finally, a United States District Court in California ruled that off-the-air home videotaping of television programs was a fair use of material copyrighted by Universal City Studios and Walt Disney Productions. There was no question that persons with the videotape recorders were taping entire programs, but the court ruled that this was a fair use because it did not reduce the market for the plaintiffs' work. The production companies had argued that owners of videotape recorders would watch the playback of previous programs rather than newly broadcast programs, and that persons would watch recorded playbacks instead of telecasts of reruns. In both ways, the plaintiffs argued, they would be harmed. But Judge Ferguson remained unpersuaded. "Most of the plaintiffs' predictions of harm hinge on speculation about audience viewing patterns and ratings, a measurement system which Sidney Sheinberg, MCA's president, calls a 'black art' because of the significant levels of imprecision involved in the calculations." Judge Ferguson added that not even the likelihood of harm had been established, and therefore the off-the-air recording was a fair use. (*Universal City Studios* v. *Sony,* 1979).

Fair use is the essential defense in a copyright infringement suit. Its judicious use will protect most scholars and journalists who honestly and fairly attempt to communicate the essence of copyrighted works to readers and viewers for the purposes of enlightenment and education. Its value as a defense is in direct proportion to the extent of impact upon the potential market for the copyrighted material.

HOW TO COPYRIGHT A WORK

In order for a work to be protected under the copyright law, it must contain what is called a copyright notice. The new law specifically prescribes the kind of notice required and states that it consists of three parts.

Proper Notice

The first part of the notice contains the word *Copyright,* or the abbreviation *Copr.,* and the symbol © (the letter *C* within a circle). The second part gives the year of publication. For periodicals the date supplied is the date of publication. For books the date is the year in which the book is first offered for sale (e.g., a book printed in November or December 1981 to go on sale January 1982 should carry a 1982 copyright). The third part gives the name of the copyright holder or owner. Most authorities recommend that both the word *Copyright* and the symbol © be used, since the use of the symbol is required to meet the standards of the international copyright agreements. The symbol © protects the work from piracy in most foreign countries. A copyright notice should look something like this:

Copyright © 1982 by Jane Adams

The courts will be very strict with regard to the composition of the notice. Any old notice will not do. For example, a notice saying, "this book was written by Jane Adams and is her property until 2005" will not qualify as proper notice. The new statute is virtually identical with previous statutes in prescribing the composition of the notice. In 1903 the Supreme Court ruled that since the statute states a specific way to give the reader proper notice that is what the courts will demand. "In determining whether a notice of copyright is misleading, we are not bound to look beyond the face of the notice, and inquire whether under the facts of the particular case it is reasonable to suppose an intelligent person could actually have been misled" (*Mifflin* v. *H. H. White*, 1903).

However, the new statute made significant changes with regard to the failure of an author to put the required notice on a copy of the work. Previously, if copyright notice was not put on a publication, the work was for all practical purposes lost forever. Years ago, for example, Oliver Wendell Holmes (the father of the great Supreme Court justice) published twelve installments of a serial entitled "The Autocrat of the Breakfast Table" in the *Atlantic* magazine. The magazine was not copyrighted, and the story was not copyrighted. About a year later Holmes brought out a book version of the serial which he also called *The Autocrat of the Breakfast Table* and which he properly copyrighted. Several years later another publisher printed copies of the work, but taken word for word from the version published in the *Atlantic*. Holmes sued on the grounds that the book was copyrighted. The Supreme Court of the United States agreed that the book was copyrighted, but since the original serialized version published in the *Atlantic* was not copyrighted, the author forfeited ownership of that version and it fell into the public domain (*Holmes* v. *Hurst*, 1899).

Also under the old law, the notice had to be in a specific place, and if it wasn't, the copyright protection was lost. Congress was more liberal in 1976. In the first place, under current law the notice may be placed anywhere that it "can be visually perceived." The Copyright Office of the Library of Congress has issued rules which implement the statutory description that the notice be visually perceptible. For example, the rules list eight different places where copyright notice might be put in a book, including the title page, the page immediately following the title page, either side of the front cover, and so forth. For photographs, a copyright notice label can be affixed to the back or front of a picture or on any mounting or framing to which the photographs are *permanently* attached.*

The 1976 copyright law also provides that omission of the proper notice does not destroy copyright protection for the work if the notice is omitted

*Additional information is available in the bulletin *Methods of Affixation and Position of The Copyright*, published by The Copyright Office, and in the *Federal Register*, vol. 42, no. 247, for 23 December 1977, pp. 64374-78.

from only a relatively small number of copies, if an effort is made within five years to correct the omission, or if the notice is omitted in violation of the copyright holder's express requirement that as a condition of publication the work carry a copyright notice.

At the same time the law protects persons who copy a work on which the copyright notice was inadvertently omitted. Such an innocent infringer incurs no liability—cannot be sued—unless this infringement continues beyond the time notice is received that the work has been copyrighted.

Registration

Proper notice is the only requirement that an author must fulfill to copyright a work. The work is then protected from the moment of creation for the life of the author plus fifty years. However, before a copyright holder can sue for infringement under the law, the copyrighted work must be registered with the federal government. The law specifically says that registration, the deposit of two complete copies of the work with the United States Register of Copyrights plus the payment of a $10 fee for most works, is required prior to institution of an infringement suit. Also, the law provides that the Register of Copyrights can require a copyright holder to make this deposit. Failure to comply can result in a fine.

Certainly for all published works, it is best to get into the habit of registering a work as soon as the work comes off the presses or is broadcast. This practice can save an immense hassle later should an infringement occur.

The requirement of notice is a very important one. It allows all the works which no one wants to copyright to fall into the public domain immediately. It also tells the reader whether a work is copyrighted, was ever copyrighted, or is still copyrighted. It also identifies the owner of the work and the date of publication. The change in the law which protects authors who accidently forget to include a copyright notice on their works is healthy and worthwhile. But writers and broadcasters should get into the habit of putting the notice on all material which they believe to be valuable, whether it is published or not.

COPYRIGHT INFRINGEMENT

It is important for authors to know how to protect their own work. It is equally important to know how to avoid being sued for stealing someone else's copyrighted material. Such theft does not always result in a successful suit or even in a suit at all. Many times the owner of the copyrighted matter is unaware of the theft. Other times the harm to the copyright holder is insignificant. In copyright, as in other areas of mass media law, who you are is often more important than what you stole. For example, if the *East Ames Morning Dispatch and World Advertiser* publishes in its entertainment section, without permission, one complete act of a Neil Simon play, the newspaper might get a nasty letter from Simon's attorney, but probably not much more. But if the

American Broadcasting Company presents the same act on one of its shows, it will surely get slapped with a copyright suit. Publication of the play in a small newspaper hasn't harmed the playwright significantly, and in addition the paper probably doesn't have much money. But presentation of even a single act of the play on ABC can diminish Simon's future royalties since it would probably lessen the number of future stage productions of the play.

The United States copyright statute does not really define infringement. The law states that anyone who violates any of the "exclusive rights" of the copyright holder is an infringer of the copyright. That statement is of little help to courts attempting to determine whether an infringement has taken place. Consequently, it is expected that the courts will continue to rely upon the definition of infringement forged during the past one hundred fifty years. Most judges who seek to determine whether a copyright has been infringed upon look to four separate elements, or criteria. Normally, all four must be proved before plaintiffs can win a suit. The four elements are originality, access, copying, and substantial similarity. Copying and substantial similarity are quite alike and in some instances are considered a single element.

Originality

If a defendant in a copyright suit can demonstrate to the court that his work, supposedly an infringement, is substantially an original work, he might succeed in stopping the infringement suit. On the other hand the plaintiff will seek to prove that the work in question is not really original, that the new material is not really a new work, that the additions by the infringer are really only trivial additions. In other words, if the pirate takes a copyrighted work and makes only trivial changes, the work is not original. The bulk of the work must be original. In 1921 a suit resulted when the publisher of a directory of jewelers sued another publisher for what he claimed was copyright infringement. The defendant in the case published a similar directory. Both directories, in addition to carrying names and addresses of jewelers, contained photographs of the jewelers' trademarks. The plaintiff prepared the photographs. The defendant clipped the pictures from the plaintiff's directory, sent them to the various jewelers, asked if the pictures were accurate representations of the trademarks, and then republished the plaintiff's pictures when the jewelers gave their approval. In a few instances jewelers sent new pictures for use in the directory. The court ruled that in this case the defendant's work was not original enough, that he was bound to make independent pictures of the trademarks, not merely obtain the jewelers' approval to use the plaintiff's photographs. The addition of a few new pictures was really only a trivial change (*Jeweler's Circular Publishing Co.* v. *Keystone Publishing Co.*, 1921).

Access

The second dimension of an infringement suit is access: the plaintiff must convince the court that the defendant had access to the copyrighted work. An opportunity to copy has to exist. If plaintiffs cannot prove that the so-called literary pirate had a chance to see and read the work, they are hard pressed

to prove piracy. As Judge Learned Hand once wrote (*Sheldon* v. *Metro-Goldwyn-Mayer Pictures,* 1939):

> . . . if by some magic a man who had never known it were to compose anew Keats's, "Ode on a Grecian Urn," he would be an 'author' and if he copyrighted it, others might not copy that poem, though they might of course copy Keats's.

Here in contemporary terms is what Judge Hand said. If through some incredible coincidence a young composer were to write and publish a song called "Alfie" which was an exact duplicate of the song by Burt Bacharach and Hal David, it would not be an infringement of copyright. Publishing a song exactly like a copyrighted song is not infringement; copying a copyrighted song is infringement. Moreover, if the young composer could prove that he had lived in a cave since birth, had never listened to the radio or records, and had never watched television or gone to the movies, and if Bacharach and David could not prove that the defendant had had access to "Alfie," they would lose their suit. It must be obvious that such a coincidence can never occur, but this illustration nevertheless makes the point. The *plaintiff* must prove access to the stolen work. The smaller the circulation of the copyrighted matter, the harder it is to prove access.

Copying

Copying is really the other side of the originality coin. When looking at the first element, the court will ask, Did the defendant do his own work? In evaluating the element of copying the court will ask, Did the defendant copy the plaintiff's work? Copying has many aspects and is perhaps the hardest of the elements to deal with. If the defendant's work is a word-for-word replica of the plaintiff's work, copying is highly probable. Such cases are rare. More typical are cases like one which occurred in the 1940s when the publication *Racing News* sued a New England newspaper for stealing its handicapping information. The *Racing News* is the bible of the fans of thoroughbred racing and publishes daily comprehensive data on horses running at tracks around the nation. Newspapers usually publish smaller amounts of information on horses running in a few well-known races or at local tracks. The *Racing News* contended that the defendant newspaper took its published material on the past performances of horses, rewrote it, and published the information as its own. The newspaper argued that while it did use material from the *Racing News* it used other information as well and that it rewrote all material that it published. Does paraphrasing a copyrighted work protect one from an infringement suit? Not at all, the court said. District Judge Wyzanski ruled that copying need not be ipsissma verba, that material stated in equivalent words is also infringement. "*Soule's Dictionary of English Synonyms* is not a licensed sanctuary for literary pirates," he added (*Triangle Publishing Co.* v. *New England Newspaper Publishing,* 1942).

In a more recent case a group aptly named Air Pirates copied Walt Disney characters for posters and T-shirts. Instead of portraying Mickey and Donald and Pluto and the gang as their lovable Disney selves, the company translated the characters into what the court called "awful characters." Changing the nature of the character did not excuse the infringement, the court said (*Walt Disney Productions* v. *Air Pirates,* 1972). Disney still owned the characters. Changing the medium doesn't work either. A toy manufacturer cannot make a plastic doll in the likeness of a comic strip character without first getting permission of the copyright owner of the comic character.

Copying was an important aspect of Margaret Alexander's infringement suit against author Alex Haley. The plaintiff claimed that Haley had copied portions of her novel *Jubilee* and her pamphlet *How I Wrote Jubilee* when writing his successful novel *Roots*. The court ruled in Haley's favor, noting that much of what the plaintiff claimed Haley had copied was material based on history—the westward movement in the United States, for example—and material that was in the public domain, such as folk customs which are an embodiment of black culture. "Where common sources exist for the alleged similarities, or the material that is similar is not original with the plaintiff, there is no infringement," the court ruled. Similarly, the court rejected the argument that Haley had copied Alexander's work when he used cliché language. "Words and metaphors are not subject to copyright protection; nor are phrases and expressions conveying an idea that can be, or is typically, expressed in a limited number of stereotyped fashions," noted the judge, citing the phrase "poor white trash" as an example of such an expression. In its ruling the court said that while certain conventional material appeared in both books, the material was not original with Alexander's works, but belonged more generally to the nation's history or its idiomatic expressions. As such, illegal "copying" from the plaintiff had not occurred (*Alexander* v. *Haley,* 1978).

Substantial Similarity

Substantial similarity is the fourth element. Often this is the most troublesome element, for while an idea cannot be copyrighted, the pattern or the action of a story can be copyrighted. To determine similarity the courts must look at each work separately, determine the story or pattern, and then compare the two works. More than just minor similarities must be present: the two works must be substantially alike. In *Folsom* v. *Marsh*, a very old copyright case involving the letters and documents of President George Washington, Justice Story wrote, "If enough is taken to diminish the value of the original or the labors of the original author are substantially appropriated," piracy occurs (*Folsom* v. *Marsh,* 1841). In a more recent statement of the same theme, the United States Ninth Court of Appeals said that the evaluation was "not an analytic or other comparison" of the works, but rather "whether defendant took from plaintiff's works so much of what is pleasing to the audience that

the defendant wrongfully appropriated something which belongs to the plaintiff" (*Sid and Marty Krofft Television Productions* v. *McDonald's Corp.*, 1977).

Two recent cases are instructive on this point. Artist Albert Gilbert painted a picture of two cardinals on an apple tree branch for the National Wildlife Art Exchange. Three years later he painted a picture of two cardinals on an apple tree branch for the Franklin Mint. National Wildlife Art Exchange, which held copyright to the first drawing, sued Franklin Mint for infringement. The United States Court of Appeals for the Third Circuit found similarities in the two pictures. Both contained two cardinals, one male and one female, in profile on apple tree branches in blossom. But there were differences as well. The male bird was on the top in one picture and on the bottom in the other; in one the male was calm; in the other, he appeared aggressive. There was a large yellow butterfly in one; there was no butterfly in the other. The idea in both pictures was similar, the court ruled. But copyright does not protect thematic concepts. The expression of this concept—two cardinals on the branches of an apple tree—was different. "A pattern of differences is sufficient to establish a diversity of expression rather than only an echo . . . ," the court noted. The fact that the same subject matter may be present in two paintings—or in stories or plays for that matter—does not prove similarity and infringement of copyright (*Franklin Mint* v. *National Wildlife Art Exchange*, 1978).

The United States District Court for Southern New York State came to a similar conclusion when David Musto sued Nicholas Meyer, the author of *The Seven-Per-Cent Solution*, for copyright infringement. Musto had written an article for the *Journal of the American Medical Association* in 1968 which was a brief history of the use of cocaine in Europe in the nineteenth century. Musto suggested the Sherlock Holmes might have been a heavy user of cocaine and that his addiction might have led him to believe that Professor Moriarity, the master criminal, was after him. Musto suggested that Holmes might have sought therapy from Sigmund Freud for his addiction.

Meyer's book tells a similar story, but the federal court ruled there had not been a copyright infringement. At most, the plaintiff could prove that Meyer had copied the idea that Holmes was addicted to cocaine and that his addiction was cured by Freud. Musto's tongue-and-cheek article was prepared for a professional journal to inform readers on cocaine use in the nineteenth century. Meyer's novel was written as a revised version of an earlier story with the view toward capturing the imagination of Holmes's followers. In addition to differences in the objective of the two works, differences in the fashioning of the plot, the delineation of characters, and the literary skill were also apparent. "Since ideas and basic plots, or even isolated incidents, are not protected by the copyright laws, it would appear that Musto's claim must fail," the court ruled (*Musto* v. *Meyer*, 1977).

It is not easy to prove infringement of copyright; yet surprisingly, a large number of suits are settled each year in favor of plaintiffs. In such instances the obvious theft of the material would generally appall an honest person. An individual who works to be creative in fashioning a story or a play or a piece of art usually has little to fear. The best and simplest way to avoid a suit for infringement is simply to do your own work, to be original.

FREE-LANCING AND COPYRIGHT

What rights does a free-lance jounalist or author or photographer hold in regard to stories or pictures that are sold to publishers? The writer or photographer is the creator of the work; he or she owns the story or the photograph. Consequently, as many rights as such free-lancers choose to relinquish can be sold or given to a publisher. Beginning writers and photographers often don't have much choice but to follow the policy of the book or magazine publisher. Authors whose works are in demand, however, can retain most rights to the material for their future benefit. Most publishers have established policies on exactly what rights they purchase when they decide to buy a story or photograph or drawing. *The Writer's Market* is the best reference guide for the free-lancer. Here are some of the rights that publishers might buy:

1. All rights: The creator sells complete ownership of the story or photograph.
2. First serial rights: The buyer has the right to use the piece of writing or picture for the first time in a periodical published anywhere in the world. But the publisher can use it only once, and then the creator can sell it to someone else.
3. First North American serial rights: The rights are the same as provided in number 2, except the publisher buys the right to publish the material first in North America, not anywhere in the world.
4. Simultaneous rights: The publisher buys the right to print the material at the same time other periodicals print the material. All the publishers, however, must be aware that simultaneous publication will occur.
5. One-time rights: The publisher purchases the right to use a piece just one time, and there is no guarantee that it has not been published elsewhere first.

It is a common practice for publishers to buy all rights to a story or photograph, but agree to reassign the rights to the creator after publication. In such cases the burden of initiating the reassignment rests with the writer or photographer, who must request reassignment immediately following publication. The publisher signs a transfer of rights to the creator, and the creator should record this transfer of rights with the Copyright Office within two or three weeks. When this transaction has taken place, the creator can then resell

the material. A $10 fee must accompany either the original form or a certified copy of the transfer form when it is sent to the Register of Copyrights.

What if no agreement between the publisher and the writer or photographer is made? Neither the publisher nor the creator of the work should really be this careless, but if they are, it is generally presumed the publisher has purchased the following rights:

1. The right to use the material in that particular publication (an issue of *Sports Illustrated,* for example)
2. The use of the material in a collection of works from the publication (a book entitled *The Best Stories from Sports Illustrated,* for example)
3. Any revisions of the collection of works noted above (a second or third or fourth revision of *The Best Stories from Sports Illustrated,* for example)
4. The right to run the material again in a later issue of the same magazine or periodical

It is obvious that the creator gives away a considerable amount by not taking the time to ensure that his or her rights are protected. It is best for the writer or photographer to specifically stipulate what rights are being offered in the query letter to the publisher regarding the story or photograph. For example, the author might tell the publisher that "one-time North American rights" are being offered. In the absence of a subsequent formal or specific agreement, the existence of such an offer in the query letter could materially aid the writer or photographer in establishing the future ownership of the story or photograph. Free-lancers are also urged to beware of endorsements on payment checks from publishers. It is not uncommon for a publisher to include a statement on a royalty check to the effect that "the endorsement of this check constitutes a grant of reprint rights to the publisher." In order to cash the check, the writer must agree to grant the reprint rights. In such cases writers should quickly notify the publisher that such an agreement is unacceptable and demand immediate payment for the single use of the story. Other pitfalls too numerous to mention await the inexperienced free-lancer. The best advice is to understand exactly what you are doing at all times during the negotiation of rights. Take nothing for granted; just because you are honest and ethical doesn't mean everyone else is. And if questions come up, consult a qualified attorney. Legal advice is costly, but it can save a writer or photographer money in the long run.

COPYRIGHT AND CABLE TELEVISION

One of the knottiest copyright problems of this century was solved with the passage of the 1976 copyright law. The problem concerned whether cable television operators are infringing upon copyrights when they transmit to subscribers the programs broadcast by over-the-air telecasters. A television station must pay royalties to the copyright holder when it broadcasts a film,

for example. The cable companies were not paying such royalties, and in both 1968 and 1974 the Supreme Court ruled that the cable companies did not have to make such payments for relaying the broadcast of such films to subscribers via cable. The court ruled that such relay of television signals was not broadcasting or performing in terms of the copyright laws. However, the 1976 Copyright Act established that henceforth cable television operators must pay a royalty fee for the programs carried on their systems. The fee is computed on the basis of both the number of cable subscribers and the income earned by the cable companies. The fee is established and adjusted by the Copyright Royalty Tribunal, an agency also established by the 1976 law.*

DAMAGES

Plaintiffs in a copyright suit can ask the court to assess the defendant for any damage they have suffered, plus the profits made by the infringer from pirating the protected work. Damages can be a little bit or a lot. In each case the plaintiff must prove to the court the amount of the loss or of the defendant's profit. But, rather than prove actual damage, the plaintiff can ask the court to assess what are called statutory damages, or damage amounts prescribed by the statute. The smallest statutory award is $250, although in the case of an innocent infringement the court may use its discretion and lower the damage amount to $100. The highest statutory award is $10,000. However, if the plaintiff can prove that the infringement was committed willfully, the maximum damage award can be as much as $50,000.

In addition the courts have other powers in a copyright suit. A judge can restrain a defendant from continued infringement, can impound the material which contains the infringement, and can order the destruction of these works. Impoundment and destruction are rare today.

A defendant might also be charged with a criminal offense in a copyright infringement case. If the defendant infringed upon a copyright "willfully and for purposes of commercial advantage or private financial gain," he could be fined up to $10,000 and jailed for not more than one year. The fines for pirating phonograph records and motion pictures are much higher: $25,000 and one year in jail for the first offense and $50,000 and up to two years in jail for subsequent offenses. Criminal actions for copyright infringement are rare today.

COPYRIGHT AND THE PRESS

The law of copyright is not difficult to understand and should not be a threat to most creative persons in the mass media. The law simply says to do your own work and not to steal from the work of other persons. Some authorities argue that copyright is an infringement upon freedom of the press. In a small

*A comprehensive survey of these rules is available in the *Federal Register*, vol. 43, no. 127, for 27 June 1978, pp. 27824–35.

way it probably is. Nevertheless most writers, most authors, and most newsmen—persons who most often take advantage of freedom of the press—support copyright laws which protect their rights to property which they create. Judge Jerome Frank once attempted to explain this apparent contradiction by arguing that we are adept at concealing from ourselves the fact that we maintain and support "side by side as it were, beliefs which are inherently incompatible." Frank suggested that we keep these separate antagonistic beliefs in separate "logic-tight compartments."

The courts have recognized the needs of society as well as the needs of authors and have hence allowed considerable latitude for copying material which serves some public function. Because of this attitude, copyright law has little, or should have little, impact upon the information-oriented mass media. No new law changes this situation.

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7 Contempt

The work of a reporter can hardly be called hazardous when compared with the work of a test pilot, a race driver, or a structural steelworker. Still, there are times when a journalist faces a special occupational peril—a term in jail. The jail sentence is the result of a contempt citation. Such citations are normally issued by judges, but can also be issued by legislatures and the Congress. While a term in jail is not a common experience for journalists, it happens often enough to remind us of the awesome nature of the contempt power.

Reporters and broadcasters can find themselves in contempt of court for numerous reasons. If a judge finds that an article published in a newspaper interferes with the administration of justice by demeaning the court or impugning the character of a judge, a contempt citation might be issued against the author of the piece Or perhaps the court has ordered the press to refrain from publishing details about a murder which is the subject of a pending criminal trial. Violation of this order might result in a contempt citation for the editor and reporter. Reporters who refuse to reveal the name of a confidential source in a criminal trial or before a grand jury can be found in contempt of court, as was noted in chapter 3 (pages 91–108). In each case the reporter who is found in contempt can be fined and/or jailed, depending upon the circumstances in the case and the orneriness of the judge.

The application of the law of contempt against reporters and others stems directly from the extraordinary power of judges. A mayor might have a reporter tossed out of her office if the journalist gets nasty or belligerent; a city council might simply go into executive session; but an angry judge has the power to put a journalist or anyone else in jail. Reporters disciplined by an angry jurist have probably not faced such absolute authority since confronting

their mother as a small child or their drill sergeant in the army. To understand the contempt power it is necessary to understand its history. That is the place to begin.

In 1631 in England a British subject was convicted of a felony, not a very uncommon event. This particular subject was angered at being found guilty, and after the sentence was read he threw a brickbat at the judge. The brickbat missed the judge, but the man was quickly seized, his right hand was cut off and nailed to the gallows, and he was immediately hanged in the presence of the court (this story is recounted by Ronald Goldfarb in *The Contempt Power*).

While such judicial retribution is an uncommon exercise of the contempt power, it nevertheless is a representative example of the power of judges to control what goes on their courtrooms. Even as the end of the twentieth century approaches, disobedience or disrespect of the court is normally put down swiftly by exercise of the power of contempt. Any act which interferes with the orderly processes of justice is usually promptly stopped and the offender is quickly punished. While other governmental bodies (legislative bodies, for example) can use the contempt power, its use by judges, which is the subject of this chapter, is far more common today.

Doesn't it seem odd in what are supposedly representative democracies like the United States and Great Britain, countries in which the guarantee of civil liberties has long been part of the national heritage, that a single individual like a judge can wield such awesome power? The answer to that question is yes. But supporters of the contempt power point out that it is a necessary tool for judges to have to ensure the orderly function of the courts. Courts are an indispensable part of our governmental system. The courts make freedom of the press, freedom of speech, freedom of religion, and other civil liberties meaningful rights by protecting these constitutional guarantees. If the court system is impeded in some way, if judges are waylaid in their trek toward justice, society then suffers.

Even this rationale does not explain why judges and justices retain such extraordinary powers, powers which include summary punishment, when justice is stripped of many of the basic constitutional guarantees which the courts are supposed to protect. Nor does this rationale explain why supposedly intelligent men can believe that our court system, or any court system, can be infallible and should be free from citizen scrutiny and comment. The answers to these questions are, once again, found in the past.

In 1927 British legal scholar John Fox wrote in the *History of Contempt of Court*, "Rules for preserving discipline . . . came into existence with the law itself, and contempt of court has been a recognized phase of English law from the twelfth century to the present time." Order has always been essential to the administration of justice. Courts, after all, are where rational decision

making must prevail. Yet the contempt power is peculiar to the common law nations. Judges in France or Holland or Italy do not enjoy such extraordinary latitude in dealing with disturbance, disobedience, and disrespect. The common law judges were able to assume such power because the first common law judge was the king himself. He was the administrator of justice. As Ronald Goldfarb points out in his important study of the contempt power, the people revered the king. Goldfarb writes, "This was but another, though not different, step from the sanctity of the medicine man, the priestly character of primitive royalty, and the Christian concepts of obedience." This legal scholar adds that the contempt power is clearly understandable, then, when viewed from the perspective of the age of its inception, "an age of alleged divinely ordained monarchies, ruled by a king totally invested with all sovereign legal powers and accountable only to God." In some instances resistance to the king was a sin, punishable by damnation. Being jailed or fined or tortured for being contemptuous of the king was really rather unimportant when compared to the fate offenders faced on judgment day in the hereafter.

When the king became too busy to hear all the cases coming before his court, he appointed ministers to sit in judgment throughout the realm. Logically, disrespect toward one of the king's judges should not be a serious offense since the discourtesy was aimed at a mere mortal, not at a person divinely ordained to rule. But that was not the case, because while the king was not physically present in the courtroom, he was assumed to be there spiritually, guiding the hand of justice. Surely this assumption sounds like nonsense, but men will believe almost anything if the belief is important to them. In any case, disrespect or disobedience of the judge were considered to be disrespect or disobedience of the king or of the spiritual presence of the king. Punishment by the judge was as swift and as sure as punishment by the king would have been.

As representative democracy developed in England and royal influence on the government diminished, judges retained the contempt power and it became institutionalized in common law courts in both Great Britain and the United States. Courts today rarely justify the exercise of the contempt power on the grounds that it protects the integrity of the judge. Today protection of the authority, order, and decorum of the court is the usual reason given for the use of the contempt power, and sometimes it is protection of the rights of the litigants using the court to settle a dispute.

KINDS OF CONTEMPT

Historically, legal scholars have tried to classify the various kinds of contempt power judges have at their disposal into either civil or criminal contempt, but contempt seems to defy classification, or at least to defy consistent classification. Goldfarb refers to the "chameleonic characteristic" of contempt: that is, an action considered civil contempt in one court may be viewed as criminal

contempt in another. Writing in the *Tennessee Law Review* (1971), Professor Luis Kutner notes the problem:

> The distinction between civil and criminal contempt is not clear-cut. The same act in different situations may be regarded as either civil or criminal. Contempt has been regarded criminal if the purpose is to punish the contemnor for his misconduct in the presence of the court or for conduct out of the court's presence challenging its authority, and the contemnor is fined a fixed amount or imprisoned for a definite term; it is regarded as civil if the primary purpose is to coerce compliance with a court order, usually for the benefit of an injured suitor, and the contemnor is imprisoned only until he complies. Whether the contempt is civil or criminal is determined by the judicial decision maker.

Despite the "chameleonic" nature of the contempt power, scholars frequently use the following method of classification. The classification is based on the purpose of the punishment: (1) punishment exacted to protect the rights of a private party in a legal dispute before the court and (2) punishment exacted to vindicate the law, the authority of the court, or the power of the judge. When the punishment is exacted for the first reason, the contempt is normally called a civil contempt. When the punishment is exacted for the second reason, the contempt is usually considered a criminal contempt. Here is a brief discussion of the types of contempt based on this classification scheme.

Civil Contempt

A civil contempt is not an affront to the court itself, but is more likely failure or refusal to obey a court ruling, decision, or order made to protect the rights of one of the litigants in the case. Normally, the punishment in a civil contempt suit is a jail sentence which is terminated when the contemnor agrees either to do something or to stop doing something. For example, John Smith wins a libel judgment from the *River City Sentinel*. The publisher of the *Sentinel* refuses to pay the judgment. A judge can find the publisher in contempt of court and put in him in jail until he is willing to pay. The publisher's refusal to pay is a civil contempt: the newspaper publisher disregards the rights of the plaintiff in the case and disregards the ruling by the court. Civil contempt, then is charged to obtain obedience to judgments, court orders, and court processes designed to protect the rights of the litigants in a case.

Criminal Contempt

Criminal contempt, on the other hand, is charged to protect the court itself, to punish a wrong against the court. Obstruction of court proceedings or court officers, attacks on court personnel, and deliberate acts of bad faith or fraud are all examples of criminal contempt. There are two kinds of criminal contempt, direct contempt and indirect contempt.

Direct Criminal Contempt

A direct criminal contempt is an action committed "in the presence of the court," that is, in the courtroom or near the courtroom. Generally two conditions underlie a direct contempt: first, the judge has actual personal knowledge of what occurred, and second, the act or action had a significant impact

upon the judicial proceedings. The key seems to be the judge's personal knowledge of the events. In the instance of a direct criminal contempt, the judge is normally empowered to use what is called his summary power. When the judge exercises his summary power, he acts as prosecutor, jury, and judge. Suppose that in the midst of the trial the defendant jumps on a table and begins to play an accordian. The judge can use his summary power. "I accuse you of disrupting this trial by playing an accordian [the prosecutor's role], I find you guilty of disrupting the trial [the jury's role], and I fine you $200 [the judge's role]."

Summary punishment is the most onerous aspect of the contempt power, for the citizen is not allowed to exercise some of the basic constitutional guarantees which are normally a part of the criminal process. There is no jury trial. The accuser is also the judge and jury. The accused has no right to call witnesses in his behalf. Many authorities argue that because the summary power can normally be exercised only in a direct criminal contempt, an instance in which the judge has direct personal knowledge of what took place, the summary power is really not a threat to civil liberty. But this argument is questionable. Anytime one person can wield such power, a threat to civil liberties exists.

Any contempt conviction can be appealed. As in any other case the appeal is taken to the next higher court in the state or in the federal system if the contempt stems from the action of a federal district judge. Normally the punishment is held in abeyance until the disposition of the appeal is settled. It is possible, but not likely, that a reporter who has been jailed for a contempt might stay in jail during at least a portion of the appeal process. But usually the journalist is freed pending the results of the appeal. In the appeal process, however, the only record of the facts in the case is prepared by the judge who issued the citation. The appeal is based upon this factual record, the facts as seen by the trial judge.

The press infrequently gets involved in direct criminal contempt. However, if a photographer were to snap a flash picture in the midst of a trial, he would undoubtedly find himself in direct criminal contempt.

Indirect Criminal Contempt

Indirect criminal contempt is sometimes called constructive contempt and can be described as misconduct which occurs apart from the trial or apart from the court, but which still interferes with the proceeding.

Another definition of indirect criminal contempt is that it is a contempt about which the court or the judge has no firsthand knowledge, or a contemptuous act that does not occur in the presence of the court. Comments published in a newspaper about the conduct of the court or of the judge in the midst of the trial can be constructive contempt. When during a trial a television station broadcasts the details of the defendant's confession after the judge suppressed the information, the station commits an indirect contempt.

Publication of false or grossly inaccurate stories about the proceedings of a court can be considered a constructive contempt. Any action which interferes with the administration of justice, but which occurs away from the courtroom, can be considered an indirect criminal contempt.

LIMITATIONS ON CONTEMPT POWER

Before the limits of the contempt power are discussed, it should be noted at this point that truth is not generally considered a limitation. That is, truthful criticism of the court, publishing truthful comments about a pending case, can be and frequently is regarded as contempt. As one author puts it, any adverse comment by the mass media, no matter how true, can interfere with the administration of justice and can be punished in most courts as contempt. The Supreme Court established this principle in the early years of this century when it upheld a Colorado court decision to punish the editor and publisher of a Denver newspaper for printing articles which questioned both the motives of the state's high court and the manner in which two of the supreme court judges had been seated. The criticism was published as part of a commentary on a case pending before the state high court. Justice Oliver Wendell Holmes, writing for the United States Supreme Court, said the comments were inappropriate because the case was being considered by the court. "When a case is finished," he wrote, "courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied" (*Patterson* v. *Colorado,* 1907). Holmes added that the fact that the criticism is truthful is immaterial in a case of constructive contempt.

The early years of the twentieth century must be regarded as a high-water mark for the contempt power, because since that time the opponents of this power have succeeded in placing rather severe limitations upon its use. Make no mistake. It is not a sterile power. Judges can and still do use their contempt power. But in the last quarter of the twentieth century, judges throughout the United States have far less freedom in how they use this power than they had in the first quarter of this century.

Legislative Limitations

One important limitation upon the power of the court to use contempt comes from legislatures. For example, for more than sixty years the Congress has passed laws which limit use of the summary power by federal judges to dispose of contempt citations. The 1914 Clayton Antitrust Act, for example, requires that judges provide a jury trial in a contempt case when the contemptuous action is also a crime under federal or state law. In 1932 as a part of the Norris-LaGuardia Act, the Congress mandated jury trials for all constructive contempts arising out of labor disputes. The 1957 civil rights law provided for a jury trial for contempt when the sentence imposed exceeds forty-five days in jail. The 1964 civil rights law contains the same provision.

Court-Imposed Limitations

The bench itself imposes limitations upon the use of the summary power. The *Federal Rules of Criminal Procedure* requires that in indirect contempt notice be given the contemnor and a hearing be allowed. In addition, there are the right to counsel, the right to cross-examine witnesses, the right to offer testimony, and in many instances the right to a jury trial. If the contempt citation is based upon criticism or disrespect of a judge, that judge is disqualified from the proceeding. Bail is also allowed. The courts and legislatures in many states also deem that a jury trial is a requirement in an indirect contempt.

In the instances just noted, the legislature or the bench itself grants the right to a jury trial. Is there a constitutional right to a jury trial in such cases? The United States Supreme Court has been grappling with this question since the 1960s.

In 1964 the high Court ruled that there is no constitutional right to a jury trial in a contempt case in upholding the contempt conviction of the governor of Mississippi, Ross Barnett, who willfully disobeyed an order of the Fifth Circuit Court of Appeals. As one might expect at that time and in that place, the substantive question involved was civil rights. However, a footnote in the court's opinion states, "Some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses" (*U.S.* v. *Barnett,* 1964).

Petty offenses generally carry a sentence of six months or less. What the court seemed to be hinting at is that a jury trial is required constitutionally if the penalty exceeds more than six months in jail. A few years later in *Cheff* v. *Schnackenberg* (1966) the high Court specifically said what it implied in the *Barnett* case—that sentences exceeding six months cannot be imposed in cases of criminal contempt without giving the accused a jury trial. Then in 1968 in *Bloom* v. *Illinois* the high Court took the last step and ruled that criminal contempt is a crime in the ordinary sense, and that since the United States Constitution guarantees the right to a jury trial in criminal cases, prosecutions by state courts for serious criminal contempts (those with more than a six-month penalty) must be heard by a jury.

One of the most interesting court-imposed limitations upon the power of contempt concerns judicial interpretation of the 1831 federal contempt statute. One of the first acts of the first United States Congress in 1789 was to establish a federal judiciary system. In doing so it gave federal judges the power "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any case or hearing before the same."

This broad authority to use the contempt power remained unchanged until the 1830s when federal Judge James H. Peck arbitrarily punished an attorney who published an article critical of the judge. The judge's action resulted in his own impeachment. He was acquitted by a vote of twenty-two to twenty-one, but the trial prompted Congress to place a limit on the summary

power. The 1831 law strictly limited federal judges' use of summary punishment to those contempts committed in the presence of the court, "or so near thereto" as to obstruct the administration of justice. The change in the law, then, was designed to limit the power of federal judges. But by the Civil War this law had been forgotten, and federal judges once again used their summary power to punish a wide variety of contemptuous behavior.

Typical of this attitude was a decision by the Arkansas Supreme Court in 1855 which rejected a state statute limiting use of the contempt power and ruled that the power in courts to punish for contempt springs into existence upon the creation of the courts, that it is a part of the court's inherent power (*State* v. *Morrill*).

In 1918 a question over interpretation of the 1831 law came before the Supreme Court. Toledo, Ohio, was in the throes of a major dispute over a change in the transit fares. While a federal judge deliberated over the constitutionality of the change in the price of a streetcar ride, a local newspaper, the *News-Bee*, published unflattering remarks about him. After the judge ruled that the change in fare was unconstitutional, he found the newspaper in contempt and summarily fined the publisher. The newspaper appealed the action on the grounds that the judge lacked the authority to invoke a summary punishment, that summary punishment could only be used in cases in which the contempt is committed in the presence of the court, or "so near thereto" as to create an obstruction of administration of justice. The *News-Bee* was published miles from the courthouse, not in the presence of the court nor "so near thereto." In other words, the *News-Bee* said that the 1831 law placed a geographic limitation upon the judge's use of the summary punishment. The high Court disagreed. It ruled that the 1831 limitation placed a causal, rather than a geographic, limitation upon the use of the summary power (*Toledo Newspaper Co.* v. *U.S.*, 1918). Chief Justice Edward F. White wrote that *so near thereto* meant that any action that was in "close relationship" to the administration of justice could be punished summarily. In this case, the newspaper articles critical of the judge surely had a relationship to the case at hand.

The matter appeared settled, albeit wrongly. In 1928 Walter Nelles and Alice King, legal researchers, looked into the history of the 1831 law ("Contempt by Publication in the United States"). By their research these writers demonstrated that the 1831 measure was designed to limit the power of federal judges, not to enlarge it, as a majority of the Supreme Court contended in the Toledo newspaper case in 1918.

In 1941 the Supreme Court had the opportunity to apply these research findings (*Nye* v. *U.S.*) in a case that didn't involve the press. Instead the case originated in a civil suit filed in federal district court against a patent medicine company. The plaintiff claimed that his son died as a result of drinking the

medicine. Agents from the patent medicine maker plied the father with liquor one night and cajoled him into writing a letter to the judge, asking that the suit be dismissed. The judge was suspicious, investigated the request, and discovered the skulduggery by the drug company. He summarily fined the two men for their contemptuous behavior, despite the fact that their meeting with the plaintiff took place more than one hundred miles from the court. In an appeal to the Supreme Court the convictions were overturned. Justice William O. Douglas, citing the legal research published by Nelles and King, noted that "so near thereto" has a geographic meaning, that before the summary power can be used the misbehavior must be in the vicinity of the courtroom, that is, in physical proximity to the proceedings.

Justice Douglas did not indicate how close, but most experts today believe that a federal judge's right to use his summary power probably extends to the hallway outside the courtroom and perhaps even to the lobby of the building when a disturbance occurs. Conceivably a demonstration on the sidewalk outside the building can also be ruled to be in physical proximity if the disturbance is noisy and disturbs proceedings.

Through various means, then, during this century the summary power of judges has been limited, and in turn the limitations have reduced the contempt power. Through statutes which explicitly limit the use of the summary power and through court rulings which limit the severity of punishment which may be applied in the absence of a jury, the absolute power of judges has been trimmed. Nevertheless, the summary power is still a threat. And even six months in jail is a long time!

First Amendment Limitations

The First Amendment was not raised as a barrier to contempt conviction until relatively modern times, in 1941 to be exact. In 1941 and again in 1946 and 1947 the United States Supreme Court ruled that freedom of the press to comment on the judiciary must be protected except in those circumstances in which the commentary presents a serious threat to the proper functioning of the legal process. These three decisions, *Bridges* v. *California* and *Times Mirror Co.* v. *Superior Court, Pennekamp* v. *Florida,* and *Craig* v. *Harney*, stand as the bedrock support for the argument that the First Amendment protects the press in writing about the judiciary.

The first case, *Bridges* v. *California* and *Times Mirror Co.* v. *Superior Court,* 1941, actually consisted of two appeals from decisions by California courts, and the cases were decided together as one case. In the first instance a newspaper, the *Los Angeles Times,* was ruled in contempt for publishing a series of antilabor editorials. The trial court claimed that the editorials were aimed at influencing the disposition of cases before the court concerning labor unionists. In the second case, labor leader Harry Bridges was held in contempt of court when he publicly threatened to take the dockworkers out on strike if the courts attempted to enforce a judicial ruling going against Bridges and

his union. While the specter of a militant antilabor union newspaper and a militant labor leader arguing on the same side of this question is remarkable, it is not as remarkable as the high Court's decision which voided both contempt citations.

In a five-to-four decision the high Court repudiated the idea that the contempt power is valid because it is deeply rooted in English common law. Justice Hugo Black wrote that even if this were the case the idea ignores the generally accepted historical belief that "one of the objects of the Revolution was to get rid of the English law on liberty of speech and press." Black said that before a judge can use his contempt power to close off discussion of a case there must be a "clear and present danger" that the discussion will produce interference with the proper administration of justice. In applying Holmes's famous World War I clear and present danger sedition test to contempt, Black meant that only those threats to justice which are imminent or immediate can be punished. The substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished, he wrote.

The government argued in these cases that commentary on a case is clearly proper, but only *after* the case is completed so that the course of justice cannot be influenced. Black rejected this notion, saying that it is while a trial is underway that the public interest about a case is highest. He wrote:

> We cannot start with the assumption that publications 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 matters touching on the pending cases.

It should be noted parenthetically that in using the clear and present danger test to block contempt convictions, Justice Black made better use of those four words than did the high Court in its application of the test in sedition trials. For the clear and present danger test indeed became an effective means of stopping contempt convictions against the press.

This concept was reinforced five years later when in the second case, *Pennekamp* v. *Florida*, 1946, the high Court reviewed an appeal from the Florida Supreme Court involving a contempt citation against the *Miami Herald*.

The *Herald* had been highly critical of the trial courts in Dade County, Florida, for many months. In at least two editorials the editors argued that the courts worked harder to protect the criminals than they worked to protect the people. But the editors' evaluation of the courts' performance was founded on serious misstatement of facts. The court found both the editor, John D. Pennekamp, and the newspaper in contempt and levied fines against them both.

The Supreme Court overturned the convictions, noting, "We are not willing to say under the circumstances of this case that these editorials are a clear and present danger to the fair administration of justice in Florida." Justice Stanley Reed wrote that while he couldn't precisely define clear and present danger, certainly the criticism of a judge's actions in a nonjury trial would not affect the legal process. What about the factual errors in the editorials? Justice Reed said the errors were quite immaterial. Free discussion, Reed said, is a cardinal principle of Americanism. Discussion after a trial ends might be inadequate and can endanger the public welfare. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice. "We conclude," Reed wrote, "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 following year, the high Court once again reinforced the First Amendment barrier to the use of the contempt power in its decision in *Craig* v. *Harney,* 1947, the third case. In this case a Texas newspaper had been highly critical of a judge who directed a jury to return a verdict against a well-liked citizen in a civil suit. The *Corpus Christi Caller-Times* was found in contempt of court, and again the high Court struck down the conviction. Justice William O. Douglas admitted that in the Court's opinion the critical articles were unfair because they contained significant errors about what actually occurred at the trial. "But inaccuracies in reporting," he wrote, "are commonplace. Certainly a reporter could not be laid by the heels for contempt because he missed the essential point in a trial or failed to summarize the issues to accord with the views of the judge who sat on the case."

Douglas wrote that it took more imagination than the court possessed to find "in this sketchy and one-sided report of a case any imminent or serious threat to a judge of reasonable fortitude. . . ." Douglas added, "Where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it."

The three cases just discussed, *Bridges, Pennekamp,* and *Craig,* represent three strong statements in favor of a broad discussion of judicial matters, of trials, and of the legal process. To some degree they also represent a limitation upon the contempt power of the courts. The clear and present danger test is a formidable hurdle for any judge to clear before punishing a newspaper or television station with a contempt citation. However, lest we get swept away by the Court's rhetoric, it is important to look at what was involved in each of these cases, or rather what was not involved. In none of the cases did the judge first issue an order banning certain kinds of publicity about the case. In none of the cases could a jury have been influenced by the media publicity.

In none of the cases did the press publish or broadcast evidence or statements prohibited at the trial. As a matter of fact, all three cases involved the same question—commentary or criticism directed toward a judge. From these cases it is clear that the Supreme Court expects the nation's judges to be strong, not to bend in the wind of public opinion, not to be influenced by journalistic commentary. But the Court has never indicated that it has the same expectations with regard to juries. It has never said that a judge must allow the press free rein in its comments on a pending case with regard to material evidence or the credibility of witnesses. The caution, then, is not to read more into these decisions than is actually there. *Bridges, Pennekamp* and *Craig* stand for almost unlimited discussion of pending nonjury cases That is about as far as we dare go, however.

A few other limitations upon the contempt power also exist. At times judges have been prone to use contempt rather than libel as the means of defending their reputation from press criticism. Appellate courts are sensitive to this tactic and routinely overturn such contempt convictions. Courts are also prohibited from stopping publication of certain material in advance on the grounds that publishing it constitutes a contempt of court. This is another instance in which prior restraint is forbidden.

PRESENT STATUS

As will be noted in chapter 8 (pages 325–34), the threat of a contempt citation is the judge's most potent weapon to enforce an order issued by the court. Reporters and others must be sensitive to the notion that the violation of a court rule or court order can result in punishment for contempt. And in some jurisdictions the contempt citation will stand even if the court order or court rule that was violated is later declared illegal or unconstitutional by an appellate court. A case which dramatically makes this point is *U.S.* v. *Dickinson* (1972).

In November 1971 a hearing was underway in federal court in Baton Rouge, Louisiana. A VISTA worker had been indicted by the state on charges of conspiring to murder the mayor of Baton Rouge. The defendant complained that the state had no evidence in the case and that prosecution was merely an attempt to harass him. The hearing in federal court was to determine the motives of the state in the prosecution. Since it was possible that the charges would be substantial and that the VISTA worker would be tried later in criminal court, the federal judge ruled that there could be no publicity about what took place during the hearing. The press could report that such a hearing was taking place, but that was all. Reporters Gibbs Adams and Larry Dickinson of the *Baton Rouge Morning Advocate and State Times* ignored the order, published a story about the hearing, and were found in criminal contempt and fined $300 each.

Upon appeal, the United States Court of Appeals for the Fifth Circuit struck down the trial court's no-publicity order, but at the same time upheld

the contempt convictions. The court cited a 1967 Supreme Court ruling—*Walker* v. *Birmingham*—as precedent. In that case Martin Luther King and seven other clergymen were arrested and held in contempt for violating a Birmingham, Alabama, court injunction banning all marches, parades, sit-ins, and so forth. The high Court ruled that while the ban on marches and parades was unconstitutional Dr. King and the other defendants should have challenged the ban in court rather than just violate it. The contempt citations stood.

The same logic was applied in the *Dickinson* case. Judge John R. Brown wrote (*U.S.* v. *Dickinson*, 1972):

> 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 questions of whether a person may with impunity violate an order which turns out to be invalid. We hold that in the circumstances of this case he may not.

This decision perplexes many persons who cannot understand why the press or anyone else for that matter should be punished for not obeying an order that is not legal in the first place. It is probably best to have Judge Brown explain by quoting a lengthy passage from his opinion in the *Dickinson* case:

> 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 nonjudicial 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 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 upon them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory."

While most members of the press accept this logic to a point, they argue that the press presents a special case because time is a crucial factor in news gathering. Had the reporters in the *Dickinson* case, for example, not disobeyed the order, but instead appealed the decision to a higher court, the trial which they were covering would have been over before the restrictive order could have been declared invalid.

Judge Brown said that timeliness is an important aspect of news and that an appellate court should grant a speedy review of such orders. "But newsmen are citizens too," he wrote. "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." Although Judge Brown seemed to see the need for speed, nine months elapsed between the original contempt citation and his ruling in the court of appeals.

The reporters appealed the ruling to the Supreme Court, but the high Court declined to hear the matter. Many authorities interpret the refusal as approval by the Court of the Fifth Circuit Court decision (*U.S.* v. *Dickinson*, 1973).

The implications of *Dickinson* are rather frightening. In a paper entitled "Judicial Restraints on the Press," Professor Donald Gillmor quotes Dickinson's attorney:

> 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.

Many experts predicted that the precedent in *Dickinson* would be an open invitation to abuse by trial courts, and such prophecies were quickly realized.

In the summer of 1972 several persons were arrested on charges of conspiring to disrupt the 1972 Republican Convention in Miami. It is normal procedure in many courts to prohibit photography in the courtroom (more about this in a later section). Many newspapers and television stations use artists to make drawings of the proceedings. In the trial of the conspirators the judge told the press that sketching would not be permitted in the courtroom if the sketches were intended for publication. As a way around the court order, an artist for the Columbia Broadcasting System attended the trial (without pad and pencil) and sketched scenes from memory after the court session. Four sketches were broadcast by the network, which was immediately held in contempt for violating the order. The trial court then issued an order that

banned sketching both inside and outside the courtroom and forbade publication of any sketch of the courthouse "regardless of the place where the sketch is made." The Columbia Broadcasting System appealed the order and the contempt citation.

The court of appeals struck down the ban on sketching, but upheld the contempt citation. Citing the *Dickinson* ruling, Judge Dyer wrote (*U.S.* v. *CBS*, 1974).

> That case stands for the proposition that before a prior restraint may be imposed by a judge, even in the interest of assuring a fair trial, there must be "an imminent," not merely a likely threat, to the administration of justice. The danger must not be remote or even probable, it must immediately imperil.

Despite the fact that the district court made no showing whatsoever that the sketching was obtrusive or disruptive or an imminent threat to the administration of justice, the court said the order should have been challenged rather than disobeyed.

The rule in the *Dickinson* case—that a contempt citation will stand even if the court order is later ruled invalid—is not accepted in all states or by all courts. For example, in a case similar to *Dickinson*, the Washington State Supreme Court ruled in an opposite fashion. In the Washington case a trial judge ordered the press to refrain from publishing reports about anything that occurred at a public trial when the jury was not in the courtroom. Two reporters from the *Seattle Times* violated the order and were found in contempt. The state's high court said the court order was unconstitutional, that it violated the reporters' right to publish what happened in an open trial. The high court also voided the contempt citation, ruling that the violation of a court order that was patently void on its face could not produce a valid judgment of contempt. "To sustain this judgment of contempt," Justice Walter McGovern wrote, "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" (*State* ex rel. *Superior Court* v. *Sperry*, 1971).

Similarly, an Illinois appellate court in 1977 rejected the reasoning in *Dickinson* when it voided a contempt citation issued against a newspaper for the violation of a court order. The paper had been sued for libel, and the trial judge presiding at the defamation suit issued an order prohibiting the newspaper from publishing any editorials in which the lawsuit was discussed. The judge said he was fearful such material might prejudice jurors in the community. The newspaper and its publisher were held in contempt of court when a subsequent editorial was published. The Illinois Court of Appeals ruled that the court order was an unconstitutional restraint on freedom of the press and threw out the contempt citation as well. Justice Seidenfeld wrote that the *Dickinson* case failed to clearly recognize the strong presumption against the validity of prior restraints on the press and the irremedial nature of the injury

inflicted upon the press by the kind of ban on publication issued in the case, the Illinois court was not persuaded by the logic of the Fifth Circuit ruling. "If the case [*Dickinson*] stands for the rule that no order prohibiting pure speech may be disobeyed while in effect, we do not agree," he wrote (*Cooper* v. *Rockford Newspapers*, 1977).

These state cases are important to consider alongside *Dickinson*. It must be remembered that each state can adopt its own rule regarding the viability of a contempt citation issued for the violation of a patently unconstitutional court order. Federal courts outside the Fifth Circuit are also not governed by the *Dickinson* rule. It might also be noted that at the time this chapter was being prepared the Congress was considering a major revision of the federal criminal code. Under revised portions of the code reporters and newspapers can defend themselves against a contempt citation by proving that the court order which was violated was a constitutionally invalid prior restraint upon the freedom of the press. Basically, the revision would overturn the *Dickinson* rule and require federal courts to follow a rule similar to the one applied in the 1971 Washington state case noted earlier.

As the material presented in this chapter readily shows, contempt remains a serious threat to the press. The experiences of a Michigan journalist named James Turner remain a reminder of this threat.

Turner was a novice newsman, but he knew enough to recognize a good story when he saw one. When he discovered, quite by accident, serious irregularities in the way the county courts probated wills, he began to investigate. What he found was that a local attorney exercised an inordinate amount of control over a few county judges. Martin J. Lavin was a kind of political boss in the county and by controlling judges was able to charge immense probate fees. In one case he received a $20,000 fee for assistance in settling a half-million dollar estate, and in another instance he took money from the sale of a client's land without telling her he had sold the land. The woman died a public welfare charge, while Lavin collected nearly $50,000 for the sale of the property.

Jim Turner wrote about these events in his magazine. "Martin J. Lavin exercised control over the courts of Livingston County which was more vicious than the control exercised by the Mafia in New York and Chicago." Turner also charged that Lavin "almost totally corrupted the entire judicial system in Livingston County. We believe the judges and most of the attorneys either live in fear of this man or for some reason are afraid or won't speak out against him."

A local circuit judge took exception to Turner's charges and found him in contempt of court. Turner asked for a jury trial, but was refused. He was summarily convicted by another judge, fined $150, and sentenced to fifteen days in jail. The response of the legal community, then, was not to investigate the problem, but to jail the editor.

Turner appealed and won the case. The Michigan Court of Appeals ruled that Turner had been wrongfully punished for his admittedly disparaging statements (in re *Turner,* 1969). In the end the people also were winners. Martin Lavin was disbarred, and criminal charges and charges of income tax evasion were filed against him. Seven of the eighteen active members of the Livingston County Bar Association, including four judges or former judges, were disciplined by the state bar association for misconduct.

During the appeal Turner incurred a $70,000 debt for his magazine. It was many months before the people of the community rallied to his side. However, Jim Turner took a philosophical outlook:

> There's nothing but heartaches and expense in a true, honest involvement. And you're classified as a radical and an idiot. My involvement was just like walking out into quicksand. I got out so far that everytime I wiggled I went down, down. . . . The press has a responsibility to the people. What the hell is a newspaper for? It's not to report the social news and not to report the sports. Sure, that's part of it, but 90 percent of the responsibility of the press is to protect the people from what can hurt them.

The contempt power is alive and well, despite the fact that an appellate court may overturn a conviction if an individual can afford to take his case that far. Contempt is a power that just doesn't seem to fit in a democracy.

Writing in "Contempt Power: The Black Robe—A Proposal for Due Process," Luis Kutner states the issue best:

> The contempt power, which arose as an extension of monarchial power, is incongruous in a nation dedicated to the principles of popular democracy . . . all contempts are examples of unlimited and arbitrary powers remaining as historical accidents and anomalies, inconsistent and incompatible with individual liberties and rights.

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8 Free Press and Fair Trial

People have complained about the abundance of crime news in American newspapers almost as long as American newspapers have existed, at least since the 1830s and 1840s when the newspaper evolved from being primarily a political journal to being a chronicler of public occurrences. For some as yet untold reason, both the press and the public seem to share a continuing fascination with the troubles and travails of humankind, especially the plight of persons caught up in the web of the law. For better than one hundred fifty years the press has provided Americans with a daily, weekly and/or monthly diet of crime news. Sometimes there was more crime news than at other times. Persons who complain that today reporters spend too much time writing about murder and kidnapping surely cannot remember the four decades between 1890 and 1930 when crime news was a staple of most American newspapers and the police reporter was the most important, envied man in the city room. Ben Hecht's remembrances in his play *Front Page* and his autobiography *A Child of the Century* are far more truthful than most journalists like to admit.

While some persons object to the publication of crime news because they believe it to be in bad taste, because they think such information is not relevant to present-day existence, or because they think the press should spend its time pursuing other news, other persons object to publication of crime news for another reason. Many people believe that the press—newspapers and broadcasting stations—interfere with the judicial process by the publication of such information.

The argument goes something like this: Every person accused of a crime has the right to a fair trial. According to the Sixth Amendment to the United States Constitution, a fair trial includes the right to an "impartial jury." Juries are selected from members of the community who read newspapers and

watch television and listen to the radio. The trial process has built-in safeguards that protect accused persons. Certain kinds of information cannot be used as evidence against a suspected criminal. A past criminal record, for example, is immaterial in most trials. So are the results of examinations using the so-called lie detector. The court keeps this kind of information from the jury during the trial. What happens if the jurors read about these circumstances before the trial begins? What if they read, for example, that the defendant has a long record of convictions? What if they read that she refused to take a lie detector test? What if they read that he is an army deserter or that she operates a brothel? Doesn't the publication of such facts tend to prejudice jurors against the defendant? Many people believe that it does.

What is the solution? To stop the press from publishing such facts? After all, the Sixth Amendment guarantees a fair trial, an impartial jury. This solution is fine—except for one problem: the First Amendment, which guarantees a free press, an unimpeded press, a press at liberty from governmental restrictions.

If this situation strikes you as a dilemma, it is. Justice Felix Frankfurter stated the problem quite succinctly in 1946 in his concurring opinion in the case of *Pennekamp* v. *Florida*:

> 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.

The recent history of the free press–fair trial controversy in the United States has been the attempt to discover a way to balance these two very important constitutional rights. The attempt has not been completely successful. In those communities which solved the problem best, courts are forced to take extra care in shielding juries from publicity and in protecting defendants. The press also has to demonstrate its responsibility by exercising caution in publishing and broadcasting material about criminal and civil cases.

In this chapter the dimensions of both the problem and its solutions are sketched. First, the kinds of publicity many persons believe to be harmful to defendants is discussed, along with evaluation of the extent to which the mass media can in fact interfere with the trial process. In the remainder of the chapter the many schemes and ideas either proposed or enacted to solve the problem are outlined. It must again be remembered that in the free press–fair trial controversy fifty-one different judicial systems are involved. That is, while the problem is clearly national, the solutions tend to be local or regional in scope. Consequently, generalizations about such a complex issue can sometimes be misleading. Reporters and broadcasters are urged to investigate the

specific rules applicable to their state regarding publication of material about the judicial process. A simple way to do this is to talk to judges, members of bar associations, and veteran court reporters.

KINDS OF DAMAGING STORIES

It is quite easy to find examples of the kinds of news stories that many people believe might prejudice potential jurors. For example, the *Los Angeles Times* ran a story a few years ago beginning this way:

> A television sportscaster, Stan Duke, shot and killed a radio commentator, Averill Berman, early Sunday at the Wilshire District home of Duke's estranged wife, police reported. Duke was booked on suspicion of murder.

Readers probably wondered why Duke was arrested for suspicion of murder when it was patently obvious from reading the lead that Duke had committed the crime—or had according to the *Los Angeles Times*. Under the American system of justice a man is presumed innocent until it is proved he is guilty. In other words the state had to prove that Duke shot and killed Berman.

A newspaper in Washington State ran a far less sensational story, but in its own way it could have been even more damaging. The *Yakima Herald-Republic* headlined the story: "Innocent Not Tried, Claims Prosecutor." The first sentence stated, " 'Because of the screening process built into the criminal justice system in this county, innocent men never go to trial,' John Moore, Yakima County Deputy Prosecutor, said Wednesday." The people of that county probably spent a considerable amount of time wondering why they had courts at all if only the guilty went to trial. All that was really needed was an administrator of some kind to hand out sentences and fines.

The first story was written in a flush of journalistic excitement brought on by a sensational murder. The second story was written by a reporter who should have challenged the outrageous statement on the spot. Numerous other specific examples can be cited, but probably a better idea is to summarize the kinds of information many people agree can possibly interfere with the defendant's right to a fair trial. The followng list was taken from lists published by the American Bar Association and various state press-bench-bar committees.

1. Confessions or stories about the confession that a defendant is said to have made, including even alluding to the fact that there may be a confession. The Fifth Amendment says that a person does not have to testify against himself. Therefore a confession given to police may be subsequently retracted and usually cannot be used against the defendant at the trial.

2. Stories about the defendant's performance on a test using a polygraph, or lie detector, or similar device, and about the defendant's refusal to take such a test. Most of this information is not permitted at the trial.

3. Stories about the defendant's past criminal record or that state he is a former convict. This information is not permitted at the trial. It may seem entirely logical to some people that when a man has committed ninety-nine robberies and is again arrested for robbery he probably did commit the crime. As a matter of fact, past behavior is immaterial in his current trial for robbery. The state must prove that he committed *this* robbery. The situation is a lot like the odds in the flip of a coin. If a penny is flipped ninety-nine times and each time comes up heads, the odds that it will come up tails on the hundredth flip should be very high. As a matter of fact, they are fifty-fifty. Every flip is a new flip, totally separate from all other flips. And every crime is a separate crime as far as the law is concerned.

4. Stories which question the credibility of witnesses and which contain the personal feelings of witnesses about prosecutors, police, victims, or even judges. To illustrate: in the Sam Sheppard case, which will be discussed a little later, the judge was quoted as telling a reporter—before the trial started—that he thought Sam Sheppard was "guilty as hell," and the remark was published (*Sheppard* v. *Maxwell*, 1966).

5. Stories about the defendant's character (he hates children and dogs), his associates (he hangs around with known syndicate gunmen), and his personality (he attacks people on the slightest provocation).

6. Stories which tend to inflame the public mood against the defendant. Such stories include editorial campaigns which demand the arrest of a suspect before sufficient evidence has been collected; man-on-the-street interviews concerning the guilt of the defendant or the kind of punishment he should receive after he is convicted; televised debates about the evidence of the guilt or innocence of the defendant. All these kinds of stories put the jury in the hot seat, as well as circulate vast quantities of misinformation.

This list is not exhaustive. There are other kinds of stories which many people agree can interfere with the judicial process. A study conducted by Professor Fred Siebert in Michigan a few years ago (in *Free Press and Fair Trial*, ed. Chilton R. Bush) reported that judges believed publication of criminal records, performance on tests, and information about confessions were potentially the most damaging kinds of stories. They felt further that publication of such stories was inappropriate in nearly every case.

One positive note should be made at this point. Stories like these are less common today. Professor George Hough (in *Free Press and Fair Trial*, ed. Chilton R. Bush) at the University of Georgia recently documented a fact that most journalists have long believed: Newspapers today carry less crime news that most critics claim. After studying both court records and newspapers in Detroit for a six-month period, Hough found that of all the felony cases in which warrants were issued only 7 percent were even reported in the newspapers. Hough also found that during a one-year period in which 9,140 felony warrants were issued only 3.4 percent of the cases ever came to jury trial.

These statistics seem to argue that the press ignores most cases. Consequently, in most criminal cases there exists no danger of prejudicial publicity affecting the judicial process.

A recent study by Professor J. Edward Gerald reported in *Journalism Quarterly* ("Press-Bar Relationships: Progress Since Sheppard and Reardon") reinforces Hough's findings. A majority of the prosecutors in the two hundred seventy-six urban counties surveyed by Gerald said that newspapers and broadcasting stations have sharply curtailed publication and broadcast of prejudicial news.

Even editors are beginning to realize that readers are really not as interested in crime news as they perhaps once were. One editor commented, "We don't get any calls for the gory stuff anymore. Most people who call in want to know why there isn't more good news."

Impact on Jurors

Despite the fact that there is less crime news in the press today than say, forty years ago, newspapers and television stations still have a tendency to publish and broadcast "prejudicial" information about defendants in some cases. Usually such cases are the big, sensational ones: Ax Murderer Confesses, Ex-Con Nabbed for Mass Murder, Sex Killer Arrested at Rape Scene. Does this kind of story endanger a defendant's right to a fair trial?

Before that question can be answered, another question must be first considered: Will such stories influence jurors who read this news in their deliberations on the guilt or innocence of defendants? Consensus on the answer to this question is slight.

Both attorneys and judges are in disagreement. Many say that this kind of publicity destroys the possibility of impartiality in potential jurors. Others agree with this opinion, but argue that screening processes (which are discussed later) will keep biased persons out of jury boxes. Still others argue that even when jurors are biased they follow the judge's admonition to decide the case on the facts presented in the courtroom, not on information from the press (Pember, Don R., "Pre-Trial Publicity in Criminal Cases: A Case Study").

Social scientists have attempted to systematically examine the question of the impact of prejudicial material on jurors over the past twenty years. A major defect in the work has been the inability of researchers to study the behavior and deliberations of real jurors in actual trials. Most researchers have been forced to try to duplicate the trial process and study the behavior of mock juries. The results of this research have been inconclusive. In some instances there is evidence that the prejudicial material had an important impact upon the subjects tested; in other studies the impact is far less clear.

Professor Walter Wilcox recently surveyed the research data available and concluded (in *Free Press and Fair Trial,* ed. Chilton R. Bush):

> Communication research with all its advances and sophistication has not given us instruments to determine precisely the impact of a crime story upon the reader in terms of knowing and feeling, let alone acting. . . .
>
> As pretrial publicity was traced through the jury trial, the most noticeable overall phenomenon was a kind of flaking (or flaying) process, of dead ends, of self-cancelling propositions, of one concept confounded by another. The results do not add up to a neat and logical and defensible summary conclusion.

In the one major study in which real jury deliberations were examined, researchers found that jurors listen carefully to the cautionary instructions given to them by judges. Project coordinator Harry Kalven noted:

> We do . . . have evidence that the jurors take with surprising seriousness the admonition not to read the paper or discuss the case with other people. . . . Our overall impression . . . is that the jury is a pretty stubborn, healthy institution not likely to be overwhelmed either by a remark of counsel or a remark in the press.*

Citing Kalven's conclusion with approval, Professor Wilcox asks, "Could it be that the American jury confounds all the subtle nuances of the behavioral sciences and simply does its duty?"

THE LAW AND PREJUDICIAL NEWS

While social scientists attempt to prove or disprove theories regarding prejudicial information, the law takes the only outlook it can—assumes that prejudicial publicity can affect the minds of jurors—and acts accordingly. This does not mean, however, that the law regards a potential juror as biased because he has seen prejudicial material or admits to having a slight bias. As recently as 1975 the United States Supreme Court ruled, "Qualified jurors need not . . . be totally ignorant of the facts and issues involved in a case" (*Murphy* v. *Florida,* 1975).

The definition of an impartial juror used by the courts in the United States is over one hundred seventy years old and stems from a ruling by Chief Justice John Marshall in the trial of Aaron Burr. Charges that the jurors were biased were made at the trial. In 1807 Marshall proclaimed that an impartial juror was one free from the dominant influence of knowledge acquired outside the courtroom, free from strong and deep impressions which close the mind. "Light impressions," Marshall wrote, "which may fairly be supposed to yield to the testimony that may be offered, which leave the mind open to a fair consideration of that testimony, constitut no sufficient objection to a juror . . ." (*U.S.* v. *Burr,* 1807).

*Personal communication from Kalven to director of American Law Institute.

While this definition is fairly precise, modern courts nevertheless have to cope with the problem of applying the definition to specific situations. It is appellate courts that most often must apply Marshall's definition to cases in which convicted defendants ask for a reversal on the grounds that the jury is not impartial, as guaranteed by the Sixth Amendment. Indeed, reversal is one important, if costly, remedy the judicial system uses to cope with prejudicial publicity, that is, to simply reverse the guilty verdict and require that the defendant be retried.

But appellate courts have had difficulty reaching consistent guidelines to determine when or under what circumstances a conviction should be reversed because of prejudicial publicity. Courts appear to consider several factors in determining whether the defendant's jury trial was impartial: Is there evidence that the jurors saw the prejudicial publicity? How much publicity was there? How intense was the publicity? Did the stories reveal that the defendant had previously confessed to the crime, or were references made only to incriminating evidence excluded at the trial? While most appellate courts ask the same questions, they evaluate the answers to these questions quite differently. The following cases demonstrate the lack of consistency by the courts in reversing convictions for prejudicial publicity.

A copy of a newspaper containing information about the trial found its way into a jury room. The appellate court ruled that this fact in and of itself was not a sufficient reason to assume prejudice. The judge had told the jury to disregard the contents of the news story, and it should be assumed that they followed these instructions unless there is evidence to the contrary (*Leviton* v. *U.S.*, 1951).

Three young black men were accused of raping a white girl. The local newspaper set about to inflame public opinion against the defendants. It published one article which said the men had confessed to the crime. They were convicted, but the conviction was overturned by the Supreme Court because blacks had been deliberately excluded from the grand jury which indicted the trio. Justice Robert Jackson noted, however, that he could not think of anything more prejudicial to the defendants than news of the confession (*Shepherd* v. *Florida*, 1951).

Wide publicity was given to the murder of a six-year-old girl by an elderly man. Reports that he had confessed were published, as well as comments by the district attorney that sex offenders (the defendant had such a background) should be handled like mad dogs. The Supreme Court chastised the trial court for permitting such publicity, but affirmed the conviction (*Stroble* v. *California*, 1952).

During a trial two newspapers containing stories about the defendant's prior criminal record were found in a courtroom. Jurors told the judge they had looked at the stories, but vowed they could decide the case solely on the

evidence presented in court. The Supreme Court overturned the conviction on the grounds that the jurors could not be impartial in such circumstances (*Marshall* v. *U.S.*, 1959).

Leslie Irvin was arrested in connection with a series of six murders. Statements that Irvin had confessed to all six killings received widespread publicity. At the trial, of four hundred thirty persons called as potential jurors, three hundred seventy-five told the judge that they believed Irvin was guilty. Of the twelve jurors finally selected, eight told the court they thought he was guilty before the trial started. The Supreme Court overturned the conviction, noting that in this case, in which so many persons so many times admitted prejudice, statements of impartiality could be given little weight (*Irvin* v. *Dowd*, 1961).

Wilbert Rideau was arrested and charged with robbing a bank and killing a bank employee. He confessed to these crimes while being questioned by the sheriff, an interrogation session that was filmed and shown on local television on three successive days. The Supreme Court overturned the conviction noting, "Any subsequent court proceeding in a community so pervasively exposed to such a spectacle could be but a hollow formality" (*Rideau* v. *Louisiana*, 1963).

Louis Van Duyne was arrested and charged with killing his wife. After his conviction he sought a reversal on the gounds that newspaper publicity had prejudiced the jury. One newspaper story cited by the defendant quoted Van Duyne as telling the police, "You've got me for murder." Newspapers were found in the jury room, and there was evidence that the jury read other prejudicial accounts of the case. The New Jersey Supreme Court affirmed the conviction, ruling that there was no evidence that the defendant had not received a fair trial, there was no evidence that the jurors were overwhelmed by the prejudicial publicity (*People* v. *Van Duyne*, 1964).

Jack (Murph the Surf) Murphy appealed his conviction in a Florida state court for robbery and assault on the grounds that the jury had been prejudiced by extensive publicity about his previous criminal record and his other extralegal exploits. The Supreme Court disagreed and ruled that while the Constitution requires that the defendant have "a panel of impartial, indifferent jurors" they "need not, however, be totally ignorant of the facts and issues involved." It is sufficient that a juror can lay aside his impressions and opinions and render a verdict based on the evidence presented in court. The court did not find the hostility in the jury toward the defendant that was found, for example, in the Irvin case. Only twenty of the seventy-eight potential jurors indicated that they believed Murphy was guilty when they were questioned prior to being seated (*Murphy* v. *Florida*, 1975).

It is apparent from these few cases that judges disagree on how much publicity a juror can absorb without becoming biased toward a defendant. Nevertheless, judges seem more willing to trust the honorable instincts of the jurors than do many social scientists who have done research in this area.

Reversing the judgment of a trial court is a drastic means of compensating for the damage caused by publication or broadcast of prejudicial publicity. Retrials cost the taxpayers money; considerable inconvenience results for witnesses, attorney, and other participants. Defendants face continued hardship from uncertainty or even jail if they have not been released on bail. Most persons concerned with this problem consider reversal a remedy of last resort—something to do if all else fails.

Other remedies are considered far better in attempting to solve the problems which could result from pretrial publicity. These remedies fall into two broad categories:

1. Remedies which can be used by the trial court to compensate for the publication or broadcast of prejudicial publicity
2. Remedies aimed at controlling the amount and kind of information which might be broadcast or published

The remedies in the first category have existed for a long time and can be applied by trial judges with little difficulty in most instances. These include delaying the trial, moving the trial, carefully questioning the jurors to determine their bias, and other means. The impact upon both the judicial system and the press tends to be minimal when such remedies are applied.

The remedies in the second category can be more drastic and can cause serious problems, especially for the press. These remedies include issuing orders specifically limiting what can be published or broadcast, issuing orders which forbid participants in the trial process from talking about the case, and even barring public and press attendance at pretrial proceedings. This latter category also includes, however, nonbinding bench-bar-press guidelines which have been adopted in many states and seem to many persons to work the least hardship of any of the remedies in either of the categories on both the press and the judicial system. A close examination of all these remedies follows.

COMPENSATORY JUDICIAL REMEDIES

Trial judges have at their disposal a battery of procedural tools which can be used to alleviate the impact of prejudicial publicity.

Voir Dire

Before prospective jurors finally make it to the jury box, they must pass a series of hurdles erected by both the attorneys in the case and the judge. These hurdles are designed to protect the judicial process from jurors who have already made up their mind about the case or who have a strong bias toward one litigant or the other. In a process called voir dire each prospective juror is questioned prior to being empaneled in an effort to discover bias. Pretrial publicity is only one source of juror prejudice. If the prospective juror is the mother of a police officer, she is likely to be biased if the defendant is on trial

for shooting a police officer. Perhaps the juror is a business associate of the defendant. Possibly the juror has read extensively about the case in the newspapers and believes the police are trying to frame the defendant.

Both sides in the case question the jurors and both sides can ask the court to excuse a juror. This procedure is called challenging a juror. There are two kinds of challenges: challenges for cause and peremptory challenges. To challenge a juror for cause an attorney must convince the court that there is a good reason for this person not to sit on the jury. Deep-seated prejudice is one good reason. Being an acquaintance of one of the parties in the case is also a good reason. Any reason can be used to challenge a potential juror. All the attorney must do is to convince the judge that the reason is proper. There is no limit on the number of challenges for cause that both prosecutor and defense attorney may exercise.

A peremptory challenge is somewhat different. This challenge can be exercised without cause, and the judge has no power to refuse such a challenge. There is a limit, however, on the number of such challenges that may be exercised. Sometimes there are as few as two or three and sometimes as many as ten or twenty, depending upon the case, the kind of crime involved, the state statute, and sometimes the judge. This kind of challenge is reserved for use against persons whom the defense or the prosecution doesn't want on the jury, but whom the judge refuses to excuse for cause For example, in the various Watergate trials, attorneys for John Mitchell, H. R. Haldeman, John Erlichman, and other Nixon associates sought jurors who were strong believers in law and order. Potential jurors were asked subtle questions about crime in the streets, the kinds of television programs they liked, the types of movies they enjoyed, and so forth. It was felt that people who thought that criminals were pampered and who liked cop shows on television and John Wayne blood-and-guts movies were "Nixon people" and might react more favorably toward the defendants in the trial. The defense used its peremptory challenges to excuse the opposite kind of persons: typical "bleeding-heart liberals" who looked at crime as a social disease, abhored violence on television, thought George Patton was an authoritarian kook, and couldn't stand John Wayne movies. Obviously, this account is an oversimplification, but psychologists did draw up such profiles for the defense. The scheme worked in the first trial in which John Mitchell, Maurice Stans, and a few other defendants were acquitted. At the end of that trial the federal prosecutor said the government hadn't paid enough attention to selecting the jury.

Is voir dire a good way to screen prejudiced jurors? Seventy-nine percent of a large group of judges surveyed by Professor Emeritus Fred Siebert of Michigan State University said (in *Free Press and Fair Trial,* ed. Chilton Bush) that the questioning process was either highly effective or moderately effective in screening biased jurors. Most trial lawyers also agree, to a point.

It is difficult, however, to argue with critics who say that voir dire uncovers only the prejudice that the prospective juror is aware of or is not too embarrassed to admit. Biased jurors can lie when questioned about their bias. They may not even know their mind is made up about the defendant's guilt. But these kinds of objections attack the root of the entire jury system. The only way to find jurors who are not biased in even a small way is to lock up babies when they are born and raise them as jurors, isolate them from the rest of the world until they are adults, and then release them to act only as jurors at trials. Nobody wants this kind of system. The faith that most persons have in the effectiveness of voir dire is comparable to their faith in the entire jury system.

Change of Venue

Many judges and legal authorities describe a change of venue as an effective means of dealing with massive pretrial publicity. Imagine for a moment that John Smith is arrested for a series of six brutal murders committed in River City over a period of six weeks and highly publicized by the local press. When Smith is arrested, the local news media saturate the community with stories about the killings, about the arrest, and about Smith. Day after day the newspapers and broadcasting stations focus on one new angle after another. Soon most of the people in River City know more about the suspect's past than even the police and his parents know. One means to compensate for such publicity about a defendant in the community in which the crime takes place is to move the trial to another community. This procedure is called a change of venue. While the people in River City may be prejudiced against Smith by virtue of the reports in the news media, the people across the state in Ames have hardly heard of the matter. Therefore, the trial, including the prosecutor, the defendant, the judges, the witnesses, and assorted other trial participants, is moved to Ames for the month or two of the trial. The jury is selected from a panel of people who live in Ames. Seventy-seven percent of the judges surveyed think a change of venue is highly effective or moderately effective in controlling prejudicial publicity (*Free Press and Fair Trial*). However, the procedure has serious drawbacks.

Change of venue is costly. The state must pay for housing and feeding all of the trial participants while they are in Ames. Also, the defendant must give up his constitutional right to trial in the district in which the crime was committed. Finally, there is no assurance that by the time the trial begins in Ames the newspapers and broadcasting stations in that town will not have saturated the community with prejudicial publicity. While the Ames press might not have been interested in murders across the state in River City, the slayings suddenly become a hot local story when the trial is moved to Ames. So the change of venue may or may not be effective. Probably effectiveness depends upon the magnitude of the crime. A simple homicide is really not a big story today, and a change of venue might effectively shield the defendant. But mass murder and assassination are quite different. Generally the interest

is great and extends far beyond the community in which the crime was committed. (Was there a community in which the names Lee Harvey Oswald and Jack Ruby were not known?)

Continuance

A continuance is somewhat like a change of venue. But the time of the trial, instead of the location, is changed. That is, the trial is postponed. Back to John Smith for a moment. A delay of six to nine months in his trial might have pushed the slayings to the back of the mind of the community. People rapidly forget information not vital to their lives. It is probably far easier to empanel an unbiased jury after a continuance of six months. But again there are problems. The defendant sacrifices his right to a speedy trial. While the right to a speedy trial is one of the myths we are content to live with in the United States, continuance nevertheless means an even longer delay than normal. If the defendant can't make bail or if bail is not permitted, he spends the six months of the continuance in jail. Also, this scheme assumes that there will be little or no further publicity about the case. This assumption is wrong. Invariably, the week before the trial is scheduled to start (after the six-month delay) the press gives the community the information: Smith Murder Trial to Begin Monday. The gory details are rehashed to remind people of what happened.

Like a change of venue, continuance probably works best in those cases in which the crime is not too spectacular and the original publicity not too heavy. It can be very effective in cases of accidental publicity. A judge told of how just as he was scheduled to begin hearing a malpractice suit on a Monday morning the Sunday paper, quite innocently, carried a long feature story on the skyrocketing costs of physicians' malpractice insurance because of the large judgments handed down in malpractice suits. The article pointed out that physicians passed the additional charges along to patients. The story was widely read. Jurors, who also pay doctors' bills, might hesitate to award a judgment to an injured patient knowing that it would raise insurance rates and ultimately cost patients more. The judge therefore continued the case for two months to let the story fade from the public mind.

While publicity before a trial can damage a defendant's chance for a fair trial, publicity during the trial can be equally dangerous. A significant portion of what occurs at a trial takes place while the jury is out of the courtroom. Imagine that Jane Adams is on trial for murder for stabbing her best friend with a kitchen knife. During the trial Ms. Adams' attorney calls a witness who will testify that the victim had been terminally ill with cancer when the killing occurred. The prosecutor objects, declaring that this testimony is irrelevant. The defense attorney disagrees. Before the judge can rule on the relevancy of the testimony, he must hear it. So the jury leaves the courtroom,

the witness gives the testimony, and the judge decides whether it is relevant and admissible evidence. The jury then returns to the courtroom. If the material is relevant, the witness goes through the testimony again, this time for the jury. If the material is not relevant, the next witness is called.

Reporters and the public usually remain in the courtroom while the judge evaluates the testimony of a witness. Assume that the judge in this case declares the material inadmissible. But that night the *River City Sentinel* runs the story anyway: Victim Terminally Ill Before Stabbing. What is to stop jurors from reading in the newspaper or watching on television what they were not allowed to see and hear in the courtroom? Judges have two legal means, admonition to and sequestration of juries, to cope with the problem.*

Admonition to Jury

At almost every trial the judge admonishes the jury not to look at newspapers, not to watch or listen to news reports, and not to talk to other people about what happens at the trial. The following admonition, which is from the standard instructions which judges of the superior court in King County, Washington, give jurors is typical:

> Do not discuss this case or any criminal case or any criminal matter among yourselves or with anyone else. Do not permit anyone to discuss such subjects with you or in your presence. . . .
>
> Do not read, view or listen to any report in a newspaper, radio or television on the subject of this trial or any other criminal trial. Do not permit anyone to read about or comment on this trial or any criminal trial to you or in your presence.

Jurors are warned that a violation of the order might result in a personal penalty against them and in a mistrial for the case. Judges who exhibit a strong faith in the jury system rate admonition to juries an important means of coping with publicity about trials.

Sequestration of Jury

For cases in which a high level of publicity is expected, publicity which might prove hard for a jury to avoid, the court has another device: sequestration of the jury, which means that once it is empaneled, the jury is locked up. Jurors eat together, are housed at state expense at a hotel or motel, and are not permitted to visit with friends and relatives. Phone calls are screened, as is contact with the mass media. Jurors are allowed to read newspapers only after court officials delete stories which could be objectionable.

Sequestration is a costly process for both the state and the jurors. Sequestration for three or four days might be a lark, but the trials which juries are normally sequestered are long trials sometimes lasting as long as six

*Judges also have a third means: to forbid the press to report the happenings when the jury is not in the courtroom. Recently in Washington State when the judge used this means, the state supreme court ruled that the method constitutes prior restraint and is in violation of freedom of the press (*State* ex rel. *Superior Court* v. *Sperry*, 1971). Supreme courts in a few other states such as Ohio have ruled similarly.

months. Life can be seriously disrupted. The number of people who can afford the loss of income involved in such a situation is limited.

Although sequestered jurors are free from prejudicial publicity, attorneys fear the long quarantine produces a different kind of prejudice—prejudice against one or the other of the two sides in the case—wrought from keeping jurors away from friends and family for so long. Defense attorneys express this fear most often, feeling that jurors will tend to hold the defendant responsible for the inconvenience and therefore vote for conviction.

The remedies just outlined have been used by trial judges for decades to minimize the impact of prejudicial publicity. Note again, these remedies don't stop the publication of prejudicial matter. They are designed to reduce or eliminate the effect this material might have in a jury trial. As such they have no direct impact upon the mass media. In the past twenty years, however, courts have attempted to apply different kinds of remedies to the problem of pretrial publicity. These remedies are aimed at either stopping the press from publishing prejudicial information already in its possession or denying the press access to such information. The latter has been accomplished by forbidding participants in the criminal proceeding from speaking outside of court about the case or by denying public and press access to normally open pretrial or trial proceedings. Court orders which limit what either trial participants or the press can report about a judicial proceeding and similar orders which have actually closed court proceedings have provoked great controversy in the nation. The law in this area is still emerging; the issues are far from settled. Here is a summary of the current state of the law.

RESTRICTIVE ORDERS

Can a trial judge constitutionally forbid the press from publishing information about a criminal case which it has obtained legally? The answer is yes, a judge can issue an order restricting the news media from publishing prejudicial pretrial information. But such a restrictive order can be issued only when there is evidence that publication of the material will create a clear and present danger of interfering with the defendant's right to a trial by an impartial jury. The Supreme Court has ruled that such a restriction is permissible only if the judge has determined that "the gravity of the evil, discounted by its improbability, justifies such an invasion of free speech as is necessary to avoid the danger" (*Nebraska Press Association* v. *Stuart*, 1976). In order for such an order to be issued, there must be sufficient evidence to reasonably conclude that:

1. Intense and pervasive publicity concerning the case is certain
2. No other alternative measure—such as a change of venue or continuance or extensive voir dire process—is likely to mitigate the effects of the pretrial publicity
3. The restrictive order will in fact effectively prevent prejudicial material from reaching potential jurors

If all three elements can be established, a restrictive order which applies prior restraint against the press may be constitutionally issued by a trial judge. The history of such restraints is important and needs to be discussed before this drastic judicial remedy to stop pretrial publicity is explored more fully.

While judges have probably always had the power to issue such orders, they were not commonly used until ten to fifteen years ago. One Supreme Court ruling more than any other can be said to be responsible for the growth in use of this remedy. This was the United States Supreme Court ruling in the case of *Dr. Samuel Sheppard* v. *Maxwell*.

In the 1960s there was a popular television series called "The Fugitive." The show was the story of a doctor wrongly convicted of killing his wife. The train carrying Dr. Richard Kimble to prison derailed and he escaped, becoming a fugitive in search of a mysterious one-armed man who he claimed had actually done the killing.

Probably few people know that the genesis of the television series was a real criminal case, the case of Dr. Samuel Sheppard. On the morning of July 4, 1954, the dead body of Sam Sheppard's pregnant wife Marilyn was found by authorities in the upstairs bedroom of their Bay Village, Ohio, home. She had been bludgeoned to death. Dr. Sheppard told police that he was awakened as he slept on the downstairs couch by screams coming from his wife's bedroom. He hurried upstairs and saw a "form" standing over his wife's bed. He said he struggled with the form and was knocked unconscious. He told police that when he awoke his wife was dead. A few weeks later he was charged with murder.

The Sam Sheppard case caught the imagination of the nation during that hot summer of Eisenhower Republican normalcy. Before Sheppard was finally arrested, Cleveland newspapers were asking in bold front-page headlines why the suburban doctor wasn't in jail. The publicity between the time of the killing and the trial was fantastic. Newspaper clippings alone filled five volumes. The coroner's inquest was held in a school gymnasium and broadcast live to the community. Debates were held, witnesses were interviewed by the media, and man-on-the-street interviews concerning Sheppard's guilt or innocence were broadcast. The trial was no better. The press dominated the courtroom. Lawyers had difficulty talking to the defendant without being overheard by newsmen who crowded close to the defense table. All participants—police, prosecutor, defense counsel—made extraneous statements, often outrageous statements, which found their way into print or onto television and radio. An appellate court finally described the trial as a Roman holiday, an orgy of sensationalism, for the press. Sheppard was convicted.

An appeal on the grounds that pretrial publicity had made a fair trial impossible was made to the Supreme Court. The high Court refused to hear the case. Sheppard went to prison. Several years later the press again entered the case when *Argosy* magazine used its column "Court of Last Resort"

written by mystery writer Earl Stanley Gardner to publicize Sam Sheppard's plight. Finally, in 1966 the United States Supreme Court heard Sheppard's appeal and reversed his conviction. The state of Ohio chose to reprosecute the middle-aged doctor, and this time he was acquitted.

Justice Tom Clark wrote the high Court's opinion in the *Sheppard* case. The Supreme Court came down hard on the press, noting that bedlam reigned during the trial and that "newsmen took over pratically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. . . ." Justice Clark saved his sharpest criticism for Judge Blythin, who conducted the trial, and the other officers of the court for allowing the publicity about the case and the coverage of the trial to get out of hand. Here are some excerpts from Clark's opinion (*Sheppard* v. *Maxwell*,1966).

> Bearing in mind the massive pretrial publicity, the judge should have adopted stricter rules governing the use of the courtroom by newsmen . . . the court should have insulated witnesses [from the media]. . . . 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. . . . 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 court might well have proscribed extrajudicial statements by any lawyer, party, witness or court official which divulged prejudicial matters . . . the court could also have requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees. In addition, reporters who wrote or broadcast prejudicial stories could have been warned as to the impropriety of publishing material not introduced in the proceedings.

The Supreme Court made it quite clear in the *Sheppard* decision that it holds the trial judge responsible for ensuring that the defendant's rights are not jeopardized by prejudicial press publicity. While the court was critical of the press's behavior, no suggestion was made that the judicial system launch an attack on the press. Nevertheless, at a meeting following the decision, a professor of law, in explaining the high Court's opinion in *Sheppard*, suggested that the Court proposed that judges use the contempt power to control the press. Justice Clark, who was at the same meeting, told the assembled trial lawyers that the professor misinterpreted the court's ruling (Friendly and Goldfarb, *Crime and Publicity*):

> The Court never held up contempt and it may well be that it will never hold up contempt because the restraint is too stringent. . . . The Court's opinion never mentioned any guidelines for the press. . . . I am not proposing that you jerk a newspaper reporter into the courtroom and hold him in contempt. We do not have to jeopardize freedom of the press.

As we will see shortly, this aspect of the Sam Sheppard controversy is frequently forgotten.

Bar Association Standards

The ink was barely dry on the opinion in the *Sheppard* case when the American Bar Association (ABA) published the first draft of its "Standards Relating to Fair Trial and Free Press." The association, working under the leadership of Paul Reardon, Chief Justice of the Massachusetts Supreme Judicial Court, had begun its study of the free press-fair trial problem in 1965. The final draft of the so-called Reardon Report was published in 1967 and adopted by the House of Delegates of the ABA in 1968.

The Reardon Report quickly became the focus of the free press–fair trial debate. The guidelines in the document were aimed primarily at attorneys and judges. Its message was fairly simple: Don't talk about cases outside of court. If the prosecutor tells the police to keep quiet, if the defense attorney keeps quiet, and if the court tells the witnesses to keep quiet—if nobody says anything—the press then can't publish prejudicial information because it won't have any information to publish.

The report also recommended that judges use the contempt power against persons who knowingly violate a valid judicial order not to disseminate information until completion of the trial, specific information referred to either in a closed pretrial hearing or in an open-court proceeding at which the jury is not present.

Before the Reardon Report could become so-called law of the land, it had to be adopted by the judiciary of the various states, which did not happen. Not a single state chose to adopt these rules officially. This does not mean, however, that the Report did not make an impression. The Reardon Report, along with the *Sheppard* decision, had an immense impact upon the judicial system. *Sheppard* told judges that it was up to them to keep the lid on publicity; and the Reardon Report told them how to do it. Many states did adopt rules similar to those proposed in the Reardon Report, but without the contempt provision.

Court Use

Starting in the mid-to-late sixties, courts throughout the United States began to hand down an increasing number of restrictive orders at the opening of many newsworthy trials. Some of these orders were aimed directly at the press—forbidding the media from publicizing certain aspects of a case. Other orders were aimed at trial participants. One observer has estimated that between 1966 and 1976 courts issued one hundred seventy-four such orders, thirty-nine of which were aimed directly at the press. In addition, nearly all of the federal courts adopted standing orders regarding publicity in criminal cases. Sometimes these orders were relatively harmless and probably justified.

For example, in 1975 in California before the trial of Lynette Fromme for attempting to shoot the president, trial judge Thomas McBride banned the showing of a ninety-minute documentary about the Charles Manson family in any of the twenty-six counties around Sacramento where the trial was held. Miss Fromme was a member of the Manson family, and the judge feared that jurors seeing the motion picture might be prejudiced against the defendant. As soon as the jury was sequestered, the ban was lifted.

In many more cases the restrictions are far more severe and not so obviously needed. In Minnesota the press was ordered not to print a word about the sentencing of young car thieves. The judge passed sentence in open court on December 7, but the press was barred from reporting the matter until December 9. Why? A brother of one of the defendants was getting married on December 8, and the family wanted the news kept out of the newspapers until after the wedding. The judge agreed.

A judge in Monterey County, California, issued an order barring release of certain information about a pending case to the press. When a motion to vacate the order was made, the judge removed the press and the public from the courtroom while the motion was debated. He then forbade all public comments about the order and required that further motions made to the court about the secrecy order be made secretly, not in public.

In 1972 an Arkansas trial court ordered the press not to report the verdict in a rape case, a verdict announced by the jury in a public trial. When the newspaper editor published the verdict anyway, he was held in contempt of court. The state supreme court later overruled the contempt citation (*Wood* v. *Goodson,* 1972).

The following year a California trial judge issued an order prohibiting the press from publishing the true names and photographs of state prison inmates scheduled to be called as witnesses at a trial. The order was later struck down by an appellate court (*Sun Company of San Bernardino* v. *Superior Court,* 1973).

There really is no such thing as a typical "gag order." As can be seen from the cases just discussed, a gag order can cover many different aspects of a particular trial. One reason judges favor such orders is that they can be tailored to the specific circumstances of the case at hand. Generally they are quite comprehensive, as can be seen from the order issued by Judge William B. Keene for the Charles Manson murder trial (pages 330–31).

Question of Constitutional Rights

The issue of restrictive orders came to a head in 1976 when Judge Hugh Stuart of North Platte, Nebraska, barred the press from reporting information which had been publicly aired during the preliminary examination of Erwin Simants for the charge of murder. Simants was arrested in 1975 and charged with killing all six members of the Henry Kellie family. The case immediately attracted widespread press attention, and Judge Stuart issued a restrictive order barring the publication of certain kinds of prejudicial information. The order was ultimately modified by the Nebraska Supreme Court to prohibit only the reporting of the existence and nature of any confessions or admissions made by Simants to police, any confessions or admissions Simants made to third parties, and other facts "strongly implicative" of the accused. The order was to stand in effect until the jury was impaneled.

Superior Court of the State of California
for the County of Los Angeles

People of the State of California
Plaintiffs,

vs.

Charles Manson, et al.,
Defendants

No. A 253156
ORDER RE PUBLICITY

It is apparent, and this Court is going to take judicial notice of the fact, that this case has received extensive news media coverage as a direct result of its apparent public interest; further, it is equally apparent to this Court by reading various newspapers and weekly periodicals that this news media coverage is not limited to the County of Los Angeles, but has been extensive not only in the entire State of California but in the Nation as well, and of this fact the Court now takes judicial notice. This Court is of the firm conviction that the impossible task of attempting to choose between the constitutional guarantees of a free press and fair trial need not be made, but that they are compatible with some reasonable restrictions imposed upon pretrial publicity. It further appears to the Court that the dissemination by any means of public communication of any out-of-court statements relating to this case may interfere with the constitutional right of the defendants to a fair trial and disrupt the proper administration of justice. Some of the defendants now being for the first time before this Court, this Court now exercises its jurisdiction and assumes its duty to do everything within its contitutional powers to make certain that each defendant does receive a fair trial, and now issues the following orders, a violation of which will be considered as a contempt of this Court and will result in appropriate action to punish for such contempt.

It is the order of this Court that no party to this action, nor any attorney connected with this case as defense counsel or as prosecutor, nor any other attorney associated with this case, nor any judicial attache or employee, nor any public official now holding office, including but not limited to any chief of police or any sheriff, who has obtained information related to this action, which information has not previously been disseminated to the public, nor any agent, deputy, or employee of any such persons, nor any grand juror, nor any witness having appeared before the Grand Jury in this matter, nor any person subpoenaed to testify at the trial of this matter, shall release or authorize the release for public dissemination of any purported extrajudicial statement of the defendant relating to this case, nor shall any such persons release or authorize the release of any documents, exhibits, or any evidence, the admissibility of which may have to be determined by the Court, nor shall any such person make any statement for public dissemination as to the existence or possible existence of any document, exhibit, or any other evidence, the admissibility of which may have to be determined by the Court. Nor shall any such persons express outside of court an opinion or make any comment for public dissemination as to the weight, value, or effect of any evidence as tending to establish guilt or innocence. Nor shall any such persons make any statement outside of court for public dissemination as to the weight,

value, or effect of any testimony that has been given. Nor shall any such persons issue any statement for public dissemination as to the identity of any prospective witness, or his probable testimony, or the effect thereof. Nor shall any such person make any out-of-court statement for public dissemination as to the weight, value, source, or effect of any purported evidence alleged to have been accumulated as a result of the investigation of this matter. Nor shall any such persons make any statement for public dissemination as to the content, nature, substance, or effect of any testimony which may be given in any proceeding related to this matter, except that a witness may discuss any matter with any attorney of record or agent thereof.

This order does not include any of the following:

1. Factual statements of the accused person's name, age, residence, occupation, and family status.
2. The circumstances of the arrest, namely, the time and place of the arrest, the identity of the arresting and investigation officers and agencies, and the length of the investigation.
3. The nature, substance, and text of the charge, including a brief description of the offenses charged.
4. Quotations from, or any reference without comment to, public records of the Court in the case, or to other public records or communications heretofore disseminated to the public.
5. The scheduling and result of any stage of the judicial proceeding held in open court in an open or public session.
6. A request for assistance in obtaining evidence.
7. Any information as to any person not in custody who is sought as a possible suspect or witness, nor any statement aimed at warning the public of any possible danger as to such person not in custody.
8. A request for assistance in the obtaining of evidence or the names of possible witnesses.

Further, this order is not intended to preclude any witness from discussing any matter in connection with the case with any of the attorneys representing the defendant or the People, or any representative of such attorneys.

It is further the order of the Court that the Grand Jury transcripts in this case not be disclosed to any person (other than those specifically mentioned in Penal Code Section 928.1) until 10 days after a copy thereof has been delivered by this Court to each defendant named in the indictment; provided, however, that if any defendant during such time, shall move the Court that such transcript, or any portion thereof, not be available for public inspection pending trial, such time shall be extended subject to the Court's ruling on such motion.

It is further ordered that a copy of this order be attached to any subpoena served on any witness in this matter, and that the return of service of the subpoena shall also include the fact of service of a copy of this order.

This order shall be in force until this matter has been disposed of or until further order of Court.

Dated: December 10, 1969

William B. Keene
Judge of the Superior Court

The press in the state appealed the publication ban to the United States Supreme Court, and in June 1976 the high Court ruled that Judge Stuart's order was an unconstitutional prior restraint upon the press (*Nebraska Press Association* v. *Stuart*, 1976). While all nine members of the high Court agreed that the restrictive order in this case was a violation of the First Amendment, five members of the Court suggested that under the guidelines outlined at the beginning of this section (page 325) such an order might be proper. Chief Justice Burger wrote the opinion for the Court, in which he stressed that prior restraint was the exception, not the rule. There must be a clear and present danger to the defendant's rights before such a restrictive order might be constitutionally permitted, he said. But the Chief Justice did suggest that if the judge could demonstrate that the publicity about the case was intense and pervasive, that no other means could be used to compensate for such publicity, and that the restrictive order would be effective in keeping the prejudicial information out of the hands of prospective jurors such an order might stand. In Simants's case, Burger said, while there was heavy publicity about the matter, there was no evidence that Judge Stuart had considered the efficacy of other remedies to compensate for this publicity. Also, the small community was filled with rumors about Simants and what he had told the police. Burger expressed serious doubts whether the restrictive order would have in fact kept prejudicial information out of public hands.

Of the remaining four members of the high Court, Justices Stewart, Brennan, and Marshall stated that such prior restraints against the press would not be constitutional under any circumstance. Justice White implied that he agreed with that notion, but since he was not compelled to answer that question in the case before the Court, he would wait until another day to face the issue.

Parenthetically, it should be noted that the Court in the *Nebraska* ruling did not declare restrictive orders aimed only at *trial participants* to be similarly unconstitutional. This issue was not raised, but it is to be assumed that courts have a much broader power to limit what attorneys, police, and other trial participants can say about a case out of court. In 1978 the American Bar Association adopted rules suggesting that judges should be limited in finding trial participants in contempt for violating such restrictive orders. The Bar Association rules state that a contempt citation is proper only if the individual disseminates the information with the intent to affect the trial's outcome and if the information presents a clear and present danger of having such an effect. But the ABA rules remain as guidelines only at present.

In establishing strict guidelines against the so-called gag order, the high Court effectively put an end to its widespread use. In the summer of 1978 Robert Trager and Harry W. Stonecipher reported in *Journalism Quarterly* that in the almost two years since the *Nebraska Press Association* case, no

gag order had been upheld by an appellate court. Experience suggests that the Trager and Stonecipher finding is applicable to the period since 1978 as well. Two subsequent Supreme Court decisions on questions peripheral to those raised in the *Nebraska Press Association* case have reinforced the strict limitations placed on the gag order.

In 1978 the high court prohibited the state of Virginia from punishing the *Virginian Pilot* newspaper for publishing an accurate story regarding the confidential proceedings of a state judicial review commission (*Landmark Communication* v. *Virginia,* 1978). A Virginia State statute authorized the commission to hear complaints of a judge's disability or misconduct, and because of the sensitive nature of such hearings, the Virginia law closed the proceedings to the public and the press. The state argued that confidentiality was necessary to encourage the filing of complaints and the testimony of witnesses, to protect the judges from the injury that might result from the publication of unwarranted or unexamined charges, and to maintain confidence in the judiciary that might be undermined by the publication of groundless charges. While acknowledging the desirability of confidentiality, the Supreme Court nevertheless ruled against the state. Chief Justice Burger, writing for a unanimous court, stated that the "publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press. . . ." The court did acknowledge that the state commission could certainly meet in secret, and that its reports and materials could be kept confidential. But while the press has no right to gain access to such information, once it possesses the information, it cannot be punished for its publication. In this sense the Court followed the *Nebraska Press Association* rule limiting restraints placed upon the press's right to publish.

In 1979 the high Court declared unconstitutional a West Virginia statute that made it a crime for a newspaper to publish the name of a youth charged as a juvenile offender without the written approval of the juvenile court (*Smith* v. *Daily Mail Publishing Company,* 1979). Again Chief Justice Burger wrote the opinion for the court and stressed the fact that once the press has legally obtained truthful information it cannot be stopped from its publication. In this case two Charleston, West Virginia, newspapers published the name of a fourteen-year-old boy who was arrested for the shooting death of a fifteen-year-old student. Reporters for the newspapers got the name from persons who had witnessed the shooting. "If the information is lawfully obtained," the Chief Justice wrote, "the state may not punish its publication except when necessary to further an interest more substantial than is present here."

Both the *Landmark* ruling and the *Daily Mail* decision add strong support to the notion that the high Court is not going to look favorably on attempts by government—judges or otherwise—to restrain the press from publishing information it has obtained about matters of public concern. This is the essence of the ruling on restrictive orders handed down in the *Nebraska Press Association* case.

CLOSED HEARINGS

Inherent, if not implicit, in both the *Landmark* ruling and the *Daily Mail* decision, however, is the notion that government has the power to keep confidential material out of the hands of the press in the first place. Chief Justice Burger noted in his opinion in the *Daily Mail* case that the Supreme Court's holding was a narrow one. "There is no issue before us of unlawful press access to confidential judicial proceedings." The Chief Justice made a similar point in a less obvious way in the *Nebraska Press Association* ruling. In footnote eight in the ruling Burger noted, "Closing of pretrial proceedings with the consent of the defendant when required is also recommended in guidelines that have emerged from various studies. . . . We are not now confronted with such issues."

Whether motivated by the suggestion in the footnote or the inability to restrain the press following the *Nebraska Press Association* ruling, trial judges began closing trials and pretrial hearings in the late seventies to an extent never before seen in the United States. They did so ostensibly to protect the Sixth Amendment fair-trial rights of the defendant. In doing so, however, judges ran squarely into confrontation with the press, which claimed that long-standing First Amendment rights were being cavalierly sacrificed. Ultimately these issues were joined before the high Court. Closure of pretrial hearings will be considered first.

Much information which might be prejudicial to a defendant and which might never be disclosed during a trial is discussed at a pretrial hearing. For example, a defendant might have confessed to the crime shortly after being arrested. Later, he asserts the confession was wrested from him by unlawful police interrogation and argues that the confession should not be admitted as evidence against him during the trial. The argument would be made at the pretrial hearing, normally an open proceeding which may be attended by the press and the public. Assume, for a moment, that the judge agrees with the defendant and rules the confession inadmissible as evidence. The thrust of the recent rulings by the Supreme Court makes it impossible for the judge to stop the press from reporting what took place at the pretrial hearing. Stories may be published and broadcast that a defendant had confessed, but that the confession could not be introduced as evidence. But if potential jurors can read about a confession, a defendant's right to a trial by an impartial jury could be seriously jeopardized. Or so the argument goes. The solution? Close the pretrial proceeding to the press and the public. If the information can be

kept out of the hands of the press in the first place, the court can rest assured it cannot be published. The need for the restrictive order vanishes. At the end of the seventies, closure of pretrial hearings became a popular judicial remedy to stop the circulation of potentially prejudicial material.

Can a trial judge, with the agreement of the defendant and the state, legally and constitutionally close a pretrial hearing to the public and the press? In 1979 a majority of the United States Supreme Court said a judge can bar the public and the press from attending such a hearing.

The Amendments Dilemma

Two constitutional amendments appear to suggest the opposite conclusion; that the closure of such a hearing would not be constitutional. The First Amendment guarantees freedom of speech and of the press. In the past two hundred years it has been presumed by many authorities that this guarantee is included among the first ten amendments to the constitution as a means of ensuring that the press cannot report upon the activities of the government without interference. Closing the door to an important part of the judicial process seems hardly consistent with this constitutional mandate. The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and *public* [emphasis added] trial. . . ." A public trial implies an open trial, one in which the people can make certain that the courts are administering justice properly and fairly. But in the case of *Gannett* v. *DePasquale*, (1979), a majority of the high Court rejected both constitutional arguments and placed its imprimatur upon a closed pretrial hearing as a means of controlling prejudicial publicity in criminal trials.

In 1976 the state of New York brought charges of second-degree murder and burglary against Kyle Greathouse and David Jones in connection with the slaying of a former Seneca County police officer. Considerable publicity surrounded the death of Wayne Clapp and the capture in Michigan of the two defendants. Before the trial began, both defendants sought to suppress statements they had given to police on the grounds that the statements had been given involuntarily. They also sought to suppress evidence that the police had uncovered as a result of those statements. Because of the intensive publicity surrounding the case, defense lawyers sought to close the pretrial hearings where arguments would be made to suppress the prejudicial evidence. The state agreed to this closure, and Judge DePasquale prohibited the press and public from attending the sessions. Gannett, which publishes both Rochester newspapers, appealed the judge's ruling. But the New York courts refused to overturn Judge DePasquale's order. The United States Supreme Court agreed to hear the case and in July 1979 sustained the trial judge's closure order.

The Court decision was fractured, and five separate opinions were written. Justice Potter Stewart's opinion for the Court drew support from only one other member of the tribunal, Justice John Paul Stevens. Chief Justice Burger,

Justice Lewis Powell, and Justice Rehnquist each wrote a separate concurring opinion, and Justices Marshall, White, and Brennan concurred in a strong dissent by Justice Blackmun.

Justice Stewart said that if the defendant, the prosecutor, and the trial judge agree, a pretrial hearing can be closed to the public. Stewart suggested that a trial might be closed as well under the same circumstances. Stewart said that the right to a public trial guaranteed by the Sixth Amendment is a right belonging to a defendant alone. The defendant could choose to waive that right at any time and seek to have a closed hearing. Justice Stewart acknowledged that there is a legitimate public concern that the criminal justice system work properly. But he said that "in an adversary system of criminal justice, the public interest in the administration of justice is protected by the participants in the litigation." If the state and the trial judge agree with the defendant, the hearing can be closed. Stewart rejected the notion that the First Amendment was even material in this case and ruled that the Court would not decide in the abstract whether the press enjoyed a constitutional right, to attend a pretrial hearing or a trial. In the *DePasquale* case, Stewart said, the trial judge had given careful consideration to the press's First Amendment rights. But because of the intensive publicity surrounding the trial, the First Amendment interests had to be abrogated to protect the defendants' right to a fair trial. Also, Stewart noted that the denial of access in this case was only temporary, since the transcript of the pretrial suppression hearing was made available to the press and public once the trial was under way. It is important to note, however, that Justice Stewart based his decision almost exclusively upon the Sixth Amendment. He did not decide whether under different circumstances (a case in which there is much less publicity surrounding the trial, for example) the First Amendment might not prohibit a judge from closing a hearing. Justice Rehnquist, who wrote a separate opinion, also based his support of the closure of the hearing upon the defendants' Sixth Amendment rights.

Chief Justice Burger agreed with Stewart that the Sixth Amendment's guarantee of a public trial did not guarantee the right of the people or the press to attend pretrial hearings. But Burger stressed that the same rationale did not necessarily apply to trials, as Stewart suggested. When the Sixth Amendment was drafted, suppression hearings were not a part of American jurisprudence, the Chief Justice noted. Similarly the common law rule which mandated an open trial did not envision the exclusionary rule and pretrial motions to suppress evidence. Hence, it is impossible to argue that the Sixth Amendment's guarantee of a public trial includes a guarantee of a public pretrial hearing.

The fifth member of the majority was Justice Lewis Powell. He was the only member of the high Court who, in his opinion, gave serious consideration to the guarantees of freedom of expression. Powell said there is a right under the First Amendment for the press and the public to attend pretrial hearings—but it is not an absolute right. The right of the press and the public must be balanced against the right of the defendant to a fair trial. When a closed hearing is requested, Powell wrote, the judge should consider if there are other ways of protecting the defendant's right less damaging to the press than to close the hearing. The press must be allowed to make arguments opposing the closure of the courtroom before the order is issued, Powell said. The press can argue that a defendant's right can be protected in ways other than by closing a hearing. If in the end the trial judge is convinced by the evidence that closing the hearing is the only way to protect the defendant's right to a fair trial, the First Amendment right to attend the proceeding must then be sacrificed. Powell was the only one of the nine members of the Court to focus exclusively on the First Amendment, and the only justice who argued that there is even a limited right for the public and the press to attend such hearings. In this case, however, he said he was convinced that Judge DePasquale had determined that the only way to protect the rights of the defendants was to close the hearing. And Justice Powell accepted this determination by the trial judge.

The dissenters, led by a long and forceful opinion by Justice Blackmun, argued that the right to a public trial was put in the constitution to protect the people as much as to protect the defendant. Blackmun wrote that the Sixth Amendment guarantee of a public trial "embodies our belief that secret judicial proceedings would be a menace to liberty. The public trial is rooted in the principle that justice cannot survive behind walls of silence." He added (*Gannett* v. *DePasquale*):

> The public trial guarantee, moreover, ensures that not only judges but all participants in the criminal justice system are subjected to public scrutiny as they conduct the public's business of prosecuting crime. This publicity guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Blackmun argued that the public interest in both trial and pretrial proceedings cannot adequately be protected by the prosecutor and the judge, as suggested by Justice Stewart. "The specter of a trial or suppression hearing where a defendant of the same political party as the prosecutor and judge—both of whom are elected officials perhaps beholden to the very defendant they are to try—obtains closure of the proceeding without any consideration for the substantial public interest at stake is sufficiently real to cause me to reject the Court's suggestion that the parties be given complete discretion to dispose of the public's interest as they see fit," the Justice wrote. The dissenters said that

the Sixth Amendment does not impose an absolute requirement that all courts be open at all times. But in order to close the pretrial hearing the judge must establish that the following conditions exist:

1. A substantial probability that irreparable damage to the defendant's fair-trial right will result from conducting the proceeding in public
2. A substantial probability that alternatives to closing the hearing will not adequately protect the defendant's right to a fair trial
3. A substantial probability that closing the hearing will be effective in protecting the defendant against the harm from the prejudicial publicity

The defendant must prove all three conditions, Blackmun wrote. The judge should begin with the presumption that the hearing will be open.

Finally, Blackmun added, before any hearing is closed, the press and the public should be given an opportunity to make objections and present argument that the proceedings should be open. In the *DePasquale* case, Blackmun noted, the defendant had not met the burden of proving the three elements just noted; hence, the hearing should have remained open to press and public.

Between June 1979 and June 1980 more than one hundred attempts were made to close pretrial hearings. About half of these requests were honored by trial judges. Yet there appeared to be a reluctance on the part of these judges to grant these requests without first seeing substantial evidence that failure to close the hearing would result in the strong likelihood of prejudice to the defendant. (See *Westchester Rockland* v. *Leggett*, 1979, as a typical example of this situation.)

The closure of even pretrial hearings can have a serious impact upon press coverage of the criminal justice system. Such hearings have become an essential part of the criminal justice system today, whereas even fifty years ago they were rare. The growth and almost institutionalization of "plea bargaining" in the criminal justice system is one reason for the importance of the hearings. If the defendant is quite certain to be convicted of the crime as charged, it is advantageous for both the accused and the prosecutor to bargain. Defendants will agree to plead guilty to a lesser crime, robbery rather than armed robbery, for example. They will usually get a softer penalty for the lesser crime, and the state will not have to pay the expense of a jury trial. As a matter of fact, more than 85 percent of all criminal defendants plead guilty. The pretrial hearing is often crucial to the state's case, and it is frequently the only real judicial hearing held. As Justice Blackmun noted:

> The pretrial suppression hearing often is critical and it may be decisive in the prosecution of a criminal case. If the defendant prevails, he will have dealt the prosecution's case a serious, perhaps fatal, blow; the proceeding often then will be dismissed or negotiated on terms favorable to the defense. If the prosecution successfully resists the motion to suppress, the defendant may have little hope of

> success at trial . . . , with the result that the likelihood of a guilty plea is substantially increased. The suppression hearing often is the only judicial proceeding of substantial importance that takes place during a criminal prosecution.

Clearly, closure of pretrial proceedings is a remedy against the press as drastic as the now uncommon gag order. Perhaps closure does not do as much direct violence to the First Amendment as does the prior restraint inherent in a restrictive order, but the result for the public is about the same—a blackout of information about crucial aspects of the criminal justice system.

Closure of Trials

In the months after the *DePasquale* decision judges occasionally closed trials as well as pretrial hearings. This development was viewed even more ominously by the press and many members of the public. A court challenge to the closure of trials quickly found its way to the Supreme Court, and in June 1980 the high Court responded with a ruling more favorable to First Amendment interests.

The question before the Court was a simple one: Is the right of the public and the press to attend criminal trials guaranteed under the Constitution? By a seven to one vote the high Court said such a right was contained in the Bill of Rights (*Richmond Newspapers* v. *Virginia*, 1980). (Justice Powell took no part in the case since he had represented the appellants in the case in the past before he was appointed to the bench.)

In March 1976 John Stevenson was indicted for murder. He was tried and convicted of second degree murder, but his conviction was reversed. A second trial ended in a mistrial when a juror asked to be excused in the midst of the hearing. A third trial also resulted in a mistrial because a prospective juror told other prospective jurors about Stevenson's earlier conviction on the same charges. This was not revealed until after the trial had started. As proceedings were about to begin for the fourth time in late 1978 the defense asked that the trial be closed. The prosecution did not object and the court closed the trial. Richmond Newspapers protested the closure to no avail. An appeal came before the United States Supreme Court in February 1980.

Chief Justice Burger wrote the court's opinion. He noted at the outset that the *DePasquale* decision a year earlier had applied only to pretrial hearings. But much to the disappointment of many persons the majority did not reverse the earlier ruling on pretrial hearings. Burger wrote that "through its evolution the trial has been open to all who cared to observe." A presumption of open hearings is the very nature of a criminal trial under our system of justice, the Chief Justice added. While there is no specific provision in the Bill of Rights or the Constitution to support the open trial, the expressly guaranteed freedoms in the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government," Burger wrote. "In guaranteeing freedoms such as those of speech and press the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees,"

he added. The First Amendment, then, the Chief Justice noted, prohibits the government from summarily closing courtroom doors, which had been open to the public at the time that amendment was adopted.

But the Chief Justice refused to see the First Amendment bar to closed trials as an absolute bar. He noted that in some circumstances, which he explicitly declined to define at this time, a trial judge could bar the public and the press from a trial in the interest of the fair administration of justice. But, while the Court did not outline such circumstances, it was clear from both the tone and the language of the Chief Justice's opinion that in his mind such circumstances would indeed be unusual.

Justices White, Stevens, Brennan, Marshall, Stewart, and Blackmun all concurred with the Chief Justice in five separate opinions. All but Stewart seemingly went farther in guaranteeing access to trials than did Chief Justice Burger. Justice Rehnquist dissented.

The ruling was a clear victory for the public and the press. While debate ensued after the ruling as to whether or not the high Court had "found" a right of access to information within the First Amendment (see chapter 3), there was little debate that in the future, except in rather unusual cases, criminal trials would be open to the public and the press.

Both restrictive orders and the closure of court proceedings are admittedly effective ways of stopping publicity from reaching the hands of potential jurors. But they are equally dangerous in a representative democracy where information about how well government is operating is fundamental to the success of the political system. The bench, the bar, and the press in many states have found that cooperation, restraint, and mutual trust can be equally effective in protecting the rights of a defendant, while at the same time far less damaging to rights of the people.

BENCH-BAR-PRESS GUIDELINES

In nearly half of these United States members of the bench, the bar, and the press have attempted to alleviate the problems in press coverage of the judicial system by reaching agreement on the kinds of events that the press can publicize and the kinds of occurrences it should not publicize. Some states have had such guidelines for more than fifteen years. However, on record is an agreement between the City Court and the press in Burlington, Vermont, that was adopted in 1927:

> The City Court in a special way represents law and order in the community. The press can render large service in helping maintain general observance of law by wielding the power of its influence in creating and maintaining due respect for the City Court.

The free press–fair trial agreements of the 1980s are far more sophisticated than that statement. The Statement of Principles and Guidelines for the Bench-Bar-Press Committee of the State of Washington is one of the first free

press–fair trial agreements and has worked exceptionally well during the past ten years. It is therefore a good example to consider in discussion of these agreements. The Washington State bench-bar-press agreement is a twelve-page booklet of guidelines for the reporting of criminal proceedings, grand jury proceedings, juvenile court proceedings, and civil proceedings. The guidelines for criminal proceedings are typical and demonstrate the thrust of the committee's work.

The guidelines open with a discussion of the role of the press in the proper administration of criminal justice. Specific suggestions are then presented. The committee states that it is appropriate for the press to make public the following kinds of information:

1. Biographical facts about the defendant including name, age, address, occupation, and the like
2. Substance or text of the charge
3. Identity of the investigating agency
4. Circumstances surrounding the arrest including time and place of arrest, resistance, pursuit, possession and use of weapons, and description of items seized by police

These recommendations are followed by the suggestion that release of certain kinds of information can seriously prejudice a defendant's case without adding significant information to the public knowledge:

1. Opinions about the defendant's character, guilt, or innocence
2. Admissions, confessions, or alibis
3. References to investigative procedures such as fingerprinting, balistic tests, polygraph examinations, and the like
4. Statements about the credibility of witnesses
5. Opinions concerning evidence or arguments in the case

Finally, the guidelines suggest that publication of information about a prior criminal record can be highly prejudicial without adding significantly to the public's need to be informed. There are also suggestions regarding photographing the defendant, covering the trial, and using sensationalism in general.

The chief criticism levied against such guidelines is that they don't work, or that they don't work all of the time. There is probably some truth in the latter criticism. But a recent study by the American Bar Association suggests that guidelines may work better than their critics charge. The ABA reported that a substantial majority of newspaper editors, radio and television news directors, and bar association officials find the agreements are effective "in helping to protect the guarantees of fair trial and free press in crime news reporting."

Undoubtedly the guidelines don't work all the time nor in all states. In some states the bench, the bar, and the press meet to hammer out an agreement, and then disband and go their separate ways. Without any enforcement mechanism—and none of the guidelines have one—the guidelines are quickly ignored and become rather useless. In some states where the bench and the bar and press view their task as a continuing one, the agreements are very effective. Again, Washington State is a good example to study.

The Bench-Bar-Press Committee in Washington has been a viable organization since 1966. It meets regularly to discuss problems in the general area of free press and fair trial. In addition, the committee periodically sponsors day-long seminars around the state to educate attorneys, reporters, and judges in application of the guidelines. The Washington Supreme Court is very active in its support of the committee, and the chief justice sits as chairman of the committee. This has the distinct effect of getting both trial lawyers and other judges to attend the seminars.

Support by the state's leading newspapers is also helpful in getting reporters to attend. Discussion of libel and related press law problems is also a device used to lure the press to meetings, so that a dose of free press-fair trial guidelines can be administered as well.

Also a subcommittee—called the liaison committee—of the state's bench-bar-press committee composed of a judge, an attorney, and a journalist acts as a special education group. The job of the committee is to respond quickly to immediate free press–fair trial problems. For example, a Seattle judge informed the press at the beginning of a trial that reporters would be excluded from certain portions of the trial. The reporters became angry, and the managing editor of one of the daily papers in Seattle immediately called the chairman of the bench-bar-press committee who in turn activated the liaison committee. The entire chain of events took about four hours. The judge who sat on the liaison committee called his colleague on the bench who had announced the trial closure. The committee member asked the judge if he realized that by closing the trial he violated provisions of the bench-bar-press agreement. He then informed the judge that it was his experience that the press can be trusted in situations like these and need not be excluded from a trial. The peer pressure worked. The trial judge called reporters into his chambers, told them he had changed his mind, and the trial would be open. But he asked the press to refrain from reporting certain sensational details of the testimony. The reporters honored his request. In other instances judges complained about newsmen, and the journalist on the liaison committee successfully applied the same kind of educational pressure to his colleagues.

This continuing work among the bench, the bar, and the press makes the Washington guidelines very effective. There are success stories in other states as well. The key factor which usually distinguishes between success and failure in application of guidelines is whether the dialogue and educational process

among members of the group is a continuing one. Only one restrictive order has been handed down in Washington in the last fifteen years, and it was overturned by the state supreme court, which urged the judge to read the guidelines. People in states in which guidelines work think their idea is a better solution.

CAMERAS IN COURTROOMS

In 1975, in all but a handful of states in the United States, the mass media were prohibited from bringing cameras and tape recorders into courtrooms. By 1980 courts in almost one-half of the nation's states permitted the press to bring cameras and other electronic recording equipment into the courtroom on either a permanent or an experimental basis.

This swift reversal of the rules regarding the use of cameras in the courtroom appeared to climax a forty-year struggle by the press for relaxation of prohibitions which were instituted in the 1930s. At that time the press had conducted itself in an outrageous fashion in covering the trial of Bruno Hauptmann, who was charged with kidnapping the baby of Charles and Anne Lindberg. The trial judge, who had great difficulty in controlling the press, ordered that no pictures be taken during the court sessions. But photographers equipped with large, bulky, flash-equipped cameras moved freely about the courtroom, ignoring the judge's orders and taking pictures almost at will. As a result of this travesty, the American Bar Association adopted rules prohibiting the use of cameras and other electronic equipment in courtrooms. The rules, known as Canon 35, were adopted in most states and were followed in practice in those states that did not adopt the rules. (See Frank M. White, "Cameras in the Courtroom: A U.S. Survey") 60, April 1979.

After World War II when the photography equipment became smaller and less obtrusive and faster film permitted photography indoors without flash equipment, the press began to agitate for changes in the rules. The television industry especially changed under the proscriptions (the ABA rules had been amended in 1952 to include television), as they put broadcast reporters who depended upon film to tell a story at a distinct disadvantage in the competition with wordsmiths of the printed press. In the mid-1960s the United States Supreme Court had a chance to consider the constitutionality of the ban on cameras in the courtroom in a case which began in Texas, one of a handful of states that occasionally allowed photography and recording in the courtroom.

The defendant was Billie Sol Estes who was accused of a salad oil swindle. The story was important in the Lone Star State, television was therefore permitted at the initial pretrial hearing, and still photographers were permitted throughout the trial. The disruption was considerable. Twelve cameramen crowded into the tiny courtroom, cables and wires snaked across the floor of the room, lots of microphones were used, and distraction was significant. For

the trial, a booth for housing the television and film equipment was built at the back of the courtroom. The situation improved, but not enough. Estes appealed his conviction on the ground that the picture taking denied him a fair trial. The question which finally confronted the United States Supreme Court was, Does the First Amendment give the press the right to take pictures—television, motion pictures, and still pictures—in a courtroom?

The high Court said no, at least not at the present time. "While maximum freedom must be allowed the press in carrying out this important function [informing the public] in a democratic society, its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process," wrote Justice Tom Clark for the majority (*Estes* v. *Texas,* 1965). Clark, who also authored the *Sheppard* decision the following year, said that this did not mean that cameras would always be banned from a trial. When technology permits cameras to be used without causing the present hazards to a fair trial, the situation will be different, Clark said.

These are the hazards Clark pointed out:

1. Interference with the jury—jurors might act differently if they know they are going to be televised and have to face community pressure.
2. Interference with witnesses—the quality of testimony could be impaired and witnesses might be embarrassed, frightened, intimidated, or demoralized. Witnesses who testify late in the trial could hear what witnesses who testify before them say.
3. Impact on the trial judge—he will have an extra burden in keeping photographers under control.
4. Impact on defendant—in its present form television can be a form of mental, if not physical, harassment resembling a police lineup or third degree.

Four justices dissented. Justice Potter Stewart wrote a dissent in which he said, "I cannot say at this time that it is impossible to have a constitutional trial whenever any part of the proceeding is televised or recorded on television film." But the 1965 decision in *Estes* v. *Texas* put the kibosh on cameras in courtrooms except in those states which did not subscribe to Canon 35.

In 1972 the American Bar Association revised its *Canons of Judicial Ethics,* calling the new document the *Code of Judicial Conduct.* Section 3A(7) of the new code suggests "a judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom. . . ." Nevertheless, the code permits the use of television equipment for presenting evidence, for making a trial record, and for other judicial administration purposes. Section 3A(7) also suggests that judges allow closed-circuit television broadcast of a trial to other rooms for press or spectators or to defendants' cells when they refuse to behave in the courtroom. Closed-circuit broadcast can also be used for educational purposes.

In 1978 the ABA House of Delegates balked at changing its rules on photography. The convention failed to adopt the simple statement that television, radio, and photographic coverage are not "per se inconsistent with a fair trial."

Regardless of the posture of the ABA, by the end of 1979 nearly half of the states had opened the courtroom to cameras and recorders. According to journalism Professor Frank White, Colorado, New York, Washington, Alabama, Georgia, Nevada, New Hampshire, Minnesota, Louisiana, Montana, Wisconsin, Tennessee, Texas, New Mexico, Alaska, New Jersey, West Virginia, Idaho, North Dakota, and Oklahoma all permit photography and recording on a routine basis, or have established a one- or two-year experimental program to evaluate the impact of the use of these devices upon the administration of justice. During the 1980s several other states announced that photography would be permitted in the courtroom.

The rules in most states are flexible, yet they permit the trial judge final authority in determining whether cameras can come into a courtroom. In some states if a witness or other participant objects to being photographed or recorded, the press must honor these wishes and exclude these persons from its coverage. Most states have adopted guidelines which establish the number of still and motion-picture cameras permitted in the courtroom at any one time. Rules often specify where the cameras may be placed, require that all pictures be taken with available light, and even set standards of dress for photographers and technicians. The press must often be willing to share the fruits of the photography through pooling agreements, since most states have guidelines limiting movement and placement of cameras to only when the court is in recess.

How have the rules worked? Seemingly quite well. After the rules in Washington had been in effect for two years, a King County Superior Court judge surveyed trial judges in the state and found them overwhelmingly satisfied with the performance of the press and the success of the new rules. Experience in other states has been similar. In at least two instances convictions have been appealed because of the new photography rules. Both cases developed in Florida, which permits photography solely at the discretion of the judge, even if parties in the case object. The Florida Court of Appeals overturned the conviction for grand larceny of a woman who alleged that the electronic-media coverage of the trial had such an adverse psychological impact upon her that she was unable to competently testify in her own behalf (*Green* v. *Florida*, 1979). A more significant appeal was taken to the United States Supreme Court. As this chapter was being prepared the high Court announced that it would hear an appeal by two former Miami policemen who were convicted of burglary of a restaurant. The defendants argued that televised coverage of their trial in and of itself had deprived them of a fair and

impartial hearing as guaranteed by law. The Florida Supreme Court had rejected the appeal. The ruling by the United States Supreme Court in this case, *Chandler* v. *Florida*, could determine the future limits of photography in the courtroom for the next decade as the *Estes* case did in the sixties.

A good deal of space has been devoted to the free press–fair trial problem because it is an important problem and because it continues to be a problem. Within both the press and the law sharp divisions regarding solution of the problem remain. Many years ago during a battle over a free press–fair trial issue in one Southern state, the national office of the American Civil Liberties Union filed an amicus curiae (friend of the court) brief supporting a free and unfettered press, while the state chapter of the same civil liberties group filed a brief in favor of the court's position supporting a fair trial.

Most journalists probably agree that we need more, not less, reporting on the justice system in the United States. In *Crime and Publicity* Friendly and Goldfarb write:

> To shackle the press is to curtail the public watch over the administration of criminal justice. . . . The press serves at the gate house of justice. Additionally, it serves in the manorhouse itself, and all along the complicated route to it from the police station and the streets, to the purlieus of the prosecutor's office, to the courtroom corridors where the pressures mount and the deals are made.

The two authors also point out that we do not want a press that is free, more or less, just as we should not tolerate trials that are almost fair. "And to complicate the issue," they note, "it is evident that a free press is one of society's principal guarantors of fair trials, while fair trials provide a major assurance of the press's freedom."

Reporters dealing with the courts and the court system must be extremely sensitive to these issues. They should not be blinded as they clamor for news to the sensitive mechanisms which operate in the courts to provide justice and fairness. At the same time they should not let the authoritarian aspects of the judicial system block their effort to provide the information essential to the functioning of the democracy.

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Sheppard v. *Maxwell,* 384 U.S. 333 (1966).

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State ex. rel. *Superior Court* v. *Sperry,* 483 P.2d 608 (1971).

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Westchester Rockland v. *Laggett,* 5 M.L. Rept. 2009 (1979).

9 Obscenity, Pornography, and Other Dirty Words

The contemporary journalist rarely takes on a censor over a question of obscenity. Erotic material is just not a large part of the mainstream mass media in the United States today. About the sexiest things in most newspapers are the movie advertisements, and such display advertisements are frequently liberally doctored by newspaper artists who are adept at painting clothing on naked females and by rewrite men who clumsily revise film titles to excise naughty words or double entendres. At some newspapers, however, even these ads are disappearing. The *Seattle Times* is one of many newspapers which refuse to publish advertisements for X-rated films, and the *New York Times* is one of several newspapers which limit the size, content, and format of advertisements for such motion pictures. Occasionally, however, a journalist, usually a loner, the publisher of an underground newspaper or a counterculture magazine, runs afoul of obscenity laws. Sometimes in such cases "professional journalists" have little sympathy for the plight of their "less respectable" colleagues: "After all, if he hadn't published that junk in the first place, he wouldn't be in trouble. And what does that have to do with news anyway." To those journalists and to other persons who think that journalists shouldn't be worried about obscenity convictions, the words uttered by Judge Cuthbert Pound sixty years ago are appropriate, "Although the defendant may be the worst of men . . . the rights of the best men are secure only as the rights of the vilest and most abhorrent are protected" (*People* v. *Gitlow,* 1921).

Perhaps more salient is Harry Clor's question concerning obscenity and pornography in *Obscenity and Public Morality*. "Why," Clor asks, "in an age which is not lacking in life-and-death issues must we continue to wrestle with this one?" The author goes on to answer his own question by arguing that vital issues lurk beneath the surface of this seemingly nonsensical dilemma.

And, he noted, the problem of obscenity "manifests a strange capacity to arouse the interest, engage the passions, and enlist the efforts of large numbers of Americans." How right Clor is, for even today in the so-called age of reason it is very difficult to engage in a discussion of obscenity and pornography without the conversation quickly descending to a level of emotionalism and witless jabber.

The problem of obscenity is truly interesting, at least for a while. We do not intend to present an exhaustive report on the subject in these few pages. Instead, a brief introduction to the issue is provided, the history of the law of obscenity in the United States is highlighted, and the ways in which the Supreme Court has defined obscenity are discussed. Then we will consider how the law operates in real life at the local level and briefly note some aspects of both postal censorship and film censorship.

The broadcast of obscene or indecent speech over radio and television is a separate problem and is outlined in chapter 11 on broadcast regulation (pages 446–49).

OBSCENITY DEFINED

There is great disagreement about what is and what is not obscene. A flower child who papers his walls with photographs of nude couples in various states of recline might consider war and violence obscene. To a man who thinks that shooting at kids who try to steal melons from his patch is big sport and who likes his killing in slow motion at the drive-in movie, any nudity at all is degenerate. While the university student might think the profits made by oil companies are "obscene," a stockholder in an oil company might think it obscene for a student to live in a commune with six other men and women. And so it goes.

Definitions for obscenity can be found in many places. In reputable dictionaries among the meanings for the word *obscene* is "indecent, lewd, or licentious." In turn, we will find *licentious* to mean "lewd or lascivious." Further research shows that *lascivious* means "inclined to be lewd or lustful." *Lustful* proves to mean "having lewd desires." Finally, *lewd* turns out to mean "indecent or obscene." We have come full circle.

The courts themselves have been in a constant state of confusion over the matter of obscenity. In 1948 the Ohio Court of Common Pleas wrote (*State* v. *Lerner*):

> Obscenity is not a legal term. It cannot be defined so that it will mean the same to all people, all the time everywhere. Obscenity is very much a figment of the imagination—an indefinable something in the minds of some and not in the minds of others, and it is not the same in the minds of the people of every clime and country, nor the same today that it was yesterday and will be tomorrow.

Former justice of the United States Supreme Court John Marshall Harlan expressed a similar kind of frustration when he warned, "Anyone who undertakes to examine the Supreme Court's decisions since *Roth* which have

held particular material obscene or not obscene would find himself in utter bewilderment" (*Ginsberg* v. *New York*, 1968). Harlan referred at least partially to the fact that between the *Roth* case in 1957 and 1968 when he wrote that comment the high Court had published signed opinions in thirteen obscenity cases. Fifty-four separate opinions were published in those thirteen cases!

Social scientists have also entered the definitional fray. Probably the most well-known definition of pornography is that of Eberhard and Phyllis Kronhausen in their study *Pornography and the Law*. The researchers said that the main purpose of pornography is to stimulate an erotic response. They also listed several characteristics of pornography, among which were heavy emphasis on the physiological reponses of participants, heavy emphasis on aberrant or forbidden forms of sexuality, heavy sadism and passive submission, and unrealistic presentation of both sexual activities and sexual capacities. Anthropologist Margaret Mead defined pornography as "words or acts or representations that are calculated to stimulate sex feelings independent of the presence of another loved and chosen human being." But even these kinds of definitions contain little precision and little agreement. Sexual aberrations which stimulate some persons nauseate others. The clothed body is far more erotic to some people than is naked flesh.

The general governmental response to obscenity and pornography (whatever these words mean, they are used interchangeably in this chapter) has been to pass laws against it. There are federal laws, state laws, city laws, county laws, township laws, and so forth. There are laws against importing obscenity, transporting it in interstate commerce, mailing it or broadcasting it over the radio and television. There are laws against publishing it, distributing it, selling it, displaying it, circulating it, and even possessing it if you plan to distribute it, sell it, display it, or circulate it.

The fact that obscenity is such an elusive concept to define makes prosecution extremely difficult sometimes. An obscenity case is not like a bank robbery or like most other crime for that matter, where everyone agrees that a criminal act has occurred (i.e., a bank robbery), and the legal debate is about whether the defendant is the robber. In an obscenity case there is usually agreement that the defendant did commit the act (i.e., sold a book or showed a movie). The debate is over whether what the defendant did was a criminal act, whether the book was obscene or not.

The ambiguities in the law also make life less than certain for booksellers and theater operators. They really can never be certain whether a local jury will rule that the books in the morning mail are obscene and whether selling a copy of such books is a criminal act.

Professor Paul Freund neatly summarized many of the problems of obscenity in a speech before the Twenty-Ninth Annual Judicial Conference in 1966 (Federal Rules Decisions, 1966):

> The problem is rendered difficult, I think, because we are working with old statutes, based on outmoded, or at least unexamined assumptions, with poorly defined conceptions of the subject matter, directed at the protection of persons who don't want to be protected, without a very clear idea of why they need protection and from what.

Why is obscenity banned? For many persons this is the $64 question. Many police believe that pornography is somehow tied to sexual crimes, although there is very little evidence to support the notion. Many persons argue, as we will note later in this chapter, that dissemination of pornography and obscenity has a deleterious impact upon communities. This argument also has really little scientific evidence to support it. At the same time there is little evidence to support the argument of persons who oppose obscenity laws that distribution of the material has no impact at all. Probably the best reason to explain why obscenity is banned is that it has been banned for more than one hundred years, and once a good suppression is started, it is hard to stop. Once an obscenity law goes on the books, it usually stays there, often virtually unenforced. Nevertheless, legislators rarely vote for repeal of an obscenity law. To many constituents a vote for repeal is a vote for obscenity. That could be a heavy cross to bear during an election.

HISTORY OF OBSCENITY LAW

The Puritans weren't the first to pass laws against obscene books and pictures. There is some confusion about obscenity laws during the colonial period, because many persons argue that pre-Revolutionary laws against blasphemy also prohibited obscenity. However, the best evidence available doesn't support this argument.

Some of the other facts we know, or don't know, about pornography in the eighteenth and early nineteenth centuries are these.

Substantial amounts of pornography were in circulation at that time, some of it homegrown, much of it imported. As busy as he was, Benjamin Franklin still had time to write erotic literature.

We don't know whether the drafters of the Bill of Rights intended to include obscenity within the mantle of protection offered by the First Amendment. Various justices of the Supreme Court, including Justice Brennan in his opinion in 1957 in the famous case of *Roth* v. *U.S.*, have argued that the framers of the First Amendment never meant to protect obscene materials through the guarantees of free speech and press. But such assertions are made without evidence and should be accorded little historical merit. Court records are devoid of evidence of obscenity prosecutions until 1815 when a man named

Jesse Sharpless was fined for exhibiting a picture of a man "in an imprudent posture with a woman." Earlier, other persons were tried for offenses tied to obscenity, but they were tried under the common law for theological crimes against God, not for merely displaying erotic pictures. In 1821 Peter Holmes was convicted for publishing an edition of John Cleland's *Memoirs of a Woman of Pleasure,* better known to us as *Fanny Hill.* Although the book was first published in 1740, the prosecution in Massachusetts was based not on the original version, but on an edition in which Holmes added both more explicit text and pictures.

In the late 1820s and 1830s the nation experienced the first strong attack on obscenity when several states passed laws limiting the distribution and sale of such material. Why should obscenity laws be passed at that particular period in our history? No one knows for certain, but numerous contemporary events and conditions may have been factors. This was a period of popular reform movements such as abolition, prohibition, and women's rights. It was also a time in which universal free education made great strides and more people were able to read, thereby increasing the market for erotic literature. The changes in printing technology which made publishing of books and magazines less expensive could also have resulted in wider distribution and visibility of erotic material. The more visible and widespread such material became, the better target it also became for reformers. Laws were the result.

The first of dozens of federal laws was passed in 1842. It was a customs law and prohibited importation of obscene paintings, lithographs, engravings, and so forth. The law was amended many times to prohibit more and more kinds of materials. The first postal law was passed in 1865, but it was an ineffective measure, because the government had no authority to exclude material from the mails, only to bring a prosecution after the shipment was delivered. In 1873 a more effective law was adopted. This was largely the handiwork of Anthony Comstock, whom some authorities have described as a psychopathic reformer who got a thrill from suppressing what other people liked. First it was liquor that Comstock sought to snuff out. Then he attacked prostitution. To him there was no such thing as erotic art, only pornography. With the help of the Protestant leaders in New York and the Young Men's Christian Association, Comstock succeeded in gaining passage, first, of a New York law against obscenity and, then, in 1873 of a federal law, the so-called Comstock Law. After passage of the bill Comstock was named a special agent for the Post Office Department, and he worked with his Committee for the Suppression of Vice for more than forty years to stamp out smut. As a kind of incentive the government gave Comstock a percentage of all the fines collected on successful prosecutions based on his work. It has been suggested that he may be the first man to have made a million dollars from pornography.

The 1873 law was simple: All obscene books, pamphlets, pictures, and so forth, were declared to be nonmailable. Violation of the law could result in a fine of $5,000 and five years in jail for the first offense and $10,000 and ten years for each offense thereafter. The Congress did not define obscenity, however, but left that to the courts.

After passage of this spate of laws in the late nineteenth century, the country underwent a terrible seventy-year period of censorship of erotic material. The censors tended to lump all erotic work into one huge pile of prohibited material. They made no attempt to distinguish art from smut—Boccacio's *Decameron* from *The Dance with the Dominant Whip* or other junk literature. The Post Office Department banned books on sex education as well as medical journals which dealt with sexual problems. The *American Journal of Eugenics* (the study of hereditary improvement) was declared nonmailable at one point because it carried an advertisement for a book entitled *The History of Prostitution.* The *Journal* wasn't obscene, but the book advertised in its pages was considered offensive. The *Journal* therefore was not allowed to be sent through the mails.

In the 1930s the Post Office Department banned, among other books, John O'Hara's *Appointment in Samara,* Hemingway's *For Whom the Bell Tolls,* and nearly everything that Erskine Caldwell wrote. In the forties the list included *From Here to Eternity, Butterfield Eight,* and *Memoirs of Hecate County.* Lots of girlie magazines, humor magazines, scandal magazines (e.g., *Confidential*), and even a skin diver's manual (because it contained pictures of several female divers with breasts exposed) were barred from the mails, and the publishers were often prosecuted.

The postal service used various devices in addition to prosecution as means of controlling pornography. It attempted to strip some publications of their second-class mailing subsidy because they failed to publish work that was for the public good. Obscenity was not for the public good, postal officials claimed. This ploy failed after a time (see *Hannegan* v. *Esquire,* 1946). The Post Office Department also used the mail block against publishers whose magazines contained solicitations for erotic materials. For example, if a magazine advertised that a reader could order an erotic book by sending $2 to the publisher, the postal service stopped delivering mail to the publisher in order to deprive him of those book orders. He received no mail at all! Not his electric bill, his bank statement, nothing. The courts declared this action illegal, but the post office continued the practice for several years (*Walker* v. *Popenoe,* 1945). According to Patricia Robertus in her study of the Post Office Department ("Postal Control of Obscene Literature 1942–1957"), postal regulations were so restrictive that in the early 1940s a magazine with the power of *Esquire* took advance copies of both stories and layouts to postal authorities to see whether they met postal standards of mailability. In some instances postal

officials asked for changes and got them. This is informal prior censorship at its boldest.

Laws against importation were also prosecuted vigorously, and customs agents, until the 1930s at least, rarely discriminated between works that were art and works that were trash. Consequently, there are scores of horror stories of customs officials destroying art works, art catalogs, religious works, and other materials which they believed to be obscene.

This can only be described as an awful period in the cultural history of the United States. Closely parallel is the struggle for freedom of the press that radicals and labor leaders endured (recounted earlier in this book), with one exception: whereas the Supreme Court grew more tolerant of aberrant political and economic philosophy, it showed little tolerance for erotic materials. Except for striking down some of the Post Office Department's most outrageous censorship techniques, the high Court stayed out of the fray, leaving the lower courts to work out the definition of obscenity and construct constitutional guidelines. That is, the Supreme Court stayed out until 1957 when it entered the controversy wholeheartedly (*Roth* v. *U.S.*) and has been there ever since, attempting to explain to judges, lawyers, censors, writers, artists, filmmakers, and other people what the term *obscenity* means when used by the Court. As you will no doubt conclude after reading the next section, the efforts of the Court in this endeavor have not been terribly effective.

FEDERAL STANDARDS

Since 1957 when the United States Supreme Court ruled in *Roth* v. *United States* (pages 356–58) that obscenity falls outside the general protection granted to speech and press under the First Amendment, courts have been forced to attempt to define what is and what is not obscene. The ultimate responsibility has fallen to the Supreme Court as the final arbiter of the meaning of the Constitution. In the twenty years between 1957 and 1977 the high Court heard arguments in almost ninety obscenity cases and wrote opinions in nearly forty of the cases. The remainder of the cases were decided by per curiam rulings (this term is explained on page 24). Yet most observers agree that the court has failed in the task of defining obscenity in a comprehensive and unambiguous fashion.

The Supreme Court borrowed and devised various tests in the past century in its frequent attempts to describe obscenity definitively. None of the tests have been satisfactory, but some were worse than others. The fatal defect in each test is that it is made up of words, words which mean different things to different people. For example, the test in use today declares that if a work has serious literary value it is not obscene. What does serious literary value mean? A comic book may have serious literary value for some people. At the other end of the spectrum, even professors of literature haggle among themselves about whether some of the classics really have serious literary value.

What we are faced with, therefore, is a dispute over not only the kinds of works which are obscene, but also the meaning of the words which the courts use to define obscenity.

In this section while the main focus is on the three primary tests fashioned by the Supreme Court for use in obscenity prosecution—the *Hicklin* rule, the *Roth-Memoirs* test, and the *Miller-Hamling* test—a number of secondary tests as well as the President's Commission on Obscenity and Pornography are discussed.

Hicklin Rule

The first widely used American test of obscenity was the Hicklin rule. The United States Supreme Court borrowed the Hicklin rule from British law when it was called upon to undertake an early interpretation of the 1873 postal statute on obscenity. Benjamin Hicklin was the recorder of London who presided over an obscenity trial in that city in the 1860s. He ruled that the pamphlet in question was not obscene, but on appeal by the government, a higher court reversed the decision. Lord Chief Justice Alexander Cockburn handed down a ruling which included a definition of obscenity, a definition to which poor Benjamin Hicklin's name has been attached ever since (*Regina* v. *Hicklin,* 1868).

The *Hicklin* rule says that a work is obscene if it has a tendency to deprave and corrupt those whose minds are open to such immoral influences and into whose hands it might happen to fall.

Look at the elements of this test for a moment. First, a work is obscene if it has a tendency to deprave and corrupt. It doesn't have to deprave and corrupt, but only a tendency to deprave and corrupt is required; that is, it might deprave and corrupt. You can decide for yourself what *deprave* and *corrupt* mean. The second aspect of the test was even deadlier for authors and painters. Whom must the work have a tendency to deprave and corrupt? Those whose minds are open to such influences, in other words, anyone who runs across the book or drawing. Children's minds are obviously open to depravation and corruption from obscenity. Children might also run across such works in a library or at a bookstore. Therefore, the Hicklin rule comes down to this: If a book might have an impact upon a child or an extremely sensitive person, it is obscene and no one can read it. The *Hicklin* rule reduced the population of the nation to reading what was fit only for children.

In adopting the *Hicklin* rule American courts also decided that if any part of a book or play or magazine or whatever was obscene the entire work was then obscene. Selected passages which might be harmful to children could result in an entire book or magazine being banned. While the tests that the Supreme Court developed in the past twenty-five years cannot be called extremely liberal, compared to the *Hicklin* rule they provide virtually absolute

freedom. The *Hicklin* rule was an extremely onerous test which was used for about seventy-five years. This test was what made prosecution of obscenity so easy in the twenties, thirties, and forties, and success in prosecution made government censors even more aggressive in rooting out "filth" and "smut."

In 1957 the Supreme Court wrote the obituary for the *Hicklin* rule when it declared that condemning the adult population to read only what children might safely read was unconstitutional (*Butler* v. *Michigan*, 1957). Various lower courts had tentatively reached this conclusion in the preceding fifty years, but the *Hicklin* rule remained law in most jurisdictions.

Roth-Memoirs Test

The 1957 decision in *Butler* was the first of a long series of high Court rulings which by 1966 had fashioned a new test for determining obscenity. Although it wasn't apparent in the beginning, the key cases, *Roth* v. *U.S.* in 1957 and *A Book Named John Cleland's Memoirs of a Woman of Pleasure* v. *Massachusetts* in 1966 (and a dozen or so lesser decisions in between), resulted in liberalizing the law with regard to obscenity (see, for example, *Manuel Enterprises* v. *Day*, 1962 and *Jacobellis* v. *Ohio*, 1964).

In 1957 the high Court announced definitively that obscenity is not protected by the First Amendment. Justice William Brennan, who was to be the chief architect of the high Court's new obscenity standards during the next nine years, wrote that while all ideas which have even the slightest redeeming social importance are entitled to the full protection of the First Amendment, obscenity and pornography were not included within this protection. In the *Roth* decision Brennan wrote, "... . implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."

By placing obscenity beyond the pale of First Amendment protection, the Court silenced those persons who believed the clear and present danger test should be used for determining obscenity as well as for determining dangerous political speech. Since obscenity is not guaranteed the protection of freedom of the press, the clear and present danger test does not apply. What is obscene then? In the *Roth* case Brennan said that a work is obscene if, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The Court continued to reshape this test slightly until 1966 when in the *Memoirs* case the test evolved into the three-part definition which was used for nearly seven years. Under the *Roth-Memoirs* test, before a court can rule that a work is obscene, three requirements must be met.

First, the dominant theme of the material taken as a whole must appeal to prurient interest in sex. Implicit in this part of the test is the concept that the prurient (erotic) appeal of a book or film is determined by its impact upon

the average man or woman, not upon a child or an extremely sensitive person. Also, the dominant theme of the work, not just selected passages or a few pages, must have this prurient appeal.

Second, a court must find that the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters. Something that is patently offensive is something that is clearly indecent, and while we are hesitant to use this term, some people have argued that *patently offensive* means hard-core pornography. By contemporary standards the Court meant current standards, but the Court did not define what it meant by community: Were the standards local, state, or national?

Third, before something can be found to be obscene it must be utterly without redeeming social value. That means to have no social value at all.

Two aspects of this test should be noted: First, all three of these elements had to be present before something was obscene. Something that was patently offensive and had a prurient appeal was still not legally obscene if it had redeeming social value. All three elements must coalesce. Second, it was not a balancing test. Social value was not weighed against prurient appeal. If there was any social value at all, the material was then not obscene. And this fact, probably more than any other, made prosecution of obscenity cases very difficult. Utterly without redeeming social value is a difficult standard to prove. Some appellate court judges believed that if even only one or two persons found some value in a book or movie it was not *utterly* without redeeming social value. Consequently, the typical tack taken by defense attorneys was to bring in expert witnesses—psychiatrists, English professors, art critics, and the like—to testify that the work had some value as sexual therapy or as an example of a certain type of literature or art.

As liberal as the *Roth-Memoirs* standard was, it was not liberal enough for some civil libertarians. Absolutists argued that because of the First Amendment the government had no business telling people what they could read or watch. The First Amendment prohibition which says there is to be no law abridging freedom of speech and press means no law. Judge Jerome Frank, who heard the *Roth* case in the court of appeals, argued that restrictions against obscenity were extremely dangerous (*U.S.* v. *Roth,* 1956):

> If the government possesses the power to censor publications which arouse sexual thoughts, regardless of whether those thoughts tend probably to transform themselves into anti-social behavior, why may not the government censor political and religious publications regardless of any causal relation to probably dangerous deeds?

Justice Brennan, who constructed the *Roth-Memoirs* test, dismissed such criticism. There is no social value to obscenity, he said, and therefore society loses little if it is banned.* Between 1957 and 1973 a majority of the high Court argued that obscenity should be restricted because it lacks social value. In 1973 and 1974 the high Court took a more aggressive position and ruled for the first time that obscenity should be banned because it may be harmful, as discussion of the *Miller-Hamling* test will shortly show.

Commission on Obscenity and Pornography

Strangely enough, also between 1957 and 1973 a presidential commission studied the questions of whether obscenity should be banned and specifically whether evidence exists that pornography might be harmful, might produce antisocial behavior.

In 1967 the Commission on Obscenity and Pornography was established, at least in part, because of the judicial and scientific uncertainty regarding the effects of obscenity on persons who consume it. The commission, which was made up of social scientists, religious leaders, and government officials, spent two million dollars and two years studying what some observers called the "puzzle of pornography." At the end of the study a majority of the commission—twelve of the seventeen members—concluded that there is no evidence that viewing obscenity produces harmful effects and recommended that all laws restricting the consumption of such materials by consenting adults be repealed. Three members of the commission fielded a vigorous dissent and two others said they believed the evidence, but didn't think it was sufficient to warrant the repeal of all laws.

The study was roundly criticized by persons who disagreed with its conclusions—rightly so in some cases. There were no long-range studies on the effects of exposure to pornography, for example, and no in-depth clinical studies. In some of the surveys people were asked blatantly foolish questions. For example, one survey asked people if they had experienced a breakdown in morals or had gone "sex crazy" from viewing explicit sexual material. Who would say yes to those questions? Patients at mental hospitals were questioned regarding the influence of pornography on sex crimes they had committed.

*Of interest is the fact that Brennan turned his back on his own ruling some sixteen years later in his dissent in *Miller* v. *California* (1973) and in the *Paris Theatre* (1973) case when the aging justice wrote:

> 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. . . .

The single survey which received the widest publicity was the one which discovered that 60 percent of the persons questioned believed that adults should be able to read and watch whatever they want. However, to another question in the same survey, 73 percent of the respondents said that sex scenes in movies that merely titillate should be censored. Moreover, in 1969 both the Harris and Gallup polls found that about 80 percent of the people wanted stiffer controls on obscenity and pornography.

Regardless of what the commission found or of the flaws in its research, its recommendations were never adopted. The Senate rejected the report out of hand, and Richard Nixon, who was president at that time, vowed that so long as he was in the White House there would be no relaxation of the national effort to control and eliminate smut from our national life. Nixon noted that despite the commission's scientific evidence to the contrary, "Centuries of civilization and ten minutes of common sense tell us otherwise." Adding a phrase that would come back to haunt him in a different context four years later, Nixon said, "American morality is not to be trifled with."

Miller Test

In 1973 and 1974, in apparent agreement with the president, the Supreme Court handed down a series of rulings which reshaped the legal test for obscenity. The central case in this group of decisions was *Miller* v. *California* (1973), a suit which emanated from California. Marvin Miller was convicted of violating the California Penal Code for sending five unsolicited brochures to a restaurant in Newport Beach. The brochures, which advertised four erotic books and one film, contained pictures and drawings of men and women engaging in a variety of sexual activities. The recipient of the mailing complained to police, and Miller was prosecuted by state authorities.

In *Miller*, for the first time since 1957, Chief Justice Burger gathered four other members of the high Court to produce majority agreement on a test for obscenity. Containing three elements, like the previous *Roth-Memoirs* standard, the new test provides that material is obscene if the following standards are met:

1. An average person, applying contemporary local community standards, finds that the work, taken as a whole, appeals to prurient interest.
2. The work depicts in a patently offensive way sexual conduct specifically defined by applicable state law.
3. The work in question lacks serious literary, artistic, political, or scientific value.

As in the *Roth-Memoirs* test, the implications and ambiguities in these three elements create the need for fuller explanation. As a result of the Miller ruling and subsequent obscenity decisions handed down by the Burger Court

since 1973, some guidelines have emerged. Before the guidelines are examined in detail, it is instructive to look at the rationale presented by Chief Justice Burger for his movement away from the *Roth-Memoirs* test to more conservative standards.

Justification

As noted previously, until 1973 the high Court had justified regulation of obscenity by arguing that because such material lacks social value it is not intended to be protected by the First Amendment. But in the *Miller* and subsequent decisions Chief Justice Burger took a less neutral approach and asserted that not only did such material lack social value, but it was also harmful to society.

In *Paris Adult Theatre I* v. *Slaton* (1973), a ruling handed down at the same time the *Miller* decision was announced, the Chief Justice said that there is a clear justification for banning adults-only theaters, even if they do not intrude upon the privacy of others and even if patrons are properly warned of the kind of film they will see. The justification is, he said, "the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers and, possibly, the public safety itself."

Ignoring the majority report from the President's Commission on Obscenity and Pornography, Burger noted that the minority report states that there is an arguable correlation between obscene material and crime. Even if there were no scientific evidence, the Chief Justice wrote, "We do not demand of legislatures 'scientifically certain criteria of legislation,' for unprovable assumptions underlie much lawful state regulation of commercial and business affairs." There need not be conclusive proof of a connection between antisocial behavior and obscene material for a state legislature to reasonably conclude that such a connection exists or might exist, Burger said.

The basic thrust of the Burger argument is a kind of quality-of-life argument which many thoughtful scholars have made for several years. In the *Paris Theatre* opinion Burger in fact quoted Professor Alexander Bickel, who represented the *New York Times* in the *Pentagon Papers* case. In 1971 in *The Public Interest* concerning justification for regulation of obscenity Bickel writes:

> It concerns the tone of the society, the mode, or to use terms that have perhaps greater currency, the style and quality of life, now and in the future. A man may be entitled to read an obscene book in his room, or expose himself indecently there. . . . We should protect his privacy. But if he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places—discreet, if you will, but accessible to all—with others who share his tastes, then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies. Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which in truth we cannot) what is commonly read and seen and heard and done intrudes upon us all, want it or not.

Perhaps the most literate spokesman for this point of view is Harry M. Clor in his book *Obscenity and Public Morality* (1969). The book came out at a time when the Warren Court was pushing the limits of permissibility farther and farther, and Clor was chided for even thinking about a change of direction by the Supreme Court. Now it appears that the Court has adopted his logic, if not his standards.

Clor argues that some kind of common ethos is needed in order to have a community and that the agencies which formerly provided this ethos—schools, churches, families—don't do it any longer. The law should set the example, he says. "It must be a task of modern government and law to support and promote the public morality upon which a good social life depends."

To enforce his argument Clor quotes Aristotle (in *Politics*):

> The education of a citizen in the spirit of his constitution does not consist in his doing the actions in which the partisans of oligarchy or the adherents of democracy delight. It consists in his doing the actions by which an oligarchy or a democracy will be enabled to survive.

Clor also cites Walter Berns (in *Freedom, Virtue, and the First Amendment*):

> Since the way of the community depends upon citizens of a certain character, it must be the business of the law to promote that character. Thus, the formation of the character is the principal duty of government.

Clor concludes his argument:

> It is generally understood that, whatever other purposes such laws may have, they are also designed to implement community ethical standards.

This is a thoughtful argument, and while many authorities may disagree, it seems to make some sense in the chaotic 1980s. There is another side to the coin, however, and perhaps Justice Brennan expresses it best in his dissent in the *Paris Theatre* (1973) ruling:

> I am now inclined to argue that the Constitution protects the right to receive information and ideas, and that this right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society. . . . This right is closely tied . . . to the right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy. . . . It is similarly related to the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child . . . and the right to exercise autonomous control over the development and expression of one's intellect, interests, tastes, and personality.

THE MEANING OF MILLER

The three-part obscenity test laid down by Chief Justice Burger in the *Miller* case has proved to be as elusive and unsatisfying as previous tests devised by the judiciary. It is best understood when reduced to its essential elements.

Community Standards

The first element of the test concerns community standards: To an average person, applying contemporary local community standards, the work, taken as a whole, appeals to prurient interest. While this standard resembles the *Roth-Memoirs* test, the Supreme Court emphasized that local rather than national standards are to be applied, which represents a departure from the earlier rulings. The Supreme Court had previously been silent on this question. In 1964 in *Jacobellis* v. *Ohio,* Justice Brennan subscribed to the notion that the applicable community standard was a national one. Only one other justice joined Brennan in this opinion, but as the only word on the subject it led many observers to believe that the community standards applicable under the *Roth-Memoirs* test were national standards. The Chief Justice rejected this in *Miller*, arguing that it was silly to suggest that persons in a small town in Utah shared the same standards as persons living in Los Angeles.

The application of local standards has placed significant emphasis upon the role of the jury as fact finders. The Supreme Court expects members of the jury to rely upon their own knowledge of the standards in the community to determine the applicable standards in an obscenity case. In 1974 in *Hamling* v. *United States* Justice Rehnquist wrote:

> This Court has emphasized on more than one occasion that a principal concern in requiring that a judgment be made on the basis of contemporary community standards is to assure that the material is judged neither on the basis of each juror's personal opinion nor by its effect on a particular sensitive or insensitive person or group.

The matter of instructing jurors in the question of determining community standards surfaced quickly as a problem. Jurors are not supposed to rely on their own subjective preference; the jury is not a distillation of the standards of the community. The jurors are supposed to apply standards that they believe to be the prevailing ones in the community, standards that can be more conservative or more liberal than their own. Justice Rehnquist noted in his *Hamling* opinion that the jury should not judge the material on the basis of how it might affect a particularly sensitive person. Yet there are sensitive persons in every community. Don't their tastes matter, too?

In California a trial judge in giving jurors instructions in an obscenity trial told them to consider the effect of the material upon members of the community as a whole including children and sensitive persons. In 1978 in *Pinkus* v. *U.S.* the Supreme Court ruled that the instructions to the jury had been faulty. In considering community standards, "Children are not to be

included for these purposes as part of the 'community' . . . ," wrote Chief Justice Burger. However, instructing the jury to consider the impact of the material upon sensitive or insensitive persons is permissible, so long as these persons are looked at as a part of the entire community. Burger wrote:

> In the narrow and limited context of this case, the community includes all adults who comprise it, and a jury can consider them all in determining relevant community standards. The vice is in focusing upon the most susceptible or sensitive members when judging the obscenity of the materials, not in including them along with all others in the community.

In summary, then, the jury is the fact finder of community standards. The jurors are supposed to rely upon their knowledge of the standards of the adult members of the entire community to determine whether the material appeals to prurient interest or is patently offensive. The jurors are not supposed to apply their own standards. One commentator notes that this new approach, which places such heavy emphasis on the jury, assumes that jurors know the prevailing standards in the community as well as have the needed exposure to "all manner of descriptions or representations of sexual matters, whether spoken, written or performed." This assumption is largely untested.

Which community is meant? Chief Justice Burger ruled in *Miller* that local community standards must prevail. Does this mean state, county, city, or neighborhood? In many instances state standards are the ones which apply. In some instances state high courts have even ruled that cities and counties have no right to pass obscenity laws, since the states, through state statutes, have preempted the field of criminalizing obscenity (see *Spokane* v. *Portch*, 1979, for example). Yet for all practical purposes, since jurors are most normally drawn from county or city voting lists, and jurors are expected to rely upon their knowledge of community standards, local standards are applied in determining the obscenity of the material.

In 1977 the Supreme Court was forced to consider an unusual case from Iowa which focused upon the role of the state in determining community standards. Between 1974 and 1978 Iowa state law prohibited only the distribution of obscene materials to minors. During this period Jerry Lee Smith used the United States postal service to distribute within Iowa several erotic magazines to adult recipients. His distribution did not violate state law, but he was charged with violating federal obscenity laws which prohibit the mailing of obscene material. At his trial Smith argued that since the state did not prohibit the distribution of such material to adults, his mailings had not offended the prevailing community standards. The federal trial judge nevertheless instructed jurors to draw upon their knowledge of the views of the people in the community to determine community standards. As part of their determination jurors could consider the state law, but the absence of statutes

prohibiting the distribution of obscene material among adults was not a controlling factor in determining community standards. The Supreme Court, by a five-to-four vote, supported this position. The jury's discretion to determine community standards was not circumscribed by state law or the absence of state law (*Smith* v. *U.S.*, 1977). Justice Blackmun wrote that it would be inappropriate for a state legislature to attempt to freeze a jury to one definition of contemporary community standards. The state legislature can define within a statute the kinds of conduct that will be regulated by the state. It can adopt a geographic limit in the determination of community standards by defining the area from which the jury can be selected in an obscenity case. But it must leave to the jury the question of community standards. Blackmun also pointed out that this was a federal case. "The community standards aspects of the federal law present issues of federal law upon which a state statute such as Iowa's cannot have a conclusive effect," he added (*Smith* v. *U.S.*, 1977).

The question of applicable community standards is also an important factor in cases which involve the shipment of erotic material over long distances and its importation from abroad. Consider these hypothetical situations. A woman in New York mails obscene materials to another woman in Nebraska. She is arrested and tried. At her trial, do the community standards of New York or the standards of Nebraska apply? Here is another case. A man in Florida orders erotic material from Sweden. The material enters this country in Boston and is seized, and the United States customs service calls for a determination of whether the material is obscene. What community standards should apply? Those of Boston or of Florida?

The answers to these questions are tentative, but case law suggests the following guidelines.

In cases involving violation of postal laws, the government may choose to try the case in the community in which the material was sent or received or in any district through which the material passed (see section on postal censorship, pages 375–77). Consequently, the applicable standards are the standards existing in the community in which the trial is held. In the hypothetical cases just given, if the government chose to prosecute the defendant in New York, the standards of that community would apply. If the government chose to prosecute in Nebraska, those community standards would apply. Recently a postmaster in Oregon asked a postmaster in Wyoming to use a false name and solicit by mail erotic material distributed by an Oregon man. The defendant sent the material to Wyoming, was arrested and tried, and Wyoming community standards were applied. The record showed that the defendant had never resided in, traveled through, or had any previous business contact in Wyoming—prior to the time he sent the erotic matter through the mails

to the Wyoming postmaster. Still, the Tenth Circuit Court of Appeals concluded (*U.S.* v. *Blucher,* 1978):

> So long as *Hamling* is the law, publishers and distributors everywhere who are willing to fill subscriptions nationwide are subject to the creative zeal of federal enforcement officers who are free to shop for venue from which juries with the most restrictive views are likely to be impanelled. . . .

A similar decision was reached in *U.S.* v. *McManus* (1977).

In cases involving import laws and customs regulations, the community standards of the district in which the material was seized—not of the district in which the addressee lives—are normally the applicable standards. In the hypothetical case just cited, Boston standards rather than Florida standards would be applied. When customs officials seized hundreds of printed articles in New York, they sent notices to all 573 intended recipients advising them that the material would be destroyed within 20 days because it was obscene unless the recipients made a claim challenging the government determination that importation of the material was illegal. Fourteen persons made such claims and sought hearings. None of these persons lived in New York, yet the Second Circuit Court of Appeals ruled that since the material was seized in New York, and since the obscenity hearing would be held in New York, New York community standards should be applied (*U.S.* v. *Various Articles of Obscene Merchandise,* 1977).

If the first element of the *Miller* obscenity test appears to give the jury almost total power in determining what is and is not obscene, the second element, as interpreted by the Supreme Court, limits that power.

State Law Standards

The second element has to do with state law standards: The work depicts in a patently offensive way sexual conduct specifically defined by applicable state law. There are two basic elements in the second part of the test: (1) patent offensiveness and (2) sexual conduct specifically defined by applicable state law. Each is important. In 1974 in *Jenkins* v. *Georgia* the Supreme Court was faced with the decision by a Georgia jury that the movie *Carnal Knowledge* was obscene. The film was an R-rated movie, and while it had scenes which included partial nudity, it contained no scenes of the explicit sexual conduct usually associated wih X-rated films. Nevertheless, because in the *Miller* ruling the United States Supreme Court had given communities the power to determine community standards, and because this jury found that *Carnal Knowledge* violated those standards, the Georgia Supreme Court upheld the conviction.

The United States Supreme Court reversed the ruling, saying that the Georgia courts obviously misunderstood the *Miller* decision. The jury did have the right to determine local standards, but only those descriptions or

depictions of sexual conduct that are patently offensive can be censored, regardless of local standards. Justice Rehnquist noted that in the *Miller* case Chief Justice Burger gave two examples of the kind of patently offensive material he was talking about. These examples included "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." Rehnquist said that while this catalog of descriptions was not exhaustive, it was "intended to fix substantive constitutional limitations . . . on the type of material . . . subject to a determination of obscenity" (*Jenkins* v. *Georgia,* 1974). Therefore, under the second part of the *Miller* test, a jury is limited in what it can find to be obscene to what some commentators call hard-core pornography. In fact the National Data Center on the Law of Obscenity, a federally funded organization in California which advises local prosecutors on obscenity prosecutions, issued bulletins to prosecutors to the effect that the *Miller* test limits district attorneys to proceeding against material which can be legitimately classified as hard-core pornography.

The second aspect of the test to be noted is this: Chief Justice Burger said the descriptions or depictions of sexual conduct which are banned have to be specifically defined by the applicable state law as written or authoritatively construed. This sounds as though before a state can prohibit a description of a certain kind of sexual conduct the state must pass a specific law defining that kind of material.

How specific does the applicable state statute have to be? Not very. The high Court approved an Ohio statute which defined material as being obscene if it contained a display or description of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, brutality, or human bodily functions or eliminations.

What if a state law does not define obscenity? What if it merely prohibits "obscene materials"? This is really not a problem, according to Justice Burger, who ruled that it is sufficient in such states if the state supreme court rules that the term *obscene materials* in the law means specific descriptions of sexual conduct. For example, the Supreme Court in 1977 upheld the conviction of an individual who had been found guilty of selling two sadomasochistic publications. The defendant argued that the state law did not specifically prohibit the sale of such material. But Justice White and four members of the high Court ruled that such an argument had no merit, that such material had been held to violate Illinois state law long before the *Miller* ruling, and that such authoritative construction of the statute was sufficient to meet the test outlined under *Miller*. The examples cited by Justice Burger in the *Miller* ruling, according to Justice White, were not exhaustive, but simply illustrative of the kinds of materials which could be considered patently offensive (*Ward* v. *Illinois,* 1977).

Since 1973 most state obscenity statutes have been found to comply with the *Miller* standards, because of either specific descriptive statutory language or authoritative construction by the state's high court.

Value Standards

Standard three has received the least consideration by the courts: The work in question lacks serious literary, artistic, political, or scientific value. This standard is considerably narrower than the previous "utterly without redeeming social value" standard of the *Roth-Memoirs* test. But as yet it has not become a serious bone of contention in obscenity litigation. It is important to note that the Supreme Court has stated that it considers this element of the *Miller* test to be a question of law, not of fact. In other words, the jury plays little if any role in making a determination regarding literary or artistic value. Justice Blackmun in *Smith* v. *U.S.* noted that the determination of whether a book or magazine or film lacks value "is particularly amenable to appellate review." Hence, while an appellate court should be reluctant to second guess a jury on a determination of contemporary community standards, it should not be hesitant in making an independent determination that a work either has or has not literary, artistic, political, or scientific value (*Smith* v. *U.S.*, 1977).

The Impact of the Miller Test

In an article in the *Seton Hall Law Review* in 1978 Rodney Grunes argued that obscenity might be the only policy area where the Burger Court significantly reversed the policies developed by the Warren Court. Conventional wisdom suggests then that the impact of the *Miller* ruling on freedom of expression, upon prosecution for obscenity, and upon other related areas would be great. This does not seem to be the case, however. In 1977 researchers attempted to evaluate the impact of the *Miller* test upon the law by questioning attorneys, police, judges, legislators, and persons who sell or distribute erotic materials. On the basis of nearly five hundred fifty completed questionnaires and nearly one hundred personal interviews, the researchers found that even though most observers agreed that the *Miller* test made it easier for the state to prosecute for obscenity there was actually a decrease in the number of obscenity prosecutions in the years following the *Miller* ruling. Similarly there was no evidence of a significant shift to nonprosecutory techniques such as zoning laws (page 371), nuisance actions, or licensing regulations. Researchers also found that "Miller has had little, if any, inhibiting effect on the content of sexually explicit material." Researchers could find little difference in the amount or kind of erotica available before and after the *Miller* decision, despite dire predictions regarding its impact upon creativity and art. Finally, though *Miller* has made the prosecution of all hard-core pornography permissible, most large jurisdictions move only against a narrow range of the most explicit materials, materials that likely could have been and were prosecuted under the old *Roth-Memoirs* standards, according to the research data (*New York University Law Review*, 1977).

These results immediately prompt the question why. Three answers come to mind. First, conventional wisdom might be wrong. In fact, not all authorities agree that the *Miller* test, on its face less liberal than the *Roth-Memoirs* test, actually makes it easier to prosecute obscenity. Of the great many prosecutors questioned and interviewed for the survey just noted, less than thirty percent said they believed the *Miller* test made it easier to win an obscenity case. Fifty-four percent could see no change; seventeen percent said the *Miller* test made it more difficult. The latter argument—that *Miller* has actually made it more difficult to win a case—was echoed in an article by Kenneth Mott and Christine Kellett in the 1979 volume of the *Suffolk University Law Review.* These writers asserted that by defining community standards as local standards the Supreme Court has seriously complicated obscenity prosecutions. They noted:

> The uniqueness of each smaller community makes it necessary for the state to move against a distributor or his agent in a separate action in each locality. Ironically, the desire of the Burger Court to give each community the privilege of setting its own standards has been defeated by the correlative duty of the community to prove the obscene nature of the material without relying on judgments of obscenity from other communities.

The result of this phenomenon has raised the cost of obscenity prosecutions and made them less attractive to budget-conscious public officials. The Los Angeles city attorney told researchers in 1977 that the average contested obscenity prosecution cost the city between $10,000 and $25,000.

The increase in cost of prosecutions, a corresponding decrease in revenues at most levels of government, and the rise in numbers of other more serious crimes have forced prosecutors to be highly selective in moving against pornographers. This set of circumstances is another reason many observers believe that *Miller* has not wrought the anticipated change in the law. In the mid-1970s *New York Times* reporter James Sterba wrote, "The police say they have more important crimes to fight. Many local prosecutors comment that they have neither the time nor the money to spend cracking down on smut dealers." In 1977 prosecutors told New York University Law School researchers the same thing, and this circumstance leads to the conclusion that "despite the rising tide of sexually explicit materials, prosecutors have not committed more time and money to the battle against obscenity."

Finally, because of a legal-political phenomenon identified by political scientists as "compliance," there is some question whether the fine tuning that Chief Justice Burger did to the definition of obscenity really makes much difference on the streets, where pornography is sold and pornographers are arrested and tried.

Political scientists have proved "scientifically" a fact that good lawyers and judges have known for some time: that simply because the United States Supreme Court says something is "the law" doesn't mean that it is "the law"

at local levels, at least not right after a decision. Local noncompliance with Supreme Court rulings is not a new phenomenon, but it has become more apparent during the last quarter century. It is a function of the fact that a lawsuit is a dispute between two parties, and the resolution of that dispute by the courts technically affects only those two parties, not everyone else in a similar situation. If the Supreme Court rules that it is unconstitutional for the state of Maine to print a prayer on its license plates, the other forty-nine states would undoubtedly follow that ruling without being forced to, because it is really not a very important issue. However, if the Supreme Court tells Maine it cannot ban certain kinds of hard-core pornography, many other jurisdictions would probably be reluctant to follow that ruling until a court stops them from doing the same thing. Why? Because this issue is important. Technically, the states do not have to comply unless they are forced to by a court.

In a study of compliance with obscenity rulings in Oregon, Stephen L. Wasby wrote recently that one of the reasons for lack of compliance is the lack of agreement on what the Court intends by its opinion on the subject. "The development of Oregon obscenity policy," Wasby added, "gives evidence that the impact nationwide of a Supreme Court decision is by no means uniform. If there is a much variance in interpretation *within* one state as occurred in Oregon, certainly considerable variation must exist across the nation as a whole" ("The Pure and the Prurient: The Supreme Court, Obscenity and Oregon Policy").

What are the factors involved in compliance and noncompliance? Wasby identified several: role of the lawyers, legitimacy ascribed to the decision, direction of the decision, sentiment of the public, precision or ambiguity of the decision, decisiveness of the ruling, number of relevant opinions, and so forth.

What does compliance have to do with the impact of *Miller* on obscenity law? It has been suggested that local communities act largely unto themselves in prosecuting obscenity. The *Roth-Memoirs* test gave general guidelines for obscenity which were followed as closely as possible. The changes in these guidelines wrought by the Burger opinion in *Miller* are too subtle to be reflected locally, where judges are forced to instruct juries in common language as to what is and what is not obscene. So sexually oriented materials that were protected by the First Amendment under the *Roth-Memoirs* test remain protected under the *Miller* test in most communities. And what was legally obscene under *Roth-Memoirs* remains obscene under *Miller*. While the changes in the law appear to be dramatic, except for the very few cases which are appealed and can be examined closely by high appellate courts, the changes in the law have had little impact for police, prosecutors, pornographers, and trial judges. The best definition of obscenity in any local community still

remains what a local jury says is obscene and has changed little in the past ten years. A brief outline of how the legal system in a large community tries to cope with the obscenity in bookstores and motion-picture theaters will show this situation more clearly.

SELECTIVE STANDARDS

Two other dimensions of the definition of obscenity which developd in the years prior to *Miller* seem to retain vitality today.

In 1966 in *Ginzburg* v. *U.S.*, the Supreme Court ruled that the manner in which material is marketed, advertised, and displayed can be a factor in determining whether a work is obscene or not. This case was the result of publisher Ralph Ginzburg's efforts to sell three different publications. In marketing these publications, Justice Brennan said, Ginzburg emphasized their erotic nature and thus was engaged in "pandering"—that is, in "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of customers." This action can be a key factor in determining whether a publication or a film is obscene or not, Brennan said. Ginzburg's conviction was affirmed.

Richard Kuh, in *Foolish Figleaves,* cites as examples of pandering such schemes as using a provocative cover, using advertisements that list the previous bannings of the work, displaying the work along with other borderline items, and in various other ways promoting the erotic, deviant, or scatological appeal of the material. In 1977 in *Splawn* v. *California* four members of the Supreme Court agreed with Justice Rehnquist's majority opinion that "evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material was obscene." One year later, in writing for a seven-man majority, Chief Justice Burger noted, "We have held, and reaffirmed, that to aid a jury in its determination of whether materials are obscene, the methods of their creation, promotion, or dissemination are relevant. . ." (*Pinkus* v. *U.S.*). Hence it seems assured that if proof of pandering is introduced by the prosecution, the jury may consider it evidence in determining the obscenity of the books or films or magazines.

The Supreme Court has also ruled that states may adopt variable standards of obscenity for juveniles and for adults. That is, material acceptable for sale to adults may not be acceptable for sale to children. A bookseller or a theater owner can be prosecuted for providing obscene material to young people. This is a standard that emerged in 1968 in *Ginsberg* v. *New York* and was upheld as recently as 1975 in *Erznoznik* v. *City of Jacksonville.* In the latter case the city forbade drive-in theaters to show movies in which female buttocks and bare breasts were shown if the theater screen was visible from the street. The ordinance, which was justified in part as a means of protecting the city's youth from exposure to such material, was defective according to the Supreme Court. The high Court said that laws aimed at setting variable

standards of obscenity for adults and for children were permissible, but must be carefully constructed. "Only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to children," Justice Powell wrote. Banning the showing of nudity is simply not narrow enough; only materials which have significant erotic appeal to juveniles may be suppressed under such a statute, he added. A simple ban on all nudity, regardless of context, justification, or other factors violates the First Amendment. While the language was somewhat more restrictive than the court's pronouncements on pandering, it is safe to say that the concept of variable obscenity is still applicable today.

FACTORS INFLUENCING OBSCENITY PROSECUTION

Many factors influence the final decision to initiate obscenity prosecution including the attitude of local authorities and local standards. After a charge is brought, another set of elements comes into play. Will the prosecutor decide to use plea bargaining? What kind of jury will hear the case?

Local Attitudes and Standards

A general trend in many larger cities today is to use zoning laws either to isolate pornographic activity in one specific part of a city and try to ignore it or to spread it throughout the central business community to keep individual purveyors isolated from other sellers and distributors. Seattle passed a law in 1977 which requires all adult theaters to be located within a small area downtown. The law was upheld as a reasonable "time, place, manner restriction" (pages 77–84) motivated by the city's great interest in protecting and preserving the quality of its neighborhoods through land-use planning (*Northend Cinema* v. *Seattle,* 1978). Detroit passed a law in 1972 which prohibits adult theaters from being located within 1,000 feet of other adult theaters, adult bookstores, caberets, bars, taxi dance halls, hotels, pawnshops, pool halls, secondhand stores, and shoeshine parlors or within 500 feet of a residential area. This law was upheld by the United States Supreme Court as a legitimate means of protecting the city's neighborhoods (*Young* v. *American Mini-Theaters, Inc.,* 1976). After initial protests most pornographers affected by these laws conclude they are a means of finding a relatively safe haven from police harrassment. The rest of the community can ignore these activities. Police keep an eye on them, make occasional raids to keep everybody honest, but are not very aggressive in enforcement so long as (1) things don't get too gross, (2) citizens lodge no serious complaints, (3) shop owners confine themselves to the so-called safe zone, and (4) other criminal laws are not violated as a result of the pornographic traffic.

Bringing a Charge

Police officers who work the vice detail are fairly candid in reporting that their standards of obscenity have changed little because of the *Miller* ruling. Police officers are usually guided by two factors in deciding whether they think

material is obscene: their individual judgment and, more important, knowledge of the kinds of materials that have been successfully prosecuted in the past in the community. One officer told the author that court tests are useless to beat detectives. He added, "After you have been on the porno detail for awhile and come into contact with enough of this stuff, you get sort of a gut feeling as to what is or what is not obscene."

When the police officer thinks a work is obscene, does he make an arrest? In most larger cities the answer is no. The officer buys a copy of the material and takes it to the prosecutor. If it is a film, he asks members of the prosecutor's staff to view the picture. Most prosecutors believe that since the obscenity guidelines are vague and somewhat airy it is better to have several opinions on the suspected material before bringing charges. In Seattle, Washington, for example, three members of the prosecutor's staff review the material independently before a decision is made. What standards are used? The court tests are one consideration, but more important is the type of material successfully prosecuted in the past. One prosecutor noted, "By paying attention to what juries have already said appeals to the prurient interest, is patently offensive and has no serious literary, artistic, political or scientific value, you can predict with some certainty success in a prosecution."

Why worry so much about successful prosecution? Why not just arrest those persons the prosecutor believes are selling obscenity? For better or worse one of the ways many people determine at election time whether their prosecutor has been doing a good job seems to be his percentage of convictions. And one way for a prosecutor to have a high conviction rate is to only prosecute sure cases.

Plea Bargaining

Once charges are brought against a bookseller or theater owner, other elements of the criminal justice system then go to work. One is plea bargaining. To plea bargain means that the defendant is willing to plead guilty to a charge less serious than the one for which he is arrested. If he is charged with five counts of violating the state law and faces a possible two-year jail term, the state might be willing to reduce the charge and merely fine the defendant if he is willing to plead guilty. Why would a defendant agree to this? Here is what a good defense attorney who specializes in obscenity cases says:

> All these defendants are ready and willing to fight the charges against them, but you must understand that regardless of how tough or easy they might think the law is it always boils down to a matter of balancing their concerns over free speech with their financial interests, and truthfully, most of them are not in the business to crusade for the First Amendment but more simply just to make a living. Therefore, since they are first and foremost businessmen, who contrary to popular belief operate within a tight profit-loss margin, it is hard for them to justify facing the cost of going to trial and even the slightest chance of incurring the stiff fine and jail sentence that a formal conviction will most likely bring if the opportunity presents itself to avoid, or at least minimize these hardships. . . .

One prosecutor told University of Washington researcher Kirk Anderson that he is willing to plea bargain with pornography dealers because "it is not my business to put people in jail, but rather to stop public distribution of certain obscene materials." If he can get the same results through a plea without going to trial, so much the better.

The Jury

If a case goes to trial, the judge and the jury are the ones who must define obscenity. Some defense attorneys believe that the most important part of an obscenity trial is selecting the jury. At the Practicing Law Institute in New York, where defense lawyers can take courses about various kinds of legal problems, attorneys Michael Kennedy and Gerald Lefcourt presented what their experience and research had showed were the characteristics of ideal defense jurors and ideal prosecution jurors in obscenity trials.

According to Kennedy and Lefcourt, defense attorneys should seek jurors who are under thirty years of age, have some college background, preferably a liberal arts background, come from a middle-income economic stratum, are irreligious, have some exposure to pornography, tend to be independent in their life-style, and are employed in a nonauthoritarian occupation. Prosecutors, according to the two attorneys, should look for men jurors more than fifty years of age if possible, since men tend to be more conservative than women. They should seek jurors with less than a high school education or with more than a college education—technical training is desirable. Those persons who have a very low or very high income, are religious, have no exposure to pornography, and have an authoritarian employment (a supervisor) make the best jurors for the state. Kennedy and Lefcourt have also found that Asians tend to be more tolerant of pornography than are other groups, and that while blacks are generally antiprosecution, they are rarely sympathetic to rich white pornographers. Persons with an artistic background tend to be more tolerant of pornography, persons with Spanish surnames usually have a religious bias, the closer jurors live to the place where the obscenity is distributed the less sympathetic they are to the pornographer. A jury made up of all one kind of jurors—all male, all old, all black, all college graduates—is bad for the defense ("Trial Strategy in an Obscenity Case").

Judge's Instructions

In addition to the jury members the instructions given the jury are vitally important to the outcome of an obscenity case. The instructions, of course, tell the jury what the law is—in other words, how to determine whether the material is obscene. A trial judge generally bases his instructions both on his personal reading of the law and on personal experience. Judge David Soukup of the Washington State Superior Court, who has tried numerous obscenity cases, told researcher Anderson this about jury instructions:

> Basically the matter of deciding what to include in a set of instructions depends on what the judge himself feels is necessary such that the jury can make a knowledgeable and legally sound determination, a judgment that is predicated

> upon his own interpretation of the law and what it requires, in combination with what his practical experience tells him jurors need in order to best understand the criteria they must apply to the facts at hand. The result of this highly individualized process, which is also influenced by the judge's philosophy of his role under the law and his feeling about pornography in general, is that some judges will stick pretty close to the *Miller* test and the definitions of it provided by the Supreme Court, while others will attempt to embellish them by adding varying degrees of explanation arising from their own interpretations of the law. . . .

In addition to determining whether the material is obscene, jurors are also called upon to answer the question of whether the defendant was knowledgeable about the contents of what he was selling or distributing or publishing. This is called scienter, or guilty knowledge. In a 1959 case, *Smith* v. *California,* the United States Supreme Court ruled that before a person can be convicted for selling obscene books the state has to prove that the seller was aware of the contents of the books, that he knew what they were about. The reason for this ruling is quite simple. As Justice William Brennan wrote more than twenty years ago, "If the bookseller is criminally liable without knowledge of the contents, . . . he will 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 . . ." (*Smith* v. *California,* 1959).

There has always been some confusion about exactly what a state or other jurisdiction must prove. For example, does the bookseller have to know the books are obscene? In the *Hamling* decision the Supreme Court tried to clarify this point by repeating that scienter merely means proving that the defendant has a general knowledge of the material in question, that it is a book about homosexuals, for example, or that the movie contains sadistic scenes. It is not necessary that the bookseller or the theater operator know that the material is legally obscene. Normally a prosecutor can demonstrate scienter without much trouble, but it is another question which the jury must decide.

What this process suggests is that, like other street crimes, the prosecution of obscenity in any community depends largely upon how the law is administered and interpreted *locally.* And within certain parameters, a community can read the books it wants to read, see the movies it wants to see, and buy the kinds of magazines it wants to buy. What the United States Supreme Court says about obscenity is relevant to most communities in only an indirect way. These practical realities regarding obscenity prosecutions suggest that the nation's appellate courts—especially the Supreme Court of the United States—probably spend far too much time contemplating this matter. But if local governments often seem ambivalent today about obscenity prosecution, agencies of the federal government seem more intent upon protecting the public morals. The United States postal service is such an agency.

POSTAL CENSORSHIP

Use of the postal service to censor obscenity has a long tradition in the United States. In fact, it is through the postal system that the federal government becomes involved in the regulation of obscenity. The Post Office Department has long been an insensitive and moralistic censor of all sorts of material. Armed with congressional authority as well as a nineteenth-century Supreme Court ruling which designated use of the mails a privilege and not a right (ex parte *Jackson,*1878), the postal service has worked hard to keep the mails free of "smut," even smut in plain brown wrappers. While the government cannot tamper with first-class mail legally, publishers of magazines of all kinds—girly, nudist, art, anthropological, crime, true confessions—have long been plagued by postal inspectors. While the loss of much of this material would not be a severe blow to the nation's cultural heritage, it is still highly frustrating to publishers who must depend upon the postal service to deliver their wares. For most publications the Post Office Department runs the only game in town.

The Post Office Department has traditionally been plagued with administrative slovenliness which causes it to run afoul of the law. Federal courts have for years been telling the postal service that it cannot do this or that: institute a mail block, for example, or deny due process of law in obscenity hearings, ban publications which don't contribute to "the public good," or force patrons to come to the post office to pick up mail from Communist countries. In 1968 the postal service took a new tack in regulating certain kinds of obscene material, a tack designed to take the service off the legal hot seat. What is known as the Anti-Pandering Law or Section 3008 of Title 39 of the United States Code was put into effect by Congress. It was designed to stop the delivery of unwanted obscene solicitations to mail patrons' homes. This had been a problem for years, a real problem in many cases. Mailers were indiscriminate in sending out such material, and it was not uncommon for youngsters to receive lurid solicitations from magazines, books, and pictures.

Section 3008 allows postal patrons to remain free from such solicitations, but only after they have received such an advertisement. It works this way. Imagine that John Smith finds an advertisement for La Femme French postcards in his mailbox and is properly shocked. Under Section 3008 John can fill out a postal form which is sent by the Post Office to the La Femme company advising the mailer that Mr. Smith does not want to receive such solicitations in the future. If La Femme were to send John a subsequent mailing, the company could be subject to prosecution.

The interesting aspect of this law concerns the definition of obscenity—there is none. Postal patrons decide for themselves what is obscene. If they don't like the material, the dislike then is all that is needed. Once the notice is sent to the mailer, *any* subsequent mailing is a violation of the law. John might decide that a *Time* magazine solicitation or an advertisement for seat

covers or a record club is obscene. There must be solicitation, but that is the only requirement.

The distributors of erotic material challenged this law, since to remove a name from a mailing list is quite costly. Also they argued that the law violated their First Amendment rights, and because the law did not define obscenity, it was too vague and therefore a violation of Fifth Amendment rights. But the Supreme Court unanimously supported the law. The Court said that Congress intended to give the postal patron the right to decide on the obscenity of an advertisement, and this right eliminates the Post Office Department from a censorship role.

As far as the First Amendment right to communicate (if there is such a right) is concerned, the high Court ruled that the right of privacy is also guaranteed by the Constitution. This law does impede the flow of ideas, information, and so forth. However, Chief Justice Burger wrote (*Rowan* v. *Post Office*, 1970):

> . . . today everyman's mail 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. It seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee. . . . We categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another.

A more recent addition to the postal laws operates on somewhat the same principle, and has caused the pornography distributors even more headaches. Section 3010 of Title 39, United States Code, called the Goldwater Amendment to the Postal Reorganization Bill, allows mail patrons the opportunity to get off a pornographer's mailing list even before they receive the first solicitation. Under this law John Smith can fill out a form at his local post office which asserts that he does not want to receive any sexually oriented advertising. The postal service periodically publishes computerized lists of the names and addresses of persons who have signed this form. After a person's name has been on the list for thirty days, it is illegal to send that individual sexually oriented advertising matter. Mailers who ignore this are subject to both criminal and civil penalties.

Where do the mailers get the lists of names? They have to buy the lists from the government. When the law went into effect a few years ago, the cost of a master list was more than $5,000. Of course supplements are published periodically, and they must be purchased as well.

Section 3010 is different from Section 3008 in that it defines sexually oriented material, whereas the Anti-Pandering Law lets postal patrons decide on their own.

Here is how the statute defines sexually oriented material:

> . . . any advertisement that depicts in actual or simulated form, or explicitly describes, in a predominantly sexual context, human genitalia, any act of natural or unnatural sexual intercourse, or any act of sadism or masochism, or any other erotic subject directly related to the foregoing.

The law does not pertain to materials in which the sexually oriented advertisement comprises only a small and insignificant part of a larger catalog, book, or periodical. This statute was also upheld by the federal courts (*Pent-R-Books* v. *U.S. Postal Service,* 1971). This law also provides that any envelope containing an advertisement which falls within the definition just given must carry a warning on the outside as to the nature of the contents.

Both of these statutes have been widely used and have solved one of the most serious problems relating to pornography—its shipment to people who don't want it. However, neither of these laws precludes the possibility of criminal obscenity prosecution against advertisers for sending out such material, even to people who want it. The 1974 *Hamling* case was based on just such an advertisement.

FILM CENSORSHIP

Courts have always treated movies differently than they treat books, magazines, and artwork. Films have been censored for a great many reasons, including obscenity. Initially the Supreme Court refused to include films under the protection of the First Amendment. In 1915 in the case of *Mutual Film Corp.* v. *Industrial Commission of Ohio,* Justice Joseph McKenna wrote for the Court that while, indeed, movies may be mediums of thought, so are many other things such as circuses and the theaters. "It cannot be put out of view," the justice wrote, "that the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . as part of the press of the country or as organs of public opinion."

This was the law until the 1950s when the high Court ruled that film is a medium protected by the First Amendment and cannot be censored by a state, except in cases of obscenity (*Burstyn* v. *Wilson,* 1952). This seemed to put moviemakers on the same footing as magazine publishers, with one exception. The courts permitted prior censorship with regard to motion pictures; that is, a theater owner or film distributor could constitutionally be required to present the film to a board of censors for approval before showing it in the theater. In 1961 a film distributor challenged this practice and lost. In a five-to-four ruling the high Court said that there is no complete and absolute freedom to exhibit, even once, any and every kind of motion picture (*Times Film Corp.* v. *Chicago*).

While approving prior censorship for motion pictures, the high Court also demands procedures within the censorship system which protect the rights of

theater owners. Concerning such, the high Court struck down several film censorship systems (for example, in Maryland and Dallas) which took too long to reach a decision, placed the burden of proof on the theater owner rather than on the government, and so forth (*Freedman* v. *Maryland*, 1965 and *Interstate Circuit* v. *Dallas*, 1968). In 1965 when the Court struck down the Maryland censorship law in *Freedman* v. *Maryland* it outlined the constitutional requirements of a permissible film ordinance. But the Court was unable to find an ordinance that passed muster until 1974 when it summarily affirmed the judgment of a three-judge panel which approved the revamped Maryland law.

The Maryland law which was approved in *Star* v. *Preller* (1974) had these provisions:

1. Every film, including those in coin-operated loop machines, must have a license from the state board of censors before it can be shown. Showing a film without a license is a crime, regardless of whether it is obscene.
2. Once a film is submitted to the censorship board, the board must either issue a license or initiate an action in court against the film within eight days.
3. In a court action to determine whether the film is obscene, the censorship board must prove the film is obscene. The film distributor does not have to prove that it is not obscene.
4. Hearing must be held in court within five days after the action is filed.
5. The court must issue a ruling within two days after the hearing is over. There is also a provision for expedited appeals.
6. The film cannot be shown until the hearing is completed.

Given the fact that prior restraint is allowed, the benefit of this ordinance is that a film must be licensed or declared obscene in a maximum of fifteen days. Moreover, the state bears the burden of proof in any hearing that results. Perhaps this seems like crumbs for a starving man, but this system is nevertheless far superior to those of yesterday in which motion pictures were often tied up for months with the censors, and the theater owner or film distributor was forced to go into court and try to prove a negative: that a movie was not obscene.

Many communities no longer operate film censorship boards. They are costly, and because the censors frequently abuse the system, these boards have a bad name. In Chicago, for example, the censorship board, which was comprised of police officers and the proverbial little old ladies in tennis shoes, once cut a scene showing the birth of a deer from a Walt Disney nature movie. Most communities proceed against obscene movies much as they do against obscene books—case-by-case prosecution.

Film prosecutions also present problems. In the case of an obscene book, an undercover officer can buy a copy of the suspect edition, and it can be scrutinized and later used as evidence if a criminal action results. But the price of a movie ticket includes only the right to look, not to take. So the police and the courts experienced many years of pushing and shoving over what was and was not legal. For a while the police merely seized all copies of the film. But the courts didn't approve of that, because whether the film was obscene was for the courts to decide. If the jury decided the film was not obscene, seizure then constituted a clear case of prior restraint. So the police were forced to use other means. In some cities the police videotaped portions of the movie for use as evidence in a trial. But the quality of the tape was poor, and often theater owners who were arguing about the high technical quality of a film complained that the police copy made the picture look worse than it actually was.

In 1973 in *Heller* v. *New York,* the Supreme Court handed down rules which clarified the matter, even though the new policies didn't satisfy many people on either side. Under the *Heller* rules a film cannot be seized by police as evidence until a warrant is issued by a neutral judge or magistrate who has viewed the film and has ruled that it is obscene. The hearing in which the judge issues the warrant is not an adversary hearing, because the theater owner is not represented. This warrant is called an ex parte warrant. Only the state is represented, and all that the warrant says is that one judge has seen the film and thinks it is obscene.

Following seizure, an adversary hearing—a trial—is held to determine whether the film is in fact obscene. During the period between seizure and final judicial determination of obscenity, the theater owner can continue to show the motion picture if he has a second copy. If no second copy is available, the state must then permit the exhibitor to make a copy of the film that was seized so that exhibition of the movie can go on. Therefore, the police get their evidence and the theater owner can keep showing the movie until the trial is over. The only serious problem is that it is expensive for the theater owner to make a second copy of the movie. *Heller* and a companion case, *Roaden* v. *Kentucky* (1973), make it clear that a police officer cannot seize a motion picture even as evidence incidental to an arrest unless a judge first sees the movie (at the theater, of course) and declares it to be obscene.

In the end, one question seems to always pop up: Why is there so much ado about nothing? Of course there are persons who argue that obscenity is not "nothing"; it is something, something very important. The morality of the community is at stake. And maybe it is.

The First Amendment hasn't worked very well with regard to obscenity. The eloquent vagueness of the drafters of the Bill of Rights has not served us

at all well in this issue. Both sides use the silence of the First Amendment with regard to obscenity to bolster their opposite arguments.

One does not get a great deal of satisfaction from studying the obscenity problem for any length of time. Often it appears that in this dispute no one is right. The trash that is normally peddled as erotic art seems not much worse than nonerotic trash, but it costs much more. Society wastes an immense amount of money, and police, prosecutors, and courts waste an immense amount of time trying to control "the obscenity problem." In one recent term ten percent of the case load of the United States Supreme Court were obscenity cases. The debate on both sides is rarely lofty; the principles at stake are often obscure. It is troublesome that in an age which is rife with problems we spend so much time on this controversy.

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10 Regulation of Advertising

Americans are treated to scores of advertisements daily. Someone has estimated that each of us is exposed to at least one hundred ten advertisements per day, and at least seventy-six of them register in our consciousness. People in the business tell us that advertising is the cornerstone of our capitalistic economic system. Low prices for consumers are dependent upon mass production, mass production is dependent upon volume sales, and volume sales are dependent upon advertising. Many economists support this theory. Critics of advertising argue that while people probably would pay more for some products without the savings wrought by mass production and advertising they would pay less for many more products such as cosmetics and patent medicines, half of whose purchase price pays for large advertising expenditures. Critics also argue (not without challenge) that people buy more than they really need because of advertising. Regardless of who is right, about $43 billion was spent in 1978 for advertising. About four cents of every dollar spent by every man, woman, and child for goods and services went to pay for advertising costs. Some companies in this country spend one dollar for every three dollars they earn in sales on advertisements for their products. Proctor & Gamble Co. spent $460 million on advertising in a single year. Far more money is spent for advertising than for many social needs, a fact which makes advertising controversial.

Regulation of advertising is also controversial. Many persons argue that advertising deserves the same measure of First Amendment protection as other kinds of speech, and that government interference with advertising is a serious violation of at least the spirit of freedom of expression. They say that our capitalistic system is based upon a laissez-faire economic theory in which consumers must compete in the marketplace like everyone else. Within bare

limits (such as laws against selling dangerous medicines or tainted meat), the consumer must learn to shop carefully, read advertising closely, be skeptical about any claim: caveat emptor—let the buyer beware.

On the other hand there are persons who consider purely commercial messages, those designed to convince consumers to purchase products, undeserving of First Amendment protection. Freedom of the press is designed to protect ideas, not the trivialities of advertising. Consumer information is the basis of our capitalistic system, they argue, and only those advertisements which inform truthfully and accurately should be published or aired. Each time they make a purchase, consumers should not have to worry that they are being lied to or deceived by the manufacturer. The government should police unfair and deceptive advertising just as it polices other fraudulent conduct such as extortion and phony land sales. Caveat venditor—let the seller beware.

In the last quarter of the twentieth century, advertisers find themselves somewhere between the two positions. A measure of regulation has been built into the law, as this chapter will show. We will take a brief look at the history of advertising regulation in the United States and consider some of the conditions making regulation necessary. Then we will consider the protection the First Amendment affords advertising claims and get a brief perspective of the means available to regulate unfair and deceptive advertising including industry and governmental regulation. Most of the chapter, however, is given over to consideration of the Federal Trade Commission, the primary watchdog of advertising in this country. Its jurisdiction, its standards, its remedies to correct bad advertising, and its procedures are discussed. Finally, the various kinds of deceptive advertising are identified and discussed briefly, and the defenses an advertiser can use in a false-advertising suit are outlined.

HISTORY OF REGULATION

From a historical standpoint, the regulation of advertising is a fairly recent phenomenon in this country because advertising as we know it today is a relatively modern practice. True, the first American newspaper published more than two hundred seventy-five years ago contained advertisements, but they were really announcements by merchants that goods had arrived or that certain merchandise was now in stock. The announcements were embellished somewhat, of course, but the modern advertising pitch did not become a common affair until the last part of the nineteenth century. Advertising depended upon the mass marketing of goods, which depended upon the so-called industrial revolution and modern modes of transportation.

In the past one hundred years or so the nation has moved gradually from having no regulations upon advertising to having hundreds of different kinds of laws whose purpose is to regulate advertising. While in this chapter we are primarily concerned with how untrue and deceptive advertising is policed, it must also be noted that today there are scores of other laws applicable to commercial messages of which advertisers and advertising agencies must be aware.

In the wake of the civil rights movement of the past two decades, a whole range of regulations whose purpose is to make advertisements comply with equal rights provisions have been adopted. In employment and housing advertisements, for example, it is illegal under federal as well as under many state laws to discriminate against persons because of sex, race, national origin, or marital status. The publication, as well as the advertiser, can be held liable for the violation of such laws. The Truth in Lending Law placed various credit disclosure requirements upon advertisers. There are numerous laws at both federal and state levels which prescribe certain rules for political advertising. The rates for political advertising are frequently limited. In many states newspapers and broadcasting stations must file the names of political advertisers with public disclosure commissions. In most states the name of the sponsor of a political advertisement must be included in the advertisement. Political party labels must also be conspicuous.

Other laws dictate what can and cannot be said in specific kinds of advertisements. For example, strict regulations apply to liquor advertising. The law requires the publication in a conspicuous type size of alcoholic content (86 proof) and kind (bourbon) of whiskey.

The provisions just given are but a few examples of how advertising laws have evolved to meet changing political and social conditions in the United States. It is sufficient to say that the advertiser must be both cautious and knowledgeable when preparing advertisements.

NEED FOR REGULATION

The first fact an advertiser must remember is that he must obey the laws which specifically regulate advertising messages *in addition* to all the other laws which regulate the mass media. In other words, an advertisement can be libelous and the advertiser can be sued for defamation. An advertisement can be obscene and can invade the privacy of a person. It can violate copyright law or violate the Federal Communications Act. It can violate a federal, state, or local advertising regulation.

The basic thrust of advertising regulation at all levels is to outlaw deceptive advertisements, unfair advertisements, advertisements which are dishonest or untruthful. Here is where the first—perhaps the biggest—problem arises. Whose standard of truth do we use? While this question is considered in greater detail later in the chapter, it is important to note at this point that there are persons who think that most advertising is dishonest, that the concepts of truth and advertising are antithetical in most instances. To demand advertising to be truthful, some argue, would be to stop most advertising. This argument is worth exploring for a moment.

Were a man to invent a truly unique product—such as an automobile which can be powered by tap water—advertising for such a product could simply be informative and tell consumers that this product is available. But

if there were such a product, advertisements would not really be needed for long. Changes in the product might require new advertising, but consumers rarely have to be convinced to buy a product with such obvious advantages. However, if you watch television closely and read the advertisements in newspapers and magazines, you will find that most advertising is not about products like the water-powered car. Most advertising dollars are spent on products which are not unique—headache remedies, toothpastes, automobiles, cosmetics, detergents, soda pop, and so forth. Because the differences between various brands of these products are usually marginal, the consumer must be given reasons to buy Bufferin rather than Bayer Aspirin or Anacin, Seven-Up rather than Pepsi-Cola. Those who argue that there is little truth in advertising point to such advertisements and say that these advertisements manufacture differences that don't exist or aren't important. They ask, who cares about such differences? and say that to promote them is dishonest.

There is considerable truth in such an argument, but not enough to halt a $43-billion-per-year industry. The regulators of advertising in the United States find it fairly easy to rationalize that such advertisements really don't hurt anybody, because consumers are smart enough to realize that their only purpose is to catch the attention, not to inform. What harm is done when one cigarette advertises that it is milder, another that it is longer, another that it is cooler, another that it is more masculine, and another that it is more feminine? No one believes these advertisements anyway. But can we be sure that consumers are skeptical of advertisements? As we will see, the law does not require that advertising actually inform, only that it doesn't deceive.

FIRST AMENDMENT PROTECTION

Advertising, or commercial speech as it is often called, enjoys limited if ill-defined protection under the First Amendment. Only ten years ago it was generally regarded that no such protection existed for advertising. In 1942 the Supreme Court had ruled that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising" (*Valentine* v. *Chrestensen,* 1942). Despite the 1964 *Sullivan* libel decision which asserted that political advertising falls within the ambit of First Amendment protection, nothing that the court had done or said suggested that commercial advertising (advertising products, goods, services, etc.) was similarly protected. But by 1980, following a series of important rulings in which the high Court began to forge a so-called commercial speech doctrine, it was clear that commercial advertising will also be shielded from government action by the First Amendment. The "commercial speech doctrine" has been developed on a case-by-case basis and hence its contours remain blurry as the 1980s begin. Two things are certain. A majority of the Supreme Court believes that the economic information which is sometimes transmitted by advertising is important to people, as important as political information. And these kinds of messages will be protected from government interference. But a majority of the high

Court also believes that advertising that is false, misleading, or deceptive has little value and hence is **not worthy** of First Amendment protection.

Commercial Speech Doctrine

Probably the first inkling that the high Court was willing to change its mind regarding First Amendment protection for advertising came in 1973 in a case involving help-wanted advertising in the *Pittsburgh Press.* In its columns of help-wanted classified advertising the newspaper used male and female designations. The city human relations commission issued a cease and desist order on the grounds that the practice violated a city ordinance prohibiting employment advertising which discriminated on the basis of sex. In deciding the case, the Supreme Court did not say that the advertisements were protected by the First Amendment. But as P. Cameron Devore and Marshall Nelson point out in the *Hastings Law Journal* ("Commercial Speech and Paid Access to the Press"), neither did the high Court say that commercial advertising remained outside the realm of First Amendment protection.

The *Pittsburgh Press* raised two arguments in an attempt to rebut the rule that commercial advertising is not protected under the First Amendment. The newspaper argued that advertising dollars provided fully 75 percent of the newspaper's revenue and limitation on advertising could damage the *Press.* The high Court did not reject this contention. It merely noted that in this case the city ordinance did not significantly impair the ability of the newspaper to publish.

Attorneys for the *Press* argued that the newspaper exercised considerable editorial judgment in the acceptance and placement of advertising and that the ordinance interfered with that. The Court agreed that editorial judgment was a factor in the publication of commercial advertising, but in that case the degree of judgment was insufficient to separate it from the commercial character of the advertisement. In its decision the high Court noted that discrimination in employment is an illegal commercial activity per se (*Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Rights,* 1973):

> 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.

While there are many ways of reading such a decision, DeVore and Marshall argue persuasively that the court placed some limitations on its outright declaration that commercial advertising is beyond the pale of the First Amendment. It can be argued, they say, that if regulation of commercial advertising were shown to endanger the economic base of the press, if it were shown that advertising is a basic content of the media because of the basic editorial judgments involved, or if it were shown that the advertisements are for otherwise lawful activity, then the Court might be willing to grant First Amendment protection to purely commercial messages.

Two years after the *Pittsburgh Press* ruling the Supreme Court reversed the conviction of a Virginia newspaper editor who had been found guilty of publishing an advertisement which offered assistance to women seeking abortion. Abortion was illegal in Virginia in 1971 when the advertisement was published. The Woman's Pavilion, a New York group, urged women who wanted an abortion to come to New York. As if to emphasize the argument made by Devore and Marshall in analyzing the *Pittsburgh Press* case, Justice Blackmun wrote for the Court that speech does not lose the protection of the First Amendment merely because it appears in the form of a commercial advertisement. Blackmun distinguished this ruling from the high Court's ruling in *Chrestensen* by arguing that in that instance the Supreme Court merely upheld the New York ordinance as a reasonable regulation *of the manner in which commercial advertising can be distributed* (author's emphasis). Blackmun refused to open the door completely or to state explicitly how far this ruling opened the door. "We need not decide in this case," he wrote, "the precise extent to which the First Amendment permits regulation of advertising that is related to activities the state may legitimately regulate or even prohibit" (*Bigelow* v. *Virginia,* 1975).

In 1976 the Supreme Court seemed to provide a much clearer answer in the case of *Virginia State Board of Pharmacy* v. *Virginia Citizens' Consumer Council, Inc.* The high Court ruled that a Virginia statute which had the effect of prohibiting pharmacies from advertising the price of prescription drugs violated the guarantee of freedom of expression in the First Amendment. Justice Harry Blackmun wrote:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions in the aggregate be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

The high Court made it equally clear, however, that the government was completely free to continue to regulate commercial speech which is false, misleading, or deceptive or which proposes illegal transactions.

Perhaps the ruling which most enriched the commercial doctrine was handed down in 1977. The township of Willingboro, New Jersey, banned the display of For Sale and Sold signs on homes and lawns in the community. The motivation for the ban was the fear that such signs contributed to panic selling by white homeowners who feared that the township was becoming populated predominantly by black families, and that property values would decline. The black population had increased in the community, while white homeowners moved elsewhere. Persons testified before the township council that "the reason 80 percent of the sellers gave for their decision to sell was

that 'the whole town was for sale and they didn't want to be caught in any bind.' " Community leaders reasoned that banning For Sale signs might diminish the fear that "everyone is selling" and might also stabilize the population.

When the ban was challenged on First Amendment grounds, Willingboro attempted to justify the policy on two grounds: first, that homeowners had other means of communicating that their property was for sale, including newspaper advertising and second, that the goal of the ban was to provide stable, racially integrated housing, two factors which the community and the region considered important. But Justice Thurgood Marshall and a majority of the high Court rejected both arguments. Marshall wrote that advertising in the newspaper was not a satisfactory alternative because it was a costly and less-effective medium for communicating the specific message that a home was for sale. He added that while the goal of racial integration was important so too were the goals asserted by the government in *Bigelow* and *Virginia Pharmacy*. Marshall asserted that the constitutional defect of the Willingboro for-sale-sign ban was basic (*Linmark Associates* v. *Township of Willingboro*, 1977):

> The Township Council . . . acted to prevent its residents from obtaining certain information. That information . . . is of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families. . . . If the dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality. . . . *Virginia Pharmacy* denies government such sweeping powers.

Two aspects of the *Linmark* ruling are important as actual extensions of the doctrine defined in the *Virginia Pharmacy* case. First, in both *Bigelow* and *Virginia Pharmacy* the Supreme Court struck down rather sweeping bans which effectively prohibited all media communication about abortion and prices of prescription drugs. There were no real alternative means for communicating these messages. Despite Justice Marshall's comments regarding the limitations of the alternatives to For Sale signs, property owners in Willingboro had several other means of reaching prospective buyers. Newspaper advertising, listings with realtors, handbills, and so forth. For Sale signs are an effective means of announcing the availability of property, but clearly not the only means. In other words, the ban on communication placed by the township of Willingboro was quite narrow compared to the broader strictures struck down in the two previous rulings.

Second, it takes a fairly active imagination to attach the same importance to the information communicated in a For Sale sign and the information communicated in the price of prescription drugs or the availability of an abortion. The sale of a house is primarily a commercial transaction more akin

to buying a pound of ground beef than to the public health matters involved in *Bigelow* and *Virginia Pharmacy*.

These two aspects of the *Linmark* case, then, suggest that the high Court was moving to a more neutral posture in its consideration of First Amendment protection for advertising. The "importance of the message" and the "availability of alternative means" seemed less important in *Willingboro* than in previous cases, and the high Court seemed closer to saying, "We don't care why the ban was instituted or what the advertisement says. So long as the advertisement communicates some information that consumers find useful, it cannot be prohibited by government." It appeared the Court was moving to a position almost akin to its position on political speech: the speaker does not have to justify the importance of the communication; the government has to justify the ban on the communication.

In 1977 the Supreme Court also struck down rules which prohibited lawyers from advertising and ruled that price advertising for routine legal services is protected by the First Amendment as long as it is not false or misleading. Justice Blackmun's opinion in *Bates and Van O'Steen* v. *Arizona* suggested, however, that the court would not go much farther when he noted that advertisements regarding the "quality" of legal service (Acme Lawyers win fifty percent more contest divorce cases or Acme Lawyers are the best criminal lawyers in town) are not susceptible to verification and "might well be deceptive or misleading to the public, or even false."

Restrictions on Commercial Advertising

All good things apparently come to an end, however, and in rulings near the end of the seventies the high Court began to sketch in restrictions on the protection granted commercial advertising. In 1978, in *Ohralik* v. *Ohio State Bar Association,* the high Court ruled that personal solicitation by attorneys is different from price advertising and can be barred without damage to the First Amendment. In 1979 the Supreme Court ruled that the state of Texas could constitutionally prohibit the practice of optometry under a trade name. In distinguishing the previous rulings on commercial advertising, Justice Powell said that the use of an optometric trade name is strictly a business use: it does not provide consumers with information or knowledge useful in making an economic decision. Also, he noted that "the trade name of an optometrical practice can remain unchanged despite changes in the staff of optometrists upon whose skill and care the public depends when it patronizes its practice." This could be misleading and deceptive, he argued (*Friedman* v. *Rogers,* 1979).

The *Friedman* case was disconcerting to supporters of a broad commercial speech doctrine more because of what it suggested than because of what it said. A ban in Texas on the use of trade names for optometrists is a relatively small matter—except to optometrists who practice in Texas. But unlike the *Linmark* case where Justice Marshall seemed to go out of his way to find

reasons to invalidate the ban on For Sale signs, in *Friedman* Justice Powell seemed to go out of his way to find reasons to justify the prohibition of the use of a trade name by optometric businesses. His reasons were weak. An interested client, for example, could easily call an eye clinic to discover the names of the optometrists on the staff. And one is hard pressed to find much difference in the amount of commercial "information" provided by a For Sale sign on a homeowner's lawn and a trade name used by an optometrist.

Current Status

As the 1980s begin, the limits of First Amendment protection of commercial advertising continue to develop. Lower courts are beginning to hand down rulings that will help shape the boundaries as the decade progresses. The federal District Court for Northern California struck down a state law which prohibited clinical laboratories from advertising to the general public (*Metpath* v. *Myers,* 1978). In Rhode Island a district court ruled that a statute which prohibited the broadcast of advertisements by persons who prepare income tax returns was unconstitutional (*Rhode Island Broadcasters* v. *Michaelson,* 1978). And in Pennsylvania the state's supreme court invalidated the state law which prohibited "situation or job wanted" advertisements from listing the advertiser's race, color, religious creed, ancestry, age, sex, or national origin. The law was initiated as a good-faith effort to enforce the state's policy of fostering nondiscrimination in employment. While such a ban on persons seeking to hire workers was permissible, the ban on persons seeking work violated the First Amendment. Citing *Linmark*, the court ruled that "it is clear that commercial speech cannot be banned because of an unsubstantial belief that its impact is detrimental" (*Pennsylvania* v. *Pittsburgh Press,* 1979).

As noted earlier, commercial advertising is not without protection by the First Amendment. Advertising which communicates valuable information to the consumer surely enjoys freedom of speech and press so long as it is not misleading, deceptive, or false. It is difficult to draw definitive conclusions beyond this simple statement. Hopefully, by the end of this decade the boundaries of the protection for commercial advertising will be more clearly drawn.

WAYS TO REGULATE UNFAIR AND DECEPTIVE ADVERTISING

The regulation of unfair and deceptive advertising is a most difficult task, for as previously noted disagreement about what is and what is not unfair and deceptive is frequent. Society uses various means to control this kind of advertising. The industry—the advertisers, the advertising agencies, and the mass media—polices itself. Both competitors (of errant advertisers) and consumers use the courts to seek redress for false or unfair advertising. Cities and states also have laws which prohibit untrue and deceptive advertising. Regardless of all these efforts, the federal government is the primary agent in regulation of advertising. To understand why this is so, we must first examine the controls just mentioned.

Self-Regulation

A great many people place considerable stock in self-regulation of advertising. The advertising industry has various codes and boards which proscribe certain unfair and deceptive advertising practices. The mass media, the newspapers and broadcasting stations, usually have policies on the kinds of advertising they will and will not accept. Normally, legal counsel for the advertiser, for the advertising agency, and for the medium scrutinize every national advertisement published or broadcast. In *The Law of Advertising* George and Peter Rosden report that advertising censors at the Columbia Broadcasting System reject or request changes in one of every five advertisements submitted to the network. Still, self-regulation does not seem to meet all the needs of a society seeking freedom from false and deceptive advertising. Louis Engman, former chairman of the Federal Trade Commission (FTC), said in a speech to the American Bar Association in 1974, "The voluntary approach [to regulation] yields far more satisfactory progress in the development of compliance mechanisms than it does in the development of substantive standards." In other words, the industry sets up codes and panels and boards, but has not been successful in establishing hard rules on what is and what is not deceptive advertising. Staff consultants to the Federal Trade Commission were even more critical in 1973 in the *Staff Report to the Federal Trade Commission:*

> . . . from the advertiser's perspective the purpose of marketing communications is ultimately to sell the product or the service. Thus, to the extent that the provision . . . [information which educates the consumer] conflicts with the ability of the advertiser to sell the product it is unlikely that he will indulge voluntarily in such "informational" communication.

At the very basis of self-regulation is the assumption that the advertiser and the consumer agree upon standards of deception and honesty, that they share a value system regarding the sale of consumer goods. Such agreement is perhaps beyond human facility at this point in its evolution. While newspapers and broadcasting stations do not necessarily share the advertisers' point of view, they tend to be more sympathetic to advertisers since they are after all the ones paying the bills.

Perhaps the most aggressive attempt at self-regulation by the industry began in 1971 with the establishment of the National Advertising Review Board. The board was designed to hear complaints against national advertisers and to foster local review boards in many American cities. In a study of the effectiveness of the board made in 1979, advertising professor Eric Zanot concluded that this body had gone beyond previous attempts in developing means of policing the advertising industry. The researcher asserted that the national board had been effective in both eradicating deceptive advertising and thwarting government action against the industry prompted by growing public criticism of advertising. Despite the limited success cited by Zanot, the

national review board and its local counterparts apparently have not diminished greatly the need for other means of regulating the advertising industry.

Competition

One school of thought holds that the best watchdogs of dishonest and unfair advertising are competitors of dishonest and unfair advertisers. While initially this theory sounds quite plausible, probably it contains much less truth than meets the eye. Given a market structure having many manufacturers of the same product, all with about an equal share of the market, an advertiser might be concerned about a competitor getting the edge by using false or misleading advertisements. Much of the market today does not meet this criterion, however. The Eastman Kodak Company, which sells most of the film bought in the United States today, would probably be quite unconcerned about exaggerated product claims of a small film manufacturer with but a tiny portion of the market. This is not an unrealistic portrait of a large segment of the marketplace.

But let's say Ford Motor Company does get angry at General Motors. What can Ford do? Really, very little by itself. There is no deceptive advertising tort at common law. Only business torts such as unfair competition apply. It is difficult, if not impossible, for a competitor to sue for unfair competition on the basis of simply a false advertisement. Both courts and legislatures have been hostile to the development of competitor suits. The courts have enough work without being burdened by hundreds of false-advertising suits.

A competitor can sue for disparagement of property, which is sometimes known as trade libel (see chapter 4). But this action applies only to advertisements making false and harmful statements about a competitor's product, and the burden of proof upon the plaintiff is heavy since proof of falsity, malice, and damages must be presented.

The American Home Products Company, the makers of Anacin, and Johnson & Johnson, manufacturers of Tylenol, tried another tack in the mid-1970s when they sued each other during the so-called aspirin wars over competing claims concerning their respective products' effectiveness. The suits were based on Section 1125 of the Lanham Trademark Act which prohibits firms from making false claims which have an adverse effect on a competitor's business. In what to many persons appeared to be a gross waste of time for the judiciary, a federal district judge plowed through masses of data purporting to prove one product was superior to the other. In the end, Johnson & Johnson won an injunction which stopped the makers of Anacin from claiming its product was superior to Tylenol for conditions "associated with inflammation or inflammation components" (*American Home Products* v. *Johnson & Johnson*, 1977).

Another course open to a competitor is to alert legal authorities such as the FTC to the existence of the deceptive advertising. This practice is common. When Standard Oil of California was taken to task for its advertisements for the gasoline additive F-310, competing oil companies were the ones who put pressure on the Federal Trade Commission to take action. The companies even provided test results from their own laboratories which they asserted proved the falsehoods in the claims in the Standard Oil advertisements.

Consumer Action

Consumers are also left in the lurch when it comes to policing false advertising. They too can report false and deceptive advertising to the authorities, but as individuals they have virtually no remedy at law for a deceptive advertisement. As the Rosdens point out in their massive compendium, *The Law of Advertising*, historically common law courts have not been receptive to protecting consumers. "During the most formative period of common law," they write, "only a few goods in the marketplace were manufactured products so that the buyer was in an excellent position to judge for himself goods offered to him." Dairy products could be judged by their smell and texture; vegetables, meat, and fruit, by their looks. Judgments about wine, beer, and cloth were also easy to make. Protection was really necessary only in case of fraud such as watered beer. The basic slogan in those days was caveat emptor—buyer beware.

While today consumers are far better protected—they must be because of the thousands of consumer products about which they know little or nothing—there is little consumers can do themselves to attack the dishonest advertiser short of reporting the advertisement to the proper authorities. Even if the law allowed a suit to redress an injury wrought by a false advertisement, where can a consumer find a lawyer to handle the case? Let's say you buy a certain toothpaste because the advertisements claim it will brighten your teeth and stop formation of cavities. If your teeth don't get brighter and you sue, your damages are for 94 cents. On a contingency fee the lawyer gets 40 percent or about 38 cents. Even suit over a $150 dental bill doesn't give an attorney-at-law much to work for, especially when a malpractice victim who wants to sue for $200,000 may lurk around the next corner.

The Rosdens point out that it is possible for a consumer to sue under product liability laws, but in such cases the advertisement must contain a commitment about the product which is not fulfilled after purchase by the consumer. For example, an advertisement for a carpet cleaning product states that it will not damage carpets, but after a consumer uses the product, a large hole appears in the rug. The consumer would be able to sue (if she could find a lawyer) for a new carpet. Products rarely make such claims today. Hedging is much more common. That is, the advertisement states that in normal use the cleaner will not harm a carpet, but also suggests that the cleaner be tested first in an inconspicuous area of the carpet. Then, if the cleaner makes a hole

in the carpet, the only problem for the manufacturer is a small hole in a carpet, which is not very serious. At least that may be the court's opinion in awarding the consumer only $15 in damages.

Consumers and competitors are marvelous snitches for attorneys general and the Federal Trade Commission. Unhappily our legal system is just not designed to allow individual attack on a false advertisement. A new law makes it possible for the Federal Trade Commission to sue on behalf of consumers to get back money wasted because of false promises. How often the FTC sues under this law and how well the law works remain to be seen.

State and Local Laws

State regulation of advertising predates federal regulation by several years. This fact is not surprising when you consider that at the time the public became interested in advertising regulation—around the turn of the century—the federal government was a minuscule creature relative to its present size. Harry Nims, a New York lawyer, drafted a model law called the *Printers' Ink* Statute (it was *Printers' Ink* magazine that urged passage of the law) in 1911. All but three states (Arkansas, Delaware, and New Mexico) have adopted one version or another of this law. Here is the text of the original law:

> Any person, firm, corporation or association who, with intent to sell or in any way dispose of merchandise, securities, service, or anything offered by such person, firm, corporation or association, directly or indirectly, to the public for sale, or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, 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 or other publication, or in the form of a book, notice, handbill, poster, bill circular, pamphlet, or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service, or anything so offered 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 general verdict is that these statutes have been fairly ineffective in dealing with false advertising. Enforcement, which is in the hands of attorneys general or local prosecutors, has been weak because these legal officers have many other statutes to enforce. When people are being murdered or robbed or maimed or kidnapped, the fact that you or I have been deceived by an advertisement from a local furniture store seems relatively unimportant.

However, because of the consumer revolution of the last fifteen years, cities, counties, and states have all strengthened their laws and their enforcement of false and deceptive advertising. In some areas prosecution is quite vigorous; in others, it is not. The laws vary from state to state, even from city to city. It is advised that persons involved in advertising obtain copies of all relevant laws regarding statutes in the area in which publication is made.

Most states don't do very well in policing false advertising statutes. There are exceptions like Washington and Wisconsin. Prosecuting false advertising is a rigorous, time-consuming chore. Big companies can afford good legal counsel to defend their advertising practices. The suits are complicated. In the time needed to begin a prosecution, the offensive advertising campaign has usually long since ended. Victory really brings little satisfaction. Outright fraud—used cars being sold as new—is usually promptly policed. However, it is costly, time-consuming, and of not much interest to the general public to take an automobile dealer to court for claiming that a used car gets 22 miles to a gallon of gasoline when it actually gets only 15 miles.

It is probably unfair to dismiss state and local regulation of deceptive advertising as handily as is done here. In some areas, cities and state attorneys general really do a superior job of protecting consumers. But this is not the norm. Unfortunately, the consumer's best friend when it comes to stopping false and misleading advertisements is also a distant friend, the federal government.

Federal Regulation

Here is the advertiser, surrounded by industry codes, media regulations, and state and city laws, and confused at best. But the worst is yet to come. The primary agent of the federal government for regulation of advertising is, of course, the Federal Trade Commission, which has a general mandate to police unfair and deceptive advertising. In addition to the Federal Trade Commission Act, federal regulations on advertising can be found in at least thirty-two other statutes. To name a few: the Communication Act, Federal Drug and Cosmetics Act, Consumer Credit Protection Act, Copyright Acts, Consumer Products Safety Act, Federal Cigarette Labeling and Advertising Act, Wool Products Labeling Act of 1939, and Plant Variety Protection Act. In addition, regulations can be found in the Age Discrimination Employment Act, Federal Seed Act, National Stamping Act, Savings and Loan Act of 1952, Securities Act, and Aid to Blind and Handicapped Act. Also postal regulations contain numerous provisions regarding the mailability of advertising matter.

Then there are specific statutes which limit such practices as using the United States flag for advertising purposes and using the name of the Federal Bureau of Investigation or its acronym FBI in an advertisement without the permission of the bureau. Rules exist that regulate the use of likenesses of United States currencies and securities in advertisements. Good books which give students a broad, comprehensive picture of this multitude of laws and regulations are available (the Bibliography at the end of this chapter has some suggestions). In the remainder of this chapter our discussion is mainly about the agency having primary responsibility for the creation and enforcement of advertising rules and regulations—the Federal Trade Commission—and also includes consideration of deceptive advertising.

FEDERAL TRADE COMMISSION

The Federal Trade Commission was created in 1914 to police unfair methods of competition. As Congress conceived the agency, the FTC was to make certain that Company A did not engage in practices which gave it an unfair advantage over its competitive rival Company B. One method of unfair competition is deceptive advertising. If Company A advertises that its widgets are four times quieter than any other widgets and they aren't, this claim gives Company A an unfair competitive advantage. What about the consumers, the people who buy widgets? As originally conceived, the FTC was not to worry about the effect of advertising on buyers, only on competitors.

In the 1920s the agency began to flex its muscles illegally and cracked down on all kinds of deceptive advertising: advertising that endangered competition and advertising that merely cheated customers. Until 1931, that is. At that time the Supreme Court ruled in *FTC* v. *Raladam* that the FTC could not stop a false advertisement unless there was proof that the advertisement had unfairly affected the advertiser's competitors. While the ruling did not totally destroy the efficacy of the agency, it did slow it down and made action against false and deceptive advertising more difficult.

In 1938 Congress bolstered the power of FTC when it passed the Wheeler-Lea Amendment to the Trade Commission Act giving the agency the authority to proceed against all unfair and deceptive acts or practices in commerce, regardless of whether they affected competition. This amendment gave the commission the power it had been seeking.

Today the FTC is one of the largest of the independent regulatory agencies. In addition to policing false advertising the agency is charged with enforcing the nation's antitrust laws, the Flammable Fabrics Act, the Truth in Lending Law, the Fair Credit Reporting Act, and various labeling laws. The five members of the commission are appointed by the president and confirmed by the Senate for a term of seven years. No more than three of the commissioners can be from the same political party. The chairman, one of the five members of the commission, is named by the president. While the agency is located in Washington, D.C., it has regional offices in Atlanta, Boston, Chicago, Cleveland, Dallas, Kansas City, Los Angeles, New Orleans, New York, San Francisco, and Seattle.

Controversial Aspects

The aggressiveness of the FTC has been a matter of controversy for many years. Because of its reluctance to investigate and prosecute, the agency earned the nickname "little gray lady of Pennsylvania Avenue" in the forties and fifties. Today, the agency is under fire from Congress and business groups across the nation for being too aggressive. In 1980, under intense pressure from business lobbyists and being significantly disenchanted on its own as well with the actions of the FTC, the Congress voted important new limitations on the power of the FTC. Ironically, the legislators were putting the agency

under the gun for doing precisely what Congress had given it the power to do in 1975 when it granted the FTC broad powers to curb business practices in entire industries. Previous to that time the agency could move only against individual companies or corporations within an industry (these powers are explained on pages 409–10). Led by an aggressive new chairman, Michael Pertschuk, the commission proposed rules that angered American business. Included were regulations that would have forced funeral homes to furnish the bereaved with a complete price listing of all services and required used car dealers to put stickers on car windows spelling out just what might be wrong with used cars they hoped to sell. The FTC instituted antitrust actions against the giant citrus cooperative Sunkist Growers and tried to take away trademark protection for words such as *Formica* from the firms which developed these products. Perhaps the most controversial set of rules proposed were those which would have banned all television advertising aimed at young children, prohibited television advertising of sweetened foods aimed at older children, and forced advertisers of sugared products to broadcast a nutritional message to balance other statements in the advertisements for their products. The FTC contended that all advertising aimed at children is unfair because the youngsters are unable to intelligently evaluate product claims. Agency attorneys argued that since the ads were unfair, they could be stopped under the law.

The Congress reacted to the new aggressiveness in the Federal Trade Commission Improvements Act of 1980. Under the law, Congress will be able to kill any FTC trade regulation rule if, within ninety days of the date that the rule becomes effective, both the Senate and the House adopt resolutions disapproving it. This legislative veto might be unconstitutional since it diminishes the power of the presidential veto. It also ignores the Constitutional provision which gives the president, not Congress, the authority to administer the laws in the nation. Consumer groups are expected to challenge this measure in the courts. The 1980 law also seriously undercut the agency's rule-making proposals regarding advertising on children's television. Under the statute the FTC will only be able to issue trade regulations regarding advertising that is *deceptive* as well as *unfair*. As noted above, the FTC had built its case against children's advertising around its claim of the inherent unfairness of such ads. No other rule-making proposals were directly attacked in the 1980 statute. But armed with the power of veto, the Congress can stop any of the other controversial rules noted above, which the agency might promulgate. The ultimate impact of the 1980 statute remains to be seen, but many impartial persons think the FTC will have to act in a more restrained manner if it hopes to avoid a clash with the national legislature.

Regulatory Powers and Deceptive Advertising

The attack by the Congress upon the FTC is aimed at its rule-making power, an important but small aspect of the commission's vast powers. Even if the congressional action of 1980 did strip the agency of some of its prerogatives, the regulatory commission still has important tools with which to discipline the American advertising industry.

Before going farther, we must understand the term *advertising* as defined by the federal government. According to FTC practice and legal custom, *advertising* is defined as any action, method, or device intended to draw the attention of the public to merchandise, to services, to persons, and to organizations (see, for example, *Rast* v. *van Deman & Lewis Co.*, 1916, and *State* v. *Cusick*, 1957). Included in the definition in addition to the obvious products advertised are trading stamps, contests, freebies and premiums, and even labels on products.

Does the FTC regulate all advertising? Legally, no, it cannot. Practically, it regulates almost all advertising. Because the agency was created under the authority of Congress to regulate interstate commerce, products or services must be sold in interstate commerce or the advertising medium must be somehow affected by interstate commerce before the FTC can intervene. While many products and services are sold locally only, nearly every conceivable advertising medium is somehow affected by or affects interstate commerce. All broadcasting stations are considered to affect interstate commerce. Most newspapers ship at least a few copies across state lines. Even when a newspaper is not mailed across state lines, it is very likely that some of the news in the newspaper comes across state lines, or that the paper on which the news is printed, the ink and type used to print the news, or parts of the printing machinery travel across state lines. The federal government became quite adept at demonstrating that businesses affect interstate commerce or are affected by interstate commerce as it learned to enforce laws like the Public Accommodations Act. The motel owner who declared that he didn't have to abide by the federal law because his business was a local operation soon discovered that if the chickens or apples he served in his restaurant were shipped in from out of state the courts were willing to say that his motel operation was a part of interstate commerce.

There are some other requirements which must be met before the FTC can act. It must be shown that the agency is acting in the public interest, which is really not too difficult since false advertising generally has an impact upon the public. If the FTC says it is acting in the public interest, courts usually take its word for it.

The advertisement must be unfair or deceptive before the FTC can act. Although deceptive advertising is discussed more fully later in the chapter and specific words and types of advertisements are considered, a few general facts about deceptive advertising must be given at this point. An advertisement

is deceptive if it has a tendency to deceive (see *FTC* v. *Raladam,* 1942). The FTC does not have to show that any person has been deceived. In fact, the commission can rule that an advertisement is deceptive even if the advertiser presents as witnesses consumers who testify that the advertisement is not deceptive.

There are really four aspects of the determination that an advertisement is deceptive. First, the meaning of the advertisement must be determined—that is, what promise is made. Second, the truth of the message must be determined. Is the promise kept? Third, when only part of the advertisement is false, it must be determined whether the false part is a material aspect of the advertisement, that is, capable of affecting the purchasing decision of consumers (*Moretrench Corp.* v. *FTC,* 1942). The Chevron F-310 gasoline additive advertisements of the early seventies illustrate this point very well. A spokesman for the company claimed he was standing in front of the Standard Oil research laboratories when in fact he was standing in front of a county courthouse. This was a false statement. But was the statement a material aspect of the advertisement as a whole? A hearing examiner said no, that the location of a spokesman is irrelevant to a consumer making a purchasing decision.

The fourth aspect of determining deception concerns the level of understanding and experience of the audience to which the advertisement is directed. This aspect, in turn, has several dimensions.

If the advertisement is directed toward a special group—children—it is judged by the ordinary perception of that group. In 1974 when the FTC announced that advertising directed at children which focused on premium offers (such as advertisements for breakfast cereals) was banned, Chairman Louis Engman said:

> The child who makes or participates in a purchasing decision faces an already taxing and complex task. Even so simple a decision as the rational selection of a breakfast cereal involves the weighing of price, taste, nutritional value, convenience and promotional devices designed to create distinctiveness. The injection of a premium offer cannot help but multiply the difficulties of choice. When that factor is irrelevant to the merits of the product, it can only increase the likelihood of confusion.

The same special consideration is given advertisements directed at specialists. An advertisement prepared for publication in a technical magazine read by engineers need not be meaningful to average consumers. However, the FTC might consider an advertisement written for a special audience but published in a magazine for the general public to be deceptive.

How does the FTC evaluate the intelligence of that great mass audience to which you and I belong? For years the commission took the approach of

the lowest common denominator. The FTC really didn't think we were very bright or cautious. In a 1942 case, *Aronberg* v. *FTC*, a federal judge outlined the prevailing standard:

> 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 are making purchases, do not stop to analyze but too often are governed by appearances and general impressions.

This was, perhaps still is, the standard the FTC uses in judging advertising. However, experts in this area recently noted a swing away from this standard to a standard based on "the average man." The first clue cited in the change of attitude is a ruling by the FTC in 1963. Commissioner Elman, speaking for the agency, said (*Heinz* v. *Kirchner*):

> Perhaps a few misguided souls believe, for example, that all "Danish pastry" is made in Denmark. Is it therefore an actionable deception to advertise "Danish pastry" when it is made in this country?

The commission said no. An advertisement is not false and deceptive merely because it is "unreasonably misunderstood by an insignificant and unrepresentative segment" of buyers.

Ten years later the FTC rejected the argument of its staff that advertisements for Hi-C fruit drinks implied that the beverages (which contain about 10 percent fruit juice) were as good as or better than fresh orange juice. The FTC ruling implied (it did not specifically say) that the average consumer is smart enough to tell the difference between Hi-C and real fruit juice (in re *Coca-Cola Co.*, 1973). Commissioners dissenting from this point of view argued that the agency was changing its definition of consumers, that it was beginning to assume they were discriminating, knowledgeable, skeptical, and incredulous. One dissenter said, "This consumer knows that fruit drinks are not the same as citrus juices despite what Hi-C ads say." Whether the FTC has adopted a new standard remains to be seen.

When it comes down to the bottom line, most lawyers who represent advertisers before the FTC have a simple, if cynical, definition of deceptiveness. An advertisement is deceptive, they say, if the FTC says it is. This assertion seems to contain substantial truth. A finding of deceptiveness by the FTC does bind courts which must often hear appeals from commission decisions, as will become obvious in the discussion of commission procedures.

Remedies

In 1973 in a study of the FTC by the American Enterprise Institute for Public Policy Research, law professor Richard A. Posner concludes that the cardinal weakness in the FTC is in the area of remedies. "To be sure," Posner writes, "it is possible that even though the commission's constructive activity is very small in any given year the very existence of the commission serves to deter

a great deal of unlawful conduct. But it is unlikely that the FTC's power to deter is very great, given the limitations of its sanctions." (*Regulation of Advertising by the Federal Trade Commission.*)

The commission's greatest enemy in dealing with false advertising is time, the time needed to bring an action against the advertiser. Advertising campaigns are ephemeral—here today, gone tomorrow. The average campaign doesn't last more than six or eight months. It normally takes the commission much longer than that to catch up with the advertiser, to comply with all the due-process requirements involved in a hearing, and to ultimately decide whether there has been a violation of the law. By that time everybody has forgotten about the advertisement, and the advertiser is promising people a new pot of gold at rainbow's end.

Media historian and critic Erik Barnouw argues that contemporary regulation of advertising has another serious weakness as well—it is word oriented. Barnouw points out that by the time the FTC had won its campaign against the makers of Geritol (see pages 403–4) the firm had switched to a more effective advertising strategy. The advertisements that got Geritol into trouble were word-oriented messages—promises that Geritol would be helpful to persons who felt tired and run-down. The new messages made no claims at all. The television spots showed radiantly healthy young women who urged viewers to "take care of yourself, be the best you can." Then the actresses told the viewers that they took Geritol every day. Barnouw says, "The success of the campaign suggests the increasing irrelevance of most FTC review, which tends to be word oriented. In the new commercial dramaturgy, verbal promise is a secondary matter, vague and understated, while situation and imagery work on a more visceral level."

Less subtle examples of what Barnouw refers to can be seen in the advertisements for Sanka coffee and American Express. Sanka hired actor Robert Young for its slice-of-life messages. For years Young was popular on television as Doctor Marcus Welby. In these commercials actor Young (or is that Dr. Welby talking?) tells viewers that Sanka contains no caffeine and will not make them as nervous or jumpy as regular coffee. The message can have the ring of *medical* advice for many stalwart television viewers. And while Young was starring in the Welby TV series, nearly a quarter of a million viewers wrote him asking for medical advice. Similarly, when Karl Malden suggests that carrying an American Express credit card is safer than carrying cash, who do viewers see giving them the advice? Karl Malden, actor, or police Lt. Mike Stone, a character Malden played on the successful television show "Streets of San Francisco"? Malden even wears a hat during the ad, a trademark of his performance as Mike Stone. Again, no verbal connection is made between the actor and the police officer during the advertisement. At this time, as Barnouw points out, the law cannot cope with such subtleties, since viewers make the crucial (and misleading) connection in their heads.

What remedies are available to the FTC to control false and misleading advertising? There is a wide range of remedies that begin with simple guidelines and end with the strong, industry-wide, rule-making power which got the agency into trouble with the Congress.

Guides (Advisory Opinions)

At the top of the list of remedies is the power of the commission to issue industry guides, which are really policy statements by the commission about potential problems. For example, if a cigar company wants to know whether it can legally advertise its cigars as "the coolest-burning cigar in town," it can ask the FTC for an opinion before launching the campaign. Normally the FTC will advise companies about the legality of proposed claims. In some cases the FTC issues an industry guide, which is merely an advisory interpretation of what the FTC believes the law to be on the subject. For example, the FTC has issued a guide on the use of the word *free* and similar representations in advertising. It has issued a guide for advertising private vocational schools and home study courses. It has issued a guide for the decorative wall paneling industry. There are many, many other guides. In a guide the commission tells the advertiser that statement X can be made, statement Y cannot be made, statement Z cannot be made without substantiation, and so forth. The purpose of the guides is to help advertisers stay within the law. What happens when an advertiser fails to comply with the provisions of a guide? The FTC must proceed against the advertisement as it would against any other advertisement. The guides do not have the force of law. They are merely FTC opinions about what the law says. Deceptiveness still has to be proved in an FTC hearing.

Voluntary Compliance

Industry guides and advisory opinions apply only to prospective advertising campaigns, events that haven't yet occurred. The next remedy on the ladder is voluntary compliance and is used for advertising campaigns that are over or nearly over. Imagine that the cigar company is nearing the end of its coolest-burning-cigar-in-town campaign. The FTC believes that the claim is deceptive. If the advertiser has had a good record in the past and if the offense is not too great, the company can voluntarily agree to terminate the advertisement and never use the claim again. In doing this, the advertiser makes no admission and the agency no determination that the claim is deceptive. There is just an agreement not to repeat that particular claim in future advertising campaigns. Such an agreement saves the advertiser considerable legal hassle, publicity, and money, all especially desirable since the advertising campaign is over or almost over.

Consent Order

The next remedy seems to be similar to voluntary compliance, but is more complicated and more binding. The remedy is called a consent order and is a written agreement between the commission and the advertiser in which the advertiser again makes promises concerning future advertising. The advertiser

is asked to agree not to do certain things and may also be asked to do certain other things. If the advertiser signs the agreement, the FTC takes no further action.

Here are some recent consent orders which were published in FTC consumer bulletins. In 1974 the Ford Motor Company agreed to stop claiming that its LTD cars ran quieter than a glider in flight. Why was this claim a problem? Apparently a glider is really quite noisy in flight, and the FTC believed that the advertisement in which the announcer said "Nobody has to convince you how quiet a glider is" was misleading. In 1975 the Morton Salt Company agreed to stop advertising its product Lite Salt in such a way as to lead buyers to believe that it was more healthful than ordinary salt. The company also agreed that all future advertising of Lite Salt would contain the statement "Not to be used by persons on sodium- or potassium-restricted diets unless approved by a physician." The company which makes Gaines Burgers dog food agreed recently to stop claiming that Gaines Burgers contain nutrient ingredients unless the ingredients are present in a nutritionally significant amount. The firm also agreed to stop advertising that pets have a need for a nutrient that in fact they do not need and to stop making representation about the nutritional quality of its dog food unless it has evidence to support the claim.

General Foods Corporation also agreed to stop its advertisements for Post Grape Nuts which depicted the late Euell Gibbons picking and eating, or pointing to, wild plants and bushes and stating that this vegetation was edible and tasty. The FTC said that the advertisements could influence children to eat plants and shrubs most of which are not edible and may be poisonous.

As will be noted in the discussion of FTC procedures, there is considerable pressure on the advertiser to agree to a consent order. The chance of winning a case before the FTC is usually slim. The litigation is also costly. Finally, the publicity that results from such litigation often does the product more harm than any FTC sanction.

If after accepting the consent order the advertiser then violates the agreement, the company is subject to a severe fine, up to $10,000 a day while the violation continues (i.e., while the advertising campaign continues).

Cease and Desist Order

What happens if the cigar company really believes that its cigar is "the coolest-burning cigar in town" and doesn't want to sign a consent order? The commission issues a cease and desist order. The advertisements must stop or the advertiser faces severe civil penalty: again, a fine of up to $10,000 a day. In the long-running (eleven years) Geritol case, for example, the commission issued an order in 1965 prohibiting the J. B. Williams Company from implying in its advertising for Geritol that its product can be helpful to persons who are tired and run-down (in re *J. B. Williams Co.*, 1965; in re *J. B. Williams*

Co. v. *FTC,* 1967). The commission contended that medical evidence demonstrates that Geritol, a vitamin-and-iron tonic, helps only a small percentage of persons who are tired and that in most persons tiredness is a symptom of ailments for which Geritol has no therapeutic value. The J. B. Williams Company violated the cease and desist order (at least, that is what the commission alleged) and in 1973 was fined more than $800,000. A court of appeals threw out the fine in 1974 and sent the case back to district court for a jury trial, which the advertisers had been denied the first time around (*U.S.* v. *J. B. Williams,* 1974). The jury was to decide whether the Geritol advertisements did in fact violate the cease and desist order. At a second hearing in 1976 the FTC won a $280,000 judgment against the patent medicine manufacturer.

In 1976 the manufacturer of STP was ordered to stop making false claims regarding the effectiveness of its oil treatment. In 1978 a court found that the advertisement violated the order, and a $500,000 fine was levied.

Standard Oil of California was ordered to stop claiming that its Chevron gasolines with F-310 produce pollution-free exhaust. The commission banned television and print advertisements in which the company claimed that just six tankfuls of Chevron will clean up a car's exhaust to the point that it is almost free of exhaust-emission pollutants.

Few advertisers are willing to carry a case as far as the cease and desist order, and those that go that far frequently go beyond to a court of appeals to challenge the FTC's ruling. The appeal process is explored in the discussion of FTC procedures (pages 410–12).

The pressure is heavy upon advertisers to voluntarily comply or to sign a consent order, especially since in neither case is there admission of wrongdoing and in both instances the legal processes will take so long that the offensive advertising campaign will probably be finished before the case is heard. Many people feel that the FTC does its job if it gains compliance voluntarily, for the mission of the agency is, after all, to stop deceptive advertising, not to punish advertisers. Other observers disagree, however, and argue that without stronger sanctions the advertiser is not motivated to refrain from future illegal acts. This kind of argument prompted the FTC to undertake new regulatory schemes, which we will now examine.

Substantiation

Substantiation of an advertisement at first glance hardly seems like an important regulatory scheme, but it is a very important one. The program began in 1971 and had only limited success. Since then it has been modified and reportedly now works better. The basis of the program is simple: the FTC asks advertisers to substantiate all claims in their advertisements. There is no assertion that a claim is false or misleading. The government merely tells advertisers to prove what they say.

At first the FTC chose an entire industry—like the soap and detergent makers—and gave all companies in the industry sixty days to provide documentation for all their claims: claims that Ivory Soap is pure, that Clorox is able to do what detergents alone cannot do, and that Pine-Sol kills household germs, and so forth.

The firms then supplied the FTC with support for their claims if they could, and most of the companies could. If they could not, through a consent order the FTC usually asked them to stop making the claim. All kinds of industries were included in substantiation orders: the automobile industry; the air-conditioning manufacturers; the makers of shampoos, electric shavers, cough and cold remedies, and antiperspirants; and so forth. However, problems arose. About 90 percent of the material submitted as documentation was too technical for a layman to understand, and since one of the goals of the project was to allow consumers to study the proof offered by the advertisers, this aspect of the program was a failure. In 1974 the FTC ordered that when documentation is in technical or scientific language it must be accompanied by a summary in lay language.

Another problem was the amount of information submitted. When an entire industry, or industries, had to submit documentation, there was just too much material. Now the FTC uses a committee of experts to screen advertising claims and target those advertisements which seem the most suspect for substantiation. Also, the time the advertiser has to submit material was cut from sixty to thirty days.

Finally, the FTC changed its policy concerning publicity about substantiation. In the past the agency publicly announced that all automakers, for example, had been asked to document their claims. Advertisers complained that many consumers incorrectly presumed that the claims were somehow deceptive. Why else would the government seek documentation? Now, no announcement is made until after the commission receives the material and places it on the public record.

There are still other complaints about substantiation. The Brown & Williamson Tobacco Company, for example, has complained that the FTC has required it to submit documents concerning its advertising practices over the past fourteen years. Senator Wendell Ford of Kentucky told *Newsweek* that it cost the company $800,000 to comply with the requests, but the FTC never did tell the firm why the material was needed. "The only reason I've ever been able to get out of them is that it was their curiosity," Ford said, citing this incident as an example of the agency's sometime arbitrary, if not irresponsible, behavior.

On its face substantiation seems a fairly innocent little process. Nevertheless from a legal standpoint it has had a major impact on regulation, because it shifted the burden of proof in a great many advertising cases from

the commission, which in the past had to prove that an advertisement was deceptive, to the advertiser who must now prove that it is true. If the case goes to litigation and a hearing, the FTC must still prove that the advertising claim is deceptive. Since most problems are solved short of this stage by consent agreement, substantiation has reduced considerably the work load of the FTC. The FTC no longer has to convince advertisers prior to getting their assent to an agreement that it can prove the advertisement is deceptive. By not being able to substantiate its claim, the advertiser accomplishes the proof himself.

Corrective Advertising

Corrective advertising is a highly controversial scheme which the FTC first used in 1971 against the ITT Continental Baking Company. The scheme is based on the premise that to merely stop an advertisement is in some instances insufficient. If the advertising campaign is successful and long running, a residue of misleading information remains in the mind of the public after the offensive advertisements have been removed. Under the corrective advertising scheme the FTC forces the advertiser to inform the public that in the past it has not been honest or has been misleading. One commentator called the scheme "commercial hara-kari."

Under what circumstances will the FTC ask for corrective advertising sanctions? The commission has resisted issuing a specific policy regarding this question. For example, in 1979 it responded to a request for such a policy from the Institute for Public Representation in Washington, D.C., by saying it would continue to deal with corrective advertising problems on a case-by-case basis. In the past, however, the agency has adopted this rather vague standard for the imposition of corrective advertising:

> If a deceptive advertisement has played a substantial role in creating or reinforcing in the public's mind a false and material belief which lives on after the false advertising ceases, there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief.

In such a case, corrective advertising is appropriate, according to the FTC.

The FTC first attempted to force what it calls affirmative or corrective disclosures in 1950, but a court of appeals ruled that it lacked the power to do so under the Federal Trade Commission Act. The court ruled in *Alberty* v. *FTC* (1950) that the agency lacked the authority to encourage or require informative advertising. Ten years later, however, in *Feil* v. *FTC* (1960), the courts reversed the *Alberty* decision. The FTC threatened to use the remedy against the Campbell Soup Company to correct the misperception created when the company put clear marbles in the bottom of a bowl of vegetable soup to force the vegetables to the top (*Campbell Soup Co.*, 1970). The first corrective advertisement didn't appear until 1971. As mentioned earlier, it

was the result of a consent order signed by the ITT Continental Baking Company with regard to its advertising for Profile Bread. The television version of the advertisement was this:

> I'm Julia Meade for Profile Bread. And like all mothers I'm concerned about nutrition and balanced meals. So I'd like to clear up any misunderstanding you may have about Profile Bread from its advertising or even its name. Does Profile have fewer calories than other breads? No, Profile has about the same per ounce as other breads. To be exact Profile has seven fewer calories per slice. But that's because it's sliced thinner. But eating Profile Bread will not cause you to lose weight. A reduction of seven calories is insignificant. It's total calories and balanced nutrition that counts. And Profile can help you achieve a balanced meal, because it provides protein and B vitamins as well as other nutrients.

This corrective advertisement was in response to a Profile campaign that led some people to believe that one could lose weight by eating Profile Bread.

The commission required that corrective advertisement like this one constitute 25 percent of the advertising for Profile Bread during the year following the agreement. This is the typical percentage in a corrective-advertising agreement, although at times the FTC has agreed to allow advertisers to allot only 15 percent of their advertising budget for corrective advertisements.

Only a few other manufacturers of well-known nationally advertised products have been forced to make corrective disclosures. One was the company making Ocean Spray Cranberry Juice which for years advertised that its cranberry juice had more food energy than other juices. Since food energy is really only another way of saying caloric value, the FTC ordered the juice maker to tell people that fact in a corrective ad (*Ocean Spray Cranberries, Inc.*, 1972). Neither the Profile advertisement nor the cranberry juice advertisement pleased all consumer advocates. Many thought the advertisements were too weak. In fact, studies showed that sales of Profile Bread were not hurt by the corrective campaign.

The FTC has been both tougher and more prepared to use the corrective-advertising device against small advertisers. Some corrective advertisements even have to include what lawyers dub "the Scarlet Letter," a statement by advertisers that the FTC found previous advertising to be deceptive. An example of such an order is the one agreed to by Wasem's Drug Store in Clarkston, Washington. The store marketed vitamin pills under its own name in advertising which the FTC deemed to be false and misleading. In the consent order the firm agreed to devote 25 percent of its advertising for one year to corrective advertising, to refrain from using the word *super* in the trade name of the vitamins, and to broadcast 7, sixty-second corrective advertisements on seven consecutive days on local television stations. This is the corrective ad, including the Scarlet Letter:

> This advertisement is run pursuant to an order of the Federal Trade Commission. I have previously been advertising Wasem's Super B Vitamins and have made various claims which are erroneous or misleading. Contrary to what I told

> you previously, Super B will not make you feel better nor make you better to live with nor work with on the job. There is no need for most people to supplement their diet with vitamins and minerals. Excess dosages over the recommended daily adult requirement of most vitamins will be flushed through the body and be of no benefit whatsoever. Contrary to my previous ads, neither the Food and Drug Administration nor the Federal Trade Commission nor anyone else has recommended Super B or approved our prior claims. Super B Vitamins are sold on a money-back guarantee, so if you are not fully satisfied, then return them to me at Wasem's Rexall Drug Store in Clarkston for a refund.

But in an important ruling by the United States Court of Appeals in 1977, the future of the so-called Scarlet Letter was clouded. Warner-Lambert, the maker of Listerine Mouthwash, was ordered by the FTC to stop claiming that its product prevents, cures, or alleviates the common cold. The agency also ordered the firm to include the following statement in its future advertisements: "Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity." Warner-Lambert challenged the entire order, arguing that the FTC had no power to force corrective advertising. United States Court of Appeals (D.C.) Judge Skelly Wright wrote on behalf of the two-to-one majority that the FTC does have the power to force corrective advertising statements in appropriate cases, but ruled that the phrase "contrary to prior advertising" was superfluous and was intended to humiliate the company. Wright said that while humiliation might be appropriate for an "egregious case of deliberate deception" it was not appropriate here. The FTC has only the power to correct the problem, not to be punitive in its actions. The firm was ordered to publish and broadcast the corrective claims in the next $10 million of its advertising for the mouthwash, which was the average annual sum spent on advertising between 1962 and 1972 when the complaint against Warner-Lambert was first issued. (The Supreme Court later refused to hear an appeal by the drug company.) While the ruling strongly upheld corrective advertising, the Court of Appeals nevertheless cast doubts on the propriety of the use of the so-called Scarlet Letter.

Nobody really knows whether these kinds of corrective advertisements are effective in ridding the consumer's mind of the falsity. Probably many buyers retain an unfavorable impression of the advertiser. If this is true, corrective advertising will probably constitute an important deterrent for exaggerated claims.

Injunction

When Congress passed the Trans-Alaska Pipeline Authorization Act in 1973, attached to that piece of legislation was a bill which authorized the FTC to seek an injunction to stop advertisements which it believed violated the law. Attorneys for the FTC can seek these restraining orders in federal court. An injunction is clearly a drastic remedy and one which the agency has said it will not use often. Spokesmen for the FTC have said that the agency will use

the power only in those instances in which the advertising can cause harm, in those cases where there is a clear law violation, and in those cases where there is no prospect that the advertising practice will end soon.

The first time the FTC used its new power was in 1973 when it sought and got a restraining order against several West Coast travel agents who promoted trips to the Philippines for "psychic surgery." The FTC said that many Americans were being fleeced by so-called psychic surgeons who supposedly performed bloodless operations on patients by using their minds rather than scalpels. The agency won its case.

Trade Regulation Rules

In January 1975 President Ford signed the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, the most significant piece of trade regulation legislation since the Wheeler-Lea Amendment in 1938. The new law did many things, but basically it greatly enlarged both the power and the jurisdiction of the FTC. Until the bill was signed, the FTC was limited to dealing with unfair and deceptive practices which were "in commerce." The new law expanded the jurisdiction to practices "affecting commerce." The change of a single word gave the FTC broad new areas to regulate. The law also gave the agency important new power. It is the vigorous use of this new power that caused the problems (discussed earlier) that the agency now has with the Congress.

Three sections of the act expanded the remedies the FTC can use against deceptive advertising. First, the agency was given the power to issue trade regulation rules defining and outlawing unfair and deceptive acts or practices. The importance of this power alone cannot be overestimated. In the past the agency had to pursue deceptive advertisements one at a time. Imagine, for example, that four or five different breakfast cereals all advertise that they are good for children because they contain nine times the recommended daily allowance of vitamins and minerals. Medical experts argue that any vitamins in excess of 100 percent of the recommended daily allowance are useless; therefore these advertisements are probably deceptive or misleading. In the past the FTC would have had to issue a complaint against each advertiser and in each case prove that the statement was a violation of the law. Under the new rules the agency can issue a trade regulation rule—as it had done for nutritional claims—which declares that claims of product superiority based on excessive dosage of vitamins and minerals are false and misleading. If advertisers make such claims they are in violation of the law. All the commission must prove is that the advertiser had actual knowledge of the trade regulation rule, or "knowledge fairly implied from the objective circumstances."

The advantages of the trade regulation rules, or TRRs as they are called, are numerous. They speed up and simplify the process of enforcement. Advertisers can still litigate the question, challenge the trade regulation rule,

seek an appeal in court, and so forth. In most cases they probably will not go to that expense. Trade regulation rules should have a great deterrent effect, as they comprehensively delimit what constitutes an illegal practice. In the past after the commission issued a cease and desist order, businesses frequently attempted to undertake practices which fell just outside the narrow boundaries of the order. The TRRs are much broader and make it much harder for advertisers to skirt the limitations. Finally, via TRRs the FTC is able to deal with problems most evenhandedly. An entire industry can be treated similarly, and just one or two businesses are not picked out for complaint.

While the FTC has issued TRRs since 1962, it has done so sparingly, since it was unsure of its power to take this action. In 1974 a court of appeals upheld the right of the agency to promulgate such rules (*National Petroleum Refiners Association* v. *FTC,* 1974). This court decision was made law by Congress in the FTC Improvement Act. Since that time, according to one FTC representative, the commission has been busy promulgating rules, so that this aspect of regulation is more visible now.

The two other aspects of the new law which improved FTC remedies are these. The FTC may seek civil penalties against anyone who knowingly violates the provisions of a cease and desist order, even if that person was not originally the subject of the order. To wit: A Chemical Company sells a spray paint which is toxic if used in a closed area, but the product is advertised as being completely harmless. The FTC moves against the company and issues a cease and desist order that states that in the future the firm must not advertise the product as being completely harmless. B Chemical Company also sells a spray paint which has the same toxicity and is advertised the same way. If it can be shown that B Company was aware of the provisions of the order against A Company and continued to advertise its product as being completely safe, B can be fined up to $10,000 per day for violating the order, even though the order is not directed against B.

Finally, the new law gave the FTC the right to sue in federal court on behalf of consumers who have been victimized by practices that are in violation of a cease and desist order or by practices that are in violation of a TRR.

These new remedies gave the FTC more muscle. Their greatest strength will be as a deterrent, giving advertisers something to think about before beginning a questionable advertising practice. It is ironic that by using this muscle the agency has landed in trouble.

Procedures

In order to understand both the regulation of advertising and the problems faced by the FTC, it is necessary to have at least a sketchy understanding of how the agency operates in a deceptive advertising case. Most cases come to the attention of the FTC from letters written either by consumers or by competitors of the offending advertiser. The legal staff of the agency then does a preliminary investigation. If the complaint counsel, an FTC staff attorney,

feels there is no substance to the charge, the case ends. But if he believes there is a provable violation, he writes a memorandum to the commission. A proposed complaint and a proposed consent order accompany the memorandum.

The agency takes a vote, and if it agrees with staff lawyers—it usually does—the advertiser is notified that a complaint is about to be issued. The advertiser is given the opportunity to sign the consent order or to negotiate a more favorable consent order. At this point there can be three results. First, the advertiser can agree to the consent order and the commission can vote to accept the consent order. Second, the commission can vote not to accept the order. Third, the advertiser could reject the consent order. If the first happens, the order is published and sixty days later is made final.

If either the commission or the advertiser rejects the consent order, a complaint is issued, and a hearing is scheduled before an administrative law judge, who works within the FTC and officiates at commission hearings. At the hearing that follows—which is a lot like an informal trial—the burden of proof rests upon the FTC staff lawyers—complaint counsels—to show a violation of the law. In a criminal trial for robbery or murder, the evidence must show "beyond a reasonable doubt" that the defendant is guilty. In a civil case, liability must be established by "preponderance of evidence." In a hearing before an administrative law judge all the complaint counsel must show is that there is "substantial evidence" of a violation of the law. While what substantial evidence is, is hard to define, it is less evidence than is required in either a criminal suit or a civil suit. After the hearing the judge either orders the case dismissed or issues a cease and desist order. The decision is final unless either the complaint counsel or the advertiser appeals. If that happens, the entire commission decides the matter. Overruling an administrative law judge is not uncommon. For example, after the hearing on Chevron F-310 the commission overruled the judge's decision to dismiss the charges. More recently the commission overruled a judge's cease and desist order against several television advertisements for Dry Ban spray deodorant. The judge agreed with complaint counsel that the advertisements implied that the spray "went on dry," but in fact was wet when it hit the skin. The FTC disagreed and said that all the advertisement implied was that Ban went on the skin drier than other antiperspirant sprays. A court of appeals must finalize either a consent order or a cease and desist order, but this is a routine matter.

If the FTC dismisses the cease and desist order, the matter ends there. If it supports the order, the advertiser can still appeal to the courts for relief. This is not a common practice, however. It is difficult for courts to reverse an FTC ruling. There are only a handful of reasons which a judge can use to overturn the commission decision. The case goes to the court of appeals and there is no new finding of fact: what the FTC says is fact, is fact. The following are all instances in which a court can overturn a FTC ruling (1) "convincing evidence" that the agency made an error in the proceedings, (2) no evidence

to support the commission's findings, (3) violation of the Constitution, for example, the agency did not provide due process of law, (4) the action goes beyond the agency's powers, (5) facts relied upon in making the ruling are not supported by sufficient evidence, and (6) arbitrary or capricious acts by the commission. Such an event is an extreme rarity. An appeal of an adverse ruling by a circuit court can be taken to the Supreme Court, but only if certiorari is granted.

The enforcement powers of the FTC are limited, but can be nevertheless effective. Violation of either a cease and desist order or a consent order can result in a penalty of $10,000 per violation per day. A fine such as this can add up fast! As a result of the *Geritol* case the agency can be forced into district court to prove to a jury that in fact the orders were violated. This action impedes the enforcement procedure, for a jury trial is time-consuming and costly. As an alternative the agency can go back to the court of appeals which finalized the consent order or the cease and desist order and seek a civil contempt citation against the advertiser. The penalty is then up to the judge and will probably be much smaller, since civil contempt damages are considered remedial and are not intended as a deterrent.

Enforcement is a complex and sometimes confusing process. This fact at least partially explains why FTC procedures often move so slowly. It also explains why the agency works so hard to gain compliance with consent orders, since voluntary compliance alleviates many bureaucratic hassles. It is easier to enforce TRRs, and the use of this remedy probably will become more common in light of the decision in the *Geritol* case.

DECEPTIVE ADVERTISING

It must be obvious that advertising regulations are fairly clear on one point: deceptive, unfair, misleading, untruthful advertising is not permitted. But what is deceptive, unfair, misleading, untruthful advertising? It is the same kind of question we confronted when defining what is obscene and what is libelous. There is no great scroll in the sky providing a complete and comprehensive list of advertisements that are permitted and those that are not permissible. An advertiser is expected to use common sense to some extent and to supplement common sense by examining what the various regulatory agencies in the past have deemed to be deceptive. In this section we will talk about the regulatory guidelines, but you are cautioned that this discussion is by no means exhaustive or complete. Scores of deceptions which have been prohibited are not included here, and scores and scores are yet to be created. So be forewarned.

Concept of Truth

Just because an advertisement is untruthful does not mean that it is deceptive or illegal. When a supermarket advertises that the Easter Bunny left lots of good grocery buys in the produce section or a gasoline company advertises that you can put a tiger in your tank, most people realize that they are being

kidded. These kinds of fanciful nonmaterial untruths are generally acceptable so long as the advertiser doesn't get carried away. All other kinds of untruths including explicit untruths (big lies), half-truths, and more subtle deceptions are problems.

If you advertise a watch as being waterproof and it isn't, that is a lie and is a violation of the law. An advertiser can't qualify a lie appearing in one part of an advertisement by providing a sneaky list of exceptions elsewhere in the advertisement (*Giant Food, Inc.*, v. *FTC*, 1963). For example, it is deceptive to claim in a prominent headline that your brand of watch is waterproof and then in a footnote in small type at the bottom of the advertisement indicate that the watch is waterproof except when immersed in water for more than 14 seconds.

Not telling the whole truth is also deceptive. To claim that 93 percent of all your watches sold since 1952 still keep perfect time is a half-truth unless you also state that the watches have only been on the market for the last three years. Deceptive mock-ups and demonstrations are also considered illegal if the mock-up is used as proof of an advertising claim (*FTC* v. *Colgate-Palmolive Co.*, 1965). More explanation is needed. For many years a shaving cream company claimed that its product was so good that it could be used to shave sandpaper. In a television commercial an actor put Rapid Shave on sandpaper and a few minutes later was shown shaving off the sand. While the claim was apparently true (if the shaving cream was left on the sandpaper long enough, that is), the demonstration was phony. What the actor shaved was not sandpaper, but loose sand sprinkled on glass. The government said this was deceptive advertising, and the courts—including the United States Supreme Court—agreed, despite advertiser pleas that it had tried to shave real sandpaper in the commercial, but because the sand and the paper were the same color, and because the advertisements were in black and white, viewers could not see that the sand really came off. In other words, as one author wrote, a mock-up cannot overcome the shortcomings of the medium, even were the claims true.

In its decision the Supreme Court did not rule that all fake demonstrations or mock-ups are illegal, only those in which the faked portion is supposed to prove a product claim (*FTC* v. *Colgate-Palmolive Co.*, 1965). For example, let's say that in a television commercial packaged ice cubes are the product being sold. The film must be shot under hot lights. Since the ice cubes would melt in the heat, plastic cubes are used. A pile of the plastic cubes are put on a table, and while the cameras grind away, an announcer extolls the virtues of these marvelous, uniform-size, crystal-clear ice cubes. This device is illegal because the plastic cubes are used to prove the advertising claims. Let's now say that soda pop instead of ice cubes is being sold, and the actor drops three or four plastic cubes into a glass before he pours in "the mouth-watering, cool, and refreshing" soda. It is permissible to use the plastic cubes in this situation because they are not being used to demonstrate a product claim.

What about advertisements that have a double meaning, a truthful meaning and one that is not? Here is a classic example. "We will put a new motor in your old car for $35 dollars." What does this statement mean? It can be read to mean that the advertiser will sell you a new motor and install it in your car for $35. That is a good deal. However, the statement can also mean that if you have a new motor for your old car the advertiser will install it for $35, which is not such a good deal. In such situations the government presumes that people believe the misleading meaning, and such advertising is deceptive (*FTC* v. *Sterling Drug Co.*, 1963).

The entire problem of half-truths, partial truths, double meanings, and so forth, is one of the most serious problems the government faces. Complaints against such advertisements are common. More than twenty years ago the FTC challenged an advertisement for Old Gold cigarettes which quoted an independent survey finding Old Golds to be low in nicotine and tar (*P. Lorillard Co.*, 1950). This claim was true, but the group which did the research also concluded that none of the cigarettes tested—including Old Gold—had sufficiently low nicotine-and-tar content to be safe. The cigarette maker didn't disclose this fact, making the advertisement deceptive. More recently the government has pressured the company that makes Wonder Bread for advertising that its product contains vitamins and minerals which will help young people grow up to be big and strong. The government says that nearly all commercially baked bread is fortified with vitamins and minerals and will help young people grow up to be big and strong. The FTC argues that by not disclosing that Wonder Bread is no different from any other bread the company tells only half the story (in re *ITT Continental Baking Co.*, 1971). The makers of Geritol, by not saying that Geritol does not help most people who are tired, and the Ford Motor Company, by comparing the quietness of their car to that of a glider and not saying that a glider is noisy in flight, were guilty of the same kind of deception. This kind of deceptive advertising is probably the most common problem today.

Testimonial

Testimonials ranging from Joe Namath advertising panty hose to "the average man" promoting a pain reliever, are a large part of the advertising business. Before 1932, when a company paid for a testimonial—any testimonial—that fact had to be revealed in the advertisement. This hasn't been the law for more than forty years, however (*Northam Warren Corp.* v. *FTC*, 1932). Today, within certain limits, paid testimonials are allowed. The testifier must have in fact endorsed the product (*Eastern Railroad Presidents' Conference* v. *Noerr Motor Freight, Inc.*, 1961). It is deceptive, as well as an invasion of privacy, for an advertiser to assert that astronaut Neil Armstrong eats X brand of breakfast cereal if Armstrong does not, in fact, endorse the product. A testimonial cannot be altered to change the meaning (see *FTC* v. *Standard Education Society*, 1937). Suppose this is a movie review: "This is the worst movie of the year. You can see it—but only if you want to make yourself ill."

Now here is an advertisement for the movie citing the review: "The critics loved it. '. . . the movie of the year. See it . . .' " The quotation is used out of context and this use is deceptive. An advertisement can note that a testimonial is unsolicited, but only if it is unsolicited (*FTC* v. *Inecto, Inc.*, 1934).

The FTC adopted a new set of rules for testimonial advertising in 1975. Experts who endorse products must now have the expertise to evaluate the products. They must have used a product before evaluating it. When stating that a product is superior, the expert must in fact have found it to be equal or superior to all other products with which it is compared. When an organization endorses a product, the endorsement must be the result of the collective judgment of the organization. If a ski manufacturer says that the Western United States Ski Association endorses his product, he must have polled the members of that association on the question. An endorsement from the executive director of a group cannot be represented as an endorsement from the group.

An endorser cannot make any statement that an advertiser cannot make; that is, the endorser also must have support for his conclusions. The makers of a cough syrup cannot honestly say that their product cures a cough. A housewife who endorses the cough syrup cannot make that statement either. If an endorser changes his view and decides the product is no good, the advertiser must stop using his testimonial.

Endorsements which claim to be from typical consumers must be made by consumers, not by actors playing the part of consumers. Laymen cannot endorse the effectiveness of drug products. If an endorser says she removes facial hair safely with a depilatory, her experience must be typical of most consumers. She cannot be the exception to the fact that the product damages the skin of most women who use it.

Finally, a connection between the endorser and the seller which might materially affect the weight or the credibility of the endorsement must be noted. The fact that a movie actress owns the perfume company must be noted in her endorsement of the product. However, the FTC rules are that under most circumstances mere payment of money to a person for an endorsement is not a material connection, unless the endorser is not a celebrity or an expert. When a typical consumer is paid for pushing a product, this fact must be disclosed.

The first big-name performer who was caught by the FTC under its new endorsement rules was singer Pat Boone. Boone had endorsed a blemish medication called Acne-Statin. In one advertisement Boone said, "With four daughters, we've tried the leading acne medications at our house, and nothing ever seemed to work until our girls met a Beverly Hills doctor and got some real help through a product she developed called Acne-Statin." The commission charged that members of the Boone family had not used the preparation,

and in an order developed by the agency and accepted by the producer of the preparation, Boone agreed to pay up to $5,000 in restitution to persons who bought the product. In addition, the agreement established that the product manufacturer would pay $175,000 and the advertising agency $60,000 to persons who had paid as much as $10 a bottle for the preparation.

Puffery

Under the common law a distinction between an advertiser's assertions of factual claims and his assertion of opinion developed. Dean William Prosser in *Handbook of Law of Torts* writes that it is a seller's privilege to "lie his head off" so long as nothing specific is said about the product. A reasonable man knows that these generalities are merely subjective puffery or hyperbole about the product. Therefore under the common law, statements claiming that a sport coat is all wool, is made in England, and is the lowest-priced coat in town have to be true because they give specific facts about the product. However, it is all right to say that the coat is the best-looking sport coat in town, or that it is the best buy today, or that girls will really notice men when they wear the coat. These claims are puffery which reasonable people do not tend to believe. Objective statements must be true. Opinion or subjective statements can be exaggerated.

Today there is very little common law adjudication of false advertising claims. The FTC and state and local agencies which police advertising are not as receptive to puffery as is the common law. In a ruling in 1957 the commission noted, "*Puffing* . . . is a term frequently used to denote exaggerations reasonably to be expected of a seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined" (in re *The Matter of Better Living,* 1957). Since that time the agency has shown little inclination to allow puffery. In the 1974 *Staff Report to the Federal Trade Commission* prepared by John Howard and James Hulbert, the two researchers write, "The traditional common law distinction between misrepresentation of fact and of opinion—the latter not being considered actionable—has to a large extent been rejected under the FTC Act." In the *Law of Advertising* Rosden and Rosden argue, "Advertisers who do not want to risk a proceeding before the Commission will have to be exceedingly careful in using hyperbole in their advertising." The Rosdens note that the test must be whether ordinary consumers of the advertised goods or service can recognize hyperbole for what it is or will be deceived by it (*Western Radio Corp.* v. *FTC,* 1965).

Bait-and-Switch Advertising

One of the classic false advertising games is what is called bait-and-switch advertising. Here is the general idea. An appliance store advertises in the newspaper that it is selling a brand-new washing machine for $57. The advertisement is the bait, to get customers into the store. When customers come

to the store to grab up this bargain, the salesmen are very honest about the advertised washer and say that it is a pile of junk (and it probably is!): it has no dials, it tears fine fabrics, it tends to leak, its motor is loud, and so forth. However, over in a corner is a really good buy, a snappy model for only $395, for only a few days. This high-pressure selling is the switch. If customers insist on buying the bait, chances are they will be told the machines have all been sold. The merchant had never intended to sell that model. The whole idea is to use the bait to lure into the store people who are in the market for washing machines, and then skillful, if not honest, salesmen switch customers to a more costly model via high-pressure selling—convenient monthly payments, and so forth.

Bait-and-switch advertising is illegal. Technically the law says that it is deceptive to advertise goods or services with the intent not to sell them as advertised or to advertise goods and services with the intent not to supply reasonably expected public demand, unless limitation on the quantity is noted in the advertisement (see Title 16 *Code of Federal Regulations,* 238).

Bait-and-switch advertising is not the same as loss-leader advertising, legal in many places, in which a merchant offers to sell one item at below cost (the leader) in order to get customers into the store who in turn then buy (he hopes) additional merchandise at regular cost. Supermarkets use this scheme and so do other retail outlets. Those states which outlawed this practice did so because of pressure from small merchants who cannot afford to sell anything at a loss and don't want to be put at a marketing disadvantage with high-volume sellers.

Other Deceptions

Advertising can be deceptive in any number of ways. Let's look at a few.

Price Deceptions

It is deceptive to be untruthful about matters of cost and price; to say that the price of an item is reduced when it is not; to advertise a factory discount price when it is not; to advertise a special introductory price when it is not. The use of the word *free* causes many problems. If a merchant gives a free toothbrush to all persons who come into the store, he can advertise that he is giving away free toothbrushes. The word *free* may be used in connection with mail-order giveaways, even if the customer is charged a small fee for postage and handling, fifteen or twenty-five cents. However, to advertise a free set of drinking glasses and then require people to pay three dollars postage and handling is illegal.

The word *free* can be used even when the customers are required to buy another item before getting the free item so long as this fact is made clear in the advertisement: a free toothbrush with every purchase of a tube of toothpaste. However, this rule applies only so long as the price of the toothpaste is not inflated to cover even partial cost of the toothbrush. The toothpaste must be sold at the regular price. The same limitation applies to two-for-one sales: the first item must be sold at regular price, not at an inflated price.

Seller Deceptions

Vendors can't advertise a business as wholesale if it is really retail. They can't advertise their operation as a nationwide distributor if it is really only local in scope.

Merchandise Deceptions

A seller cannot falsely advertise the origin of merchandise, that is, say it is imported when it is not or claim cheese is Wisconsin cheese when it is really Vermont cheese. A seller can't exaggerate about the quantity, that is, advertise a bushel of apples that is really only a peck or label a small can of coffee giant economy size when in fact the price per ounce of the coffee is higher than the regular-size can.

Deceptions about the quality of merchandise are also prohibited. A merchant can't advertise a chair as an antique unless it meets strict government definition of what is and what is not an antique. Under the 1931 Tariff Act only furniture made before 1830 is considered antique. The same is true for porcelain and silver. A rug made after 1701 is not an antique. A violin made before 1801 is. And so on. Unless the item meets these standards, it cannot be advertised as antique.

Something advertised as homemade has to be made at home. Home style is another matter. "Home style" cottage cheese can be manufactured in a dairy plant. *Colorfast* means that the fabric colors won't run or fade. The word *cure* implies that a permanent solution to a problem is offered. Most medicines give temporary relief, and then only for the symptoms of a specific medical problem. The word *permanent* means just that—permanent. Hair dye cannot be advertised as *permanent* because hair continues to grow, and new undyed roots will always appear. A product advertised to be "fireproof" must be fireproof, not merely fire resistant. A paint advertised to be easy to apply and to clean up must be easy to apply and clean up. The word *remedy* also implies a permanent cure: there is no such thing as a *headache remedy* since these words imply that users will have no more headaches. There are products, however, which temporarily relieve headaches. A product that is advertised to be safe must be safe for ordinary use. If a painter must wear a gas mask to avoid toxic fumes when he applies a paint, the paint is not safe since people normally don't paint wearing gas masks.

If a company has sold its maple syrup for twenty-five years using 20 percent real syrup in each bottle and then suddenly eliminates the real maple syrup and substitutes chemically flavored corn syrup, it must announce the change on the label. Any change in a product detrimental to the product must be noted on the label. This kind of change is not often advertised. For instance the syrup manufacturer would be better off to discontinue selling the old brand of syrup and introduce a new brand, "with that old-fashioned maple flavor." He can then sell his corn syrup, and only inveterate readers of package labels will know that they are buying chemically adulterated corn syrup.

Results Deceptions

An advertiser can't claim that a product is capable of something it can't do. If a spot remover cannot remove oil-base spots, it is illegal to advertise that it can remove all kinds of grease and grime from rugs. Antiperspirants cannot be advertised as such unless they really prevent perspiration.

By the same token, the harmful effect of a product must also be disclosed. If a laxative can be damaging to kidneys, that fact must be disclosed on the label. If an aerosol cleaner can irritate the eyes, that fact must be acknowledged.

The list is endless. Probably, the FTC or another regulatory agency will find a way to interpret as misleading almost any claim capable of being seen in that light.

Irrelevant Claims

At times—but not consistently—the FTC has said that advertising which invokes an irrelevant factor to win sales is deceptive. Health products are especially vulnerable to this interpretation. What is an irrelevancy? For example, an advertisement based on sex appeal. The FTC recently issued a complaint against Vivarin, a patent medicine which contains both an analgesic and a stimulant, for advertising which implies that use of the product makes persons more exciting and attractive, improves their personality, marriage, and sex life, and solves mental and personal problems. These benefits are irrelevant (as well as exaggerated) to the primary purpose of the product, to relieve a headache (in re *J. B. Williams,* 1972).

DEFENSE

The basic defense in any false advertising suit is truth, that is, proving that a product does what the advertiser claims it does, that it is made where he says it is made or that it is as beneficial as it is advertised to be. While the burden is upon the government to disprove the advertiser's claim, it is always helpful for an advertiser to offer proof to substantiate advertising copy.

Another angle which advertisers can pursue is to attack a different aspect of the government's case rather than try to prove the statement true. For example, an advertiser can argue that the deceptive statement is not material to the advertisement as a whole, that is, it will not influence the purchasing decision, or that the advertisement does not imply what the government thinks it implies. For example, to say that a deodorant "goes on dry" does not mean that it is dry when it is applied, merely that its application is drier than that of other antiperspirants.

The success rate in defending false advertising cases is not high. As for most legal problems, it is best to consult legal counsel before a problem arises and not after a complaint has been issued.

Advertising law is complicated, involved, and constantly changing. Even advertisers who set out to honestly follow the straight and narrow run into difficulty once in a while. The best way to cope with these problems is thorough understanding of both the law and the way the law operates.

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11 Broadcasting Regulation

When the regulation of broadcasting is first considered, many of the principles encountered in earlier chapters of this book must be temporarily set aside. Although they must observe all the other laws concerning such issues as libel and invasion of privacy, in both theory and practice, broadcasters face a regulatory scheme totally different from that faced by their counterparts in the print media. In 1966 Chief Justice Warren Burger, then a judge in the United States Court of Appeals for the District of Columbia, wrote (*Office of Communication, United Church of Christ* v. *FCC*, 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.

There was a time in the United States when the only requirement confronting broadcasters was to request a license before broadcasting. Newspaper publishers and broadcast station owners were on almost equal terms. However, this scheme didn't work very well, or at least most people seemed to think that it didn't. The era of almost regulation-free broadcasting was a failure: neither broadcasters nor listeners were satisfied. Both listeners and broadcasters therefore asked the government to step in and impose order on the chaos, and regulation was the result.

Why didn't freedom work? One reason is the nature, or physical limitations, of the transmission of radio signals. Only a small number of radio (or television) signals can be transmitted in one place at one time. Each signal must be carefully guided along its own private roadway or it will interfere with other signals. This is where the problem of the "spectrum," or the "ether"

as some old-timers still call it, arises. The airwaves are capable of carrying only a limited number of signals; that is, the spectrum is limited.

Still, even limited-spectrum, regulation-free radio broadcasting could have worked had the broadcasters cooperated with each other in sharing the valuable airwaves and in using caution when transmitting their signals to avoid interference with other broadcasters. Many broadcasters, however, were not willing to cooperate. More people wanted to own a broadcasting station than could be accommodated, and usually each owner wanted the best and strongest signals for his station. When two or more broadcasters attempted to transmit simultaneously on the same frequency, there was chaos, and listeners were often treated to what might be charitably called gobbledygook. Regulation seemed to be the only answer.

Today, new attempts are being made to free at least radio from the yoke of regulation imposed more than one-half century ago. In the autumn of 1979 the Federal Communications Commission (FCC), the nation's watchdog of the broadcasting industry, announced a number of proposals to allow radio to broadcast both programs and commercials free of government control. The proposals, which are vigorously opposed by public interest groups and many church organizations, will remove limits on the number of radio commercials on the air and abandon requirements that stations devote a certain amount of time to news or other nonentertainment material. Also, the rule changes will abolish much of the record-keeping practices now required of radio stations by the federal government. Finally, the FCC is prepared to abandon the requirement that each station formally take measurements of community needs and interests under what are called "ascertainment" rules. The changes are being proposed because many persons at the commission believe that market forces will work to both stimulate stations to provide broadcast programs that the public needs and limit abuses by radio stations. As this chapter is prepared the rules are still under consideration. If adopted, they will surely face a court challenge by groups which argue that the rule changes mean that the agency has abandoned its statutory responsibility to regulate broadcasting in the public interest.

The purpose of this chapter is not to train lawyers for the Federal Communications Commission or general counsels for the networks. Rather, the focus of the chapter is the Federal Communications Commission (FCC) *and* its influence on all aspects of broadcasting. We begin by briefly reviewing the origins of the commission by considering the development of radio and the federal laws resulting from its development. We then move on to the commission itself and take a quick, overall look at its procedures and powers. Next, the most important of these powers, licensing, renewal of licenses, and program regulation are discussed in depth, as are two of the sometimes controversial powers of the commission, the equal time rule and the Fairness Doctrine. Finally, the other segment of the electronic media, cable television, is explored.

DEVELOPMENT OF RADIO

Radio is not the invention of a single individual. Rather, it represents an accumulation of many ideas that emerged during the last years of the nineteenth century. At first only simple radio signals were transmitted. But gradually transmission of more complicated voice signals became possible. The basic hardware of radio had been developed by 1910, but the medium grew far differently than did the print medium. Remember, printing came at a time when people were groping for a means of spreading propaganda, and the printing press became a major weapon in the battle for religious freedom in England. The press was used as a means of spreading information and ideas. Radio has never really been dedicated to those ends. Initially it was a gadget which tinkerers built as a plaything for talking with friends and neighbors and for listening to strangers in distant places. The military was first to see the practical value of radio. The navy used radio as a means of keeping track of its ships out of port and for transmitting messages to captains on the high seas. The army too saw radio as an effective device for improving military communications. After World War I the armed forces made one concerted push to have the government take control of all radio communication, but the effort failed.

Aside from the military, few persons could see the practical side of radio, especially of radio broadcasting. The giant radio manufacturers were the first to reason that if they used radio to broadcast entertainment people would want to buy radio sets. Commercialism took a big step forward in the early twenties when the concept of broadcasters selling broadcast time to sponsors developed.

RADIO ACT OF 1912

The regulation of broadcasting in the United States dates from 1910 when Congress ruled that all United States passenger ships must carry a radio. Two years later the lawmakers passed the Radio Act of 1912 in response to considerable pressure from the army and navy which asserted that increasing numbers of amateur broadcasters interfered with military transmissions. The 1912 law required that all radio transmitters be licensed by the federal government and that operators of the transmitters be required to have a license. The secretary of labor and commerce, who was delegated the job of administering the law, was given authority to assign specific broadcast wavelengths to specific kinds of broadcasting (military wavelength, ship-to-shore wavelength, etc.). The secretary also had the power to determine the time periods when broadcasts could be carried, but he had no discretionary power to license. Anyone walking in the door and filling out an application could get a license.

Part of the problem in the early 1920s was the proliferation of licenses. Too many people wanted a license and too many radio stations wanted to transmit at the same time. In 1923 Secretary of Commerce Herbert Hoover decided to take things into his own hands when he refused to grant a license to an applicant, claiming that this discretion was inherent in the 1912 law.

A federal court disagreed with the secretary, however. "The duty of issuing licenses to persons or corporations coming within the classification designated in the act reposes no discretion whatever in the Secretary of Commerce. The duty is mandatory," Judge Van Orsdel wrote (*Hoover* v. *Intercity Radio Co., Inc.*, 1923).

While Hoover was defeated in the courts, conscientious broadcasters and other persons concerned with the future of radio continued to urge the secretary to set up regulations to control broadcasting. At the Fourth National Radio Conference in 1925 (Hoover called yearly meetings to draft broadcasting regulations which Congress annually rejected), the secretary of commerce outlined his philosophy with regard to broadcast regulation. This philosophy remains today the basic foundation for the regulatory scheme:

> We hear a great deal about freedom of the air, but there are two parties to freedom of the air, and to freedom of speech for that matter. Certainly in radio I believe in freedom for the listener. . . . Freedom cannot mean a license to every person or corporation who wishes to broadcast his name or his wares, and thus monopolize the listener's set. We do not get much freedom of speech if one hundred fifty people speak at the same time at the same place. The airwaves are a public medium, and their use must be for the public benefit. The main consideration in the radio field is, and always will be, the great body of the listening public, millions in number, countrywide in distribution. There is no proper line of conflict between the broadcaster and the listener. Their interests are mutual, for without the one the other could not exist.

Under pressure from elements in the broadcasting industry and somewhat flush with the consensus which the annual radio conferences seemed to indicate, Hoover continued to act beyond his legal authority in regulating broadcasting. In 1926 his actions were again challenged by Eugene F. McDonald who operated station WJAZ in Chicago on an unauthorized wavelength and at times not authorized by his license. His challenge to Hoover was joined in federal district court and Hoover lost. Judge Wilkerson ruled, "There is no express grant of power in the [1912] Act to the Secretary of Commerce to establish regulations" (*U.S.* v. *Zenith Radio Corp.*, 1926).

Hoover insisted that the attorney general appeal the ruling, but in a lengthy opinion Acting Attorney General William J. Donovan stated that he agreed with Wilkerson's interpretation of the law. Donovan wrote that, while stations were required to have licenses to operate, the secretary of commerce had no authority to assign specific stations to specific wavelengths, to limit hours of operation, or to place limitations on the amount of broadcast power used by a station. Donovan added:

> It is apparent from the answers contained in this opinion that the present legislation is inadequate to cover the art of broadcasting, which has been almost entirely developed since the passage of the 1912 Act. If the present situation requires control, I can only suggest that it be sought in new legislation, carefully adopted to meet the needs of both the present and the future.

Hoover capitulated, and the chaos which the secretary's illegal regulations had somewhat abated returned to the airwaves. Finally, Congress could no longer ignore the mounting pressure and adopted federal legislation by passing the comprehensive Radio Act of 1927.

RADIO ACT OF 1927

The nation had operated without substantial regulation of broadcasting for about twenty years, but nonregulation didn't work. A traffic cop was obviously necessary to make certain that broadcasters transmitted on assigned wavelengths, that they operated during assigned hours, and that they operated at assigned levels of power. Only with this kind of regulation could listeners use the medium. The Radio Act of 1927 created much more than a traffic cop however. As FCC Commissioner Glen Robinson notes in *The Administrative Process,* "Even a cursory examination of the Act, however, indicates that the regulatory powers granted to the Federal Radio Commission (and later to the FCC) exceeded those minimally required to avoid electronic interference." The new law governed programming, licensing and renewal, and many other aspects of radio not associated with broadcast signals and electronic interference.

The years immediately following the passage of the new law brought order to broadcasting. The courts upheld the power of the federal government to regulate the broadcast media, and the system of regulations which exist today began to take shape. The 1927 act also provided the basic philosophical foundation for broadcasting regulation. The law asserted that the radio spectrum, the airwaves, belong to the public and that broadcasters merely use this public resource while they operate a licensed station. The law established that the broadcaster must operate in "the public interest, convenience or necessity" at all times. This was the standard of conduct which would be used to evaluate licensees at renewal time. An independent agency, the Federal Radio Commission, was also established to supervise the regulation of broadcasting.

While the 1927 legislation was satisfactory in dealing with the problems of broadcasting, it became evident following a study initiated by President Franklin D. Roosevelt in 1933 that the radio industry and the telephone and telegraph industries were interdependent. In 1934 Roosevelt urged Congress to adopt a new law which would be broad enough in scope to govern all these media. After extensive hearings and debates the federal Communications Act of 1934 was approved. This law has been amended frequently since 1934, but it stands as the basic regulation of the broadcast industry today (47 *United States Code*, Section 151, 1970).

In 1977, the House Subcommittee on Communications attempted to entirely rewrite the Communications Act of 1934. Almost 100 days of public hearings were held on the new proposal sponsored by Representative Lionel Van Deerlin. More than 1,200 witnesses testified regarding the proposed measure. But the entire effort was abandoned in August 1979 when, according to

one Washington broadcast lobbyist quoted in *TV Guide*, it became clear to members of the subcommittee that "no one really liked H.R. 3333 [the proposed measure]." The Van Deerlin bill would have removed most federal rules governing radio, relaxed many controls on television, taxed broadcasters fairly heavily for their use of the airwaves, totally reshaped public television, lengthened the term of broadcast licenses, and allowed the telephone company (American Telephone & Telegraph) to get into cable television—to name just a few aspects of the proposed measure. However, in writing such a comprehensive measure, Van Deerlin found that his bill alienated a wide range of persons. Public interest groups opposed deregulation of broadcasting—they believed that the government should force radio and television to do more to serve the public, not less. Broadcasters favored deregulation, but didn't like the heavy new taxes. Cable operators opposed allowing the telephone company to get involved in cable casting. Ron Miller of the Knight News Service said that in the end Van Deerlin had "all of broadcasting, most citizen media reform groups and a host of academics lined up against him. It was something like trying to unify the Armed Forces. With the Army, Navy, Air Force and Marines against you, the outcome might be somewhat predictable." After abandoning the effort, Van Deerlin said that he and his staff would attempt to amend the 1934 law, and would focus upon common-carrier matters, such as restructure of the telephone system. Broadcasting would probably not be considered, the Congressman added. To understand the regulation of broadcasting, then, it is still necessary to look to the nearly fifty-year-old 1934 law.

The Communications Act of 1934 basically reenacted the 1927 law with regard to broadcasting, but added provisions for regulation of common carriers, the telephone and telegraph industries.

FEDERAL COMMUNICATIONS COMMISSION

The 1934 law provided that the five-member Federal Radio Commission be replaced by a seven-member Federal Communications Commission. Members of the FCC are appointed by the president, with the approval of the Senate, to serve a seven-year term. One member is selected by the president to be chairman. The law also provides that not more than four members of the agency can be from the same political party.

Like all administrative agencies, the FCC is guided by broad congressional mandate—in this case the federal Communications Act. The agency has the power to make rules and regulations within the broad framework of the Communications Act, and these regulations carry the force of the law. With regard to some matters the 1934 law is very specific. For example, Section 315—the equal opportunity provision (or equal time rule)—details regulations concerning the use of the broadcast media by political candidates. But in other areas Congress was eloquently vague. The mandate that broadcasters operate their stations in "the public interest, convenience or necessity" can mean

almost anything a person wants it to mean. Consequently, the FCC developed rules like the Fairness Doctrine and the ascertainment rules (we will talk about these rules in detail later) in its effort to implement the public interest requirement.

Procedures

The commission employs a large staff and is divided into various divisions. The Broadcast Bureau, for example, deals exclusively with broadcasting problems. Other divisions work with telephone and telegraph problems and with safety and special services. Administrative law judges, who are assigned to the FCC by the Civil Service Commission, are independent of control and direction by the agency. The administrative law judges are responsible for conducting inquiries for the agency and have powers which are normally incident to conducting trials and hearings. Their decisions on matters, such as controversy involving alleged violation of the Fairness Doctrine and license revocation, are final unless an exception is filed by any of the parties in a case. If there is an exception, the FCC commissioners themselves normally hear the dispute and render a decision. Here is an example of this procedure.

Imagine that the National Rifle Association accuses television station KLOP of violating the Fairness Doctrine in presentation of material on gun control. The Fairness Doctrine requires that when a broadcaster presents a discussion of a controversial public issue all sides of the issue be fairly presented. The National Rifle Association files a complaint with the FCC which the Broadcast Bureau then investigates. Assume that after its investigation the Broadcast Bureau concludes that the station did violate the Fairness Doctrine. It then files a complaint with KLOP. The administrative law judge then conducts the hearing in the dispute. The Broadcast Bureau argues that the Fairness Doctrine was violated, and the station argues that it was not. Imagine that the judge decides that the station did not act fairly and rules against KLOP. This decision is final unless the station files an exception within thirty days. If the judge rules that the station did not violate the doctrine, the Broadcast Bureau can file an exception. The issue of whether KLOP violated the Fairness Doctrine then goes before the seven commissioners where oral argument is held and a decision is reached.

What happens if the FCC rules against KLOP? Is the matter finished? No. The station can ask a United States court of appeals (not the district court since the FCC has already conducted its fact finding) to review the decision.

An appellate court cannot substitute its own judgment for that of the Federal Communications Commission. The judges do not review the factual record to see if they reach the same conclusion. FCC decisions, like the decisions of all administrative agencies, cannot be overhauled except for quite specific reasons. The court can check to see whether the petitioner (the party who brings the appeal) has been afforded due process of law. It can investigate

various other issues. Were there procedural irregularities? Did the FCC make an adequate finding of the facts? Did the commission state the reasons for its decision? Are the findings of the agency supported by the evidence in the record? Did the action by the FCC conform to its congressional mandate or did it go beyond the authority granted in the Communications Act?

While theoretically these are the only kinds of issues a court can examine, courts on occasion have gone beyond these limits to examine the factual questions. Some judges have been reluctant to refrain from examining the substantive issues involved and sometimes have even reached conclusions different from those reached by the FCC. The United States Supreme Court is available for the final appeal.

We have briefly reviewed how the FCC operates. Other aspects of FCC procedures are considered when licensing and programming controls are discussed in detail. Let us next take a quick look at FCC powers as invested by the Communications Act of 1934.

Powers

An important aspect of the 1934 law is the affirmation of the philosophy in the 1927 measure which established a privately owned broadcasting system operating over the public airwaves. This was a kind of compromise between establishing complete government control of broadcasting, as in most nations, and allowing the broadcasting industry to operate like most other industries, that is, with no government regulation.

The Congress approved the 1934 law under the authority of the commerce clause of the United States Constitution which gives the federal legislature the exclusive power to regulate interstate commerce. Under the 1927 act the question had arisen of whether this clause meant that the federal government lacked power to regulate broadcasters whose signals did not cross state lines, stations that were not engaged in interstate commerce. In 1933 in *FRC* v. *Nelson Brothers* the United States Supreme Court ruled that state lines did not divide radio waves and that national regulation of broadcasting was not only appropriate, but also essential to the efficient use of radio facilities. However, laws must be based on the Constitution, not just on efficiency. What legal logic did the Court use to back up its opinion? Simply this: While a radio station's signal may not cross state lines, it can interfere with the signal from a radio station which does cross state lines. Consequently, regulation of intrastate broadcasting is "ancillary" to the regulation of interstate broadcasting. In order to properly regulate the vast majority of broadcasting which falls within interstate commerce, the federal government must have the power to regulate all broadcasting. Later in this chapter we will see that this is the same rationale used to justify federal regulation of cable television.

While the Communications Act branded telephone and telegraph companies common carriers (because they are monopolies, they have to be common carriers; that is, they must accept business from anyone who wishes to use their services), broadcasting stations were not so designated. Because

broadcasters are not common carriers, they may refuse to do business with anyone or any company. Broadcasters do not have to make their facilities available to all members of the public. In addition the commission lacks the power to set rates for the sale of broadcasting time. Broadcasting is founded on the basis of free competition among holders of broadcast licenses.

The Communications Act makes it clear that while broadcasters may freely compete they in no way assume ownership of a frequency or wavelength by virtue of using it for three years or for three hundred years. When a license is granted, the broadcaster must sign a form in which is waived any claim to the perpetual use of a particular frequency.

While the FCC has direct control over all broadcasting stations, there is nothing in the Communications Act which gives the agency authority to control the broadcast networks. The National Broadcasting Company (NBC), the broadcast network, does not really broadcast anything itself. The network transmits programs to its affiliate stations which in turn do the broadcasting. Technically, therefore, the FCC has no power over the networks because they do not "broadcast."

But as is often the case, in this instance the technical truth is not the real truth. The FCC does in fact exercise considerable authority in spite of the Communications Act. How? First, since each of the networks owns several radio and television stations, the FCC controls the networks to a considerable extent by controlling the programming and practices of these "owned-and-operated" stations. Second, by controlling the actions of stations affiliated with the networks, the FCC can in fact regulate the networks. The "prime-time rule" is a good example. Several years ago the FCC was convinced by an assortment of groups that the networks dominated the program schedules of their affiliated stations. So the FCC adopted a rule that a network cannot provide more than three hours of programming for its affiliates during the prime evening viewing hours from 7 P.M. to 11 P.M., thereby giving local stations and other independent producers a chance to get programs into prime time. Because the FCC has no direct authority to control the networks, it is unable to rule that the National Broadcasting Company, The Columbia Broadcasting System (CBS), and The American Broadcasting Company (ABC) cannot provide more than three hours of programming. But the agency can and did rule that the affiliated broadcasting stations cannot accept more than three hours of network programming. These are two ways in which the FCC can regulate broadcasting networks.

Recently, however, the FCC went a step beyond these means and made regulations aimed directly at the networks. The agency ruled, for example, that networks can no longer syndicate old television programs, but have to sell them to someone else for syndication. This was a direct regulation and was challenged in court. But the United States Court of Appeals for the

District of Columbia upheld the right of the FCC to take such actions. In *Mt. Mansfield Television* v. *FCC* (1971) the court ruled that the fact that the Communications Act vested no explicit authority in the FCC to regulate the networks is not conclusive. The court said the rules passed by the agency, though they are direct regulation of the networks, are within the commission's statutory power if they are "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."

Technically the FCC lacks the power to censor broadcasters. Section 326 of the Communications Act states:

> Nothing in this act shall be understood or construed to give the commission the power of censorship over radio communications or signals transmitted by any radio station, or condition shall be promulgated or fixed by the commission which shall interfere with the right of free speech by means of radio communication.

No censorship, then. At least that is what Section 326 states. But that is not the way this section has been interpreted. The FCC has chosen to interpret Section 326 (with the approval of the courts) to mean that it may not censor specific programs, that is, forbid a broadcaster to carry programs on radical politicians or programs which picture members of a minority group in a derogatory fashion. However, at license renewal time the agency can consider the kind of programming the licensee broadcasts, and if the agency finds the programming objectionable, this fact can be held against the licensee. The United States Supreme Court adopted this understanding of Section 326 in its 1978 ruling in *FCC* v. *Pacifica Foundation* in which the Court sustained the agency's censure of WBAI-FM for broadcasting George Carlin's monologue "Seven Dirty Words." Most people would call this censorship. Section 326, then, has limited meaning and is of limited value to broadcasters.

The commission has broad-ranging powers in dealing with American broadcasters. Section 303 of the Communications Act outlines some of the basic responsibilities of the agency which include classification of stations, determination of the power and technical facilities licensees must use, and specification of hours during the day and night stations can broadcast. The FCC also regulates the location of stations, the area each station can serve, the assignment of frequency or wavelength, and even the designation of call letters. There are not many things that broadcasters can do without first seeking the approval or consent of the Federal Communications Commission.

The key powers held by the FCC, however, focus on licensing and renewal of licenses and the authority to regulate programming and program content. It is toward these powers that primary consideration is directed in the remainder of this chapter.

LICENSING

Issuing and renewing broadcast licenses are perhaps the most important functions of the FCC. These functions are very important to broadcasters as well, for without a license there can be no broadcasting. Virtually everything the broadcaster does is tied in some way to having the license renewed. In addition to getting a license for a new station, the broadcaster must also seek FCC approval for most operational changes such as increasing power, changing the antenna height or location, selling the station, transferring ownership, and so forth.

The licensing process is very complex and loaded with small but important details. Mountains of paperwork must accompany the license application. The first thing the potential licensee seeks is a construction permit, permission to start building the station. Obtaining this permit is actually the biggest hurdle. If the permit is granted, if construction of the station conforms to technical requirements, and if the work is completed within the time specified in the permit, the license is routinely issued for three years of operation.

What kinds of qualifications must the prospective licensee meet? The applicant must be a United States citizen, must be capable of building and operating the station for one year without taking in any revenue, and must possess (or be able to hire people who possess) the technical competence to construct and operate a broadcasting station. The applicant must also be honest and open in dealing with the commission and must have generally good character. The applicant must meet the qualifications under the multiple-ownership rules which prohibit one individual from owning more than seven television stations, two of which must be ultrahigh frequency (UHF) stations, seven amplitude modulation (AM) radio stations, and seven frequency modulation (FM) radio stations. There are additional rules which limit ownership of multiple broadcasting properties and newspapers and broadcasting stations within a city or market area (these regulations are discussed in more detail in chapter 12). The applicant has to endeavor to ascertain the needs and interests of the people in the community to be served by the station and then prepare a programming scheme which will serve those needs and interests (ascertainment is discussed further on pages 436–38). If the applicant shows the commission that he is in compliance with these requirements, and if there is no competing applicant or community protest against granting the permit, the permit to construct the station will be granted. The license then follows when construction is completed.

Challenges

License applicants can face two kinds of challenges, the first from other applicants and the second from already licensed stations. Let us consider challenges from other applicants first. One such challenge comes when two applicants apply for the same license. When this occurs, the commission is required to compare the qualifications of both applicants. This type of challenge is considered more fully when license renewal is discussed (see pages 433–43).

Another challenge occurs when two applicants apply for separate licenses, but the proposed stations are mutually exclusive. For example, one applicant plans to build a station in a city just four miles away from the city in which the other applicant wants to build a station. Since only one frequency remains in the spectrum in that area, the two stations are mutually exclusive. In this case the FCC must grant both applicants a hearing. The commission cannot arbitrarily choose one applicant and ignore the other.

The second kind of challenge applicants for a new license may face comes from an existing station in the area where the new station is proposed to be located. The challenger usually argues that there is no room in the spectrum for the addition of another signal, that it will damage the quality of his own signal. Also in the past, existing broadcasters argued that they would be damaged economically by addition of a new station, that the total advertising dollars available in the community would have to be shared by an additional station, that there was not enough business to go around. Is this a legitimate argument? To a point it is. In 1940 the United States Supreme Court ruled, "Resulting economic injury to a rival station is not, in and of itself, . . . an element the FCC must weigh" in granting a new license (*FCC* v. *Sanders Brothers Radio Station,* 1940). In 1958, however, the United States Court of Appeals (D.C.) weakened this proposition somewhat by pointing out that in the 1940 decision the high Court added that economic injury can become a relevant factor if reduced revenues *will adversely affect program service.* Whether a station makes a big profit should not be of interest in such a case, the Court ruled (*Carroll Broadcasting Co.* v. *FCC,* 1958):

> . . .[but] if the situation in a given area is such that available revenue will not support good service in more than one station, the public interest may well be in the licensing of one station rather than two stations. To license two stations where there is revenue for only one may result in no good service at all.

RENEWAL OF LICENSES

The process of having a broadcasting license renewed is one of the most odious tasks ever devised by man. Perhaps it should be, for after all the broadcaster usually reaps grand profits through use of the public airwaves. Every three years the license of each station comes up for renewal. Renewals are staggered so that every two months the FCC receives a batch of between three and five hundred renewal applications. The broadcaster must provide the FCC with volumes of data, which points out an important facet of renewal: the FCC does not conduct an independent investigation of the licensee. Rather, the licensee (and sometimes other interested persons) provides the commission with nearly all the relevant material.

Program Information

At renewal time, in addition to wanting a considerable amount of technical data, the commission seems most interested in programming information, that is, in the kinds of programs the licensee carried during the past three years.

The FCC establishes what is called a composite week, taking a Monday from one month, a Tuesday from another month, perhaps a Wednesday from the following year, and so forth. The licensee must report what programs were broadcast on those days. Licensees must break down other program data into categories such as news and public affairs, religion, and so forth, and must also show that they have provided programs on local needs and interests, all of which will be discussed in some detail further on. If the FCC is not satisfied with what it sees, it can schedule a formal hearing on the renewal application. A formal hearing is prerequisite to both nonrenewal and revocation of a license before expiration.

Theoretically, at least, the renewal process is supposed to be a rigorous examination of whether the broadcaster is serving the public interest. While the process is odious because it does entail a great deal of work for the broadcaster, the examination is rarely rigorous. The FCC is too small and understaffed to give renewal applications much more than a cursory examination. Unless there are serious citizen complaints, renewal is generally automatic. Between 1935 and 1969 less than fifty renewal applications were denied. Since 1969 the number of denials has increased somewhat, but the increase is due to challenges to renewal from citizen groups, as we shall soon see.

Another problem fundamental to the entire spectrum of broadcast regulation is that while the Communications Act and the FCC both frequently refer to "public interest, convenience or necessity," there exists no specific definition of these words. Instead of defining the words for broadcasters, over the years the FCC has developed a rather extensive set of policies and rules—broadcasters must do this, broadcasters cannot do that. If licensees follow the rules, it is assumed that they are serving the public interest. Of course this may or may not be true.

Inertia is another reason why the renewal process is less than a rigorous examination of the licensee. The FCC, which is a bureaucracy on the grand scale, takes too long to begin meaningful action. In 1978 the agency was still in the process of deciding whether to strip a Tacoma, Washington, radio station of its license even though the hearings had begun six years earlier. In 1975 the commission voted to strip the licenses from all the public television stations in Alabama because they had discriminated against blacks in the late 1960s. Their renewal applications were denied in spite of the fact that by 1975 the stations had solved discrimination problems of the 1960s and offered a broad range of programming for the black citizens of the state. In fact many persons looked to public television in Alabama as a model for a broadcasting operation which both employed minority group members and served the minority community with high-quality programming. The FCC had taken more than five years to get up enough steam to correct a serious problem. By the

time the agency reached a solution, the problems were solved. Also in 1975 the FCC denied Don Burden the renewal of licenses for his five radio stations for among other reasons improperly using newscasts to promote political candidates in 1964 and 1966, almost ten years earlier.

Clearly the sanction of nonrenewal can be a valuable sanction. No broadcaster wants to lose a license, nor do broadcasters want to face the prospect of a costly renewal hearing. However, the threat is worse than fact, since examination is generally cursory. So long as broadcasters can convince the FCC that they have followed agency rules, renewal is usually automatic. Former FCC commissioners Nicholas Johnson and Kenneth Cox once described the renewal process this way: "a sham—a ritual in which little review of performance actually takes place."

Nonrenewal Standards

However, there have been cases in which licenses were not renewed, and these cases established principles which are now law. A York, Nebraska, radio station had a renewal application rejected for broadcasting advertisements and information for fraudulent business enterprises and false and misleading statements about medical products. The owner of the station was apparently involved in the crooked businesses. Broadcasting fraudulent advertising, then, can result in nonrenewal (*May Seed and Nursery Co.* et. al., 1936). A Georgia station was threatened with nonrenewal for broadcasting a contest which was a lottery, a violation of federal law. The station changed its errant ways and got its license renewed (*WRBL Radio Stations,* 1936). A station cannot be used solely to promote causes of the owner—even religious causes. "Where the facilities of a station are devoted primarily to one purpose and the station serves as a mouthpiece for a definite group or organization it cannot be said to be serving the general public," the FCC ruled (*Young People's Association for the Propagation of the Gospel,* 1938).

In the *Trinity Methodist Church* case in 1932 the former Federal Radio Commission was faced with a situation in which a station owner used his broadcast facilities for sensational attacks upon the Catholic Church. The licensee also had been convicted of using his radio station to obstruct justice and was held in contempt of court. When the commission refused to renew the license, the Reverend Dr. Shuler argued that this violated his First Amendment rights. A court of appeals issued what probably remains the definitive ruling on this question. Acknowledging the First Amendment considerations, the court nevertheless ruled (*Trinity Methodist Church, South* v. *FRC,* 1932):

> . . . this does not mean that the government, through agencies established by Congress, may not refuse a renewal of license to one who has abused it to broadcast defamatory and untrue matter. In that case there is not a denial of the freedom of speech, but merely the application of the regulatory power of Congress in a field within the scope of its legislative authority.

The previous year another court of appeals judge had ruled that the commission had a perfect right to look to past programming practices of a renewal applicant to determine whether the license should be renewed. Invoking the Biblical injunction By their fruits ye shall know them, the court affirmed that past programming is a central issue in consideration of service in the public interest (*KFKB Broadcasting Association* v. *FRC*, 1931). Past programming, then, is an important element in the renewal scheme.

In perhaps the most striking action in its forty-six-year history the FCC in 1980 stripped a single license holder of television stations in Boston, Los Angeles, and New York. The reason, according to the agency, was that license holder RKO and its parent company, the General Tire & Rubber Company, had engaged in misconduct "so extensive and serious" that they could no longer be trusted as broadcasters. In the 1960s General Tire had been accused of pressuring companies into placing advertising with RKO stations as a condition of doing business with the rubber products manufacturer. An insurance company seeking to sell a life insurance policy to General Tire, for example, was forced to buy time on RKO stations before the tire producer would agree to deal with the insurance company. General Tire signed a consent agreement in 1970 in which it agreed not to pursue such "reciprocal trade relations programs." The tire company signed another consent agreement with the Securities and Exchange Commission in the late 1970s in which it admitted such misconduct as maintaining illegal political slush funds, bribing foreign officials to obtain confidential tax records of competitors, cheating affiliate companies, falsifying stock reports, and violating foreign tax laws. Because there was a close corporate management relationship between General Tire and RKO, and because RKO's own management had knowingly filed inaccurate financial information with the FCC during hearings, the agency stripped RKO of the three lucrative licenses. RKO protested, charging that "they are saying the moral character of people at one location makes a company unfit at another location, and the logic doesn't fit." RKO promised to institute a court appeal, and it appears that the issue will not be finally resolved until late 1981 or 1982.

Another important element today is what is called ascertainment, which we will consider for a moment.

Ascertainment

In 1973 the FCC issued the *Primer on Ascertainment of Community Problems by Broadcast Applicants* which was qualified and expanded by additional ascertainment guidelines in 1975. While all but a handful of tiny radio stations (10 watts or less) are expected to undertake some kind of study of community needs and problems, stations in communities with less than 10,000 persons and not within a Standard Metropolitan Statistical Area (SMSA) are exempt from following the specific ascertainment requirements established by the FCC. Approximately 1,900 small market radio stations and 14 commercial

television stations are not obligated to carry out the detailed requirements listed by the agency. And if FCC proposals on the deregulation of radio are adopted (as noted earlier), all radio stations will be exempt from these specific rules.

When ascertaining community needs and interests, the broadcaster is required to consult with leaders of significant groups in the area, as well as with members of the general public. The applicant must "determine the demographics and composition of the city of license, indicating its economic, social, racial, ethnic and other significant characteristics," according to the FCC policy statement. The station owner and management level persons must conduct at least half of the interviews with community groups. The FCC has provided broadcasters with a checklist of the institutions or "elements" in the community which should be consulted during this process. The list includes government agencies and business, labor, education, charity, public safety, health, environmental, religious, cultural, and consumer-service groups. The FCC also asks broadcasters how many black, Spanish-American, native American, oriental, and women community leaders were consulted. To gather ascertainment information from the general public the broadcasters can use a survey based on a random sample of the population in the community, and the survey can be undertaken by professional polling agencies.

The commission insists that the broadcaster attempt to find out what is on the people's mind in the community. Ascertainment was first mentioned formally in the commission's 1960 programming statement. "From this relatively modest application," writes Commissioner Glen Robinson, "the local needs ascertainment policy has been crystallized into an increasingly formalized and elaborate requirement for community surveys and reporting to the FCC both the survey efforts and how the station's programming is responsive to the ascertainment needs and interests."

The entire ascertainment process must be undertaken six months before the application for license renewal is filed with the commission. However, it is FCC policy that at least some community leaders should be contacted annually, not just triennially.

Ascertainment is not designed to elicit program suggestions from the people. Rather, it is to discover community problems which broadcasters must attempt to explore in their programming. Not all problems must be treated in programming. The broadcaster is expected to make a good-faith effort to determine which problems merit treatment, and then "propose what programs it will broadcast to deal with those problems, giving a description of the program or program series, its anticipated time segment, duration and frequency of broadcast." Programming can take the form of public service announcements, editorials, segments of newscasts, or special programs. The FCC has also recognized that not all media must treat all problems to the same

extent. A small radio station, for example, is not expected to respond to the same extent as a larger television station in dealing with problems uncovered during the ascertainment process.

The Public Interest

Prior to 1966 the license renewal process was generally a two-party process between the license holder and the commission. Information about the broadcaster's performance came from the broadcaster and from the FCC's Broadcast Bureau, which maintained minimal surveillance of the licensee. All letters of complaint which the commission received about the licensee were also included in the record. But citizens, listeners or viewers, were not permitted to officially bring forth evidence or testimony either in support of or against renewal of the broadcast license. In order to participate in a license renewal hearing, "standing" was needed, according to the FCC. *Standing* is a five-dollar legal word meaning some kind of direct and substantial interest in the outcome of the hearing. *Standing* was frequently defined as "economic interest." Since viewers and listeners of a broadcasting station stood to gain or lose no money regardless of the results of a renewal hearing, the FCC just did not allow participation by these kinds of people.

This policy was reversed in 1966 by the United States Court of Appeals (D.C.). A group of citizens from Mississippi wanted to protest the renewal of a license for television station WLBT which they claimed had discriminated against blacks both in programming and in hiring. The FCC refused to hear the Mississippians because they lacked standing. The challengers went to the United States Court of Appeals which ruled that the commission's action was improper. The action of the FCC, Judge Warren Burger wrote (*Office of Communication, United Church of Christ* v. *FCC*, 1966),

> . . . denies standing to spokesmen for the listeners, who are most directly concerned with and intimately affected by the performance of a licensee. . . . 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 . . . is one of the assumptions we collectively try to work with so long as they are reasonable and 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 effect of allowing citizens to challenge the renewal of broadcast licenses has had a significant and sometimes intimidating impact on broadcasters. Not more than a couple of stations have lost a license or had a renewal denied because of such public pressure. But the renewal challenge is an effective device to bring the broadcaster to the bargaining table. A challenge might be initiated against stations as a means of applying pressure to force broadcasters to adopt more minority-oriented employment practices or to encourage station owners to change particularly onerous programming practices. Once the license holder makes a commitment to institute such changes, the challenge to the renewal is withdrawn.

In order to get a citizen challenge withdrawn when it purchased television stations in four cities, McGraw-Hill, Inc., agreed to meet minority employment quotas, set up minority advisory councils, and increase the amount of minority programming. These are typical of the kinds of concessions broadcasters have been forced to make to get licenses renewed and, more important, to avoid costly renewal hearings. While the results of these challenges seem socially desirable, there is something basically unhealthy about a situation in which broadcasters are "blackmailed" into making changes to keep from losing a license or to defend a challenge. There is no way to know whether the challenging groups really represent the public interest any better than broadcasters do. A far more desirable system would be to force the FCC to exert this kind of pressure on broadcasters when it is needed. But in such a system the FCC would be forced to take a far more active role in the renewal process than it currently takes. Renewal roulette, as it is called by broadcasters, is better than the old system in which no citizen voice was allowed. However, any system which places a premium on pressure by organized, but not necessarily representative, groups is suspect.

Competing Applicants

The license renewal challenges discussed to this point have concerned citizens seeking to have the broadcaster stripped of the license, but not seeking the license themselves. However, there are also persons seeking to have the renewal denied because they want the license. In other words, the challengers have a proposal to operate a broadcasting station on the same frequency used by the current license holder. Since only one of the applicants can use the frequency, the FCC faces a problem.

Historically, the commission has maintained the illusion that all renewals will be granted on what is called a comparative or competitive basis. That is, if station KLOP seeks a license renewal, all other applicants for the use of that frequency will be considered at the same time before the renewal is granted or denied. Indeed, in 1928 in the *Second Annual Report of the Federal Radio Commission* the agency noted that it applied a comparative, not an absolute, standard to broadcasting stations:

> Since the number of channels is limited and the number of persons desiring to broadcast is far greater than can be accommodated, the commission must determine from among the applicants before it which of them will, if licensed, best serve the public.

Theoretically, at least then, all applicants for the license should be evaluated at the same time. In 1965 the FCC issued a policy statement on comparative hearings which involved regular renewal applicants. To obtain the best service for the public and the maximum diffusion of control of the mass media, the commission said it would consider at least seven items in regard to each applicant for license or license renewal.

1. Diversification of control of the media: Persons holding existing media (like a newspaper or a second broadcasting station) in the area or having significant media holdings elsewhere will not be considered as favorably as those without or with fewer media holdings.
2. Full-time participation in station operation by the owners: The FCC will favor working owners over absentee owners.
3. Proposed program service: What does the applicant propose to do with the frequency? Supposedly, applicants who plan to devote more time to programs on public affairs and education and information will be favored over those who plan to program heavily with entertainment.
4. The past broadcast record of the current license holder as well as the record of other broadcasters who seek the license: If the past record is average, it is disregarded. If it is exceptional with unusual attention to public needs and interests, or if it is especially poor with regard to serving the public interest, the past record then becomes a factor.
5. Efficient use of the frequency: This is a technical question and has to do with judicious use of the spectrum.
6. Character of applicant: Does the applicant have a record free of criminal prosecution? Is he considered honest and trustworthy? and so forth.
7. Other factors: The report did not outline these additional factors.

Theoretically, then, based on these criteria, the best applicant will be given the license, regardless of who previously held the license.

Despite the rhetoric and the policy of the FCC, the notion of a comparative hearing at renewal time was an illusion in 1965 and had been since the middle 1940s. Despite the fact that nothing in the Communications Act states that the license holder should get preference, that is exactly what the FCC based its decisions on. In cases in 1951 (*Hearst Radio, WBAL*) and 1963 (*Wabash Valley Broadcasting Co., WTHI-TV*) the FCC publicly stated it gave the incumbent licensee preference. In the 1963 *Wabash Valley Broadcasting Co.* ruling the commission said that a newcomer seeking to oust an incumbent license holder must make a showing of superior service and must be higher on other comparative criteria as well. In other words, when the incumbent is average, the challenger has to be superior in several criteria before it can gain the license.

In an unusual case in 1969 the FCC reversed this policy and stripped the television license for station WHDH in Boston from the Herald Traveler Corporation and gave it to a challenger, Boston Broadcasters, Inc. The commission said the challenger was superior to the license holder in the diversification and owner-participation categories (in re *WHDH*, 1969). The decision caused panic in the industry, as broadcast station owners suddenly saw their own licenses as vulnerable to challenge. Pressure on Congress to legislate

against such FCC policy produced more than fifty proposals which, if adopted, would have had the effect of limiting such FCC action in the future. Apparently hearing these legislative footsteps, the FCC reconsidered its change of heart the following year and issued a new policy which stated that license holders would be given preference over challengers in the future if they could demonstrate that their past performance had "no serious deficiencies" and that they had been substantially attuned to meeting the needs and interests of the community. Only if incumbents fail to meet these criteria will the challengers or competing applicants be given an opportunity even to present proposals. In effect this secured the license for license holders meeting minimum service requirements.

This policy effectively killed comparative renewal. It was quickly challenged in the courts and reversed in June 1971 (*Citizens Communication Center* v. *FCC*, 1971). A group called the Citizens Communication Center challenged the 1970 renewal policy. The group argued that the commission's policy violated the federal Communications Act as it had been interpreted by the Supreme Court and other courts. The Court ruled that every applicant must get at least a hearing. Judge Skelly Wright, writing the unanimous opinion for the United States Court of Appeals for the District of Columbia, said that when two or more applicants for a license are mutually exclusive—that is, only one can have the license—the commission must conduct a full comparative hearing. This ruling applied to renewals as well as to original applications. The court recognized that in a comparative renewal hearing the challenger can be required to demonstrate qualifications superior to those of the incumbent. Under the law, however, challengers must be given the chance to present their proposal, a right denied them by the commission's 1970 policy.

In a footnote to that decision the court urged the FCC to formulate in both qualitative and quantitative terms a definition of superior service or superior qualifications. The following year the same court outlined some aspects of what it believed to be superior service, noting such things as elimination of excessive advertising, delivery of quality programs, reinvestment of profits in the station to improve service to the public, diversification of media ownership, and independence from governmental influence in promoting First Amendment objectives (*Citizens Communication Center* v. *FCC*, 1972).

The FCC began an inquiry in 1971 to "explore the feasibility and appropriateness of quantifying a concept of substantial service" or superior service by a licensee, as suggested by Judge Wright. In 1977 it abandoned the effort, deciding that such minimum quantitative standards would artificially increase the time television stations devoted to news and public-affairs programming. The commission said it was concerned that broadcasters would meet the quantitative requirements by "spreading their resources thinner, and reduce

the quality and value of such programming" in order to increase the amount of such programming, which would not result in better service for the community. Also, the commission said it did not believe such quantitative standards would truly assist them in the comparative renewal process. In its 1977 *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process,* the agency noted, "On the contrary, they might well complicate the process further."

The agency's decision to abandon the search for quantitative standards was challenged in court, but in 1978 the decision of the agency was sustained (*National Black Media Coalition* v. *FCC*, 1978). The United States Court of Appeals (D.C.) said the persons seeking to challenge the decision by the FCC were seeking "the impermissible substitution of their policy judgment for that of the commission by this court." The decision not to promulgate quantitative standards was a policy decision that belonged within the discretion of the commission, the court ruled.

The question of the renewal process and comparative hearings is one of the most troublesome problems that the FCC faces. Strict enforcement of programming standards through comparison with proposals by challengers certainly invokes a level of regulation which probably goes beyond that envisioned by Congress in 1927 and again in 1934 when broadcasting legislation was drafted. The chaos in this area undoubtedly suggests the difficulty created by the problem. That this issue is far from settled is demonstrated by the recent decision regarding the use of a television license in Florida. Cowles Communication, Inc., held the license for a Daytona Beach television station, WESH-TV. In 1969 Cowles was challenged when it sought renewal of that license by a group entitled Central Florida Enterprises, Inc. Despite findings that the Cowles company had violated an FCC rule by moving a production studio without first getting permission, that some principals in the Cowles organization had pleaded no contest to charges of mail fraud for a *Look* magazine subscription scheme, and that Central Florida was rated more highly on the diversification and integration of ownership and management criteria, the FCC returned the license to Cowles after the comparative hearings. The commission concluded that Cowles had provided substantial service in the past which should provide the owners with a "renewal expectancy." In 1978, nine years after the renewal application was filed, the United States Court of Appeals (D.C.) called the decision unreasonable and overturned it. The court said it was simply unfair to place so much weight upon past performance when the challenger was superior on other criteria (*Central Florida Enterprises Inc.* v. *FCC*, 1978). "The fly in the analysis is that the Commission judges incumbents largely on the basis of their broadcast records," wrote Judge Wilkey, "to which there will be nothing comparable on the side of the

challenger in any case." Four months later in an unusual statement, Judge Wilkey tried to clarify his earlier ruling in denying the FCC's petition to rehear the case:

> Our principal reason (for setting aside the renewal). . . . was that the Commission's manner of balancing its findings was wholly unintelligible, based as it was said, on "administrative feel." Admittedly, licensing in the public interest entails a good many discretionary choices, but even if some of them rest inescapably on agency intuition . . . , we may at least insist that they do not contradict whatever rules for choosing do exist.

To the assertion by the FCC that the decision by the court had created great apprehension among licensees, the Court replied, "The only legitimate fear which should move licensees is the fear of their own substandard performance, and that would be all to the public good."

Judge Wilkey's comment notwithstanding, the greatest cause of apprehension among broadcasters and citizens groups alike is the fear wrought by confusion—confusion which is rooted in a seemingly ever-changing and uncertain policy as regards renewal hearings. Most observers agree that of the many failings of broadcast regulation this is one of the most serious.

PROGRAM REGULATION

The Federal Communications Commission has extensive control over programming matters. Regulations range from specific federal statutes (the law which prohibits the broadcast of obscenity) to vague general guidelines (the policy statement regarding broadcasters' responsibility for phonograph records played over the air). Each rule or policy promulgated by the FCC is tied to the Communications Act of 1934, many by that tenuous and wispy thread "public interest, convenience or necessity."

The FCC can enforce its rules on programming in many ways. Station licenses can be revoked for gross programming violations. The use of this sanction is exceedingly rare. The normal three-year renewal period might be cut to one year instead. This short-term renewal is a strong warning to the station that the FCC will be watching closely during the ensuing year to make certain other programming violations don't occur. If the station performance is without serious deficiencies after the twelve months, the station license is renewed as normal. This sanction is not used very often either, but more often than is revocation. If a station's failure to observe programming rules violates a statute, the station can be fined, sometimes a considerable amount. A fine is not a common FCC sanction either, but is used more often than either revocation or short-term renewal. The typical reaction by the FCC to a programming error is a letter which expresses commission concern over the failure to observe programming rules. The letter normally asks the broadcaster to justify the particular practice in question. A record of this correspondence is put into the broadcast station's official file and can be considered at renewal

time. But unless a pattern of such behavior is evident, it is unlikely the broadcaster will be further disciplined. Some persons call this "regulation by raised eyebrow."

Some programming rules are simple. Stations, for example, are required to identify themselves periodically. Broadcasters must announce when the station or program receives a gratuity in return for an advertising plug on the air. A station may not knowingly broadcast fraudulent advertisements. It is illegal for a station to broadcast a lottery (a lottery is a contest in which a person trades something of value for the chance to win a prize). The license for station WWBZ in Vineland, New Jersey, was not renewed in 1955 at least partially because it had broadcast information on lotteries—in this case horse races. Giving the race results from the local track as a part of the evening news is one thing, but broadcasting up-to-the-minute race results from racetracks around the country is something else altogether. At least the FCC thought so and ruled that such information is useful primarily to persons involved in illegal gambling (in re *Community Broadcasting Service, Inc.*, WWBZ, 1955).

At one time the FCC tried to ban two nationally broadcast game shows which were constructed around participation by viewers and listeners at home. A band played a melody and the emcee called randomly selected listeners. If the listeners could "name that tune" or tell the band to "stop the music," they won a prize. The commission said that the games were lotteries and were illegal for broadcast purposes. The Supreme Court disagreed, ruling that while the FCC may indeed regulate the broadcast of lotteries, these games were not lotteries (*FCC* v. *American Broadcasting Co.* et. al., 1954). To qualify as a lottery a contest must have three elements. First, there must be a prize for the winner. Second, the prize must be awarded to a person chosen wholly or partly by chance. Finally, winners must be required to furnish something of value—called consideration—in order to participate in the game. When participants must buy a product before they are allowed to play the game, have to ante up money, or have to send in a box top, they are furnishing consideration. The third element was missing from the musical game shows and is missing from nearly all televised game shows today. (Tickets to shows to get a chance to play the games are always free.)

Before some important specific programming regulations are explored in depth, the FCC's general programming policies should be noted. Although the FCC is not supposed to tell broadcasters what to broadcast, when renewal time comes the kind of programming the station has carried becomes an important factor in determining whether the broadcaster has served the public interest, convenience, or necessity. In lieu of saying specifically what is to be broadcast, the FCC has issued two important sets of general guidelines.

Blue Book Guidelines

The first set of guidelines, a report issued by the commission in 1946, is remembered in the industry as the Blue Book. The Blue Book, which was neither vigorously enforced nor officially repudiated, covered a wide variety of topics including public service programming. The document said that broadcasters have the responsibility to carry sustaining programming (programming which is not sponsored or paid for) to provide listeners and viewers with a well-balanced radio or television diet. The commission said that certain kinds of programs such as on politics, religion, and education are not appropriate for sponsorship, and should be carried on a sustaining basis. So should programs required to meet the tastes and interests of minority groups, programs which are a service to nonprofit groups, and experimental programs which typically cautious advertisers will be likely to avoid.

The Blue Book also suggested that broadcasters carry programming which featured local talent and reflected local needs and issues. "The public interest clearly requires that an adequate amount of time be made available for the discussion of public issues," according to the Blue Book. Finally, broadcasters were told to avoid advertising excesses such as too many advertisements, advertisements that were too long or offensive, and fraudulent advertisements.

en Banc Programming Inquiry

While the Blue Book set a programming regulation precedent for the FCC, its interest today is largely historical. It was replaced in 1960 with a statement called the commission's en Banc Programming Inquiry. This policy is milder than the Blue Book, has been more effectively enforced than the Blue Book, and is the law today. The en Banc Inquiry is a long, often thoughtful report. "In view of the fact that a broadcaster is required to program his station in the public interest, convenience and necessity," the commission notes, "it follows that despite the limitations of the First Amendment and Section 326 [no censorship] of the Act, that his freedom to program is not absolute." Broadcasters must afford a reasonable opportunity for the discussion of conflicting views on issues of public importance. They should consider the tastes, needs, and desires of the public in the community which is served by the station. The commission then notes:

> 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. Development and use of local talent
> 3. Programs for children
> 4. Religious programs
> 5. Educational programs
> 6. Public affairs programs
> 7. Editorialization by licensees
> 8. Political broadcasts
> 9. Agricultural programs

10. News programs
11. Weather and market reports
12. Sports programs
13. Service programs for minority groups
14. Entertainment programs

The commission noted that these elements are not all-embracing, that they are not constant, and that they provide no rigid mold to which all stations must conform. The ascertainment of local needs is the responsibility of the broadcaster.

Despite these caveats and although it was issued in the hope of improving diversity in broadcasting, the 1960 en Banc policy statement has tended to have the opposite impact. It has reinforced the inherent tendencies of some broadcasters to conform to safe, established patterns of operation and programming by providing an outline of programming practices which radio and television stations can use. The cautious broadcaster will tell the FCC at renewal time, "See how well we have served the public interest. We program in all fourteen categories." Whether the community actually needs agricultural reports each day, or whether the station has anything to say in its editorials, programming in all fourteen categories is nevertheless presented to listeners and viewers. If the deregulation of radio noted previously occurs, programming rules such as these will be abandoned for radio. In fact, the FCC has not keenly enforced these rules for radio for several years. So long as agricultural reports are broadcast by some stations in a market area, so long as a few stations carry religious broadcasts, so long as programs for children are broadcast in the community by at least two or three radio stations, the community needs are then being served. It is not necessary for all stations to carry all kinds of programs. And the FCC has expressed some faith that the community itself—its market conditions—will ensure that a variety of programming is available in each broadcast area. The general programming rules will continue to be enforced for television stations, however. Again, it is stressed that the FCC will consider information gained through ascertainment far more important than a broadcaster's rigid adherence to a set of static criteria.

The commission's en Banc policy on programming was challenged in 1962 in a federal court of appeals (*Henry* v. *FCC*, 1962). The court upheld the agency and ruled that the guidelines did not violate the First Amendment. Citing a nineteen-year-old decision handed down by the United States Supreme Court (*NBC* v. *U.S.*, 1943), Judge David Bazelon ruled that the commission may impose reasonable restrictions upon the granting of licenses to assure programming designed to meet the needs of local communities.

Obscenity

Broadcasters have a special set of problems concerning pornography. Section 1464, Title 18, of the *United States Code* gives the Federal Communications Commission the power to revoke any broadcast license if the licensee transmits

obscene or indecent material over the airwaves. No station, however, has ever had its license revoked for broadcasting obscenity. Nor has the FCC denied renewal of a license solely on the grounds that the licensee broadcast pornographic or indecent material. The commission is quite hesitant to use its big guns in this area because of the immense constitutional questions involved. It is clearly a free-speech issue. Yet stations have been put on short-term renewal and have been fined, as will be noted momentarily.

Generally, when the FCC receives a complaint from a listener or viewer about a broadcast believed to contain obscene language or pictures, the agency responds with a form letter which includes the following statement:

> The broadcast of obscene, indecent or profane language is prohibited by a federal criminal statute. Although the Department of Justice is responsible for prosecution of federal law violations, the commission is authorized to impose sanctions on broadcast licensees for violation of this statute, including revocation of the license or the imposition of a monetary forfeiture. However, both the commission and the Department of Justice are governed by past decisions of the courts as to what constitutes obscenity, and the broadcast of material which may be offensive to many persons would not necessarily be held by the courts to violate the statute.

Although the FCC approaches the problem of obscenity cautiously, the mere fact that it sends out even a form letter has an impact upon conservative broadcasters.

"Family Hour" Censorship

In 1975, the National Association of Broadcasters (NAB), following suggestions made by CBS President Arthur Taylor and at least condoned by the other networks, instituted what it called "the family hour." Stations which subscribe to the NAB Code of Good Practices were told that the hours from seven to nine each evening were to be set aside for family viewing, and that programs with sexual overtones and excessive violence were taboo in this period. The censorship undertaken by the networks was heavy-handed. The word *virgin* was cut from one program (*innocent* was substituted). Censors began to look anew at Cher's navel and a braless guest on the "Phyllis" show was redressed before filming began. Programs which had been broadcast in the 8 P.M. time slot for several years were either moved or toned down to meet the new family-hour standards. But the rule was challenged by the creators of television programs. Writers and directors in Hollywood, where most television programs are produced, went to court, and in 1976 federal Judge Warren J. Ferguson of the District Court for Southern California ruled that the "adoption of the Family Viewing Policy by each of the three networks constituted a violation of the First Amendment." The judge ruled that the policy had been motivated by informal statements from the Federal Communications Commission which threatened government action against the industry should not the family hour or something like it be adopted (*Writers Guild* v. *FCC*

1976). The judge's conclusion is more than substantiated in Geoffrey Cowan's fascinating book *See No Evil*, the story of the genesis of the family hour.

Law professor Harry Kalven wrote more than ten years ago in the *Michigan Law Review* that while a regulation may not directly interfere with free speech "in operation it may trigger a set of behavioral consequences which amount in effect to people censoring themselves in order to avoid trouble with the law." Or what people believe will be trouble with the law. Such is the case with the regulation of obscenity in broadcasting. The family hour is a good example of this tendency.

FCC Censorship

In the past twenty years the FCC has considered several instances in which charges were made that obscene or indecent material was broadcast. In 1962 the commission refused to renew the license of radio station WDKD at least partially because a disc jockey at the station habitually told "off-color" or "indecent" jokes on the air (in re *Palmetto Broadcasting Co.*, 1962). A college radio station was fined $100 for broadcasting "indecent" four-letter words over the air in 1970 (in re *WUHY-FM, Eastern Educational Radio*, 1970). A $2,000 fine was levied against an Illinois radio station in 1973 for broadcasting a discussion between an announcer and a listener about oral sexual practices (*Sonderling Broadcasting Corp.*, 1973). The discussion stemmed from the station's call-in "topless radio" format. A federal court of appeals upheld the judgment two years later (*Illinois Citizens Commission for Broadcasting* v. *FCC*, 1975).

Undoubtedly the most significant decision on broadcast indecency came in 1978 when the Supreme Court upheld an FCC ruling that station WBAI in New York City had violated the federal law when it presented a recorded monologue on the English language by George Carlin. The recording, which was played in midafternoon after the announcer warned listeners that it might be offensive to some, contained seven four-letter words which were used many times. The record was played as a part of a program on society's attitude toward language. The FCC got one complaint, and as a result took action against the station on the grounds that it had broadcast indecent language. The agency defined indecent language as "language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium sexual or excretory activities and organs, at times of the day when there is a reasonable risk children may be in the audience." The FCC said the WBAI broadcast met this definition.

Pacifica Foundation, which owns and operates the station, challenged the ruling, and in March 1977 the United States Court of Appeals (D.C.) overturned the FCC action, ruling that the commission's order was overbroad and vague. Two years later, however, the Supreme Court reversed the court of appeals and sustained the FCC ruling. Justice John Paul Stevens wrote the

opinion for the Court, noting that because of its unique characteristics broadcasting had traditionally received the least First Amendment protection of all media. Stevens said broadcast was uniquely pervasive, that it can have an impact upon persons not only in public, but also in the privacy of their own home. Prior warning cannot completely protect the listener or viewer, he added. Also, "The ease with which children may obtain access to broadcast material . . . amply justifies special treatment of indecent broadcasting," Stevens wrote. The majority denied that the order was vague or overbroad. Stevens said that the ruling would deter only the broadcast of offensive references to excretory and sexual organs and activities. "While some of these references may be protected, they surely lie at the periphery of First Amendment concern," he said. The associate justice added that the court's ruling did not involve Elizabethan comedy or even citizens band transmission. "We have not decided that an occasional expletive in either setting would justify any sanction . . . ," Stevens noted, adding that the FCC decision rested on a nuisance rationale—"putting the right thing in a wrong place." Stevens added, "Like a pig in a parlor" (*FCC* v. *Pacifica*, 1978).

Many observers were sharply critical of the Court ruling, noting that if broadcast standards were to be determined by what was fit for children to listen to, the court was then turning its back on its 1957 ruling in *Butler* v. *Michigan*. In that case the Supreme Court invalidated a Michigan statute that forbade the sale of erotic material to anyone if the material would be offensive to children (see page 536). Critics also argued that the high Court left too many loose ends in its ruling. Children can be present in the radio audience at any time of day or night. Does this mean such material can never be broadcast? Or can it be broadcast late at night when children are not expected to be listening? Who is a child? Many feared that given the timidity of the broadcast industry the ruling would have a serious, chilling effect on radio stations causing them to overreact and censor too much material. Only time will determine whether this prediction has merit.

In practical terms there is little government censorship of broadcast obscenity. The broadcasters censor themselves too well for obscenity to be much of a problem. The cases that do pop up tend to be from stations which are not in the mainstream of broadcasting—little educational stations, offbeat FM stations, and the like. The managers of these kinds of stations tend to believe the First Amendment means what it says and aren't afraid to rock the boat. The vast majority of station owners and managers, however, are reluctant to even get into the boat. To see how shock waves can reverberate through the industry let's look briefly at the controversy over drugs and song lyrics.

In the early 1970s as the United States tried to put its finger on the reason why so many young people were turning to drugs to find salvation and happiness, someone, somewhere, suggested that popular music was probably a

factor. The reasoning was that all those musicians and singers used dope and talked about dope and drugs in all their songs. There were undoubtedly Pied Pipers leading little Billy and Sally astray. Peter G. Hammond, the executive director of the National Coordinating Council on Drug Abuse and Education, as well as numerous other experts on drug use and drug abuse, testified that he found no evidence whatsoever of a cause-and-effect relationship between song lyrics and drug abuse. Nevertheless in March 1971 the FCC issued Public Notice 71–205 regarding *Licensee Responsibilities to Review Records Before Their Broadcast.* On its face it was a harmless enough document: it merely reminded licensees that they were responsible for material broadcast over their station—including songs whose lyrics promoted the use of drugs. When it hit the rock stations, the notice literally caused an explosion. Most broadcasters saw it as an effort by the FCC to exclude certain kinds of songs from air play, but they complied with what they believed to be the wishes of the commission. One station owner confiscated the entire record library and then eliminated all Bob Dylan songs because he could not understand the lyrics.

The disc jockeys were told not to play any songs which mentioned drugs and were threatened that if they violated this rule the station would change from a rock station to an easy-listening format. Do Not Play Lists, common at all radio stations even before the public notice, suddenly expanded from listing a few records to listing often hundreds. Some of the records put off limits included "With a Little Help from My Friends" by the Beatles, "White Rabbit" by the Jefferson Airplane, the Beatles's "I Am the Walrus" and "Lucy in the Sky with Diamonds," "One Toke Over the Line" by Brewer and Shipley, and "Mr. Tambourine Man" by Bob Dylan and the Byrds. Even "Puff the Magic Dragon" by Peter, Paul, and Mary was banned at many stations. Some station owners read the notice to mean that all drug-related songs, not just songs which glorified or suggested the use of drugs, were banned. Songs like "The Pusher" and "Snowblind Friend" by Steppenwolf, both of which had strong antidrug lyrics, were also banned by many stations.

Because of the vast number of songs issued each week, and because the lyrics of many rock songs are unintelligible or subject to various interpretations, many songs were banned from the airwaves because there wasn't time to give them a careful screening or because the screeners found it impossible to understand either the words or the meaning of the lyrics. Some songs were banned at one station, but not at another station in the same community. Record companies began to distribute copies of the lyrics with the records and sometimes tossed in an explanation of what the words meant if it was needed. One record company fired most of its artists—those who would admit they used drugs or those who were suspected of using drugs—and promoted its new "clean" image to radio stations and record buyers. All these events took place within the span of about one month.

Five weeks after the initial notice, the situation was so bad that the FCC had to publish an explanation of its original notice. In the explanation the agency said that it was not suggesting that radio stations ban certain records, but were merely pointing out that licensees' responsibility for the material broadcast over their facilities extends to phonograph records. The agency added that broadcasters must make the judgment. At renewal time, the explanation continued, the commission will look at the broadcaster's overall programming record, not at whether this song or that song was broadcast. Serving the public interest is the key, the memorandum noted. The constitutionality of the notice was upheld by the United States Court of Appeals for the District of Columbia (*Yale Broadcasting Co.* v. *FCC*, 1973).

The explanation lowered the blood pressure in the industry by thirty or forty points, and since then things have cooled off. But this incident remains an interesting case study of the sensitivity of the broadcast industry to any little twitch by the regulatory agency.

News Programs

The FCC treads a bit softer when it comes to dealing with news programming. The commission normally gets involved in news programming through its enforcement of the Fairness Doctrine, which we shall consider shortly. There have been instances, especially recently, in which charges were made that stations and networks falsified the news. Congress also gets into such debates as it did in the controversy over the CBS broadcast "The Selling of the Pentagon," but usually takes no action. The FCC is also reluctant to act in such cases. The only difference is that the FCC astutely seeks to avoid confronting the issues involved in the charge of news falsification, whereas inaction by Congress results from both sensitivity to the First Amendment and inertia.

Complaints were made to the commission about such programs as "The Selling of the Pentagon" and "Hunger in America." The Columbia Broadcasting System was accused of careless editing in the program on the Pentagon, editing which took quotes from various parts of a speech and made it appear that these separate statements were actually one statement. There were other questionable editing practices as well. In "Hunger in America" the same network showed viewers a baby which it claimed had died of malnutrition. While many babies do die each week of malnutrition, the one photographed by the network had, in fact, died of other causes. The response of the FCC in "The Selling of the Pentagon" case is typical of how that agency handles such complaints. "Lacking evidence or documents that on their face reflect deliberate distortion, we believe that this government licensing agency cannot properly intervene," the commission ruled. "As we stated in the *Hunger in America* ruling, the commission is not the national arbiter of truth." While taking a hands-off action itself, the agency reminded broadcasters, "The licensee must have a policy of requiring honesty of its news staff and must take

reasonable precautions to see that news is fairly handled. The licensee's investigation of substantial complaints . . . must be a thorough, conscientious one, resulting in remedial action where appropriate." From this one can glean that obvious and blatant staging of news will be considered a disservice to the public interest, but that the FCC is not in a position to evaluate or monitor the editing techniques of thousands of news departments. Errors will have to be fairly serious and well documented before the commission intervenes.

The two most widely discussed programming controls exercised by the FCC are the Fairness Doctrine and what is known as the equal time rule. The Fairness Doctrine is a creature of the commission based on an interpretation of the 1934 act, but the so-called equal time rule is Section 315 of the Communications Act. While the commission has interpreted this rule frequently, it remains primarily a rule designed by Congress. Let us look first at the equal time rule.

EQUAL TIME RULE

Section 315 is not really difficult to understand. If a broadcasting station permits one legally qualified candidate for public office to use its facilities, it must afford equal opportunity to all other such legally qualified candidates for the same office. Section 315 also specifically prohibits the station from censoring material in broadcasts by political candidates. The FCC recently fined a Stamford, Connecticut, radio station $10,000 for censoring the paid political broadcasts of two mayoralty candidates (see *Kuczo* v. *Western Connecticut Broadcasting,* 1977).

What does equal opportunity mean? It means equal time, equal facilities, and comparable costs. If John Smith buys one-half hour of television time on station KLOP to campaign for the office of mayor, other legally qualified candidates for that office must be allowed to purchase one-half hour of time as well. If Smith is able to use the station's equipment to prerecord his talk, other candidates must have the same opportunity. If the station charges Smith $100 for the one-half hour of time, the station must charge his opponents $100.

The station does not have to solicit appearance by the other candidates; it merely must give them the opportunity to use the facilities if they request such use within one week of Smith's appearance. Finally, Section 315 clearly states that broadcasters do not have to allow any political candidates the use of their facilities if they so choose. However, if they allow one candidate to use the facilities, they must allow the same use to all seeking the same office.

Federal Election Campaign Act

In 1971 the Congress passed the Federal Election Campaign Act which instituted revisions of Section 315, but only as they applied to federal elections. (for details see Section 312 (a) (7) of 47 *United States Code* (annotated). Under the new law the broadcaster cannot institute an across-the-board policy refusing all candidates for federal office the opportunity to use the station.

The new law states that it is a ground for revocation of a license for a licensee willfully or repeatedly to fail "to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for federal elective office on behalf of his candidacy."

In spring 1980 a federal court ruled that all three television networks had violated the 1971 statute when they flatly refused to sell broadcast time to the Carter-Mondale Presidential Committee (CMPC) in December 1979 (*CBS* v. *FCC*). The CMPC had sought thirty minutes of prime time to broadcast a documentary to coincide with Carter's formal announcement of his candidacy. CBS offered two five-minute non-prime time segments, ABC said it had not yet developed a policy on the sale of broadcast time to candidates for the presidency, and NBC simply said "No." In the litigation that followed, all three networks argued that the request had come too early in the campaign. But the FCC ruled that the networks had violated the "reasonable access rule" and the United States Court of Appeals for the District of Columbia agreed. The court noted that the campaign for the White House had clearly begun when the request was made. Judge David Bazelon wrote that a broadcaster should use several standards to determine whether or not the time should be granted to a candidate: the needs of the candidate, the amount of time previously provided to the candidate, the program disruption that would occur if access is granted, the timing of the request by the candidate, and the number of other candidates who would make similar requests. Bazelon wrote that in looking at the standards the broadcaster must balance the candidate's and the broadcasting station's interests, but the broadcaster must be responsive to each individual request from a candidate. A station cannot have an across-the-board policy against granting any time. Also, the judge wrote, the broadcaster must provide a full explanation of the basis of any decision regarding the candidate's request. Bazelon wrote that in the case of the CMPC all three networks based their rejections on what amounted to across-the-board policies against the sale of thirty-minute segments. Neither ABC, CBS, nor NBC had really evaluated the CMPC requests in light of the relevant standards outlined in the court's opinion.

The ruling in *CBS* v. *FCC* was important because it sustained the constitutionality of the 1971 campaign law, determining that there was indeed an affirmative responsibility on the part of broadcasters to provide candidates for federal office reasonable access to their broadcast channels. Remember, the law only applies to federal candidates. And, the broadcaster can still reject a candidate's request for time so long as it is done properly, with regard to the criteria outlined by Judge Bazelon in the court's opinion.

The 1971 law also specified the highest rate which a broadcaster can charge a candidate for federal office for using station facilities. Forty-five days

before a primary election and sixty days before a general election, the charge to a candidate cannot exceed the lowest rate the station charges local advertisers for that particular time slot. At other times the rate must be "comparable" to what the station charges other advertisers.

This ruling affects the equal time rule in this way. Candidate John Smith appears on KLOP 61 days before the election. He is charged $300 for 30 minutes. Candidate Jane Adams asks for equal opportunity and appears on KLOP for 30 minutes 51 days before the election. Because the time is within 60 days of the general election, the station must bill Ms. Adams at its lowest rate for that time slot, which may be $200. In that case she pays only $200. What if the price that Smith paid—$300—is below the station's lowest rate for that time slot? Then Ms. Adams pays $300. She will pay either what Smith pays or the station's lowest rate—whichever is less.

Use of the Airwaves

Section 315 states that "use" by one candidate of a broadcast facility entitles all opponents to "use" the facility as well. A key question then is, What does the word *use* mean? What constitutes an appearance by a candidate in the eyes of the law? It is easiest to begin by listing those things which do not constitute a "use."

1. The appearance by a candidate in a bona fide or legitimate newscast does not constitute use of the facility in the eyes of the law. Section 315 will not be triggered.

2. The appearance of a candidate in a bona fide news interview program does not constitute a use. The key words are *bona fide.* An appearance on "Meet the Press," which is a bona fide news interview show, is not use of a broadcasting facility. But an appearance on "Meet the Candidates," a public-affairs show created by a television station for the express purpose of interviewing candidates prior to an election is use because it is not a bona fide news interview show. The show was created especially for the election campaign by the station and is not broadcast when electioneering is not in progress.

3. The appearance of a candidate in the spot news coverage of a bona fide news event is not use. When candidate Smith is interviewed at the scene of a bad fire about the problems of arson in the city, this is not use in terms of Section 315. Political conventions are considered bona fide news events; therefore an appearance by a candidate at the convention can be broadcast without invoking Section 315.

4. The appearance of a candidate in a news documentary is not a use if the appearance is incidental to the presentation of the subject of the program. Example: During the spring months of the 1968 political campaign, CBS broadcast a documentary on reform of the federal income tax laws. An interview with Senator Robert Kennedy, who was leading a fight in the United

States Senate for tax reform, was included in the program. At that time Kennedy was a candidate for the presidency, but his appearance in the documentary did not activate the equal opportunity rule because the program was about tax laws. Kennedy's appearance was incidental to that subject. A news documentary about Kennedy would have been a different story and would have triggered the Section 315 sanction. In the documentary the network was merely talking to Kennedy about a national problem on which he was an expert.

Press conferences held by political candidates, as well as debates between political condidates, are bona fide news events, and the broadcast of these events will not initiate use of Section 315, according to an FCC ruling in 1975. The only qualification for a debate to be exempt is that the debate be sponsored by and under the control of someone other than either the broadcaster or the political candidates. In federal elections the FCC has ruled that only tax-exempt organizations can sponsor or control the debates. The 1980 Carter-Reagan debate was sponsored by the League of Women Voters and was covered by the television networks as a bona fide news event. This interpretation of the law has been upheld by the courts. The equal opportunity rule was not triggered by these telecasts (see In re *Aspen Institute and CBS, Inc.*, 1975 and *Chisholm* v. *FCC*, 1976).

With these exceptions, all other appearances by a candidate are considered use in the meaning of Section 315. A paid political broadcast, a spot announcement, and even a five-minute interview on the "Tonight Show" are all appearances that will invoke Section 315. Opposing candidates would have the right to ask for equal opportunity. During Ronald Reagan's campaign for the presidency, stations had to refrain from showing his old movies and segments of "Death Valley Days" in which he appeared as the host (see *Adrian Weiss*, 1976). Pat Paulsen's quadrennial run for the White House forced television stations and networks to pull movies in which he appeared out of their libraries until the election was over. Once, Johnny Carson entertained the mayor of Burbank, California, on his program in recognition of the fame that town gained by being the butt of a joke on Rowan and Martin's "Laugh-In." But Carson's staff hadn't done their homework, for the mayor was in the midst of a campaign for reelection. The National Broadcasting Company affiliate in Los Angeles was forced to give each of the mayor's dozen or so opponents equal time.

Legally Qualified Candidates

One of the most confusing aspects of Section 315 regards the FCC's definition of a legally qualified candidate. It is a long definition filled with lots of *ands* and *ors* and needs clarification.

A legally qualified candidate is any person (1) who publicly announces that he or she is a candidate for nomination or election to any local, county,

state, or national office, *and* (2) who meets the qualifications prescribed by law for that office, *and* (3) who qualifies for a place on the ballot or is eligible to be voted for by sticker or write-in methods, *and* (4) who was duly nominated by a political party which is commonly known and regarded as such or makes a substantial showing that he or she is a bona fide candidate.

There should be no question about number one in the definition: the candidate must be an announced candidate. Number two merely states that the person must be eligible to hold the office to which he or she aspires. Henry Kissinger, for example, is not eligible to be president since he is not a natural-born citizen. Despite the fact that he may be an announced candidate for that office, he is not a legally qualified candidate. Number three is self-explanatory: the person's name must appear on the ballot or he or she must be an eligible write-in or sticker candidate. Number four is the confusing qualification. Who knows what a substantial showing really is? What is a political party "commonly known and regarded as such"? Answers to these questions are judgment calls, and broadcasters with questions can solicit answers from the FCC. In fact, it is through the solicitation of such questions that the agency makes most of its Section 315 rulings.

Equal opportunity cases are rare. Normally the broadcaster asks the agency for guidance and then follows the recommendations of the commission. If there is a valid Section 315 complaint, the FCC usually just informs the licensee that candidate Adams is entitled to equal opportunity time and the station provides the time.

Many critics charge that a smart politician can refrain from announcing his candidacy for reelection, for example, and just make many television appearances and not be in violation of Section 315. That is true. But stations should be able to see what the candidate is doing and can refuse to allow appearances by an unannounced candidate, especially appearances which are clearly political in nature. A station which is not careful in this regard can be subject to problems at renewal time.

The FCC has granted two qualifications for the application of the equal opportunity doctrine, one of which appears much more important than it really is. The first qualification is broad: In primary elections, Section 315 applies to intraparty contests rather than to interparty contests. In a primary election, the situation is not Republicans versus Democrats, it is Republican versus Republican and Democrat versus Democrat. Only opponents can get equal opportunity. Imagine Jane Adams is a Republican candidate for governor. She is one of four Republicans seeking to win the primary. Six Democrats are also seeking to win the primary election and gain the nomination for the governorship in their party. Ms. Adams appears on KLOP for fifteen minutes. What are the station's obligations? The station is obliged to give equal opportunity to the other three Republican candidates, since they are the

ones against whom Jane is running. The Democrats are not running against Ms. Adams at this time. While this qualification is broad, it makes a good deal of sense.

The second qualification turns out to be not much of a qualification at all, although it appears to be on its face. The only appearance that can trigger use of Section 315 is an appearance by the candidate. Under Section 315 appearances by friends, relatives, supporters, and so forth, do not require the station to give equal opportunity to opponents. However (this is an important however), the FCC has decided that such noncandidate appearances do require the station to provide an opportunity for appearances by supporters of the other legally qualified candidates.

Zapple rule

This is known as the Zapple rule and was formulated a few years ago in response to a letter from Nicholas Zapple, formerly a staff member of the Senate Subcommittee on Communications. It was restated in the FCC's 1972 *Report Regarding the Handling of Political Broadcasts.* This is what the FCC said:

> The commission held in "Zapple" that when a licensee sells time to supporters or spokesmen of a candidate during an election campaign who urge the candidate's election, discuss the campaign issues, or criticize an opponent then the licensee must afford comparable time to the spokesmen for an opponent. Known as the quasi-equal opportunity or political party corollary to the fairness doctrine, the "Zapple" doctrine is based on the equal opportunity requirement of Section 315 of the Communications Act; accordingly, free reply time need not be afforded to respond to a paid program.

The Zapple rule is a fairly specific formulation of one part of what had been vague FCC policy for some time, that is, that during political campaigns programs that do not invoke Section 315 fall under the ambit of the Fairness Doctrine. This means that licensees are required to play fair with all candidates. Broadcasters are therefore obliged to scrutinize even those programs which are exempt from Section 315 such as newscasts to ensure that a balance of some sort is maintained.

Two last points need to be made about Section 315. First, since broadcasters are not permitted to censor the remarks of a political candidate, they are immune from libel suits based on those remarks. In 1959 the Supreme Court ruled that since stations cannot control what candidates say over the air they should not be held responsible for the remarks. The candidate, however, can still be sued (*Farmers Educational and Cooperative Union of America* v. *WDAY,* 1959). Second, ballot issues like school bond levies, initiatives, and referendums do not fall under Section 315, but are treated as controversial issues under the Fairness Doctrine.

FAIRNESS DOCTRINE

There is no aspect of broadcast regulation that is more controversial than the Fairness Doctrine. Some authorities consider it a flagrant affront to the First Amendment's guarantee of freedom of expression; others argue that the Fairness Doctrine is the only thing which makes freedom of expression a reality in broadcasting. In addition to being controversial, the doctrine is confusing. Even many broadcasters really don't have a good grasp on what the doctrine means. No wonder! While on the face the doctrine appears patently simple, one needs a clear mind and a pure heart to wade through the hundreds of FCC rulings which interpret one or another aspect of this infamous doctrine.

The Fairness Doctrine is a broad doctrine, affecting advertising (as will be noted later in this chapter), political campaigns, and political candidates, as was just noted briefly. Its primary thrust, however, is aimed at public affairs programming and controversial public issues. In barest essentials the Fairness Doctrine involves a two-fold duty for broadcasters. First, broadcasters must devote a reasonable percentage of their broadcast time to the coverage of public issues. Second, the coverage of these issues must be fair in the sense that an opportunity for presentation of contrasting points of view is provided. That is it, period. What's so hard about that? Well, little words like *reasonable* and *public issues* and *fair* and *contrasting* are the troublemakers. These are the words that need to be clarified.

A quick look at the origin of the Fairness Doctrine is in order first. In 1927 and again in 1933 members of Congress tried to include a kind of Fairness Doctrine in federal legislation regulating broadcasting. All attempts failed, stopped either by the Congress itself or by presidential veto. In 1947 another attempt was made when a Senate bill to adopt a legislative Fairness Doctrine was introduced, but again the effort failed.

With or without a law, however, first the Federal Radio Commission (FRC) and later the Federal Communications Commission (FCC) ruled that balance and fairness were requirements of broadcasting which serves the public interest, convenience, or necessity. In 1929 in the *Great Lakes Broadcasting* case the FRC ruled, "insofar as a program consists of discussion of public questions, public interest requires ample play for the free and fair competition of opposing views and the commission believes that the principle applies not only to addresses by political candidates but to all discussion of issues of importance to the public" (in re *Great Lakes Broadcasting Co.*, 1929). Sixteen years later in the *United Broadcasting* case the FCC echoed the FRC. The commission agreed with the broadcaster's contention that a radio station is not a common carrier, but noted also (in re *United Broadcasting Co.*, 1945):

> These facts, however, in no way impinge upon the duty of each station licensee to be sensitive to the problems of public concern in the community and to make sufficient time available, on a non-discriminatory basis, for a full discussion thereof. . . .

The first "official" announcement of what we know as the Fairness Doctrine was made in 1949 when the FCC issued the long report *In the Matter of Editorializating by Broadcast Licensees.* The report was the result of an extensive study that the commission undertook after broadcasters and other persons protested a 1941 ruling by the agency that licensees could not editorialize on their stations (in re *Mayflower Broadcasting Corp., WAAB,* 1941). The editorialization report stated that broadcasters had an affirmative responsibility to provide a reasonable amount of time for the presentation of programs devoted to the discussion and consideration of public issues. The report added that it was the licensee's responsibility to afford a reasonable opportunity for the presentation of all responsible positions on the matters discussed. The commission said that licensees would not be meeting their Fairness Doctrine responsibility if they refused to broadcast all controversial matter. The FCC also noted:

> . . . it is clear that any approximation of fairness in the presentation of any controversy will be difficult if not impossible of achievement unless the licensee plays a conscious and positive role in bringing about balanced presentation of the opposing viewpoints.

To the question that would surely be raised about the commission's role as censor in applying the Fairness Doctrine, the agency noted, "The duty to operate in the public interest is no esoteric mystery, but essentially a duty to operate a radio station with good judgment and good faith guided by a reasonable regard for the interests of the community to be served."

In 1959 when Congress amended Section 315 of the Communications Act to exclude news programming from the ambit of the equal opportunity rule, the legislators approved language in the measure which said that nothing in the amendment should be construed to relieve broadcasters "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." Many legal authorities, including the United States Supreme Court, consider this to be congressional sanction of the Fairness Doctrine which, as we have seen, was created by the FCC. Other observers note that if this be the case the 1959 congressional action was at best tenuous authority for such broad legal powers as the Fairness Doctrine gives the FCC.

Before the application of the doctrine is discussed, one point needs to be further emphasized. Broadcasters have an affirmative responsibility to make certain that all sides of a public question are presented. That is, broadcasters must either find spokespersons or make the presentation themselves. Merely allowing persons who have a different viewpoint to use the station is not sufficient. Broadcasters are obliged to seek out spokespersons for divergent viewpoints.

Meaning

In 1971 the FCC decided to review the Fairness Doctrine. Did it work? Should it be replaced? be modified? be abandoned? In 1974 the commission issued its findings in a report entitled *The Fairness Report.* To sum up what the agency said in a single sentence is quite simple: The Fairness Doctrine is needed and it works just fine. The commission justified the need for the doctrine by the nearly fifty-year-old argument of scarcity. There are not enough frequencies for all to have one, and therefore owners who do must make certain that all points of view are thoroughly aired. Critics of this rationale have argued for years that scarcity is no longer a problem since cable television now provides an unlimited number of channels. In the report the commission refuted this argument:

> The effective development of an electronic medium with an abundance of channels (through the use of cable, or otherwise) is still very much a thing of the future. For the present we do not believe that it would be appropriate—or even permissible—for a government agency charged with the allocation of the channels now available to ignore the legitimate First Amendment interests of the general public.

The commission went on to assert that the net effect of the Fairness Doctrine has been to enhance the volume and quality of the coverage of issues of public importance, which is important in the complex era in which we live. Quoting from an earlier opinion it had issued, the commission alerted broadcasters, "We regard strict adherence to the Fairness Doctrine—including the affirmative obligation to provide coverage of issues of public importance—as the single most important requirement of operation in the public interest, the *sine qua non* ["the indispensable requisite"], for grant of a renewal of license."

In addition to defending the Fairness Doctrine in this report, the FCC outlined and provided an interpretation of the doctrine. If this interpretation is used as a guide, it is possible to gain a good understanding of what the Fairness Doctrine means today.

Question one: What is adequate time for the discussion of public issues? This determination is up to the broadcaster, according to the FCC. Some persons—even some members of the FCC—suggest that the agency set a minimum standard for public affairs programming. For example, former Commissioner Nicholas Johnson suggested that at least 5 percent of a station's programming be devoted to the discussion of public issues. However the FCC has resisted adopting such a scheme. "It is the individual broadcaster who, after evaluating the needs of his particular community, must determine what percentage of the limited broadcast day should be devoted to news and discussion or consideration of public issues," the FCC said.

A significant ruling in 1976 has added some weight to this requirement. Representative Patsy Mink, the sponsor of an anti-strip-mining bill in Congress, asked a West Virginia radio station to broadcast an eleven-minute audiotaped discussion of her bill. The station refused, noting that it had not

carried any pro-strip-mining broadcasts and consequently was not required to carry an anti-strip-mining program. Representative Mink complained to the FCC that the station had not fulfilled its obligations under the Fairness Doctrine to provide an adequate amount of time for a discussion of public issues. The station argued that it had covered the issue by presenting Associated Press news reports on the issue during its regular newscasts.

The FCC ruled against the station, reaffirming that "the Fairness Doctrine imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints." The commission noted that the requirement to present contrasting viewpoints would not make much sense without a corresponding obligation to cover issues of public importance. But what about the station's contention that the issue was covered via newscasts? Doesn't the broadcaster enjoy the discretion to fulfill Fairness Doctrine obligations in this manner? While acknowledging that the licensee was not obligated to address each and every issue which may be important to the public, the commission ruled (*Patsy Mink,* 1976):

> Where, as in the present case, an issue has significant and possibly unique impact on the licensee's service area, it will not be sufficient for the licensee as an indication of compliance with the Fairness Doctrine to show that it may have broadcast an unknown amount of news touching on a general topic related to the issue cited in a complaint. Rather it must be shown that there has been some attempt to inform the public of the nature of the controversy, not only that such a controversy exists.

The ruling should not be taken as standard policy for the FCC. The agency was specific in noting that the principle of the *Mink* case would be reserved for issues that are "critical and of great public importance." Still, the *Mink* ruling was the first time the FCC had taken such a strong stand on this issue and may mark a distinct change in the direction of the application of this aspect of the Fairness Doctrine.

Question two: What is a reasonable opportunity for opposing viewpoints? The Fairness Doctrine does not require—as does Section 315—one-to-one precision in granting time for opposing viewpoints. So long as all sides of the issue are reasonably aired (this is terribly vague), the strictures of the Fairness Doctrine will have been met. Do all viewpoints have to be aired? What about the fellow in the valley whose ideas are different from those of everyone else? No, that would be unreasonable. The commission requires an airing only of viewpoints which have a significant measure of support or viewpoints which reflect the ideas of a significant segment of the community. But remember, it is the duty of broadcasters to make certain that these views are publicly aired. They have an affirmative duty to find someone to raise these points or have someone at the station present these ideas.

Question three: What is a controversial issue of public importance? In actual practice (as will be noted shortly) the broadcaster decides what is controversial and what is not. Some of the factors which the FCC suggests that the licensee take into consideration when determining whether an issue is controversial include the following:

1. The degree of media coverage of the issue
2. The degree of attention the issue receives from government officials and other community leaders
3. The impact the issue is likely to have on the community at large

A recent ruling by the FCC, supported by the Court of Appeals (D.C.), indicates that a controversial issue is expected to be rather specific and narrow. A conservative political-action group calling itself American Security Council Foundation (ASCF) undertook a content analysis of CBS television news broadcasts in 1975 and 1976 and concluded that the network's coverage of the national security issue was not balanced. The group called the coverage "too dovish." The FCC rejected the complaint, noting among other things that ASCF had not defined a controversial issue with sufficient specificity in its complaint. The United States Court of Appeals upheld this ruling in 1979, arguing that the items included under the umbrella of "national security" were simply too diverse to be bunched together under a single national security heading. The ASCF looked at such items as NATO, detente with China and Russia, SALT treaties, amnesty for persons prosecuted during the Vietnam War for a wide range of offenses, Vietnam War itself, Middle East issues, and others. "The issues analyzed by ASCF arose independently in time and were largely discussed and acted upon on an independent basis," the court ruled. "Consideration of the issues together, rather than individually, would not provide a basis for determining whether the broadcaster presented a reasonable balance of conflicting views, because views on any one issue do not support or contradict views on the others," the six-person majority noted. What does NATO have to do with detente in China? or what does amnesty have to do with SALT? the court asked.

An issue is not a "particular, well-defined" issue for Fairness Doctrine purposes if the separate issues comprising it are so indirectly related that a view on one does not, in a way that would be apparent to an average viewer, support or contradict a view on any other (*American Security Council Foundation* v. *FCC,* 1979).

By and large it comes down to whether the broadcaster believes that an issue is important, is controversial, and does stimulate debate within the community.

How It Works

If our discussion of the Fairness Doctrine were stopped at this point, the doctrine would indeed appear imposing. It is really far from that, despite what broadcasters say. Yes, it is disconcerting—even frightening—to receive an inquiry from a government agency, the government agency which grants your license, asking whether you have been fair in dealing with a community issue. However, the mechanics of the process are such that broadcasters really have little to fear if they have only attempted to do their job.

The FCC does no monitoring for violations of the Fairness Doctrine itself, but depends instead upon viewer and listener complaints. Organizations like Accuracy in Media (AIM) which take the pose of "professional media monitors" are popping up across the nation. Usually these groups have an axe to grind of one sort or another. Nevertheless, they do make complaints, and have created problems for broadcasters.

The FCC requires that a Fairness Doctrine complaint contain the following items:

1. The name of 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 presented only one side of the question
5. Whether the station afforded or has plans to afford an opportunity for presentation of contrasting viewpoints.

Numbers one and three are simple to accomplish. Number two can be a problem, however, for the station may define the issue aired during the program somewhat differently than does the complainant, as we shall soon see. Number five requires that the complainant talk to the station before making a complaint, which is the only way the question can be answered. It is number four, however, that is the primary problem for unhappy viewers. The Fairness Doctrine does not require that a station present all sides of an issue within the context of a single program. What is required is that in its *overall programming* it make a balanced presentation of the issues. This month the station might present a program which is against abortion, and next month it may present one which is for abortion. Overall, the station has been fair. Therefore, in alleging that the station has presented only one side of an issue, the complainant has to have a pretty good idea of the station's overall programming—what has gone on in the past as well as what is going to happen in the future. This is a heavy burden for persons who seek to complain. Imagine seeing a one-sided gun-control program on television tonight. How certain are you that somewhere along the line in the past few months the station did not present the other side of the issue? maybe in a documentary? maybe during the news?

maybe on a Sunday afternoon while you were watching a football game on another channel? While complaints are not foreclosed, they are difficult to make.

What happens to the complaints the FCC does receive? According to the commission, nothing in most cases. Chairman Charles Ferris reported in testimony before Congress in 1978 that the FCC receives about 5,000 fairness complaints and inquiries each year. Of this total only about 3 percent or 150 inquiries require some kind of response from the license holder. In other words, in 97 percent of the cases the station owners are not even notified of the complaint. According to Chairman Ferris, only about 15 to 20 of the 150 annual substantive complaints are resolved in a manner unfavorable to the broadcaster. If the complaint is forwarded to the station, the FCC letter asks the broadcaster these two questions:

1. Is the issue of controversial public importance in your viewing area?
2. Have you fulfilled your Fairness Doctrine obligations by presenting balanced programming on that issue?

If the broadcaster says that the issue is not controversial or not of public importance, the FCC must accept the answer unless there is evidence that the broadcaster is arbitrary or capricious in making the determination. So long as the broadcaster makes a good-faith judgment that the issue is not controversial, there is nothing the FCC can do. The broadcaster has the discretion to decide what is and what is not controversial. Furthermore the FCC cannot substitute its judgment for that of the broadcaster. Clearly if the broadcaster ignores overwhelming evidence that the people are interested, if he ignores the fact that a vigorous public debate is underway, the FCC can then rule that the determination is not made in good faith. But this is a very rare kind of ruling. Generally the agency takes the licensee's word.

In 1972 NBC broadcast a program entitled "The Broken Promise," a documentary about private pension plans. It was very critical of certain private pension plans and graphically showed how millions of Americans had been ripped off and cheated. Narrator Edwin Newman told viewers *that most private pension plans are good,* that they provide a real benefit to the workers. Most of the NBC program, however, dealt *with bad pension plans.*

A Fairness Doctrine complaint was lodged against the network by AIM. The FCC asked NBC whether the program dealt with a controversial issue. The network said no, and this was its reasoning. The program talked about bad private pension plans. There were no allegations that all pension plans were bad. In fact, quite the oposite: it was stated that most plans are good. NBC focused on the bad plans. Everybody agrees that some plans are bad. There is no controversy about that. Since the program focused only on the bad plans, it did not deal with a controversial issue.

The FCC didn't accept this logic. But when the decision was appealed to a court of appeals, the agency had its hand slapped. The court said that so long as the network had made a good-faith judgment, NBC was to exercise discretion as to whether the issue was controversial (*NBC* v. *FCC*, 1974). The FCC could not come to a different conclusion on the basis of the same evidence. That was not permitted. What the agency must ask was this: Was there any evidence that could lead the network to decide that the issue was not controversial? And if there was, then NBC's determination was made in good faith.

Because the case took so long to get through the courts, the rulings by both the FCC and the court of appeals were in the end moot. The controversy disappeared when Congress passed its pension-reform bill. So the *Broken Promise* case is not a precedent. However, the rules have not changed. The case was cited to show how the rules work. If another case were to come along tomorrow, the same kinds of restrictions upon the FCC would exist. It is basically the broadcaster's decision whether the issue at hand is controversial and important.

If the licensee says the issue is controversial, the station must then tell the commission how it has fulfilled the Fairness Doctrine requirements, or how it plans to fulfill its responsibilities. Here the FCC has a bit more discretion. However the key is still whether broadcasters *make a good faith effort to provide balanced programming,* rather than whether they *provide balanced programming.* Unless the licensee is really out in left field, the commissioners are usually satisfied. It is only in outrageous cases that the FCC demands a hearing or demands that the broadcaster provide time for opposing viewpoints. Remember also that the initial burden of proof is upon the complainant to convince the FCC that a violation of the doctrine did indeed occur. Before the FCC even sends out a letter to the station, the complainant must provide "a reasonable basis for the conclusion that the licensee has failed in its overall programming to present a reasonable opportunity for contrasting views."

What happens if the FCC finds there has been a violation? A request may be made that the station provide time for airing opposing viewpoints, or a fine may be levied against the broadcaster. In extreme cases the broadcast license may not be renewed (see *Brandywine-Main Line Radio, Inc.,* v. *FCC,* 1972). Denial of renewal generally results only when a pattern of flagrant abuses of the Fairness Doctrine can be shown. Few fairness complaints result in action of any kind against the station. Still, the time and trouble involved in answering such a complaint, especially one which evolves into a hearing and a court case like the NBC case just discussed, are quite onerous. Typical complaints may cost from $500 to $1,000 to answer. When a hearing is involved, expenses can easily reach into the tens of thousands of dollars. A West Coast television station won a Fairness Doctrine hearing which cost the broadcaster $20,000 to defend.

Advertising

The Fairness Doctrine has been applied to advertising as well as to other subjects. In 1967 in response to a petition from a young attorney named John Banzhaf, the commission ruled that stations which carry advertisements for cigarettes must carry free public service messages showing the dangers of smoking as well (*WCBS-TV: Applicability of the Fairness Doctrine to Cigarette Advertising,* 1967). The United States Court of Appeals (D.C.) sustained the ruling in *Banzhaf* v. *FCC* (1969). Cigarette smoking was a controversial subject. Later, of course, Congress passed a law which banned cigarette advertisements from the airwaves completely.

Following the *Banzhaf* ruling other public interest groups sought to have broadcasters balance advertisements for gasoline and automobiles with messages about environmental protection. But the FCC did not agree to these proposals. The commission argued that the smoking decision was unusual, that smoking is a habit that can disappear, that the government urged the discontinuance of cigarette smoking, that government studies showed the danger of smoking, and so forth. In other words the problem of smoking is different from the problem of pollution. So the Friends of the Earth went to court, and in 1971 the Court of Appeals (D.C.) reversed the FCC ruling. The court said it could not see the distinction between the cigarette case and that case (in re *Wilderness Society and Friends of the Earth,* 1971):

> Commercials which continue to insinuate that the human personality finds greater fulfillment in the larger car with the quick getaway do, it seems to us, ventilate a point of view which not only has become controversial but involves an issue of public importance. Where there is undisputed evidence, as there is here, that the hazards to health implicit in air pollution are enlarged and aggravated by such products, then the parallel with cigarette advertising is exact and the relevance of *Banzhaf* inescapable.

The court said, however, that stations do not have to broadcast antibig-car advertising, as in the cigarette advertisements case. The key is overall programming. If the licensees carry programming which discusses the environmental dangers of pollution and the dimuition of resources, the Fairness Doctrine will be satisfied.

In its 1974 report the FCC discussed the application of the Fairness Doctrine to advertising. The commission said that it would apply the doctrine to editorial advertising—commercials which consist of direct and substantial commentary on important public issues—but not to product advertising, not even to controversial products. It said that the cigarette decision was a mistake; if it had to decide the case today, it would not make the same decision. "We believe that standard product commercials," the commissioners wrote, "make no meaningful contribution toward informing the public on any side of any issue." The courts have upheld this decision by the FCC, most recently in 1977 (*National Citizens Committee for Broadcasting* v. *FCC,* 1977). The commission also rejected a proposal by the Federal Trade Commission that

the FCC require stations to offer rebuttal time to public interest groups to answer commercials which raise controversial issues, commercials which make claims which are based on disputed scientific premises, and commercials which are silent about the negative aspects of the advertised products (like too many aspirin can be harmful). The FCC said that almost all commercials raise controversial issues for some people, that such a "counteradvertising proposal" could have an adverse economic effect on broadcasting, and that it did not believe that the Fairness Doctrine was an appropriate vehicle with which to correct false and misleading advertising.

The case of *Public Media Center* v. *FCC* (1978) is an example of the kind of advertising to which the FCC will apply the Fairness Doctrine. In this case, in which eight California television stations were charged with violating the Fairness Doctrine for broadcasting commercials for the Pacific Gas and Electric Company advocating development of nuclear power without presenting the views of opponents of such development, the United States Court of Appeals (D.C.) upheld the commission ruling. The court also remanded the case to the FCC to clarify why it had not made the same ruling regarding four other stations which had also broadcast the same television commercials.

One additional note: The FCC has not applied the Fairness Doctrine to entertainment programs, even to controversial shows such as the two-part "Maude" episode concerning abortion (*Diocesan Union of Holy Name Societies of Rockville Centre and Long Island Coalition for Life,* 1973).

Personal Attack Rules

While the Fairness Doctrine remains a nebulous policy which has been outlined almost on a case-by-case basis, the commission has drafted specific rules with regard to one portion of the doctrine—what are known as the personal attack rules. The personal attack rules are a subsection of the doctrine (see 32 Fed. Reg. 10303; 11531; and 33 Fed. Reg. 5362; 1967) and deal with a specific kind of one-sided presentation. Here are the rules:

> 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 (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, or other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign;

and (3) 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) of this section shall be applicable to editorials of the licensee).

NOTE: The Fairness Doctrine is applicable to situations coming within [(3)], above, and, in a specific factual situation, may be applicable in the general area of political broadcasts [(2)], above.

(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 (i) the candidate opposed in the editorial (1) notification of the date and 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 paragraph 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.

The personal attack rules stem from FCC rulings in 1962 stating that when licensees broadcast what amounts to a personal attack upon an individual or group within the community they have an affirmative obligation to notify the target of the attack of the broadcast and offer the target an opportunity to respond. In 1967 these earlier decisions were clarified and made more specific with the publication of the personal attack rules.

As you can see from the rules, the licensee's obligations are quite specific. It is important to remember that just naming someone in an editorial or commentary does not necessarily constitute a personal attack. On the other hand the rules apply to attacks made by everyone, not just by the station itself.

Paragraph (b) of the rules exempts attacks made by candidates and their followers upon other candidates and their followers. Newscasts, news interviews, and on-the-spot news coverage are also exempted from the personal attack rules, but not from the more general provisions of the Fairness Doctrine. Paragraph (c) outlines licensee obligations with regard to editorial endorsements of candidates.

Soon after the personal attack rules were published, they were challenged in court. A small radio station in Pennsylvania challenged an FCC ruling requiring it to provide free time to Fred Cook, an author, who had been attacked by right-wing evangelist Billy James Hargis. The United States Court of Appeals for the District of Columbia upheld the constitutionality of both the personal attack rules and the Fairness Doctrine (*Red Lion Broadcasting Co.* v. *FCC,* 1967). While this case was being litigated, the Radio and Television News Directors Association and other broadcasting organizations petitioned the United States Court of Appeals for the Seventh District in Chicago to review the constitutionality of the Fairness Doctrine. In this case

the court of appeals struck down both the personal attack rules and the Fairness Doctrine as being in violation of the First Amendment (*Radio and Television News Director's Association* v. *U.S.*, 1968). With two circuit courts at odds on the question, the Supreme Court had to decide the issue.

The argument made by opponents of the Fairness Doctrine, more specifically of the personal attack rules, was two pronged. First, it was asserted that by forcing broadcasters to carry material, that is, the reply by the target of the attack, the government interfered with the First Amendment rights of broadcasters. Second, it was claimed that the Fairness Doctrine amounts to prior restraint as well. Here is the argument. A station has a public affairs budget of $5,000, just enough to produce and air a documentary opposing mandatory busing of children. The Fairness Doctrine requires the licensee to present both sides of the issue; therefore the station has to produce a second documentary which outlines the favorable aspects of busing. But the station has no money for that and therefore cannot air the first documentary opposing busing. This government interference amounts to restraining the broadcast of the documentary opposed to busing. Hence, there is a violation of the First Amendment, there is prior restraint.

Whatever merit you may find in these arguments, the Supreme Court found little to recommend them. In a unanimous decision in 1969 the high Court upheld the constitutionality of both the personal attack rules and the Fairness Doctrine with the argument that the First Amendment operates as a command to the government to protect the public from one-sided presentations of public issues. Going back to the original congressional mandate that the broadcaster operate in the public interest, the Court said the public interest is served only when the community receives exposure to all sides of controversial matters. As far as the First Amendment is concerned, wrote Justice Byron White, the licensed broadcaster stands no better off than those to whom the licenses are refused (*Red Lion Broadcasting Co.* v. *FCC*, 1969):

> 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 air waves.

Later in the opinion Justice White asserted, "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 the Congress or by the FCC."

This case, *Red Lion Broadcasting* v. *FCC,* stands as the leading declaration that the First Amendment is for the people, not for the media, that the purpose of the First Amendment is to ensure that the public obtain the information needed to act as knowledgeable voters and citizens. The Court is willing to stand behind this philosophy with regard to broadcasting, but rejects these ideas with regard to the printed press in the *Tornillo* case discussed earlier in the book. How strong the high Court will stand behind the Fairness Doctrine today as it is battered from all sides is an important question. In 1973 at least some of the nine justices hinted that perhaps they were pulling back somewhat from their earlier unanimous declaration in a case involving the obligation of a broadcaster to sell, note the word *sell,* time to persons seeking to air controversial public issues.

First Amendment Implications

Broadcasting stations are not common carriers. That is, they have the right to refuse to do business with anyone they choose. During 1969 and 1970 two groups, the Democratic National Committee and a Washington, D.C., organization known as Business Executives Movement for Peace sought to buy time from television stations and networks to solicit funds for their protest of the Vietnam War and to voice their objections to the way the war was being prosecuted by the government. Broadcasters rebuffed these groups on the grounds that airing such controversial advertisements and programming would evoke the Fairness Doctrine, and they would then be obligated to ensure that all sides of the controversy were aired. Such action was a nuisance and could be costly. The broadcasters told the Democratic committee and the businessmen that one of their basic policies was not to sell time to any individual or group seeking to set forth views on controversial issues.

When this policy was challenged before the FCC, the commission sided with the broadcasters, noting that it was up to each individual licensee to determine how best to fulfill Fairness Doctrine obligations. But the United States Court of Appeals for the District of Columbia reversed the FCC ruling, citing the *Red Lion* decision that the right of the public to receive information is deeply rooted in the First Amendment. A ban on editorial advertising, the court ruled, "leaves a paternalistic structure in which licensees and bureaucrats decide what issues are important, whether to fully cover them, and the format, time and style of coverage. . . ." This kind of system, the court ruled, is inimical to the First Amendment (in re *Business Executives Movement for Peace* v. *FCC,* 1971):

> It may unsettle some of us to see an antiwar message or a political party message in the accustomed place of a soap or beer commercial. . . . We must not equate what is habitual with what is right or what is constitutional. A society already so saturated with commercialism can well afford another outlet for speech on public issues. All that we may lose is some of our apathy.

The victory of the businessmen and Democrats was short-lived, for by a seven-to-two vote, the United States Supreme Court overturned the appellate court ruling (*CBS* v. *Democratic National Committee,* 1973). Stations have an absolute right to refuse to sell time for advertising dealing with political campaigns and controversial issues. To give the FCC the power over such advertising runs the risk of enlarging government control over the content of broadcast discussion of public issues.

In response to the argument that by permitting broadcasters to refuse such advertising we place in their hands the power to decide what the people shall see or hear on important public issues Justice Burger wrote:

> For better or worse, editing is what editors are for; and editing is the 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 high values.

The Court was badly fractured on this case and Justices Brennan and Marshall dissented. Only two other justices—Stewart and Rehnquist—joined the chief justice in his opinion. The remainder joined in overturning the court of appeals ruling, but for their own reasons. It could be said that the issue is not completely resolved, but in light of the unanimous *Tornillo* decision the following year the matter probably is settled (*Miami Herald Co.* v. *Tornillo,* 1974). Broadcasters are required to present programming on public issues and to do so in such a manner as to ensure that all sides get a fair hearing. How this is to be accomplished is the business of the broadcaster. The Fairness Doctrine does not provide right of access to television or radio.

CABLE TELEVISION

Cable television, in which wires are used to relay radio and television into homes, offices, schools, and public buildings, is different from broadcasting, in which radio and television signals are transmitted through the airwaves. Therefore we could ask, How did the FCC happen to get jurisdiction to regulate cable television? Regulation had to be done by someone (according to many people), and the FCC turned out to be the someone.

Despite unclear jurisdiction in the field (notwithstanding court opinions), the FCC has until recently taken a strong hand in the regulation of cable casting. Cable television (CATV) is really a hybrid of broadcasting and wire (telephone and telegraph) communications. It might therefore be argued that since the FCC has congressional authority to regulate both broadcasting and wire communications it has the authority to regulate cable casting.

The first move toward regulation occurred in 1958. In the *Frontier Broadcasting* case the commission ruled that since cable television is neither common carrier nor broadcast system the agency would not regulate cable television directly (*Frontier Broadcasting Co.* v. *Collier,* 1958). However, the agency did say that one of its concerns was to control excessive electromagnetic

radiation emissions by cable systems which might interfere with other communication systems. It therefore intended to keep an eye on happenings.

Four years later in 1962 the commission changed its mind somewhat and asserted indirect jurisdiction over cable systems. Cable systems often use microwave relay towers to pick up television signals and move them along to the cable system. This practice smacks of broadcasting, and the FCC ruled that it has the power to deny a permit for a relay system if the existing broadcasting stations and thus the public interest will be injured by increased competition from the cable system. This ruling, known as the *Carter Mountain Transmission Corp.* decision, was affirmed by both the Court of Appeals (D.C.) and the United States Supreme Court. The FCC was well on its way to controlling cable under the justification of serving the public interest by protecting existing broadcasters from competition (in re *Carter Mountain Transmission Corp.*, 1962, 1963).

In 1965 the FCC issued its *First Report and Order on Microwave-Served CATV.* The agency adopted a series of operating rules for cable television and said it would grant microwave relay permits only to those cable systems which agreed to abide by the FCC rules. The rules included an agreement by the cable operator to carry local as well as distant stations, to not duplicate local programming by bringing in distant stations carrying the same network programming as the local station, and so forth. At the same time the commission issued a notice that it planned to apply these rules to all cable systems some time in the future.

The future was 1966, the following year, when the FCC issued its *Second Report and Order.* It applied the rules formerly directed at those systems seeking microwave relay permits to all cable systems. This action was challenged by the Southwestern Cable Co., and ultimately the case came before the Supreme Court. In 1968 the high Court backed the FCC in its newly asserted power to control all cable systems. Justice Harlan wrote for the Court (*U.S.* v. *Southwestern Cable Co.*, 1968):

> The commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting. . . . The commission has reasonably found that the successful performance of these duties demands prompt and efficacious regulation of community antenna television systems [cable systems]. We have elsewhere held that we may not, "in the absence of compelling evidence that such was Congress' intention . . . prohibit administration action imperative for the achievement of an agency's ultimate purpose. . . ." 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.

Justice Harlan added that the FCC can regulate cable television at least to the extent "reasonably ancillary to the effective performance of the commission's various responsibilities for the regulation of television broadcasting."

It was at this point that the FCC shifted its posture from regulation of cable systems in order to protect broadcasters to regulation of cable systems in order to enhance communication by improving the nature of communication media available to the public. The agency imposed equal time rules, sponsor identification rules, and the Fairness Doctrine upon all programming originated by cable casters. In addition, the FCC ruled that all cable systems having more than 3,500 subscribers would have to operate "to a significant extent as a local outlet by originating cable casting." In other words, the cable operators could no longer merely scoop the signals of other broadcasting stations out of the air and send them into a home via wire. They had to create programs themselves, which required programming facilities far beyond the needs of the simple automated services thus far originated by cable operators.

The Midwest Video Corp. challenged this rule. Again the Supreme Court upheld the authority of the FCC. In a five-to-four decision the Court ruled (*U.S.* v. *Midwest Video Corp.*, 1972):

> The effect of the regulation, after all, is to assure that in the retransmission of broadcast signals viewers are provided suitably diversified programming. . . .
>
> 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.

Cable television operators argued, as did Justice Douglas in a strong dissent, that the FCC was forcing them into the broadcasting business when they did not want to be licensed for that business. A majority of the Court disagreed, however, noting that the cable operators voluntarily engaged themselves in providing that service and that "the commission seeks only to ensure that it satisfactorily meets community needs within the context of their undertaking." Given this broad, sweeping power, the FCC issued a comprehensive set of cable regulations in 1972, the *Fourth Report and Order on Cable Television Service.*

FCC Rules

In 1976 the FCC refined these rules to the extent that all cable systems with more than 3,500 subscribers carrying over-the-air broadcast signals had to develop a minimum 20-channel capacity by 1986, had to make certain channels available for access by third parties, and had to furnish equipment and facilities for the creation and broadcast of this "access" programming. Again Midwest Video challenged the commission's ruling. This time the cable company won when the Supreme Court in April 1979 struck down the FCC order, saying that the commission was going beyond its authority. Justice Byron White, writing for the six-person majority, said that these rules were not reasonably ancillary to the effective performance of the commission's responsibility to regulate over-the-air television. White said the access rules transferred control of cable television from the cable operator to the public seeking

to use the medium. "Effectively," White wrote, "the Commission has regulated cable systems . . . to common carrier status," something which Congress has always rejected for broadcasting in the past (*FCC* v. *Midwest Video Corp.*,1979). Earlier, the Eighth Circuit Court of Appeals had been even more critical of the commission when it struck down the cable access rules in 1978. The court said the FCC had no jurisdiction to promulgate such rules (*Midwest Video Corp.* v. *FCC*, 1978):

> Jurisdiction is not acquired through visions of Valhalla. An agency can neither create nor lawfully expand its jurisdiction by merely deciding what it thinks the future should be like, finding a private industry that can be restructured to make that future at least possible, and then forcing that restructuring in the mere hope that if its there it will be used.

But neither the Supreme Court nor the court of appeals said in their decisions that local governments which franchise cable television systems cannot make these access rules a part of the franchising agreement, and many observers believe that this will occur at local levels. Many viewed the *Midwest II* ruling as the beginning of the end of comprehensive FCC control over cable television. The agency itself gave credence to this notion in July 1980 when it announced that it was eliminating two major regulations that limited the programs that cable television could offer its viewers. By a narrow vote the commission said that it would now allow cable operations to import as many distant television signals into their area as they chose to import. Distant signals are broadcast signals coming from more than thirty-five miles away from a cable system in a large market, or more than fifty-five miles away from a cable system in a smaller market. In the past, the FCC sharply limited the number of such signals, which might be imported, to protect the local over-the-air broadcasters from too much competition. In addition, the agency announced in July 1980 that it was abandoning rules that stopped cable systems from televising programs carried by stations outside the area if the same programs were carried by local stations. Cable operators will now be able to show, for example, *Star Trek*, when it is carried on a station outside the area even though the same show is being broadcast carried by a local station. Previously the cable operator could have been forced to black out that portion of his programming. The broadcasting industry was critical of these changes and, as this chapter was being written, threatened to go to court to challenge the agency's decision.

The relaxation in rules does not mean that cable television will be without regulation. The FCC has indicated that local governments, which franchise cable systems, can regulate them for the benefit of the community. And such rules will undoubtedly increase in the future as the federal agency relaxes its grip on cable television. But local governments will undoubtedly regulate with

an eye on serving local community needs rather than protecting broadcasters in the area, a criteria long used by the FCC in its regulatory schemes. The FCC has established guidelines for use by local authorities for regulating cable systems and providing guidance on such matters as construction timetables, franchise duration, installation and subscription rates, complaint procedures, and franchise fees. There is inconsistency in various regions concerning which local authority should regulate cable television. In some areas state public utility commissions have this responsibility. Cities or counties undertake this function in other areas.

The regulation of broadcasting is not something that is either easy to grasp or fun to hold. It is a mess. One final point should be recalled. Broadcasters must obey all the rules and regulations on broadcasting in addition to all the other rules and regulations discussed in this book. The television station manager must worry about libel, privacy, access, contempt, and Federal Trade Commission rules in addition to the Federal Communication Act of 1934 and the several thousand Federal Communications Commission edicts issued since that time.

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12 Regulation of the Media as a Business

The primary purpose of this book is to focus upon the censorship and regulation of what is printed in the press or broadcast over radio and television—the content of mass media communication. Yet mass media face other regulation as well, regulation based not on content, but on other criteria. In the United States newspapers, broadcasting stations, film companies, and magazines are usually private businesses, and as such these media businesses face the myriad rules and regulations confronting other businesses in this nation. Rules regarding minimum wages, maximum working hours, safety, health, taxation, and many other areas apply to the mass media as well as to automobile manufacturers, furniture companies, and beauty salons.

Two factors stand out regarding these rules. First, they are applied to the media regardless of the content of a press. Magazines that aim to contribute to the essential political debate in this country have to meet the same minimum wage rules as do true romance magazines which appeal to the emotions. The makers of serious films must meet the same safety standards at their studios as do the makers of sleazy sex-oriented films. The point is this: Whereas in some areas the law is applied variably to businesses thought to serve the public interest and to those who do not, no such variable application occurs when the media are looked at as a business.

Second, while the First Amendment has been at the center of our discussion of press regulation to this point in the book, the guarantees of freedom of expression mean very little when the media are regulated as a business. The First Amendment might protect a newspaper which erroneously labels a politician a crook or a magazine which publishes the intimate secrets of the life of a public official, but it will not protect the publisher who fails to meet fire code regulations or the broadcaster who refuses to pay legitimate taxes.

More than forty years ago the Supreme Court made this abundantly clear when it upheld the constitutionality of the National Labor Relations Act which, at the time, was under a First Amendment challenge launched by the Associated Press (AP). "The business of the Associated Press is not immune from regulation because it is an agency of the press," wrote Justice Owen Roberts for the five-man majority. "The publisher of a newspaper has no special immunity from the application of general laws." (*AP* v. *NLRB*, 1937). With minor exceptions to be noted later, this general proposition describes the state of the law in the 1980s. The press must meet all its legal responsibilities as a business regardless of the First Amendment.

No attempt will be made in this chapter to outline all the broad areas of regulation affecting the media as a business. Consideration of such rules more properly resides in a class in business law. But two areas of commercial regulation are considered, since both have implications beyond simple business regulation. The regulation of the ownership and operation of the media through antitrust laws and FCC policies is significant, because it can have an important impact on who can own the press and, in some instances, the content of media communication. Taxation of the press will be noted briefly also, since on at least some occasions taxation has been used as a means to indirectly censor the press. These are the broad subjects to be covered in this short chapter.

NEWSPAPERS AND ANTITRUST LAW

The government's primary weapon against economic concentration and restraint of trade in industry are the antitrust laws. The Sherman Act of 1890 and the Clayton Act of 1914 provide the legal bases for the Department of Justice to bring both criminal and civil suits against businesses which use monopolistic tactics to endanger free competition. The press is not immune from such legal pressure, yet surprisingly it has been an infrequent target of government antitrust action. One author notes that between 1945, when the Supreme Court ruled that the First Amendment did not shield the press from action by the government to stop monopolistic practices, and 1969, only twelve antitrust suits were initiated against the press. In 1976, when seventy-two different newspapers changed hands (most were bought up by newspaper chains), there were no antitrust actions against newspaper interests. Why? Catherine B. Roach offered one opinion in an article in the *Memphis State University Law Review:*

> Because of the structure of the communications industry—basically a collection of local circulation and advertising markets—anti-trust enforcers have encountered difficult problems of proof as to anticompetitive effects in relevant markets.

In an effort to explain some of the anticompetitive problems the federal government has sought to control in the press, here is a summary of some of the litigation in the past forty years.

Action Against Restraint of Trade

As noted previously, it was in 1945 that the Supreme Court first gave approval to the prosecution of antitrust action against members of the press. The occasion was a suit by the government against the Associated Press, the giant news cooperative and wire service. Marshall Field had founded the morning *Chicago Sun* and sought an AP membership for his newspaper. But under AP bylaws the owners of the rival *Chicago Tribune* were given the opportunity to approve or disapprove Field's application for membership. Without this approval, the applicant needed the consent of a majority of all AP members for the membership application to be accepted. These rules effectively kept newspapers which competed with AP members from getting the highly desirable membership and access to the AP wire service.

The federal government brought an antitrust action against the AP, charging that its membership laws resulted in an illegal monopoly in restraint of trade—a violation of the Sherman Act. Among the AP responses to the suit was the vigorous assertion that the Department of Justice lawsuit against the news cooperative represented a serious infringement upon the constitutionally guaranteed freedom of the press. But the high Court ruled that the Associated Press membership provisions were in fact a violation of the Sherman Act. And Justice Hugo Black, writing for the majority, dismissed the argument that the AP was shielded from such legal action by the First Amendment. "Member publishers of the AP are engaged in business for profit exactly as are other businessmen who sell food, steel, aluminum or anything else people need or want," Black wrote. He said that the inability to buy news from the news agency could have serious effects upon a publication and actually endanger its ability to continue to operate successfully. And then Black penned one of his most memorable passages regarding freedom of the press (*AP* v. *U.S.*, 1945):

> 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 means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to keep others from publishing is not.

The First Amendment, then, provides no safe house for the business person who violates laws or rules designed to foster free competition. And as we have noted earlier, this generalization rings as true with regard to other commercial regulations as it does with antitrust laws.

Six years after the *AP* case the Supreme Court heard arguments in another antitrust action involving the press. This case focused upon what was essentially a monopoly newspaper business in a medium-sized town. The newspaper refused to accept advertising from businesses which also used other community advertising media.

The *Lorain* (Ohio) *Journal* and the *Times Herald* were owned by the same publisher. The combined daily circulation of the two papers reached nearly 100 percent of the families in the community. The only print competition came from the weekly *Sunday News*. In 1948 a radio station began operation in the community. Shortly thereafter the publisher of the two daily papers announced that the newspapers would no longer accept advertising from businesses and industries in the community which also broadcast advertisements over the radio station. The Department of Justice brought an antitrust action against the Lorain Journal Company, charging that the publishing firm was attempting to monopolize interstate commerce and attempting to force advertisers to boycott the radio station. Justice Harold Burton, writing for a unanimous Supreme Court, ruled that the newspaper's policy violated the Sherman Act, "A single newspaper, already enjoying a substantial monopoly in its area, violates the 'attempt to monopolize' clause [of the Sherman Act] . . . when it uses its monopoly to destroy threatened competition." A publisher has the right to refuse to publish any advertisement, but he cannot use this right as "a purposeful means of monopolizing interstate commerce." The First Amendment afforded the paper no special protection: "The injunction applies to a publisher what the law applies to others," Burton wrote (*Lorain Journal Co.* v. *U.S.*, 1951).

Two years later the Supreme Court was forced to scrutinize a tie-in or combination advertising rate scheme used by a New Orleans publisher. The Times-Picayune Company published both the morning *Times-Picayune* and the evening *States*. There was also a competing afternoon paper published in the city, the *Item*. Advertisers who wanted to purchase an advertisement in either the *Times-Picayune* or the *States* had to purchase an advertisement in both. The government brought a civil action against the Times Picayune Company, charging that its forced combination advertising policy was an unreasonable restraint of trade.

The Supreme Court ruled in a five-to-four decision that the combination advertising rate was not a violation of the law. Justice Tom Clark admitted in his opinion for the majority that such an advertising scheme could hurt competition. Clark cited statistics which showed that of the 598 daily papers that had begun publication between 1929 and 1950, more than 225 of them survived at the end of that period. Of these 598, 46 dailies had encountered combination advertising rate schemes like the one in New Orleans. Of those 46 papers, only 5 survived in 1950.

According to the Supreme Court, however, such an advertising-rate combination or "tying" arrangement was illegal only if a business with a dominant position in the market coerced its customers into buying an unwanted inferior product along with the desired product. The government argued that the *Times-Picayune* was the dominant, desired product and the afternoon *States*

was the unwanted, inferior product which advertisers were forced to buy. The crucial questions in the case, according to Clark, were whether the *Times-Picayune* held a dominant market position, and whether the *States* was really an inferior product. The five-man majority answered both questions negatively. The *Times-Picayune* had the greatest circulation, published the most pages, and had the highest amount of advertising, but it was not dominant in the relevant market—the advertising market. The morning paper carried about 40 percent of the classified and display advertising published by the three papers. If all papers had an equal share, the *Times-Picayune* would have still had about 33 percent. The circulation for the *Times-Picayune* was 190,000; for the *States*, 105,000; and for the *Item*, 115,000. The third paper, the *Item*, was flourishing, Clark wrote. He added, "The record in this case thus does not disclose evidence from which demonstrably deleterious effects on competition may be inferred." A majority of the high Court rejected the argument that the *Times-Picayune* was the desired product and the *States* was the inferior product. The products were identical, Clark added (*Times-Picayune* v. *U.S.*, 1953):

> Here . . . two newspapers under single ownership at the same place, time and terms sell indistinguishable products to advertisers; no dominant "tying" product exists . . . no leverage in one market excludes sellers in the second, because for present purposes the products are identical and the market the same.

Five years after the ruling, the Times-Picayune Company purchased the *Item* and created the *State-Item*, making it the only afternoon paper in the city.

Despite the loss in the *Times-Picayune* case, the Department of Justice pushed on with a similar antitrust action in Kansas City against a rate-combination or tie-in advertising policy. This time the government was successful in proving the market dominance of the Kansas City Star Company, something it couldn't prove with regard to the Times-Picayune Company.

The defendant owned the morning *Kansas City Times* and the afternoon *Kansas City Star*. The two papers were circulated to 96 percent of the homes in the area. In addition, the Kansas City Star Company published the *Sunday Star* and owned WDAF radio and WDAF-TV stations. Through all its holdings, the company received 94 percent of all advertising revenue spent in the area. The only competition in the print media field were weekly and suburban papers.

In order to subscribe to any one of the three Star Company-owned newspapers, a resident had to subscribe to all three—both dailies and the Sunday edition. Advertisers were also required to run advertising in all three newspapers. The Star Company used this monopoly power ruthlessly. Examples

documented by the government included threats by the newspaper to stop the news coverage of a professional baseball player who bought space in a competing paper to advertise his florist shop. Also, it was reported that advertisers who failed to buy space in the defendant's newspapers received less favorable treatment in getting advertising on WDAF-AM and WDAF-TV. The United States Eighth Circuit Court of Appeals ruled that such circulation and advertising tie-ins violated the Sherman Act in light of the market dominance by the Star Company. With regard to the First Amendment the court said, "To use the freedom of the press guaranteed by the First Amendment to destroy competition would defeat its own ends, for freedom to print news and express opinions as one chooses is not tantamount to having freedom to monopolize," (*U.S.* v. *Kansas City Star,* 1957).

The conviction in this criminal antitrust action was just the beginning for the Star Company. A subsequent civil suit was settled by the firm through a consent decree (this legal device is described on pages 402–3), under which the Star Company agreed to sell its broadcasting properties and to stop the tie-in policies with regard to advertising and circulation. Additional civil suits were generated by media competitors in the Kansas City area, and it is estimated that in the end the Star Company paid out several hundred thousand dollars in damages.

Action Against Chain Ownership

Ten years elapsed before a federal court again ruled in an important media antitrust action. And for the first time the government action against the press was initiated because of something other than newspaper policy regarding advertisers or subscribers. In this case the target of the federal suit had merely purchased a nearby newspaper.

Serious concern was generated by many thoughtful students of the media during the sixties with regard to the shrinking number of independently owned newspapers in the United States. Similarly, competition between papers in major cities shrunk rapidly to the point where communities with competing daily newspapers were considered unusual. The statistics tell the story graphically. In 1923 daily newspapers were published in nearly 1,300 American cities. Of that total, 502 cities had two or more competing daily papers. Forty years later in 1963 daily newspapers were published in 1,476 cities, but only 51 communities had competing papers. (By 1978 there were dailies in 1,536 cities, but in only 35 were there competition between daily newspapers.) Many feared the demise of the independent newspaper in the United States. The dearth of competition between papers in communities augured a less vital press and fewer outlets for the publication of ideas and protests. The first real government response to these fears came in southern California when the Department of Justice brought a civil antitrust action against the Times-Mirror Corporation for purchasing a large newspaper company in an adjoining county.

Since 1948 the morning *Los Angeles Times* had the largest circulation in California. It was an important force in southern California. In the mid-1960s the firm bought the Sun Company which published the morning *Sun,* the afternoon *Telegram,* and the *Sunday Sun-Telegram,* in San Bernardino County, which adjoins Los Angeles County on the east. Until its purchase by the Times-Mirror Corporation, the Sun Company had been the largest independent publisher in southern California. The government argued that the purchase of these newspapers by the Times-Mirror Corporation resulted in a restraint of interstate commerce, in violation of the Sherman Act, and had the impact of lessening competition in the area, which is a violation of the Clayton Act.

In ruling in favor of the government, Judge Warren Ferguson noted that the purchase of the Sun Company newspapers by Times-Mirror was only the latest of a series of actions which had reduced the number of independently owned California newspapers from 59 percent in 1952 to 24 percent in 1966. "The acquisition of the *Sun* by the *Times* was particularly anticompetitive," Judge Ferguson wrote, "because it eliminated one of the few independent papers that had been able to operate successfully in the morning and Sunday fields." Since the purchase of the Sun Company newspapers by the Times-Mirror Corporation, Ferguson noted, two daily newspapers had been closed and two more newspaper mergers in San Bernardino County had occurred. The federal district judge ruled that the acquisition of the Sun Company newspapers by the Times-Mirror Corporation "has raised a barrier to entry of newspapers in the San Bernardino County market that is almost impossible to overcome." Ferguson said that the market for new papers was effectively closed, and "no publisher will risk the expense of unilaterally starting a new daily newspaper there." The judge pointed to the fact that even the prestigious *New York Times* failed to break into the market with a West Coast edition of its successful newspaper. Divestiture was ordered by the court, and the Supreme Court affirmed this ruling one year later (*U.S.* v. *Times-Mirror Corporation,* 1968).

Following divestiture the Sun Company newspapers were purchased by the Gannett newspaper chain, the largest chain in the nation. Many persons questioned whether the people in San Bernardino County gained or lost as a result of the government lawsuit and the subsequent purchase of the paper by Gannett. Gannett ownership of the *Sun* and the *Telegram* did create a "second owner" in the community, but was the owner a better owner or as good an owner? Both the Times-Mirror Corporation and Gannett are absentee owners not living in the community in which the newspapers are published. But the Times-Mirror Corporation resided just over the county line and certainly was familiar with the problems and people in the area. Gannett has corporate offices in New York State, completely across the nation. The *Los Angeles Times* is one of America's most prestigious newspapers. It remains speculative

whether Gannett has fused this quality into the Sun Company newspapers. The opportunity did exist. However, few Gannett newspapers have risen above a mediocre or adequate level. Chances of producing a superior paper for the people of San Bernardino County seem significantly lower with the Gannett ownership. Finally, while the Times-Mirror Corporation is a large media corporation in its own right, its newspaper holdings remain miniscule compared with the growing Gannett chain which by 1980 owned almost eighty daily newspapers in the nation. What was accomplished, many persons asked, by taking the Sun Company newspapers away from a small newspaper chain and giving it to a large one? The answers to these questions reflect directly on government antitrust policy which appears to focus on the competition among economic units—advertisers and competing newspapers—rather than on the impact upon the reading public.

Action Against Joint-Operating Agreement

A year later the justice department's next major newspaper antitrust suit reached the Supreme Court. In this action the Department of Justice sought to break up the "joint-operating agreement" between the Citizen Publishing Company and the Star Publishing Company in Tucson, Arizona. The joint-operating arrangement had been in effect for nearly thrity years in Tucson, and similar agreements existed between newspapers in more than twenty other American cities. The arrangement was simple. Two independent newspapers merged their advertising, printing, and circulation operations to form a third company. The news departments of the two papers remained separate and independent. The third company, Tucson Newspapers Incorporated, handled all advertising and circulation and printing for the evening *Citizen* and the morning and Sunday *Star*. Profits were pooled and shared.

The joint-operating agreement had two clear impacts in the community. First, it provided lower costs for both papers and made it possible for two newspapers to be published in situations where one might only survive in pure head-to-head competition. At the same point, however, the lowered costs for the two newspapers made it difficult if not impossible for a third newspaper to compete. The government attacked several provisions of the arrangement as being violations of the Sherman Act. Specifically the lawyers for the Department of Justice argued that the setting of advertising and subscription prices by Tucson Newspaper, Inc., was price fixing. They also objected to profit pooling and to the fact that both the Star Publishing Company and the Citizen Publishing Company agreed not to engage in other media business in the area.

After considerable time in the lower courts, the Supreme Court in 1969 declared the arrangement to be a violation of the law (*U.S.* v. *Citizen Publishing Company*, 1969). Justice Douglas wrote that through a joint-operating agreement the two publishers had gained market control over the newspapers

in Tucson. The Court did allow the *Star* and the *Citizen* to share some of the same facilities, but struck down policies on profit pooling, establishment of joint advertising and subscription rates, and other similar agreements.

In the months immediately following the ruling in the *Citizen Publishing Company* case, scores of bills were introduced in Congress to salvage the joint-operating agreement. If such policies were against the law, as the Supreme Court ruled, then the law would have to be changed, the publishers argued. And it was. In 1970, after an intensive lobbying effort by the publishing industry, the Congress adopted the Newspaper Preservation Act. Taking a clue from Justice Douglas's opinion in the *Citizen Publishing Company* case, Congress enacted legislation which permitted newspapers to continue to function under joint-operating agreement so long as at the time at which the agreement is made one of the two papers is in "probable danger of failing." Papers seeking to enter into joint-operating agreements in the future have to first gain permission from the Attorney General if they expect to be exempted from the antitrust rules provided for by the law. The measure had the impact of legalizing the twenty-two agreements in effect in 1970, including the one which the Supreme Court had declared illegal in Tucson. The merits of the law have been hotly debated along lines similar to the debate over the joint-operating agreements themselves. While legalizing these agreements has ensured that in 22 cities at least newspaper news and editorial competition will survive, the law at the same time makes it practically impossible for other publishers to compete with the two monopoly papers which boast lower operating costs.

After several years of trying to compete with the *San Francisco Examiner* and the *Chronicle,* which have operated under a joint agreement since 1965, Bay Area publisher Bruce Brugman went to court in July 1971 and charged that the Newspaper Preservation Act violated his freedom of the press by encouraging journalistic monopoly. Brugman, who published the monthly *Bay Guardian,* told the court that his small paper had difficulty getting advertisers because of the lower joint advertising rates set by the two newspapers. Many advertisers could not afford to or chose not to advertise beyond the two large San Francisco dailies. Federal district judge Oliver Carter showed little sympathy for Brugman's arguments, however, and in 1972 ruled that the congressional measure did not authorize a monopoly (*Bay Guardian Publishing Company* v. *Chronicle Publishing Company,* 1972). Carter wrote:

> 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.

Little of significance has occurred in the field of antitrust regulation of the printed press since the early seventies. In 1979 the *Anchorage Daily News* and the *Anchorage Times* dissolved the joint-operating agreement under which they had operated for only about one year. In the same year the E. W. Scripps Company sought Department of Justice approval of a joint-operating agreement between its *Cincinnati Post* and Gannett's *Cincinnati Enquirer*. For the first time a public hearing was held on the question. While the government ultimately agreed that the Scripps's publication met the requirements of a failing newspaper, attorneys for the Department of Justice raised the interesting question of whether a newspaper could truly be termed "failing" when the parent company (Scripps) might be benefitting financially from the tax write-offs accorded by the *Post*'s losses. The matter was not pressed at that time by the government, and the application for the joint-operating agreement was approved.

Current Status

What most people regard to be the most serious anticompetitive newspaper phenomenon of the 1980s is the rapid growth of newspaper chains and the concurrent demise of the independent newspapers. But the Department of Justice seems unwilling to move against such acquisitions. The antitrust division of the department did investigate the merger of the Gannett newspaper chain with Combined Communications, a large broadcasting chain which also owned two newspapers. But following the investigation *Editor and Publisher* quoted the Assistant Attorney General for Antitrust, John H. Shenefield, as saying:

> The antitrust laws do not flatly prohibit media conglomerates anymore than they prohibit other kinds of conglomerates. Under present law, some measurable impact on competition in some market must be proven before a merger or acquisition will be held to violate the antitrust laws. Indeed, the courts have been generally reluctant to condemn conglomerate mergers where such an impact has not been shown, regardless of the social or other objections that have been asserted.

In an effort to enhance the government's ability to attack the growth of the giant conglomerates, Senator Edward Kennedy introduced a bill in 1979 which, if enacted, will prohibit companies with more than $2.5 billion in annual sales or more than $2 billion in assets from merging. In addition, under the Kennedy proposal companies with $350 million in annual sales or $200 million in assets can merge only if they can convince the government that such a merger will enhance competition or produce efficiencies of benefit to consumers. The Kennedy proposal would have little impact upon media conglomerates, as most are not as large as the companies the Kennedy proposal seeks to regulate.

BROADCASTING AND ANTITRUST LAW AND FCC RULES

The Department of Justice has carried the largest burden in attempting to control the competitive practices of the newspaper industry. But in broadcasting the Federal Communications Commission (FCC) has taken the lead in regulating the ownership of radio and television stations, and only recently has the Department of Justice moved against members of the industry.

The Federal Communications Commission has closely regulated the business practices of broadcasters by means of the three-year license renewal procedures and other commission policies. Congress has passed statutes with regard to some matters such as the rates a broadcaster may charge a candidate for public office. The FCC itself has issued scores of rules regarding business and advertising practices. It has also been the FCC which has attempted to control both the growth of broadcast chains and other ownership practices of the members of the industry.

The commission's first rules on ownership were issued in 1940 when it declared that no single individual or company could own more than three television stations and six frequency modulation (FM) radio stations. Amplitude modulation (AM) radio ownership is not limited. These numbers were revised continually until 1954 when rules were adopted which stand today. A single individual or company cannot own more than seven AM stations, seven FM stations, and seven television stations, but only five of the television stations can be the more desirable variety, very high frequency (VHF) stations.

In 1968 the FCC adopted what is called its "one to a customer rule," which was modified in 1971 and is the rule that exists today. The commission will not permit any broadcasting company to own more than a single VHF television station in a given market or one AM-FM radio combination. The 1971 rule was applied prospectively, that is, the agency did not force the owners of existing very high frequency TV—AM-FM combinations to sell one of their properties. It simply announced it would no longer approve the formation of such combinations in the future. The agency took a more flexible position on the ultrahigh frequency TV—AM-FM combinations, announcing that it would rule upon requests for such combinations on a case-by-case basis in the future.

In 1975 the agency attempted to thwart what it saw as another problem—the ownership of broadcast properties by newspaper companies in the same city. The rules promulgated by the commission were rather simple, but provoked a serious court battle. The commission said that in the future it would bar the ownership of a broadcast license by a newspaper operating in the same city. All but a handful of the existing newspaper-broadcast combinations were allowed to remain intact. However the FCC did seek divestiture in communities in which there was common ownership of the only daily newspaper and the only broadcasting station. Similarly, in communities where there was more than one broadcasting station, the agency sought to break up the common ownership of the only daily newspaper and the only television station. Sixteen

such forbidden combinations existed, and the license holders were given five years to divest themselves of either the broadcasting property or the newspaper.

The National Citizens Committee for Broadcasting challenged the FCC rules, arguing that while it supported the prospective cross-ownership ban, the FCC should have forced *all* existing combinations to sell either their newspapers or broadcasting properties. In other words, the public interest groups opposed the grandfather clause in the FCC rules. The United States Court of Appeals (D.C.) agreed and ruled that the FCC must order divestiture of all the jointly owned newspaper-broadcast combinations except in "those cases where the evidence clearly discloses that cross-ownership is in the public interest" (*National Citizens Committee for Broadcasting* v. *FCC*, 1977). Judge McGowan wrote that "although we do not disturb the Commission's prospective rules, we conclude that the divestiture order is inconsistent with its long-standing policy that 'nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible.' "

The FCC appealed the ruling by the court, and in 1978 the Supreme Court reversed the lower court decision. Justice Thurgood Marshall, writing for the unanimous Court, said the court of appeals was mistaken in ruling that the FCC could have no rational reason for not ordering divestiture of the existing combinations. The agency's arguments that it would disrupt the industry, that it would deny to many meritorious broadcast station owners the opportunity to continue service to the public, and that it would likely result in an increase in the growth of broadcast chains as locally owned broadcast properties were sold under the divestiture orders were substantial, Marshall argued. "We believe that the limited divestiture requirement reflects a rational weighing of competing policies," the justice concluded for the court (*FCC* v. *National Citizens Committee for Broadcasting*, 1978).

Another important action aimed at broadcasters in the 1970s was a Department of Justice antitrust suit against the three major television networks, ABC, CBS, and NBC. The Department of Justice filed the actions in 1972, but the complaints were dismissed without prejudice. In 1974 the justice department refiled the actions, which asserted that the networks had violated the Sherman Act by trying to monopolize the programs shown in prime-time evening hours. The government originally sought a court order that would have accomplished the following:

1. Prohibited the networks from obtaining any interest (other than showing the program for the first time) in any entertainment television program, including feature films, made by others
2. Prohibited the networks from the syndication of such programs

3. Prohibited the networks from offering over a network any such programming produced by the network itself or any other network commercial television network
4. Prohibited the network from offering any other commercial network programs it produced

The thrust of what the government sought was to take the television networks out of the program production business. Three years after the litigation began, NBC surprisingly agreed to sign a consent decree which was considerably more limited than the original order sought by the government. In the decree the network agreed to specific restrictions in bargaining with independent program producers, agreed not to acquire syndication rights or other distribution or profit shares in programs produced by others, agreed not to enter into reciprocal arrangements with either CBS or ABC in the purchase or sale of programming rights, and agreed to limit the broadcast of programs it had produced. Under the terms of the settlement, the network agreed that for the next ten years it would limit the broadcast of programs it produced itself to two-and-one-half hours per week during prime time, eight hours per week during daytime hours, and eleven hours per week during fringe hours. However, this programming limitation would only apply if both CBS and ABC either agreed to similar limitations or similar limitations were forced upon them through court order. In the summer of 1980 CBS signed a similar agreement. Litigation with ABC was still underway.

While these events were taking place in the broadcasting industry, the film industry was also under scrutiny by the government for anticompetitive practices that were first banned more than twenty-five years ago.

MOTION PICTURES AND ANTITRUST LAW

The movie industry has faced government scrutiny for possible antitrust violations since the late 1930s. A succession of officials within the Department of Justice including Thurman Arnold, Francis Biddle, and Tom Clark attacked the Hollywood studios for a variety of commercial practices deemed to be anticompetitive. Particularly onerous was the fact that in the 1930s and 1940s most of the major studios owned vast chains of theaters. By controlling the film industry from the initial creative stages through to the sale of popcorn during the exhibition of a film, the studios exercised powerful dominance in the media. Independent theaters found it extremely difficult to obtain good motion pictures to exhibit—the studios kept those for their own theaters. And independent filmmakers, of which there were few, found it difficult to compete with the large studios. A film made by a major studio was bound to be shown in a good theater—one owned by the film company—and generally costs at least were made. Independent producers had no guarantee that their films would be exhibited at all, let alone at a "good house."

Independent distributors and theater owners also faced a second problem: the block-booking policies of the major studios. Under block-booking a distributor or theater owner was forced to "buy" a package of movies to exhibit. Generally this package included the popular and quality films the studio produced, but the package was also laced with a great many poorer films, often the lower grade B pictures which the Hollywood studios produced to keep their vast number of salaried technical employees busy and to develop new creative talent within the studio. Theater owners would often lose a considerable amount of money by exhibiting these second-rate films, but had to take them as part of the package containing the good films that would be profitable to exhibit.

By the end of the 1940s, through a series of protracted antitrust litigations, the Department of Justice had succeeded in forcing the major studios to revise many of their policies. In 1948 the courts declared the block-booking practices to be a violation of the Sherman Act (*U.S.* v. *Paramount Pictures,* 1948). The studio policy of forcing independent theaters to charge minimum admission prices (so the independent owners could not undercut the admission prices at the studios' own theaters) was also declared illegal. Henceforth independent theaters were allowed to competitively bid for the right to show any of the films made by the major studios, and there could be no requirement that a theater had to take a bad picture to get a good one. The following year the studios agreed to sell their chains of theaters, a move which broke the back of some of the weaker studios. By 1950 most of the serious anticompetitive practices the industry had developed in its fifty-year history had ended. But while this was a positive step for those in competition with the major studios, some students of film found that the government action hurt the creative end of the motion picture industry. Charles Higham in his book *Hollywood at Sunset* notes:

> . . . in practical terms the victory of the Department of Justice and the independents over wicked Hollywood had incalculably disastrous effects on the film industry and the very character of film entertainment itself. For confidence in a product, the feeling that it could flow out along guaranteed lines of distribution, was what gave many Hollywood films before 1948 their superb attack and vigor. Also, the block-booking custom, evil though it may have been ensured that many obscure, personal, and fascinating movies could be made and released, featherbedded by the system and underwritten by more conventional ventures.

Higham concluded that the successful antitrust action was a victory for justice, but a defeat for entertainment.

But the illegal practices by the major studios did not altogether cease after 1950. In 1962 the Department of Justice brought an action against Loew's, Inc., Screen Gems, and other film distributors for using the block-booking techniques in selling movies to television. In Washington WTOP-TV had complained that in order to get quality films such as *Casablanca, Sergeant*

York, and the *Treasure of Sierra Madre*, the station had to accept a large number of weak, less popular films. The Supreme Court followed its earlier precedents and declared the practice to be illegal under the Sherman Act (*U.S.* v. *Loew's, Inc.*, 1962). Even as late as 1978 the practice of block-booking was found to exist in the film industry. Twentieth Century-Fox pleaded no contest to the charge of forcing theaters to exhibit *The Other Side of Midnight* in order to get the opportunity to book the studio's enormously popular *Star Wars*. The studio was fined $25,000 and assessed court costs of nearly $20,000.

The configuration of the film industry in the 1980s makes such illegal practices almost unnecessary, as the business is dominated by seven major studios which control the distribution of more than 80 percent of the films exhibited in the United States. The 1978 Task Force on the Motion Picture Industry reported that "major producers/distributors are effecively limiting competition by maintaining tight control over the distribution of films, both by their failure to produce more films and by their failure to distribute more films produced by others." As of today, this practice has not been investigated and probably is legal under our current interpretation of antitrust laws. The task force noted that there was no evidence of criminal intent on the part of the film companies, but they have nevertheless agreed to "tacitly limit production among themselves and . . . create sufficient barriers to entry to effectively squash new competition." Independent Hollywood producers are attempting themselves to beat this system by forming their own distribution systems, but it is a difficult and expensive task. Time will tell whether such schemes loosen the rein the major studios have over competition.

If the First Amendement has failed as a defense against antitrust action by the government, it has fared somewhat better as a means for blocking government taxes aimed at harrassing or hurting the press. And that is the next subject of this chapter.

TAXATION AND THE PRESS

The First Amendment guarantees that the press shall be free from unfair and discriminatory taxes which have an impact upon circulation, or distribution. In this area the classic case concerns a United States senator from a southern state and the daily press of that state (*Grosjean* v. *American Press Co.*, 1936).

During the late 1920s and early 1930s the political leader of Louisiana was Huey P. Long. Long was a demagogue by most accounts and in 1934 held his state in virtual dictatorship. He controlled the legislature and the state house and had a deep impact upon the judicial branch as well. Long started his career by attacking big business—Standard Oil of California, to be exact. He became a folk hero among the rural people of Louisiana and was elected governor in 1928. In 1931 he was elected to the United States Senate, and many people believe that he would have attempted to win the presidency had he not been assassinated in 1935.

In 1934 the Long political machine, which the majority of the big-city residents had never favored, became annoyed at the frequent attacks by the state's daily newspapers against the senator and his political machine. The legislature enacted a special 2 percent tax on the gross advertising income of newspapers with a circulation of more than 20,000. Of the 163 newspapers in the state, only 13 had more than 20,000 subscribers, and of the 13, 12 were outspoken in their opposition to Long. The newspapers went to court and argued that the tax violated the First Amendment as well as other constitutional guarantees. The press won at the circuit court level on other grounds, but the state appealed. Then in 1936 the Supreme Court ruled in favor of the newspapers squarely on First Amendment grounds.

The state of Louisiana argued that the English common law, which it claimed the American courts had adopted after the Revolution, conferred the right to tax newspapers and license them if need be upon the government. Justice George Sutherland, who wrote the opinion in this unanimous Supreme Court decision, said however that such taxes upon newspapers were the direct cause of much civil unrest in England and were one of the chief objections Americans had to British policy—objections which ultimately forced independence.

The justice wrote:

> 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 in immunity from previous censorship. . . . 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 . . . taxation."

Sutherland asserted that the tax not only restricted the amount of revenue the paper earned, but also restrained circulation. Newspapers with less than 20,000 readers would be reluctant to seek new subscribers for fear of increasing circulation to the point where they would have to pay the tax as well. The justice added that any action by the government which prevents free and general discussion of public matters is a kind of censorship. Sutherland said that in this case even the form in which the tax was imposed—levied against a distinct group of newspapers—was suspicious. He then wrote:

> The tax here involved is bad not because it takes money from the pockets of the appellees [the newspapers]. 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.

Therefore in *Grosjean* v. *American Press Co.*, the Supreme Court struck down a discriminatory tax against the press. An interesting footnote to the case concerns the opinion. Justice Sutherland's opinion is one of the most eloquent ever penned in defense of free expression. The justice was not normally such an articulate spokesman. What happened in this case? Speculation is that Sutherland's opinion incorporates a concurring opinion by Justice Benjamin Cardozo, perhaps the greatest writer to ever serve on the Court, and the eloquence of the *Grosjean* opinion is really Cardozo's, not Sutherland's.

Despite the fact that Justice Sutherland specifically noted in his opinion that the ruling in *Grosjean* did not mean that newspapers are immune from ordinary taxes, some newspaper publishers apparently did not read the opinion that way, but saw it instead as a means of escaping other kinds of taxes. After *Grosjean*, for example, unsuccessful attempts were made to have a sales tax in Arizona declared inapplicable to newspapers because it was a restriction on freedom of the press (*Arizona Publishing Co.* v. *O'Neil*, 1938). Since 1953 when the United States Supreme Court refused to hear an appeal from a California decision affirming the constitutionality of a general business tax on newspapers, the matter has been fairly well settled. The California case involved the *Corona Daily Independent* which challenged a business tax imposed by the city of Corona. A license tax of thirty-two dollars had been levied for many years against all businesses. In 1953 the newspaper refused to pay the levy on the grounds that the tax violated its First Amendment rights to freedom of expression. The *Grosjean* case prohibited such taxation, lawyers for the publication argued. The trial court ruled in favor of the newspaper, but the California Appellate Court disagreed and reversed the ruling (*City of Corona* v. *Corona Daily Independent*, 1953). Justice Griffin wrote that there is ample authority to the effect that newspapers are not made exempt from ordinary forms of taxation. Justice Griffin said that the newspaper had not shown that the amount of the tax was harsh or arbitrary, that the tax was oppressive or confiscatory, or that the tax in any way curtailed or abridged the newspaper's right to disseminate news and comment:

> We conclude that a nondiscriminatory tax, levied upon the doing of business, for the sole purpose of maintaining the municipal government, without whose municipal services and protection the press could neither exist nor function, must be sustained as being within the purview and necessary implications of the Constitution and its amendments.

The United States Supreme Court refused to review the ruling in *City of Corona* v. *Corona Daily Independent*, and most people believed the refusal signaled concurrence with the opinion of the California court.

The basic rule of First Amendment law regarding taxes on the press is this: Newspapers, broadcasting stations, and other mass media must pay the

same taxes as any other business. Taxes which are levied only against the press and tend to inhibit circulation or impose other kinds of prior restraints (such as very high taxes which keep all but very wealthy people from publishing newspapers) are unconstitutional.

Regulation of the commercial aspects of the mass media is not new. Yet surely as the media continue to grow as giant businesses and more and more take on the configuration of modern American industry, commercial regulation will increase. The Chief Justice of the United States suggested as much in 1978 in a concurring opinion in the case of *First National Bank of Boston* v. *Bellotti*. The case involved a Massachusetts state law which forbade banks and corporations from making contributions or expenditures for the purpose of "influencing or affecting the vote on any question submitted to the voters." The Court struck down the statute as running afoul of the First Amendment. Chief Justice Burger noted in his concurrence:

> A disquieting aspect of Massachusetts's position is that it may carry the risk of impinging on the First Amendment rights of those who employ the corporate form—as most do—to carry on the business of mass communications, particularly large media conglomerates. This is so because of the difficulty, and perhaps impossibility, of distinguishing, either as a matter of fact or constitutional law, media corporations from corporations such as the appellants [a bank] in this case.

John Oakes, editorial page editor of the *New York Times*, noted that Burger's opinion "may lead to a questioning of the need for special protection of the press as such, under a First Amendment that was in fact designed to insure the free flow of information and opinion, and not the accretion of corporate power." Oakes added, during a speech at the 1978 Conference on Media and the Public at the Washington Journalism Center, that the growth of concentration of the ownership of the media into fewer hands could lead to a grave dislocation between the press and the public:

> The quality of the product turned out by the conglomerates' publishing and broadcasting arms may be less important in the long run than the loss of public confidence in the press engendered by fears of "the sinister effect of riches" upon the institution of the press.

Oakes added that he feared that public disillusionment with the press could even adversely influence the judiciary's normal strong adherence to the guarantees of a free press.

As the decade of the 1980s progresses, the press will see more, not less, commercial regulation, and its response to such regulation may have a direct impact upon the public's opinion of the press.

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Preface

Writing the second edition of *Mass Media Law* was, in some ways, more difficult than writing the first edition. The challenge was to retain the good aspects of the manuscript, weed out the weaknesses that emerged after three years of use, and restructure the textual material in light of the often significant changes in American mass communications law. In doing this I was ably assisted by students, instructors who used the book, colleagues, and editors at Wm. C. Brown Company.

Several goals were in the forefront of my thinking as I revised this mass media law text. The first and most obvious was to update the material in every chapter. Much has happened in communications law during the past three years, and I have incorporated many of these legal developments into the book. As with the first edition, however, I have resisted using material simply because it is new or controversial. The primary focus of the book remains the presentation of the law needed by a working journalist, broadcaster, or person in advertising or public relations. Consequently you will not find material in the second edition on the widely publicized *Herbert* v. *Lando* ruling by the Supreme Court, a case dealing with the discovery process used by attorneys after the libelous material has been published. The case is interesting, but an understanding of the ruling is of little importance to the working communicator, since it does not change the law of libel one bit. The Supreme Court simply reinstated discovery procedures which the Second Circuit Court of Appeals had changed. Two or three other cases have been left out for the same reason.

The second goal of the book was to add a chapter on regulation of the press through antitrust laws and taxation. Many users of the book feel that such a chapter is needed. While I do not generally include this material in my

press law course, I can see the need for such information. The information is provided in chapter 12, Regulation of the Media as a Business.

The third goal of the book was to "tighten up" some chapters. New material makes the book somewhat longer, but cutting and trimming unneeded or extraneous material has kept the length of the text a reasonable size.

Finally, three important organizational changes were made. Chapter 2, Freedom of the Press, a broad, general discussion of freedom of expression, now reflects the more common manner of dealing with this material. For example, the section on prior restraint is divided into several subsections that discuss prior restraint generally and then national security matters, "fighting words," doctrine, prior restraint in schools, and time, place, and manner restrictions specifically.

Chapter 3, Gathering News and Information, is new and represents the second major organizational change. A series of decisions by the Supreme Court and various lower courts over the past five years focused upon the journalist as a news gatherer and upon the integrity of the news-gathering process. In teaching the course I find that combining the material on these subjects with material on protection of sources and access to information makes considerable sense. Hence, chapter 3 deals with the law and news gathering. Included is material on newsroom search, source confidentiality, prison interview, problems of trespass, access to government-held information, and other matters.

The final organizational change is of chapter 4, Libel, and rests upon my firm belief that the law of libel needs to be made more understandable; especially for students, in light of the fault requirements placed upon libel plaintiffs since the mid-1970s. After the 1964 *New York Times* ruling and in the years immediately preceding the *Gertz* decision, I (like other press law teachers) considered the requirement that public-person plaintiffs prove actual malice to be a libel defense and talked about it as a defense. Proof of actual malice was never really a defense, at least from a technical standpoint, since the burden of proving actual malice rests solely upon the plaintiff. It is true defendants in such suits can argue that a particular plaintiff is a public person and should have to prove actual malice, but this argument confuses the issue and does not make the malice requirement a defense. The *Gertz* ruling—that all plaintiffs have to prove some level of fault—exacerbates the teaching problem.

In 1978, shortly after the first edition of this book was published, I changed the way I teach my class. I discuss fault immediately after other aspects of the plaintiff's case—defamation, publication, and identification—are discussed. The fact that all plaintiffs must prove some level of fault is stressed, and then the ramifications of private persons, limited public persons, all-purpose public persons, negligence, and actual malice are gone into. Next,

the traditional common law defenses are considered, but the *New York Times* rule is not discussed as a constitutional defense. It seems to me that the new way of teaching the material is superior to past methods since a libel suit is not always litigated in the step-by-step manner which we are forced to use when teaching libel law. Moreover, inclusion of the material on fault as a part of the plaintiff's requirement seems to make sense to students. Therefore, chapter 3 is organized in the manner just outlined, and the dilemma regarding whether the fault requirement is a defense or part of the plaintiff's case is explained. The material on fault is a self-contained unit and can be assigned as part of the reading on defenses.

One additional small change in the libel chapter: all reference to "common law malice," that kind of malice plaintiffs can use to overturn a common law defense such as fair comment, was dropped from the chapter, but I do continue to talk in terms of material being published for an improper motive or as a means of hurting someone. Everything that was in the first edition regarding common law malice remains in the second edition. It simply isn't called "common law malice." This tactic avoids using such terms as "actual malice" and "common law malice" that seem to confuse students.

Many people deserve thanks for making this book possible. I have gained much of value from my students, who helped me develop material and other resources included in this book. Colleagues—especially Roger Simpson and Gerald Baldasty—gave invaluable advice and patiently listened as I outlined new ideas about press law and the teaching of press law. Thanks also goes to the many persons who reviewed the manuscript and provided important assistance in preparation of the second edition. I would especially like to thank Donald Brod, Northern Illinois University; Rick D. Pullen, California State University, Fullerton; and Bill F. Chamberlin, University of North Carolina, Chapel Hill. Editors Julie Kennedy and Susan J. Soley were extremely helpful, patient, and concerned about the welfare of both the book and its author.

Greatest thanks obviously and properly go to those closest to me. Writing a book is difficult and is undoubtedly as tough or tougher on an author's family as it is on the author. So my deepest thanks go to Alison and Brian, for understanding and accepting a part-time Daddy for many months, and to Diann, who gave great assistance and help (and also typed the manuscript) through the long process. It is to these three persons that the second edition of *Mass Media Law* is dedicated.

Mass Media Law

1 The American Legal System

Probably no nation is more closely tied to the law than the American Republic. From the 1770s, when in the midst of a war of revolution we attempted to legally justify our separation from the motherland, to the 1970s, when a dissatisfied people used the law as a wedge to drive a president from office, and during the nearly two hundred years between, the American people have showed a remarkable faith in the law. One could write a surprisingly accurate history of this nation using reports of court decisions as the only source. Beginning with the sedition cases in the late 1790s which reflected the political turmoil of that era, one could chart the history of the United States from adolescence to maturity. As the frontier expanded in the nineteenth century, citizens used the courts to argue land claims and boundary problems. Civil rights litigation in both the midnineteenth and midtwentieth centuries reflects a people attempting to cope with racial and ethnic diversity. Industrialization brought labor unions, workmen's compensation laws, and child labor laws, all of which resulted in controversies that found their way into the courts. As mass production developed and large manufacturers began to create most of the consumer goods used, judges and juries had to cope with new laws on product safety, honesty in advertising, and consumer complaints.

Americans have protested nearly every war the nation has fought—including the Revolutionary War. The record of these protests is contained in scores of court decisions. Prohibition and the crime of the twenties and the economic woes of the thirties both left residue in the law. In the United States,

The Bibliography at the end of each chapter supplies additional information about the sources and legal cases cited in the text. An explanation of how to locate a given case using its citation is provided on page 8.

as in most other societies, law is a basic part of existence, as necessary for the survival of civilization as are economic systems, political systems, cultural achievement, and the family.

This chapter has two purposes: to acquaint readers with the law and to present a brief outline of the legal system in the United States. Students who study mass media law frequently face the serious difficulty of studying a special area of law without having an understanding of the law or the court system in general, a situation somewhat like a medical student studying neurosurgery before taking work in anatomy, basic medicine, and surgical techniques. While this chapter is not designed to be a comprehensive course in law and the judicial system—such material can better be studied in depth in an undergraduate political science course—it does provide sufficient introduction to understand the remaining eleven chapters of the book.

The chapter opens with a discussion of the law, giving consideration to the five most important sources of the law in the United States, and moves on to the judicial system including both the federal and state court systems. Judicial review is discussed, and finally there is a brief explanation of how lawsuits, both criminal and civil, are started and proceed through the courts.

SOURCES OF THE LAW

There are almost as many definitions of law as there are people who study the law. Some people say that law is any social norm, or any organized or ritualized method of settling disputes. Most writers on the subject insist that it is a bit more complex, that some system of sanctions is required before law exists. John Austin, a nineteenth-century English jurist, defined law as definite rules of human conduct with appropriate sanctions for their enforcement. He added that both the rules and the sanctions must be prescribed by duly constituted human authority. Roscoe Pound, an American legal scholar, has suggested that law is really social engineering—the attempt to order the way people behave. For the purposes of this book it is probably more helpful to consider the law to be a set of rules which attempt to guide human conduct and a set of sanctions which are applied when those rules are violated.

Scholars still debate the genesis of "the law." A question that is more meaningful and easier to answer is, What is the source of American law? There are really five major sources of law in the United States: the common law, the law of equity, the statutory laws, the Constitution, and the rulings of various administrative bodies and agencies. Historically we can trace American law to Great Britain. As colonizers of much of the North American Continent, the British supplied Americans with an outline for both a legal system and a judicial system. In fact, because of the many similarities between British and American law, many people consider the Anglo-American legal system to be a single entity.

The Common Law

The common law, which developed in England during the two hundred years after the Norman Conquest in the eleventh century, is one of the great legacies of the British people to colonial America. During those two centuries the crude mosaic of Anglo-Saxon customs was replaced by a single system of law worked out by jurists and judges. The system of law became common throughout England; it became the common law. It was also called the common law to distinguish it from the ecclesiastical (church) law prevalent at the time. Initially, the customs of the people were used by the king's courts as the foundation of the law, disputes were resolved according to community custom, and governmental sanction was applied to enforce the resolution. As such, the common law was, and still is, considered "discovered law." It is law that has always existed, much like air and water. When a problem arises, the court's task is to find or discover the proper solution, to seek the common custom of the people. The judge doesn't create the law; he merely finds it, much like a miner finds gold or silver.

This, at least, is the theory of the common law. Perhaps at one point judges themselves believed that they were merely discovering the law when they handed down decisions. As legal problems became more complex and as the law began to be professionally administered (the first lawyers appeared during this era and eventually professional judges), it became clear that the common law reflected not so much the custom of the land as the custom of the court—or more properly, the custom of the judges. While judges continued to look to the past to discover how other courts had decided, given similar facts (precedent is discussed in a moment), many times judges were forced to create the law themselves.

This common law system was the perfect system for the American colonies. Like most Anglo-Saxon institutions, it was a very pragmatic system aimed at settling real problems, not at expounding abstract and intellectually satisfying theories. The common law is an inductive system of law in which a legal rule is arrived at after consideration of a great number of specific instances of cases. (In a deductive system the rules are expounded first and then the court decides the legal situation under the existing rule.) Colonial America was a land of new problems for British and other settlers. The old law frequently didn't work. But the common law easily accommodated the new environment. The ability of the common law to adapt to change is directly responsible for its longevity.

Fundamental to the common law is the concept that judges should look to the past and follow earlier court precedents. The Latin expression for the concept is this: *Stare decisis et non quieta movere* ("to stand by past decisions and not disturb things at rest"). *Stare decisis* is the key phrase: let the decision stand. A judge should resolve current problems in the same manner as similar problems were resolved in the past. When Barry Goldwater sued publisher

Ralph Ginzburg for publishing charges that the conservative Republican senator was mentally ill, was paranoid, the judge most certainly looked to past decisions to discover whether in previous cases such a charge had been considered defamatory or libelous. There are ample precedents for ruling that a published charge that a person is mentally ill is libelous, and Senator Goldwater won his lawsuit (*Goldwater* v. *Ginzburg,* 1969).

At first glance one would think that under a system which continually looks to the past the law can never change. What if the first few rulings in a line of cases were bad decisions? Are we saddled with bad law forever? Fortunately, the law does not operate quite in this way. While following precedent is the desired state of affairs (many people say that certainty in the law is more important than justice), it is not always the proper way to proceed. To protect the integrity of the common law, judges have developed several means of coping with bad law and with new situations in which the application of old law would result in injustice.

Imagine for a moment that the newspaper in your hometown publishes a picture and story about a twelve-year-old girl who gave birth to a seven-pound son in a local hospital. The mother and father do not like the publicity and sue the newspaper for invasion of privacy. The attorney for the parents finds a precedent (*Barber* v. *Time,* 1942) in which a Missouri court ruled that to photograph a patient in a hospital room against her will and then to publish that picture in a news magazine is an invasion of privacy.

Now does the existence of this precedent mean that the young couple will automatically win their lawsuit? that the court will follow the decision? No, it does not. For one thing, there may be other cases in which courts have ruled that publishing such a picture is not an invasion of privacy. In fact in 1956 in the case of *Meetze* v. *AP,* a South Carolina court made just such a ruling. But for the moment assume that *Barber* v. *Time* is the only precedent. Is the court bound by this precedent? No. The court has several options concerning the 1942 decision.

First, it can accept the precedent as law and rule that the newspaper has invaded the privacy of the couple by publishing the picture and story about the birth of their child. Second, the court can modify or change the 1942 precedent by arguing that *Barber* v. *Time* was decided almost forty years ago when people were more sensitive about going to a hospital, since a stay in a hospital was often considered to reflect badly on a patient, but that hospitalization is no longer a sensitive matter to most people. Therefore, a rule of law restricting the publication of a picture of a hospital patient is unrealistic, unless the picture is in bad taste or needlessly embarrasses the patient. Then its publication is an invasion of privacy. If not, the publication of such a picture is permissible. In our imaginary case, then, the decision turns on what kind of picture and story the newspaper published—a pleasant picture which

flattered the couple? or one that mocked and embarrassed them? If the court rules in this manner, it modifies the 1942 precedent, making it correspond to what the judge perceives to be contemporary life.

As a third option the court can argue that *Barber* v. *Time* provides an important precedent for a plaintiff hospitalized because of disease—as Dorothy Barber was. But that in the case before the court the plaintiff was hospitalized to give birth to a baby, a different situation: Giving birth is a voluntary status; catching a disease is not. Consequently the *Barber* v. *Time* precedent does not apply. This practice is called *distinguishing the precedent from the current case*, a very common action.

Finally, the court can overrule the precedent. In 1941 the United States Supreme Court overruled a decision made by the Supreme Court in 1918 regarding the right of a judge to use what is called the summary contempt power (*Toledo Newspaper Co.* v. *U.S.*, 1918). This is the power of a judge to charge someone with being in contempt of court, to find him guilty of contempt, and then to punish him for the contempt—all without a jury trial. In *Nye* v. *U.S.* (1941) the high Court said that in 1918 it had been improperly informed as to the intent of a measure passed by Congress in 1831 which authorized the use of the summary power by federal judges. The 1918 ruling was therefore bad, was wrong, and was reversed. (Fuller explanation of summary contempt as it applies to the mass media is given in chapter 7.) The only courts that can overrule the 1942 decision by the Missouri Supreme Court in *Barber* v. *Time* are the Missouri Supreme Court and the United States Supreme Court. Judges in other states can just ignore the *Barber* v. *Time* precedent if they believe it to be a poor decision.

Obviously the preceding discussion oversimplifies the judicial process. Rarely is a court confronted with but a single precedent. And numerous other factors must be taken into account in addition to past case law. In fact, many people talk about the "hunch theory" of jurisprudence which suggests that judges decide a case on the basis of their instincts and then seek to find rational reasons to explain the decision. The imaginary invasion-of-privacy case just discussed demonstrates that the common law can have vitality, that despite the rule of precedent a judge is rarely bound tightly by the past. There is a saying, Every age should be the mistress of its own law. This saying applies to the common law as well as to all other aspects of the legal system.

It must be clear at this point that the common law is not specifically written down someplace for all to see and use. It is instead contained in the hundreds of thousands of decisions handed down by courts over the centuries. Many attempts have been made to summarize the law. Sir Edward Coke compiled and analyzed the precedents of common law in the early seventeenth century. Sir William Blackstone later expanded Coke's work in the monumental *Commentaries on the Law of England*. More recently, in such works as the massive *Restatement of Torts* the task was again undertaken, but on

a narrower scale. Despite these compilations, in the eyes of some European attorneys the common law remains "the law nobody knows" because it isn't spelled out neatly in a statute book or administrative edict.

Courts began to keep records of their decisions centuries ago. In the thirteenth century unofficial reports of cases began to appear in Year Books, but they were records of court proceedings in which procedural points were clarified for the benefit of legal practitioners, rather than collections of court decisions. The modern concept of fully reporting the written decisions of all courts probably began in 1785 with the publication of the first British Term Reports.

While scholars and lawyers still uncover the common law using the case-by-case method, it is fairly easy today to locate the appropriate cases through a simple system of citation. The cases of a single court (such as the United States Supreme Court or the federal district courts) are collected in a single case reporter (such as the *United States Reports* or the *Federal Supplement*). The cases are collected chronologically and fill many volumes. Each case collected has its individual citation which reflects the name of the reporter in which the case can be found, the volume of that reporter, and the page on which the case begins. For example, the citation for the decision in *Adderly* v. *Florida* (a freedom-of-speech case) is 385 U.S. 39 (1966). The letters in the middle (U.S.) indicate that the case is in the *United States Reports*, the official government reporter for cases decided by the Supreme Court of the United States. The number 385 refers to the specific volume of the *United States Reports* in which the case is found. The last number (39) gives the page on which the case appears. Finally, 1966 provides the year in which the case was decided. So, *Adderly* v. *Florida* can be found on page 39 of volume 385 of the *United States Reports*.

If you have the correct citation, you can easily find any case you seek. Locating all citations of the cases apropos to a particular problem—such as a libel suit—is a different matter and is a technique taught in law schools. A great many legal encyclopedias, digests, compilations of the common law, books, and articles are used by lawyers to track down the names and citations of the appropriate cases.

There is no better way to sum up the common law than to quote Oliver Wendell Holmes (*The Common Law*, published in 1881):

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order

> to know what it is, we must know what it has been, and what it tends to become. . . . The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned.

The Law of Equity

The common law is not the only legal legacy the British provided the American people. The law of equity, as developed in Britain beginning in the fourteenth and fifteenth centuries, is also a remnant of our British heritage and is the second basic source of the law in the United States. Equity was originally a supplement to the common law and developed side by side with the common law. During the 1300s and 1400s the king's courts became rigid and narrow. Many persons seeking relief under the common law for very real grievances were often turned away because the law did not provide a suitable remedy for their problems. In such instances the disappointed litigant could take his problem to the king for resolution, petitioning the king to "do right for the love of God and by way of charity." According to legal scholar Henry Abraham (*The Judicial Process*), "The king was empowered to mold the law for the sake of 'justice,' to grant the relief prayed for as an act of grace." Soon the chancellor, the king's right-hand man, set up a special office or court to settle the kinds of problems which the king's common law courts could not resolve. At the outset of the hearing the aggrieved party had to establish that he had no adequate remedy under the common law and that he needed a special court to hear his case. The office of the chancellor soon became known as the Court of Chancery. Decisions were made on the basis of conscience or fairness or "equity."

British common law and equity law were American law until the Revolution in 1776. After independence was won, the basic principles of common law in existence before the War of Revolution were kept because the cases remained acceptable precedent. After some hesitation, equity was accepted in much the same way. While present-day United States courts can consider decisions made in British courts after the Revolution, they are not bound by these decisions. For example, when the law of privacy is discussed, it will be seen that the decisions of British courts were often cited by American judges in the early development of privacy law, but were rarely fully accepted.

Initially there was a separate court of equity, or chancery, in Great Britain. But today in Great Britain and the United States, the same court hears cases both in equity and under the common law. Depending upon the kind of judicial relief sought by the plaintiff, the judge applies either the common law or the rules of equity.

The rules and procedures under equity are far more flexible than those under the common law. Equity really begins where the common law leaves off. Equity suits are never tried before a jury. Rulings come in the form of judicial decrees, not in judgments of yes or no. Decisions in equity are (and

were) discretionary on the part of judges. And despite the fact that precedents are also relied upon in the law of equity, judges are free to do what they think is right and fair in a specific case.

Equity provides another advantage for troubled litigants—the restraining order. A judge sitting in equity can order preventive measures as well as remedial ones. Individuals who can demonstrate that they are in peril, or about to suffer a serious irremediable wrong, can usually gain a legal writ such as an injunction or a restraining order to stop someone from doing something. Generally a court issues a temporary restraining order until it can hear arguments from both parties in the dispute and decide whether an injunction should be made permanent.

In 1971 the federal government asked the federal courts to restrain the *New York Times* and the *Washington Post* from publishing what have now become known as the Pentagon Papers (this case is discussed in greater detail in chapter 2). This case is a good example of equity law in action. The government argued that if the purloined documents were published by the two newspapers the nation would suffer irremediable damage; that foreign governments would be reluctant to entrust the United States with their secrets if those secrets might someday be published in the public press; that the enemy would gain valuable defense secrets. The federal government argued further that it would do little good to punish the newspapers after the material had been published since there would be no way to repair the damage. The federal district court temporarily restrained both newspapers from publishing the material while the case was argued—all the way to the Supreme Court of the United States. After two weeks of hearings the high Court finally ruled that publication could continue, that the government failed to prove that the nation would be damaged (*New York Times Co.* v. *U.S.*, 1971).

Prior to the Revolution, Americans were also bound by laws made by their colonial legislatures as well as by the British Parliament. Following independence, the British statutes passed by Parliament were no longer applicable in the United States; instead the residents of the new nation were bound by the laws of their own local, federal, and state legislatures. Legislation is therefore the third great source of United States law.

Statutory Law

Today there are legislative bodies of all shapes and sizes. The common traits they share are that they are popularly elected and that they have the authority to pass laws. In the beginning of our nation, legislation, or statutory law, really didn't play a very significant role in the legal system. Certainly many laws were passed, but the bulk of our legal rules were developed from the common law and from equity law. After 1825 statutory law began to play an important role in our legal system, and it was between 1850 and 1900 that a greater percentage of law began to come from legislative acts than from common law court decisions. Today, most American law comes from various

legislatures: Congress, state legislatures, city councils, county boards of supervisors, township boards, and so forth. In fact, legislative action is the most important source of American law in the 1980s.

Several important characteristics of statutory law can best be understood by contrasting them with common law. First, statutes tend to deal with problems affecting society or large groups of people, in contrast to common law, which usually deals with smaller, individual problems. (Some common law rulings affect large groups of persons, but this occurrence is rare.) It should also be noted in this connection the importance of not confusing common law with constitutional law. Certainly when judges interpret the Constitution they make policy which affects us all. However, it should be kept in mind that the Constitution is a legislative document voted upon by the people and is not "discovered law" or "judge-made law."

Second, statutory law can anticipate problems, and common law cannot. For example, a state legislature can pass a statute which prohibits publication of the school records of a student without prior consent of the student. Under the common law the problem cannot be resolved until a student's record has been published in a newspaper or broadcast on television and the student brings action against the medium to recover damages for the injury incurred.

Third, the criminal laws in the United States are all statutory laws—common law crimes no longer exist in this country and haven't since 1812. Common law rules aren't precise enough to provide the kind of notice needed to protect a criminal defendant's right to due process of law.

Fourth, statutory law is collected in codes and law books, instead of in reports as in the common law. When a proposal or bill is adopted by the legislative branch and approved by the executive branch, it becomes law and is integrated into the proper section of a municipal code, a state code, or whatever. However, this does not mean that some very important statutory law cannot be found in the case reporters.

Passage of a law is rarely the final word on the subject. Courts become involved in the process of determining what that law means. While a properly constructed statute usually needs little interpretation by the courts, judges are frequently called upon to rule upon the exact meaning of ambiguous phrases and words. The resulting process is called **statutory construction** and is a very important part of the law. Even the simplest kind of statement often needs interpretation. For example, a prohibition stating "it is illegal to distribute an obscene newspaper" is filled with ambiguity. What does *distribution* mean? Can an obscene newspaper by sent through the mail? distributed from house to house? passed out on street corners? Are all of these actions prohibited? What constitutes a newspaper? Is any printed matter a newspaper? Is any printed matter published regularly a newspaper? Are mimeographed sheets and photocopied newsletters considered newspapers? Of course, implicit is the classic question with which courts have wrestled in this country for nearly a century, What is obscenity?

Usually a legislature tries to leave some kind of trail to help a judge find out what the law means. For when judges rule on the meaning of a statute, they are supposed to determine what the legislature meant when it passed the law (the legislative intent), not what they think it should mean. Minutes of committee hearings in which the law was discussed, legislative staff reports, and reports of debate on the floor can all be used to help a judge determine the legislative intent. Therefore when lawyers deal with statutes, they frequently are forced to search the case reporters to find out how the courts interpreted a law in which they are interested.

Constitutional Law

Great Britain does not have a written constitution. The United States does have a written constitution, and it is an important source of our law. In fact, there are many constitutions in this country: the federal Constitution, state constitutions, city charters, and so forth. All of these documents accomplish the same ends. First, they provide the plan for the organization of the government. Next, they outline the duties, responsibilities, and powers of the various elements of government. Finally, they usually guarantee certain basic rights to the people, such as freedom of speech and freedom to peaceably assemble.

One Supreme Court justice described a constitution as a kind of yardstick against which all the other actions of government must be measured to determine whether the actions are permissible. The United States Constitution is the supreme law of the land. Any law or other constitution which conflicts with the United States Constitution is unenforceable. A state constitution plays the same role for a state: a statute passed by the Michigan legislature and signed by the governor of that state is clearly unenforceable if it conflicts with the Michigan constitution. And so it goes with all levels of constitutions.

While constitutions tend to be short and infrequently amended, the process of determining what specific areas of these documents mean and whether a specific law or government action violates a certain constitutional provision is a laborious one, usually taking hours and hours and days and days of court time. Consequently, with the exception of the bare-bone documents themselves, the case reporters are once again the repository for the constitutional law which governs the United States.

Twenty-six amendments are appended to the United States Constitution. The first ten of these are known as the Bill of Rights and provide a guarantee of certain basic human rights to all citizens. Included are freedom of speech and freedom of the press, rights you will come to understand more fully in future chapters.

Constitutions are an important source of the law in the United States, especially law involving the mass media.

Administrative Rules

By the latter part of the nineteenth century in the United States, not only had the simple idyllic life of the eighteenth century slipped away, but also the job of governing had become much more complex. Congress was being asked to resolve questions going far beyond such simple matters as budgets, wars, treaties, and the like. Technology created new kinds of problems for the Congress to resolve. Many such issues were complex and required specialized knowledge and expertise which the Congress lacked and could not easily acquire, had it wanted to. Federal agencies were therefore created to deal with these problems.

For example, the flow of natural gas through long pipelines which traversed the nation created numerous disputes. Since questions concerning use of these pipelines fell within the commerce power of the Congress, that deliberative body was given the task of resolving this complex issue. But pipeline regulation involved serious technical matters and competent regulation required a high level of expertise. To deal with these problems, Congress created the first administrative agency, the Interstate Commerce Commission (ICC). This agency was established by legislation and funded by Congress. Its members were appointed by the president and approved by the Congress. Each member served a fixed term in office. The agency was independent of the Congress, the president, and the courts. Its task was (and is) to regulate commerce between the states, a matter which concerned pipelines, shipping, and transportation. The members of the board presumably were somewhat expert in the area before appointment and of course became more so during the course of their term.

Today hundreds of such agencies exist at both federal and state levels. Each agency undertakes to deal with a specific set of problems which are too technical or too large for the legislative branch to handle. Typical is the Federal Communications Commission (FCC) which was created by Congress in 1934. Its task is to regulate broadcasting in the United States, a job which Congress has really never attempted. Its members must be citizens of the United States and are appointed by the president. The single stipulation is that at any one time no more than four of the seven individuals on the commission can be from the same political party. The Senate must confirm the appointments.

Congress sketched the broad framework for the regulation of broadcasting in the Federal Communications Act of 1934, and this act is used by the agency as its basic regulatory guidelines. The agency also creates much law itself in administration of the 1934 Act. In interpreting provisions, handing down rulings, developing specific guidelines, and the like, the FCC has developed a sizable body of regulations which bind broadcasters. For example, the Federal Communications Act of 1934 states that broadcasters must operate in the public interest, convenience, or necessity. The FCC holds that one aspect of operation in the public interest is to air all sides of a controversial issue to

make certain that the audience has access to the full range of opinion on the topic. This general rule gradually emerged during the past forty years as the fairness doctrine, a full-blown set of rules created by the FCC which carry the force of law. Broadcasters who fail to live up to these rules can be fined or (rarely) have their license to broadcast taken away.

Persons dissatisfied with rulings by the FCC can go to court and seek a reversal of the commission action. But courts are strictly limited in their power when reviewing decisions by administrative agencies, and can overturn a commission ruling or any other action by an administrative agency in only these limited circumstances: (1) if the original act which established the commission is unconstitutional, (2) if the commission exceeds its authority, (3) if the commission violates its own rules, or (4) if there is no evidentiary basis whatsoever to support the ruling. The reason for these limitations is simple: These agencies were created to bring expert knowledge to bear on complex problems, and the entire purpose for their creation would be defeated if judges with no special expertise in a given area can reverse an agency ruling merely because they have a different solution to a problem.

The case reporters contain some law created by the administrative agencies, but the reports which each of these agencies themselves publish contain much more such law. These reports are also arranged on a case-by-case basis in chronological order. A citation system similar to that used for the case reporters is used in these reports.

As the problems which governments must deal with become more complicated and more numerous, administrative agencies seem to proliferate, and more and more of our law comes from such agencies.

There are other sources of American law. Executives—a governor, a president, a mayor—have the power to make law in some circumstances through executive order. The five sources just discussed—common law, law of equity, statutory law, Constitutional law, and rules and regulations by administrative agencies—are the most important, however, and are of most concern in this book. First Amendment problems fall under the purview of constitutional law. Libel and invasion of privacy are matters generally dealt with by the common law and the law of equity. Obscenity laws in this country are statutory provisions (although this fact is frequently obscured by the hundreds of court cases in which judges attempt to define the meaning of obscenity). And of course the regulation of broadcasting and advertising falls primarily under the jurisdiction of administrative agencies.

While this section provides a basic outline of the law and is not comprehensive, the information is sufficient to make upcoming material on mass media law understandable.

THE JUDICIAL SYSTEM

This section gives an introduction to the court system in the United States. Since the judicial branch of our three-part government is the field upon which most of the battles involving communications law are fought, an understanding of the judicial system is essential.

It is technically improper to talk about the American judicial system. There are fifty-one different judicial systems in the United States, one for the federal government and one for each of the fifty states. While each of these systems is somewhat different from all the others, the similarities among the fifty-one systems are much more important than the differences. Each of the systems is divided into two distinct sets of courts, trial courts and appellate courts. Each judicial system is established by a constitution, federal or state. In each system the courts act as the third branch of a common triumvirate of government: a legislative branch which makes the law, an executive branch which enforces the law, and a judicial branch which interprets the law.

Common to all judicial systems is the distinction between trial courts and appellate courts, and it is important to understand this distinction. Each level of court has its own function: basically, trial courts are fact-finding courts and appellate courts are law-reviewing courts. Trial courts are the courts of first instance, the place where nearly all cases begin. Juries sit in trial courts, but never in appellate courts. Trial courts are empowered to consider both the facts and the law in a case. Appellate courts consider only the law. The difference between facts and law is significant. The facts are what happened. The law is what should be done about the facts.

The difference between facts and law can be emphasized by looking at an imaginary libel suit that might result when the *River City Sentinel* publishes a story about costs at the Sandridge Hospital. (See story on page 16.)

The Sandridge Hospital sued the newspaper for libel. When the case got to court, the first thing that had to be done was to establish what the facts were—what happened. Both the hospital and the newspaper presented evidence, witnesses, and arguments to support its version of the facts. Several issues had to be resolved. In addition to the general questions of whether the story had been published and whether the hospital had been identified in the story, the hospital had to supply evidence that its reputation had been injured, that its good name had been damaged, and that the newspaper staff had been negligent. The newspaper relied on the truth as its defense. It presented evidence to document its charges that the hospital overcharged patients, that the medications were stale, that expired medicine is less effective than fresh medicine, and that patients did receive the stale medicine.

All this testimony and evidence establishes the factual record—what actually took place at the hospital. When there is conflicting evidence, the jury decides whom to believe (in the absence of a jury, the judge makes the decision). Suppose that the evidence presented by the newspaper convinced

Ineffective Medications Given to Ill, Injured
SANDRIDGE HOSPITAL OVERCHARGING PATIENTS ON PHARMACY COSTS

Scores of patients at the Sandridge Hospital have been given ineffective medications, a three-week investigation at the hospital has revealed. In addition, many of those patients were overcharged for the medicine they received.

The *Sentinel* has learned that many of the prescription drugs sold to patients at the hospital had been kept beyond the manufacturer's recommended storage period.

Many drugs stored in the pharmacy (as late as Friday) had expiration dates as old as six months ago. Drug manufacturers have told the *Sentinel* that medication used beyond the expiration date, which is stamped clearly on most packages, may not have the potency or curative effects that fresher pharmaceuticals have.

Hospital spokesmen deny giving patients any of the expired drugs, but sources at the hospital say it is impossible for administrators to guarantee that none of the dated drugs were sold to patients.

In addition, the investigation by the *Sentinel* revealed that patients who were sold medications manufactured by _____ Pharmaceuticals were charged on the basis of 1980 price lists despite the fact that the company lowered prices significantly in 1981.

the jury that the hospital did possess expired drugs, that patients were charged 1980 prices for some medications, and that most authorities do regard expired medication to be less beneficial than fresher drugs. Given the factual record of the case, what is the law? Had the newspaper really proved its charges against the hospital? Had it proved the truth? A simple explanation is that in order to successfully use the defense of truth (defense of truth is discussed further in chapter 3) the newspaper must prove the substance of its charges, the heart of its allegations. In this case, a judge would probably rule that the newspaper had not proved the substance of its charges: there was no evidence that any patients had been given expired medication. Therefore, the hospital wins the suit. If the newspaper is unhappy with the verdict, it can appeal.

In an appeal, the appellate court does not reconsider the factual record. No more testimony is taken. No more witnesses are called. The factual record established by the jury at the trial stands and cannot be reconsidered. What the appellate court can do is to decide whether the law has been applied properly in light of the facts. It is possible that in this case the appellate court would rule that in establishing that the drugs were stored in the hospital pharmacy the newspaper has in fact established the substance of its charge—that it is inconceivable that patients had not received the expired medicine

and that the trial judge erred in applying the law. Perhaps the judge erred in allowing certain testimony into evidence, or he refused to allow a certain witness to testify. Nevertheless, in reaching an opinion the appellate court considers only the law; the factual record established at the trial stands.

What if new evidence is found or a previously unknown witness comes forth to testify? If the appellate court believes that the new evidence is important, it can order a new trial. However, the court itself does not hear the evidence. These facts are given at a new trial.

The important differences between trial and appellate courts have now been pointed out. Other differences will undoubtedly emerge as the specific structure of each court system is discussed.

In the discussion that follows, the federal court system and its methods of operating are considered first, and then some general observations about state court systems are given, based on the discussion of the federal system.

The Federal Court System

The Congress has the authority to abolish every federal court in the land save the Supreme Court of the United States. The United States Constitution calls for but a single federal court, the Supreme Court. Article III, Section 1 states: "The judicial power of the United States shall be vested in one Supreme Court." The Constitution also gives Congress the right to establish inferior courts if it deems these courts to be necessary. And Congress has, of course, established a fairly complex system of courts to complement the Supreme Court.

The jurisdiction of the federal courts is also outlined in Article III of the Constitution. The jurisdiction of a court is its legal right to exercise its authority. Briefly, federal courts can hear the following cases:

1. Cases that arise under the United States Constitution, United States law, and United States treaties
2. Cases that involve ambassadors and ministers, duly accredited, of a foreign country
3. Cases that involve admiralty and maritime law
4. Cases that involve controversies when the United States is a party to the suit
5. Cases that involve controversies between two or more states
6. Cases that involve controversies between a state and a citizen of another state (we must remember that the Eleventh Amendment to the Constitution states that a state must give its permission before it can be sued)
7. Cases that involve a controversy between citizens of different states

While special federal courts have jurisdiction which goes beyond this broad outline, these are the circumstances in which a federal court may normally exercise its authority. Of the seven categories of cases just listed, categories one and seven account for most of the cases getting to federal court.

For example, disputes which involve violations of the myriad federal laws and disputes which involve constitutional rights such as the First Amendment are heard in federal courts. Also, disputes between citizens of different states—what is known as a diversity of citizenship matter—are heard in federal courts. It is very common, for example, for libel suits and invasion of privacy suits against publishing companies to start in federal courts rather than in state courts. If a citizen of Arizona should be libeled by *Time* magazine, the case would very likely be tried in a federal court in the state of Arizona, rather than in a state court. The magazine would look at the tribunal as a more neutral court. But the federal court would still follow Arizona law when hearing the case.

The Supreme Court

The Supreme Court of the United States is the oldest federal court, having been in operation since 1789. The Constitution does not establish the number of justices who will sit on the high Court. That task is left to the Congress. In 1789 the Congress passed the first judiciary act and established the membership of the high Court at six: a chief justice and five associate justices. This number was increased to seven in 1807, to nine in 1837, and to ten in 1863. The Supreme Court had ten members until 1866 when Congress ruled that only seven justices would sit on the high tribunal. Since 1869 the Supreme Court has had eight associate justices and the Chief Justice of the United States. (Note the title: not Chief Justice of the Supreme Court, but the Chief Justice of the United States.)

No attempt to change the size of the Court has occurred since the 1930s when President Franklin Roosevelt, unhappy about the manner in which it treated some of his New Deal legislation, proposed enlarging the Court. Publicly, Roosevelt argued that serving on the Court was arduous and that the work load for the older judges had become onerous. He sought the power to appoint one new justice for every justice over seventy years of age, to a limit of fifteen justices on the high Court. The public response to the president's plan was strongly negative, and the measure never came to a vote in the Senate. But the president won in the end when James McReynolds, one of the Court's staunchest New Deal foes, retired and Roosevelt was able to appoint a jurist more of his own philosophical bent as a replacement. In addition, following the announcement of the president's judiciary plan, the high Court handed down a ruling which seemed to indicate that one of the formerly anti-New Deal justices (Owen Roberts) had changed his position regarding the president's social and economic programs. Despite a political defeat, Roosevelt got his legislation, and in the end he appointed nine men to the high Court, more than any president except Washington.

The Supreme Court exercises both original and appellate jurisdiction. Under its original jurisdiction the Court is the first court to hear a case and acts much like a trial court in ascertaining facts and deciding the law. By the

middle of this century the Court had exercised its original jurisdiction only one hundred twenty-nine times. The Supreme Court has the authority to exercise this jurisdiction in only certain instances. In cases between two or more states, for example, the Supreme Court is the only court which can hear the matter and has exclusive jurisdiction. In cases involving foreign ambassadors and ministers the Supreme Court can exercise original jurisdiction, but Congress has given federal district courts jurisdiction in these matters as well. While there are a few other situations in which the high Court can exercise original jurisdiction, as a practical matter it rarely does so. Consequently this power is not very important.

The appellate jurisdiction of the Supreme Court, which has been established by Congress, *is* important, for it is under this jurisdiction that much of the law in the United States is ultimately made or reviewed. Basically, under appellate jurisdiction a case gets to the Supreme Court in one of two ways: by direct appeal or by writ of certiorari. The third way, by certification, is rarely used—so rarely that the Court hears even fewer cases by certification than under original jurisdiction.

Under appeal, the aggrieved party (the aggrieved party is the appellant; the answering party is the appellee or respondent) has a statutorily granted right to carry an appeal to the Supreme Court. When does the right to appeal exist? Following are some examples of this right:

1. When a federal circuit court says that a state statute violates the United States Constitution or that it conflicts with a federal law or a federal treaty and is invalid, the state has the right to appeal the decision to the Supreme Court.
2. When a federal court declares an act of Congress to be unconstitutional, the United States has the right to appeal the matter to the Supreme Court.
3. When a state court rules that a United States law is unconstitutional or that one of the state's own laws violates the United States Constitution, the right of appeal to the United States Supreme Court exists.

These are just some instances of when technically the Supreme Court must accept jurisdiction and hear an appeal. The word *technically* is important to note, because over the years the Court has constructed a vast loophole to escape from hearing cases under direct appeal. The Court can reject even a statutorily granted appeal if the case lacks "a substantial federal question." That is, if the Court feels that an issue is unimportant, that an issue has been decided previously by other courts, or that an issue isn't as important or as pressing as other issues, the Court can simply refuse to hear the case.

Despite the right to appeal, many litigants are turned away from the high Court without a hearing. Generally, the Supreme Court is concerned more

with construction of law than with ensuring all citizens in the land their full measure of justice. The high Court is a policy-making court. If it heard every case in which a litigant claimed he or she was treated unfairly, it would have no time to do anything else. The Supreme Court looks for cases which raise important points of law, issues which are ripe for decision, issues which are troubling lower courts, issues which need a final resolution. Sometimes a citizen who has been denied justice by the lower courts finds the Supreme Court unwilling to set things right just because it is too busy.

Only about 9 percent of the Supreme Court's business comes to it through direct appeal. The much more common way for a case to reach the nation's high Court is via a writ of certiorari. No one has the right to such a writ. It is a discretionary order issued by the Court when it feels that an important legal question has been raised. Litigants using both the federal court system and the various state court systems can seek a writ of certiorari. The most important requirement which must be met before the Court will even consider issuing a writ is that a petitioner exhaust all other legal remedies. While there are a few exceptions, this generally means that if a case begins in a federal district court, the trial level court, the petitioner must first seek a review by a United States Court of Appeals before bidding for a writ of certiorari. The writ can be sought if the court of appeals refuses to hear the case or sustains the verdict against the petitioner. All other legal remedies have then been exhausted. In state court systems every legal appeal possible must be made within the state before seeking a review by the United States Supreme Court. This usually means going through a trial court, an intermediate appeals court, and finally the state supreme court.

But occasionally the law provides for limited appeal and sometimes for no appeal at all—to wit, the case of Shufflin' Sam and the city of Louisville, Kentucky. Sam Thompson was an itinerant soul who made his way through life the best he could on the streets of Louisville. He may have been a vagrant, but he was harmless and rarely got into trouble. Sam's name was added to American legal history because he liked music and he liked to dance. Since he didn't have a radio or record player of his own, he frequently stood in the doorway of cafés and restaurants and shuffled his feet to the beat of the jukebox music playing inside. He was arrested one day during a spell of shuffling and charged with loitering and disorderly conduct. At police court he was convicted and received a small fine. The public defender felt that the law under which Sam was tried was too vague and therefore sought an appeal of the ruling. But there was no provision in the law for appeal—the lowly police court was the highest and only court which could hear the matter. Sam had exhausted all the state remedies. The next step was the United States Supreme Court. A writ was granted. In 1960 the high Court overturned the conviction and ruled that the city had presented no evidence that Sam had violated the law, and that to convict a man without evidence was a violation

of the Fifth Amendment to the Constitution (*Thompson* v. *Louisville,* 1960). This is a rare event in United States legal history—not every litigant can go from police court to Supreme Court and win.

When the Supreme Court grants a writ of certiorari, it is ordering the lower court to send the records to the high Court for review. Each request for a writ is considered by the entire nine-member Court, and an affirmative vote of four justices is required before the writ can be granted. The high Court rejects most of the petitions it receives. Again, work load is the key factor. Certain important issues must be decided each term, and the justices do not have the time to consider thoroughly most cases for which an appeal is sought. Term after term, suggestions to reduce the Court's work load are made. Chief Justice Burger has on several occasions argued that a second high Court, a court just below the Supreme Court, is needed to screen out less important cases. Theoretically, the Supreme Court would then have more time to deliberate on really important matters, while the second-level court would arbitrate less cosmic problems.

But such plans have got a cool reception from attorneys, Congress, and the public. All citizens believe that they should have the right to appeal to the Supreme Court—even if the appeal will probably be rejected, and even if the Court may never hear the case, the right to make the appeal should remain.

Hearing a case While it is impossible to go into detail about each court considered here, it is important to understand the manner in which the Supreme Court operates.

The first thing the Court does is to decide whether it will hear a case, either on appeal or via a writ of certiorari. Once a case is accepted, the attorneys for both sides have the greatest burden of work during the next few months. Oral argument on the case is scheduled, and both sides are expected to submit briefs—their legal arguments—for the Court to study before the hearing. The greatest burden at this point is on the party seeking appeal since he or she must provide the Court with a complete record of the lower court proceedings in the case. Included are trial transcripts, lower court rulings, and all sorts of other materials. Getting multiple copies of all the records is time-consuming and, more important, is quite costly.

Arguing a matter all the way to the Supreme Court takes a long time, often as long as five years—sometimes longer—from initiation of the suit until the Court gives its ruling. James Hill brought suit in New York in 1953 against Time, Inc., for invasion of privacy. The United States Supreme Court made the final ruling in the case in 1967 (*Time* v. *Hill,* 1967). Even at that the matter would not have ended had Hill decided to go back to trial, which the Supreme Court said he must if he wanted to collect damages. He chose not to.

After the nine justices study the briefs (or at least the summaries provided by their law clerks), the oral argument is held. For a generation schooled on Perry Mason and Owen Marshall, oral argument before the Supreme Court (or indeed before any court) must certainly seem strange. For one thing, the attorneys are strictly limited as to how much they may say. Each side is given a brief amount of time, often no more than an hour or ninety minutes, to present its arguments. In important cases "friends of the court" (amici curiae) are allowed to present briefs and to participate for thirty minutes in the oral arguments. For example, the American Civil Liberties Union often seeks the friend status in important civil rights cases. The attorneys' arguments are carefully planned and often scripted, to make full use of the allotted hour or so. The justices often destroy these plans by their questions and comments to participants on both sides of the issue. Sometimes the justices get into small disputes among themselves during an attorney's oral argument and use up valuable time. In some instances the justices can be downright rude as the legal advocates attempt to make their argument. For example, during oral argument on a case involving a Florida law which required newspapers to allow political candidates space to respond to editorial attacks upon them (*Miami Herald* v. *Tornillo,* 1974), former Justice William O. Douglas opened and slammed shut law books on the desk in front of him. Such behavior is a trifle disconcerting at best.

After the oral argument, which of course is given in open court with visitors welcome, is over, the members of the high Court move behind closed doors to undertake their deliberations. No one is allowed in the discussion room except members of the Court itself—no clerks, no bailiffs, no secretaries. The discussion, which often is held several days after the arguments are completed, is opened by the Chief Justice. Discussion time is limited, and by being the first speaker the Chief Justice is in a position to set the agenda, so to speak, for each case—to raise what he thinks are the key issues. Next to speak is the justice with the most seniority, and after him, the next most senior justice. The Court usually has an average of seventy-five items or cases to dispose of during one conference or discussion day; consequently brevity is valued. Each justice has just a few moments to state his thoughts on the matter. After discussion, a tentative vote is taken and recorded by each justice in a small, hinged, lockable docket book. In the voting procedure the junior justice votes first; the Chief Justice, last. The Court normally works from 10 A.M. to 5:30 P.M. on conference days in an attempt to get through all the matters before it.

Under the United States legal system, which is based so heavily upon the concept of court participation in developing and interpreting the law, a simple yes-or-no answer to any legal question is hardly sufficient. More important than the vote, for the law if not for the litigant, are the reasons for the decision.

Therefore the Supreme Court and all courts which deal with questions of law prepare what are called opinions in which the reasons, or rationale, for the decision are given. At the Supreme Court this is a complex task. One of the justices voting in the majority is asked to write what is called the Court's opinion. If the Chief Justice is in the majority, he selects the author of the opinion. If he is not, the senior associate justice in the majority makes the assignment. Either the Chief Justice or the senior associate justice can write the opinion himself.

Opinion writing is a difficult task. Getting five or six or seven people to agree to yes or no is one thing; getting them to agree upon why they say yes or no is something else. The opinion must therefore be carefully constructed. After it is drafted, it is circulated among all Court members, who make suggestions or even draft their own opinions. The opinion writer incorporates as many of these ideas as possible into the opinion to retain its majority backing. While all this is done in secret, historians have learned that rarely do court opinions reflect solely the work of the writer. They are more often a conglomeration of paragraphs and pages and sentences from the opinions of several justices. Henry Abraham, in his book *The Judicial Process*, writes that former Chief Justice Earl Warren wrote, circulated, and rewrote his opinion in the case of *Brown* v. *Board of Education* (1954) for nearly two years in an attempt to get a unanimous Court with a single opinion. (This was the case in which the Court ruled that segregation in the schools in Topeka, Kansas, violated the Constitution.)

A justice in agreement with the majority who can't be convinced to join in backing the Court's opinion has the option of writing what is called a concurring opinion. This means that the justice agrees with the outcome of the decision, but does so for different reasons than those of the majority. The late Justice Hugo Black and former Justice Douglas frequently joined in writing concurring opinions in freedom-of-expression cases. While other members of the Court often agreed that in a particular case government censorship was not appropriate, Black and Douglas often wrote opinions in which they argued that government censorship is *never* permissible.

Justices who disagree with the majority can also write an opinion, either individually or as a group, called a dissenting opinion. Dissenting opinions are very important. Sometimes, after the Court has made a decision, it becomes clear that the decision was not the proper one. The issue is often litigated again by other parties who use the arguments in the dissenting opinion as the basis for a legal claim. If enough time passes, if the composition of the Court changes sufficiently, or if the Court members change their minds, the high Court can swing to the views of the original dissenters. This is what happened in the case of *Nye* v. *U.S.* (noted earlier) when the high Court repudiated a stand it had taken in 1918 and supported instead the opinion of Justice Oliver Wendell Holmes, who had vigorously dissented in the earlier decision.

Finally, it is possible for a justice to concur with the majority in part and to dissent in part as well. That is, the justice may agree with some of the things the majority says, but disagree with other aspects of the ruling. This kind of stand by a justice, as well as an ordinary concurrence, frequently fractures the Court in such a way that in a six-to-three ruling only three persons subscribe to the Court's opinion, two others concur, the sixth concurs in part and dissents in part, and three others dissent. Such splits by the members of the Court have seemingly become more common in recent years. In several key mass media law decisions (*Branzburg* v. *Hayes*, 1972, and *Gannett* v. *DePasquale*, 1979, for example) such disarray has left substantial confusion among persons vitally interested in the issues.

The Supreme Court can dispose of a case in two other ways. A per curiam ("by the court") opinion can be prepared. This is an unsigned opinion drafted by one or more members of the majority and published as the Court's opinion. There are probably several good reasons for the publication of unsigned opinions, but these opinions normally succeed only in creating confusion among Court watchers and other persons who study decisions of the high Court. Per curiam opinions are not common, but neither are they rare.

Finally, the high Court can dispose of a case with a memorandum order—that is, it just announces the vote without giving an opinion. Or the order cites an earlier Supreme Court decision as the reason for affirming or reversing a lower court ruling. This device is quite common today as the work load of the high Court increases. In cases with little legal importance and in cases in which the issues were really resolved earlier, the Court saves a good deal of time by just announcing its decision.

One final matter in regard to voting remains for consideration: What happens in case of a tie vote? When all nine members of the Court are present, a tie vote is technically impossible. However, if there is a vacancy on the Court, only eight justices hear a case. Even when the Court is full, a particular justice may disqualify himself from hearing a case. For instance, when William Rehnquist was named an associate justice a few years ago, before the Court were several cases on which he had worked as a member of the justice department before being appointed to the Court. It would not have been fair for him to act as a judge in these matters. Former Justice Douglas also had a slight conflict of interest in cases involving Grove Press, Inc. Grove Press publishes much erotic literature and is frequently in court on charges of violating obscenity laws. Douglas was paid a small sum for writing an article for one of the Grove Press publications. However tenuous, this was said to give him an interest in the case, and he was forced to sit out several cases involving Grove Press. This situation shows that a tie vote is possible. What happens? Nothing. A tie means that the opinion of the lower court is sustained or affirmed. No opinion is written. It is almost as if the high Court had never heard the case.

During the circulation of an opinion justices have the opportunity to change sides, to change their vote. The number and membership in the majority may shift. It is not impossible for the majority to become the minority if one of the dissenters writes a particularly powerful dissent which attracts support from members originally opposed to his opinion. This event is probably very rare. Nevertheless, a vote of the Court is not final until it is announced on decision day, or opinion day. The authors of the various opinions— court opinions, concurrences, and dissents—publicly read or summarize their views. Printed copies of these documents are handed out to the parties involved and to the press. In the past, opinion day was always on Monday, and three Mondays during each month were set aside for this public reading. But on some opinion days when the Supreme Court handed down several important rulings, important cases were often overlooked by both the press and the public. Suggestions were made that the Court hand down opinions on other days as well. And that is the practice today—any day of the week can be a decision day, but it is usually Monday.

After the decision Are lower courts bound to follow United States Supreme Court decisions? The answer to that is yes and no. Since the Supreme Court is the supervisor of the federal courts, lower federal courts are bound closely by the high Court rulings. Still, occasionally lower federal courts are reluctant to follow the lead of the high Court.

The Supreme Court is not empowered to make a final judgment when it reviews a state court decision. All it can do, as Henry Abraham writes in *The Judicial Process*, is "to decide the federal issue and remand it to the state court below for final judgment 'not inconsistent with this opinion.' " However, new issues can be raised at the lower level by the state courts, and the opportunity to evade the ruling of the Supreme Court always exists. One study undertaken by the *Harvard Law Review* showed that of one hundred seventy-five cases remanded to state courts between 1941 and 1951, twenty-two of the litigants who won at the high Court level ultimately lost in the state courts following the high Court ruling. As pointed out earlier, because courts operate on a case-by-case basis the opportunity for defiance beyond the instant case is real.

Finally, the Supreme Court itself has no real way to enforce decisions and must depend upon other government agencies for enforcement of its rulings. The job normally falls to the executive branch. If perchance the president decides not to enforce a Court ruling, no legal force exists to compel him to do so. If former President Nixon, for example, had chosen to refuse to turn over the infamous Watergate tapes after the Court ruled against his arguments of executive privilege, no other agency could have forced him to give up those tapes.

At the same time, there is one force which usually works to see that Supreme Court decisions are carried out—public opinion. Political scientists frequently use the concept of "legitimacy" in connection with public opinion to describe how those "nine old men" can wield such immense power in the nation. People believe in the high Court; they have an immense amount of faith that what the Supreme Court does is probably right. This doesn't mean that they always agree with the decision. But they do agree that this is the proper way to settle disputes, and that when the Supreme Court speaks, its opinions become the rule of law. The Court helps engender this spirit or philosophy by acting in a temperate manner. It generally avoids answering highly controversial questions in which an unpopular decision could weaken its legitimacy. It calls such disputes "political questions," nonjusticiable matters. When it senses that the public is ready to accept a ruling, the Court may take on a controversial issue. Desegregation is a good example. Many people think that *Brown* v. *Board of Education* (1954) came out of the blue. Of course this isn't true. There had been almost a decade of desegregation decisions and executive actions prior to the *Brown* case. The nation was prepared for the decision, and it was generally accepted, even by the South which continued to fight desegregation tooth and nail for nearly ten years more. The high Court will continue to enjoy its legitimacy so long as it avoids rushing headlong into unsettled issues which the people consider important. Caution is the byword. This is not to say however that the high Court is conservative. It isn't, or at least it was not during the fifties and sixties and early years of the seventies. The Court frequently leads both the Congress and the executive branch in forging new social policy. It can be argued, however, that this situation reflects not the radical policy of the Court, but rather the Stone-Age thinking of Congress and the executive branch.

In summary it can be safely said that the Supreme Court of the United States is unique, that there is no other institution in the world like it, and that it plays a role in our government probably not envisioned by the drafters of the Constitution nearly two hundred years ago. In this role, it adds an important element to our democratic system. In addition, the Court gives the law and the legal process high visibility in this nation and is at least partially responsible for the stability of our democratic Republic during the past two centuries.

The United States Supreme Court is the most visible, perhaps the most glamorous (if that word is appropriate), of the federal courts. But it is not the only federal court nor even the busiest. There are two lower echelons of federal courts, plus various special courts, within the federal system. These special courts, such as the Court of Military Appeals, Court of Claims, Customs Court, and so forth, were created by the Congress to handle special kinds of problems.

The United States District Courts

Most business in the federal system begins and ends in a district court. This court was created by Congress by the Federal Judiciary Act of 1789, and today there are nearly one hundred such courts in the United States. Every state has at least one United States district court. Some states are divided into two districts: an eastern and western district or a northern and southern district. Individual districts often have more than one judge, sometimes many more than one. The Southern District of New York (a veritable hotbed of litigation), for example, has two dozen judges at work full time. Other metropolitan areas frequently have six or eight district judges.

When there is a jury trial, the case is heard in a district court. It has been estimated that about half the cases in United States district courts are heard by a jury.

The United States Courts of Appeal

At the intermediate level in the federal judiciary are the United States courts of appeal. Until thirty years ago these courts were called circuit courts of appeals, a reflection of the nation's early history when members of the Supreme Court "rode the circuit" and presided at circuit court hearings. The court of appeals was also created by the Federal Judiciary Act of 1789. Today the nation is divided into eleven circuits, and there are eleven courts of appeals. Ten of the circuits are numbered (the Second Circuit comprises Connecticut, New York, and Vermont; the Seventh, Illinois, Indiana, and Wisconsin, for example). The eleventh unnumbered circuit is the District of Columbia Court of Appeals in Washington, a very busy court which has the added responsibility of hearing direct appeals of decisions made by many of the federal regulatory agencies such as the Federal Communications Commission.

The courts of appeal are appellate courts, which means that they hear appeals from lower courts and other agencies exclusively. These courts are the last stop for nine out of ten cases in the federal system. Each circuit has nine or more judges. While all judges can hear a single case—sitting en banc it is called—more commonly three judges hear a case. It is possible for two judges to hear a case, but this is unusual. In a case of great importance all the judges hear the case, as in the Pentagon Papers case, when in both the Second Circuit Court and the District of Columbia Circuit Court, all members of the court heard the appeals from the two district courts.

Federal Judges

All federal judges are appointed by the president and must be confirmed by the Senate. The appointment is for life. The only way a federal judge can be removed is by impeachment. Nine federal judges have been impeached. Four were found guilty by the Senate, and the other five were acquitted. Impeachment and trial is a long process and one rarely undertaken.

Political affiliation plays a distinct part in the appointment of federal judges. Democratic presidents usually appoint Democratic judges, and Republican presidents appoint Republican judges. Nevertheless, it is expected that nominees to the federal bench be competent jurists. This is especially

true for appointees to the courts of appeal and to the Supreme Court. The Senate must confirm all appointments to the federal courts, a normally perfunctory act in the case of lower court judges. More careful scrutiny is given nominees to the appellate courts. The Senate has rejected twenty-one men nominated for the Supreme Court either by adverse vote or by delaying the vote so long that the appointment was withdrawn by the president, or the president left office and the new chief executive nominated a different individual.

American presidents have used various schemes to select justices to the Supreme Court, but normally most presidents ask the American Bar Association to approve a list of potential nominees. In selecting a justice to the high Court the president obviously seeks a person who reflects some of his personal philosophy. Because so many different kinds of issues confront the Court, to find someone who is both "right" on all the issues and professionally competent is virtually impossible. A potential nominee may have the same philosophy on law-and-order issues, but take a stance opposite the president on labor matters and antitrust law.

While district judges must live in the community in which they work and are therefore clearly sensitive to some public pressure, judges of the courts of appeal and the justices of the Supreme Court are quite isolated from public pressure. Hence, philosophy can change when an individual reaches the Court; judges and justices mature or change in many directions. Liberal President John Kennedy named Justice Byron White to the Supreme Court, but Justice White more often than not takes the conservative position in recent years. On the other hand conservative President Dwight Eisenhower appointed former Chief Justice Earl Warren and Justice William Brennan, two of the Court's most outstanding liberals in the last half of the twentieth century. It is difficult to predict just which way an appointee will move after reelection or reappointment is no longer a factor.

The State Court System

The constitution of every one of the fifty states either establishes a court system in that state or authorizes the legislature to do so. The court system in each of the fifty states is somewhat different from the court system in all the other states. There are, however, more similarities among than differences between the fifty states.

Its trial courts (or court) are the base of each judicial system. At the lowest level are usually what are called courts of limited jurisdiction. Some of these courts have special functions, like a traffic court which is set up to hear cases involving violations of the motor vehicle code. Some of these courts are limited to hearing cases of relative unimportance, such as trials of persons charged with misdemeanors or minor crimes or civil suits where the damages sought fall below $1,000. The court may be a municipal court set up to hear

cases involving violations of the city code. Whatever the court, the judges in these courts have limited jurisdiction and deal with a limited category of problems.

Above the lower level courts normally exist trial courts of general jurisdiction similar to the federal district courts. These courts are sometimes county courts and sometimes state courts, but whichever they are, they handle nearly all criminal and civil matters. They are primarily courts of original jurisdiction; that is, they are the first court to hear a case. However, on occasion they act as a kind of appellate court when the decisions of the courts of limited jurisdiction are challenged. When that happens, the case is retried in the trial court—the court does not simply review the law. This proceeding is called hearing a case de novo.

A jury is most likely to be found in the trial court of general jurisdiction. It is also the court in which most civil suits for libel and invasion of privacy are commenced (provided the state court has jurisdiction), in which prosecution for violating state obscenity laws starts, and in which many other media-related matters begin.

Above this court may be one or two levels of appellate courts. Every state has a supreme court, although some states don't call it that. In New York, for example, it is called the Court of Appeals, but it is the high court in the state, the court of last resort. Formerly a supreme court was the only appellate court in most states. As legal business increased and the number of appeals mounted, the need for an intermediate appellate court became evident. Therefore, in most states there is an intermediate court, usually called the court of appeals. This is the court where most appeals end. In some states it is a single court with three or more judges. More often numerous divisions within the appellate court serve various geographic regions, each division having three or more judges. Since every litigant is normally guaranteed at least one appeal, this intermediate court takes much of the pressure off the high court of the state. Rarely do individuals appeal beyond the intermediate level.

State courts of appeal tend to operate in much the same fashion as the United States courts of appeals, with cases being heard by small groups of judges, usually three at a time.

Cases not involving federal questions go no further than the high court in a state, usually called the supreme court. This court—usually a seven- or nine-member body—is the final authority regarding the construction of state laws and interpretation of the state constitution. Not even the Supreme Court of the United States can tell a state supreme court what that state's constitution means. Some years ago a group of citizens protested the use of public money to pay for crossing guards and safety devices to protect students walking to parochial schools. They sued in federal court to have the support stopped on the grounds that it violated the First Amendment to the United States Constitution which guarantees the separation of Church and State. The

United States Supreme Court ruled that the First Amendment did not prohibit a state from giving money to church-sponsored schools to pay for safety materials and crossing guards. So the citizens brought suit in state court and argued that the payments violated a similar provision of the state constitution which ensures the separation of Church and State. This time they won; the state supreme court ruled this was indeed a violation of the state constitution. The decision was final. The United States Supreme Court could not overrule it, because what was involved was interpretation of the state constitution, not of the federal Constitution.

State supreme court judges—like most state judges—are usually elected. Normally the process is nonpartisan, but because they are elected and must stand for reelection periodically, state court judges are generally a bit more politically motivated than their federal counterparts. In some states the judges or justices are appointed, and a few states have experimented with a system which both appoints and elects. Under this scheme, called the Missouri Plan, the state's high court judges (and sometimes all judges) are appointed to the bench by the governor from a list supplied by a nonpartisan judicial commission. After a one-year term the judge must stand before the people during a general election and win popular support. The voter's ballot asks "Shall Judge Smith be retained in office?" If Judge Smith wins support, his next term is usually a long one, up to twelve years. If support is not forthcoming, a new person is selected to fill the seat for one year, and at the end of the term the judge must seek voter approval.

The advantages of the Missouri Plan are appointment of a qualified person initially and eventual citizen participation in the selection process.

Judicial Review

One of the most important powers of courts and at one time one of the most controversial is the power of judicial review—that is, the right of any court to declare any law or official governmental action invalid because it violates a constitutional provision. We usually think of this in terms of the United States Constitution. However, a state court can declare an act of its legislature to be invalid because the act conflicts with a provision of the state constitution. Theoretically, any court can exercise this power. The Circuit Court of Lapeer County, Michigan, can rule that the Environmental Protection Act of 1972 is unconstitutional because it deprives citizens of their property without due process of law, something guaranteed by the Fifth Amendment to the federal Constitution. But this action isn't likely to happen, because a higher court would quickly overturn such a ruling. In fact, it is rather unusual for any court—even the United States Supreme Court—to invalidate a state or federal law on grounds that it violates the Constitution. Only about one hundred federal statutes have been overturned by the courts in the nearly two-hundred-year history of the United States. During the same period less than eight hundred state laws and state constitutional provisions have been declared

invalid. Judicial review is therefore not a power which the courts use excessively. In fact, a judicial maxim states: When a court has a choice of two or more ways in which to interpret a statute, the court should always interpret the statute in such a way that it is constitutional.

Judicial review is extremely important when matters concerning regulations of the mass media are considered. Because the First Amendment prohibits laws which abridge freedom of the press and freedom of speech, each new measure passed by the Congress, by state legislatures, and even by city councils and township boards must be measured by the yardstick of the First Amendment. Courts have the right, in fact have the duty, to nullify laws or executive actions or administrative rulings which do not meet the standards of the First Amendment. While many lawyers and legal scholars rarely consider constitutional principles in their work and rarely seek judicial review of a statute, attorneys who represent newspapers, magazines, broadcasting stations, and motion-picture theaters constantly deal with constitutional issues, primarily those of the First Amendment. The remainder of this book will illustrate the obvious fact that judicial review, a concept at the very heart of American democracy, plays an important role in maintaining the freedom of the American press, even though the power is not included in the Constitution.

LAWSUITS

Very important basics

The final topic which needs to be understood before mass media law itself is considered is what happens in a lawsuit. The brief discussion of the process which follows is simplified as much as possible. Many good books on the subject are available for persons interested in going further into the intricacies of lawsuits (some are listed in the Bibliography at the end of the chapter).

The party who commences a civil action is called the plaintiff, the person who brings the suit. The party against whom the suit is brought is called the defendant. In a libel suit the person who has been libeled is the plaintiff, and he starts the suit against the defendant— the newspaper, the magazine, the television station, or whatever. To file a civil suit is a fairly simple process. A civil suit is usually a dispute between two private parties. The government offers its good offices—the courts—to settle the matter. A government can bring a civil suit such as an antitrust action against someone, and an individual can bring a civil action against the government. But normally a civil suit is between private parties. (In a criminal action, the government always initiates the action.)

To start a civil suit the plaintiff first picks the proper court, one which has jurisdiction in the case. Then the plaintiff presents the charges in the form of a complaint. The plaintiff also summons the defendant to appear in court to answer the charges. If the defendant chooses not to answer the charges, he or she normally loses the suit by default. After the complaint is filed, a hearing is scheduled. Then the plaintiff prepares a more detailed set of charges and

arguments called pleadings, a very formal, written statement of the charge and the remedy sought. Usually the remedy involves money damages.

The defendant then prepares his or her own set of pleadings which constitute an answer to the plaintiff's charges. If there is little disagreement at this point about the facts—what happened—and that a wrong has been committed, the plaintiff and the defendant might settle their differences out of court. The defendant might say, "I guess I did libel you in this article, and I really don't have a very good defense. You asked for $15,000 in damages, would you settle for $7,500 and keep this out of court?" The plaintiff might very well answer yes, because a court trial is costly and takes a long time, and the plaintiff can also end up losing the case. Smart lawyers try to keep their clients out of court if possible and settle matters in somebody's office.

If there is disagreement, the case is likely to continue. A common move for the defendant to make at this point is to file a motion to dismiss, or a demurrer. In such a motion the defendant says this to the court: "I admit that I did everything the plaintiff says I did. On June 5, 1979, I did publish an article in which he was called a socialist. But Your Honor, it is not libelous to call someone a socialist." The plea made then is that even if everything the plaintiff asserts is true the plaintiff is not legally wronged. The law cannot help the plaintiff. The court might grant the motion, in which case the plaintiff can appeal. Or the court might refuse to grant the motion, in which case the defendant can appeal. If the motion to dismiss is ultimately rejected by all the courts up and down the line, a trial is then held. It is fair play for the defendant at that time to begin argument of the facts, in other words, to deny that his newspaper published the article containing the alleged libel.

Before the trial is held, the judge may schedule a conference between both parties in an effort to settle the matter before starting the formal hearing or at least to narrow the issues so that the trial can be shorter and less costly. If this move fails, the trial goes forward. If the facts are agreed upon by both sides and the question is merely one of law, a judge without a jury hears the case. There are no witnesses and no testimony, only legal arguments before the court. If the facts are disputed, the case can be tried before either a jury or, again, only a judge. Note that both sides must waive the right to a jury trial. In this event, the judge becomes both the fact finder and the law giver. Now, suppose that the case is heard by a jury. After all the testimony is given, all the evidence is presented, and all the arguments are made, the judge instructs the jury in the law. Instructions are often long and complex, despite attempts by judges to simplify them. Instructions guide the jury in determining guilt or innocence if certain facts are found to be true. The judge will say that if the jury finds that X is true and Y is true and Z is true, then it must find for the plaintiff, but if the jury finds that X is not true, but that R is true, then it must find for the defendant.

After deliberation the jury presents its verdict, the action by the jury. The judge then announces the judgment of the court. This is the decision of the court. The judge is not bound by the jury verdict. If he or she feels that the jury verdict is unfair or unreasonable, the judge can reverse it and rule for the other party. Needless to say this happens rarely.

If either party is unhappy with the decision, an appeal can be taken. At that time the legal designations change. The person seeking the appeal becomes the appellant. The other party becomes the appellee or respondent. The name of the party initiating the action is listed first in the name of the case. For example: Smith sues Jones for libel. The case name is *Smith* v. *Jones.* Jones loses and takes an appeal. At that point Jones becomes the party initiating the action and the case becomes *Jones* v. *Smith.* This change in designations often confuses novices in their attempt to trace a case from trial to final appeal. If Jones wins the appeal and Smith decides to appeal to a higher court, the case again becomes *Smith* v. *Jones.*

The end result of a successful civil suit is usually awarding of money damages. Sometimes the amount of damages is guided by the law, as in a suit for infringement of copyright in which the law provides that a losing defendant pay the plaintiff the amount of money he might have made if the infringement had not occurred, or at least a set number of dollars. But most of the time the damages are determined by how much the plaintiff seeks, how much the plaintiff can prove he or she lost, and how much the jury thinks the plaintiff deserves. It is not a very scientific means of determining the dollar amount. In chapter 4 in the discussion of libel damages we will see that considerable hocus-pocus is involved.

A criminal case is like a civil suit in many ways. The procedures are more formal, are more elaborate, and involve the machinery of the state to a greater extent.

The state brings the charges, usually through the county or state prosecutor. The defendant can be apprehended either before or after the charges are brought. In the federal system persons must be indicted by a grand jury, a panel of twenty-one citizens, before they can be charged with a serious crime. But most states do not use grand juries in that fashion, and the law provides that it is sufficient that the prosecutor issue an information, a formal accusation. After the defendant is charged, he or she is arraigned. An arraignment is the formal reading of the charge. It is at the arraignment that the defendant makes his formal plea of guilty or not guilty. If the plea is guilty, the judge then gives the verdict of the court and passes sentence, but usually not immediately, for presentencing reports and other procedures must be undertaken.

If the plea is not guilty, a trial is then scheduled. Some state judicial systems have an intermediate step called a preliminary hearing or preliminary examination. The preliminary hearing is held in a court below the trial court,

such as a municipal court, and the state has the responsibility of presenting enough evidence to convince the court—only a judge—that a crime has been committed and that there is sufficient evidence to believe that the defendant might possibly be involved. There is no need to convince the judge that the defendant is quilty, only that he or she might be guilty. The trial is then held in much the same fashion as is a civil trial. A jury may or may not be used—this decision is up to the defendant. The evidence is presented, the verdict is announced, the judgment is read, the sentence is imposed, and the appeals are undertaken.

In both a civil suit and a criminal case, the result of the trial is not enforced until the final appeal is exhausted. That is, a money judgment is not paid in civil suits until defendants exhaust all of their appeals. The same is true in a criminal case. Imprisonment or payment of a fine is not required until the final appeal. However, if the defendant is dangerous or if there is some question that the defendant might not surrender when the final appeal is completed, bail can be required. Bail is money given to the court to ensure appearance in court.

As stated at the outset, this chapter is designed to provide a glimpse, only a glimpse, of both our legal system and our judicial system. The discussion is in no way comprehensive, but it provides enough information to make the remaining eleven chapters meaningful. The chapter is not intended to be a substitute for a good political science course in the legal process. Students of communications law are at a distinct disadvantage if they don't have some grasp of how the systems work and what their origins are.

The United States legal and judicial systems are old and tradition bound. But they have worked fairly well for these last two hundred years. In the final analysis the job of both the law and the men and women who administer it is to balance the competing interests of society. How this balancing act is undertaken comprises the remainder of this book. The process is not always easy, but it is usually interesting.

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2 The Freedom of the Press

When a man reaches the final years of his life he often ponders how people will remember him. What aspects of his character and his contributions to society will people cherish? What will be quickly forgotten? So too is it with nations. Historians outline the important contributions made by ancient Greece and Rome, by Imperial Spain, and by the British Empire. What will historians consider the outstanding contributions of America and Americans? William O. Douglas, former associate justice of the Supreme Court of the United States, suggests that United States technology will not be the most memorable aspect of the nation's life. Instead, it will be our experiment with freedom of expression, an experiment shared with other Western democracies. Freedom of speech and freedom of the press—they are the achievements people will look upon with awe in eons to come.

No one knows whether Justice Douglas will be right. Clearly the attempt by Western democracies during the past three centuries to construct societies based upon the freedom to speak, the freedom to publish, and the freedom to criticize the government is a remarkable effort. Perhaps even more remarkable is that the experiment has worked so well. The guarantee of freedom of expression can be found in the constitution of nearly every nation. Only in a few countries such as the United States, however, are the people and the government dedicated to making the ideal come true.

The purpose of this chapter is to sketch a broad outline of the meaning of freedom of the press in the United States today. Freedom of the press is an element in all aspects of mass media—libel, invasion of privacy, obscenity, regulation of broadcasting, and so forth. Indeed, in any area in which the law touches mass media the First Amendment is a material consideration. At the

same time, broader general principles defining freedom of expression have been fashioned by the courts in the past half-century. It is these broader principles that we will focus upon in chapter 2.

HISTORICAL DEVELOPMENT

Before freedom of the press can be defined, however, a brief look at the roots of the idea, roots which wind through many centuries, is necessary. Freedom of the press is not, and was not, exclusively an American idea. We did not invent the concept—in fact, no one invented it. Like Topsy, it just grew from crude beginnings which can be traced back to Plato and Socrates. The concept developed more fully during the past four hundred years. The modern history of freedom of the press really began in England during the sixteenth and seventeenth centuries as printing developed and grew. Today the most indelible embodiment of the concept is the First Amendment to the United States Constitution, forged in the last half of the eighteenth century by the men who built upon their memory of earlier experiences. To understand the meaning of freedom of the press and freedom of speech, it is necessary to understand the meaning of censorship, for viewed from a negative position freedom of expression can be simply defined as the absence of censorship. To understand censorship it is necessary to look first at the experience of the British who fought to be free from the yoke of censorship more than four centuries ago.

Freedom of the Press in England

When William Caxton set up the first British printing press in Westminster in 1476 his printing pursuits were restricted only by his imagination and ability. There were no laws governing what he could or could not print—he was completely free. For five centuries Englishmen and Americans have attempted to regain the freedom that Caxton enjoyed, for shortly after he started publishing, the British crown began the control and regulation of printing presses in England. Printing developed during a period of great religious struggle in Europe and it soon became an important tool in that struggle. Printing presses made communication with hundreds of persons fairly easy and in doing so gave considerable power to small groups or individuals who owned and/or could use a printing press. These facts make the printing press unique in the development of mass communication, since it became a weapon in the fight for the minds of men. To understand the importance implied here, consider how other modern mass media developed. Motion pictures began as an entertainment device, radio was considered only a gadget until its commercial possibilities became evident, and television also developed as a commercial device, a twentieth-century electronic medicine show.

The British government soon realized that unrestricted publication and printing could seriously dilute its own power. Information is a powerful tool in any society, and the individual or individuals who control the flow and content of the information received by a people exercise considerable control over those people. The printing press broke the crown's monopoly of the flow of information, and therefore control of printing was essential.

In his study of censorship of the British press during the three hundred years between establishment of printing in England and the American Revolution, Frederick Siebert (*Freedom of the Press in England*) lists several means used by the crown to limit or restrict the press. Criticism of the government or of the king or the great men of the realm was called "sedition" or "seditious libel" and considered a serious crime. Whether the criticism was truthful was immaterial. In fact, for many years British courts considered truthful criticism of the government more harmful than untruthful criticism since untruthful criticism was easier to deny. Truthful criticism could more easily stir the people to dissatisfaction and anger. Hence the maxim which was the law in Britian for decades: The greater the truth, the greater the libel, that is, the more truthful the criticism, the more serious the crime.

In England, the press was licensed as well until the 1690s. Licensing meant prior censorship since all printers were forced to get prior approval to publish from the crown or the Church. Bonding ensured that printers followed the rules. Printers were required to put up large sums of money before they were allowed to print. If they violated the law or failed to assist the government in enforcing the law, they forfeited the money and were out of business until they raised another bond. The British government granted patents and monopolies to certain printers in exchange for their cooperation in publishing only acceptable material and for their assistance in locating printers who broke the law by printing without permission or printing seditious material. For their help these printers were granted exclusive rights to publish various categories of books such as spellers, Bibles, and grammar books.

These restraints were just some of the means the British used between 1476 and 1776 to control printing, and they are considered by most authorities to have been effective in controlling the press. While control was fairly effective, it did not go unchallenged. Men of ideas—writers, philosophers, even statesmen—argued for the rights of free British subjects to enjoy freedom of expression: the right to print without prior restraint and the right to criticize the government and the Church without punishment. The basic elements of what is called today the natural rights philosophy come from the ideas of these men. The natural rights philosophy asserts that man is a rational thinking creature and must be free to plot his destiny. Men may have to sacrifice some natural rights in order to live in harmony with other men in society, but basic rights such as the freedom to think, the freedom to speak, and the freedom to publish can never be denied.

The men who drafted the Constitution were well acquainted with these ideas as well as with British censorship and control of the press. In addition, the founding fathers could draw upon first-hand experience of British control of the press in the American colonies.

Freedom of the Press in Colonial America

There were laws in the United States restricting freedom of the press for almost thirty years before the first newspaper was published. As early as 1662 statutes in Massachusetts made it a crime to publish anything without first getting prior approval from the government, twenty-eight years before Benjamin Harris published the first—and last—edition of *Publick Occurrences.* The second and all subsequent issues of the paper were banned because Harris failed to get permission to publish the first edition, which contained material construed to be criticism of British policy in the colonies, as well as a report that scandalized the Massachusetts clergy because it said the French king took immoral liberties with a married woman (not his wife).

Despite an inauspicious beginning, the American colonists seemed to have had a much easier time getting their views into print than their British counterparts. There was censorship, but when the British prosecuted offenders, American juries were reluctant to convict. Also, the colonial government was less efficient, and the British had less control over the administration of its colonies in North America, making criticism of the government somewhat easier for publishers.

The British attempted to use sedition laws to control the press in America, but did not attempt to organize guilds or printing monopolies. Licensing, which died in England in 1695, continued until the 1720s in the colonies. In 1723 the government of Massachusetts forbade printer James Franklin to publish the *New England Courant* or any similar newspaper or pamphlet without government supervision. Franklin, who was Benjamin Franklin's older brother, angered officials by charging in his newspaper that the colonial government was ineffective in protecting coastal communities from raids by bands of pirates. This restraint was the dying gasp of licensing in America.

The few taxes on the press were legitimate taxes levied to raise revenues, not to censor the press. The taxes were generally ignored by publishers and printers. The most widely known tax, the Stamp Act of 1765, succeeded only in increasing disgust toward and hatred of Parliament and the king. The stamps were poorly distributed, not being available in many communities. Newspaper publishers, who were supposed to buy the stamps and affix one to each copy of papers printed and sold, devised a multitude of schemes to avoid the tax. Some publishers removed the nameplate (the name of the paper) from the first page and declared they no longer published newspapers, but pamphlets, which were not subject to the tax. Others defied the law with little fear of retribution.

The first widely publicized lawsuit in the colonies which involved a freedom of expression issue was the trial of John Peter Zenger for seditious libel. While the legal importance of the case is certainly a debatable issue, there can be no question that the case commanded (and continues to command) considerable attention. However, the *Zenger* case was not the first sedition case in the colonies.

One of the nation's leading scholars on colonial freedom of the press, Professor Harold L. Nelson, reports that at least four sedition cases occurred prior to the widely publicized trial of Zenger (*American Journal of Legal History*, 1959). Nelson found no record of subsequent sedition trials in justice courts after the Zenger case, but he did find at least four other instances in which charges of seditious libel were brought against colonists by colonial legislatures.

In the *Zenger* case, the defendant, an immigrant printer, was prosecuted because in the newspaper he published, the *New York Weekly Journal*, he printed statements which the royal governor of New York, William Cosby, believed to be critical of both him and the government. In all likelihood the *Zenger* case became famous because some of the participants wanted to make it famous. At the time freedom of expression was an important issue both in the colonies and in Great Britain, and the results of the trial, as well as a short book about the trial, were widely circulated. The case is also well known because it has all the elements needed to become well known: a noble cause, a proper villain, and a truly eloquent advocate as spokesman for freedom of the press.

Zenger's newspaper was sponsored by political opponents of Governor Cosby, who was unpopular since Cosby apparently saw his position as a means to acquire great wealth. His chief opponent was Lewis Morris, a wealthy politician who also had his eye on the money to be made from land speculation in the colony. Lewis Morris enlisted an associate, James Alexander, to publish a newspaper opposing the governor in hope of political gain. Zenger printed the newspaper and thereby became embroiled in a political dispute not of his making.

The first edition of the *New York Weekly Journal* appeared on November 5, 1733. The attacks on Cosby in subsequent editions were relentless, and in November of 1734 Zenger found himself in jail, accused of printing and publishing seditious libels which "tended to raise factions and tumults in New York, inflaming the minds of the people against the government, and disturbing the peace." Since Zenger was one of only two printers in the colony (the other printed a progovernment newspaper), Morris and Alexander had to get him out of jail if they were to continue publication of the *Journal*. Although Alexander was a lawyer, he could not defend Zenger because he was disbarred for attacking the authority of two members of the Supreme Court.

A court-appointed attorney, John Chambers, prepared to defend Zenger as the trial opened in August 1735. He was ably assisted by Andrew Hamilton, a fifty-nine-year-old Scots attorney and a renowned criminal lawyer whose interest in the case led him to come from Philadelphia to participate in the defense. Professor Stanley Nider Katz, an authority on the Zenger trial, writes

in Alexander's *A Brief Narrative on the Case and Trial of John Peter Zenger,* "Armed with years of courtroom experience and a well-prepared brief, speaking with the daring of one indifferent to the local political contests, Hamilton made short work of convincing the sympathetic jury of Zenger's injured innocence." Defying both British law and tradition with regard to seditious libel, Hamilton urged the jury to find Zenger innocent if they believed that his criticism of the government was truthful and fair. This impassioned plea caught the fancy not only of the thousands who read about the trial, but also of the members of the jury. A verdict of not guilty was returned and Zenger was freed.

Despite its fame the *Zenger* case did not, as lawyers like to say, make any "new law." The law before the trial was that truth is not a defense in a prosecution for seditious libel. This remained the law after the trial. In addition, the jury was prevented by British law from determining whether the criticism of the government was seditious. The judge made such determinations. All the jury could rule upon was whether the defendant had in fact printed or published the work. The *Zenger* case did not change that rule, either. The verdict was simply a case of jury revolt. The freemen on the jury ignored the law and found Zenger innocent.

The debate continues as to whether the Zenger trial really matters to American law. Legally, it probably does not. Politically, it is probable that the trial suggested strongly to colonial governors that future prosecutions for sedition before colonial juries were likely to fail. Historically, it is one of the best publicized instances in colonial America in which a ringing defense of freedom of the press carried the day. As such, the case is fondly remembered by most journalists and civil libertarians.

After Zenger's trial, government strategy changed. Rather than haul printers and editors before juries often hostile to the State, the government hauled printers and editors before legislatures and state assemblies which were usually hostile to journalists. The charge was not sedition, but breach of parliamentary privilege, or contempt of the assembly. There was no distinct separation of powers then, and the legislative body could order the printer to appear, question him, convict him, and penalize him. The same kinds of criticism which previously provoked a sedition trial now resulted in a trial before a colonial assembly. Only the basis of the charge was changed. In a contempt hearing the printer was accused of questioning the authority of the assembly, detracting from its honour, affronting its dignity, or impeaching its behavior, rather than of arousing general dissatisfaction among the people. Professor Nelson estimates that probably a large number of persons were brought before legislatures on such charges, but much more research is needed before all that happened during that period is known. We do know that repression of this kind was powerful and quite common. The press was as free as the colonial legislatures and assemblies permitted it to be.

The belief of many persons that freedom was a hallmark of society in colonial America ignores history. Political scientist John Roche (*Shadow and Substance*) writes persuasively that in colonial America the people and their representatives simply did not understand that freedom of thought and expression means freedom for the other fellow also, particularly for the fellow with hated ideas. Roche points out that colonial America was an open society dotted with closed enclaves—villages and towns and cities—in which citizens generally shared similar beliefs about religion and government and so forth. Citizens could hold any belief they chose and could espouse that belief, but personal safety depended upon the people in a community agreeing with a speaker or writer. If they didn't, the speaker then kept quiet or moved to another enclave where the people shared his ideas. While there was much diversity of thought in the colonies, there was often little diversity of belief within towns and cities, according to Roche.

The propaganda war which preceded the Revolution is a classic example of the situation. In Boston, the Patriots argued vigorously for the right to print what they wanted in their newspapers, even criticism of the government. Freedom of expression was their right, a God-given right, a natural right, a right of all British subjects. Many persons, however, did not favor revolution or even separation from England. Yet it was extremely difficult to publish such pro-British sentiments in many American cities after 1770. Printers who published such ideas in newspapers and handbills did so at their peril in many instances. In cities like Boston the printers were attacked, their shops were wrecked, and their papers were destroyed. Freedom of the press was a concept with limited utility in many communities for colonists who opposed revolution once the Patriots had moved the populace to their side. In other cities where the pro-British held the upper hand, colonists seeking independence published in fear for their safety.

Many small towns in the United States still operate in much the same way. There is no governmental censorship, but social censorship makes certain that alien ideas don't often find their way into the community. Many activists on both the right and the left who speak the loudest about freedom deny that freedom to their political or economic opponents without hesitation.

Freedom is often fragile, and in the United States, as well as in other countries, the government is not always the most powerful censor. The community or social pressure, sometimes violent social pressure, is often a greater villain than the law in stifling freedom of expression. The First Amendment, which is the next subject at hand, affords little protection for the publisher or speaker in these kinds of cases.

The First Amendment

As stated previously, the men who built the legal structure of this nation drew upon their colonial experience (just recounted here) in establishing a government. Freedom of expression was clearly not a new idea. British subjects both

in England and in colonial America fought for this right for nearly two centuries. The basic belief that men can best serve themselves and their society when they are exposed to a full range of opinion was an idea with broad support in all levels of society, although it was not universally accepted in colonial America.

Even before the end of the Revolution, the government of this new nation drafted its first constitution, the Articles of Confederation. The Articles provided for a loose-knit confederation of the thirteen colonies, or states. It was a weak government system and unworkable in many ways, since the separate states retained most of the power and were frequently reluctant to work in concert to solve problems which affected the entire nation. Many persons criticized the national charter because it did not contain a single article which ensured citizens the freedom of conscience, freedom of the press, or any of the other rights which Americans had insisted the British respect. The Articles of Confederation did not contain such provisions because the men who drafted the Articles did not believe such guarantees necessary. The states remained sovereign and independent under our first Constitution. The national government had little power. There was no need to forbid the national government from interfering with freedom of expression. It had no power to do so in the first place. With regard to the power of the states, most states had guarantees of freedom of expression in their state constitutions.

Virginia was fairly typical. In June 1776, nearly a month before the Declaration of Independence was signed, a new constitution containing a declaration of rights or a bill of rights was adopted. The document, written by George Mason, guaranteed citizens that the state could never impose excessive bail, that the state could never use cruel or unusual punishment, that an accused person would enjoy a speedy trial, that an accused person would not have to testify against himself, and that freedom of religion would be preserved. Section 12 of that document states: "That the freedom of the press is one of the great bulwarks of liberty and can never be restrained except by despotic governments." Other states soon followed Virginia's lead, and declarations of rights could be found in the charters of most of the new states by 1785.

The weaknesses in the confederated system of government soon became intolerable. Despite the hopes of many of the nation's new citizens who desired to see the states retain sovereignty and power in the new alliance called the United States of America, it soon became obvious that a loose collection of states could not survive. A stronger alliance was needed, an alliance that would create a nation. In the hot summer of 1787 each state sent a handful of delegates to Philadelphia to revise or amend the Articles of Confederation. It was a remarkable group of men; perhaps no such group has gathered before or since. The members were merchants and planters and professional men and

none were full-time politicians. As a group these men were by fact or inclination members of the economic, social, and intellectual aristocracy of their respective states. These men shared a common education centered around history, political philosophy, and science. Some of them spent months preparing for the meeting—studying the governments of past nations. Professor Robert Rutland (*The Birth of the Bill of Rights*) reports that James Madison outlined the history of scores of past nations and tried to determine the governmental defects which led to their ultimate downfall. While some members came to modify the Articles of Confederation, many others knew from the start that a new constitution was needed. In the end that is what they produced, a new governmental charter. The charter was far different from the Articles in that it gave vast powers to a central government. The states remained supreme in some matters, but in other matters they were forced to relinquish their sovereignty to the new federal government.

No official record of the convention was kept. The delegates deliberated behind closed doors as they drafted the new charter. However, some personal records remain. We do know, for example, that inclusion of a bill of rights in the new charter was not discussed until the last days of the convention. The Constitution was drafted in such a way as not to infringe upon state bills of rights. When the meeting was in its final week George Mason of Virginia indicated his desire that "the plan be prefaced with a Bill of Rights. . . . It would give great quiet to the people," he said, "and with the aid of the state declarations, a bill might be prepared in a few hours." Few joined Mason's call. Only one delegate, Roger Sherman of Connecticut, spoke against the suggestion. He said he favored protecting the rights of the people when it was necessary, but in this case there was no need. "The state declarations of rights are not repealed by this Constitution; and being in force are sufficient." He said that where the rights of the people are involved Congress could be trusted to preserve the rights. The states, voting as units, unanimously opposed Mason's plan. While the Virginian later attempted to add a bill of rights in a piecemeal fashion, the Constitution emerged from the convention and was placed before the people without a bill of rights.

Opposition to the proposed national charter sprung up immediately. Opponents of the charter are remembered as the anti-Federalists. Their primary complaint was that the new Constitution gave the federal government too much power. They had many other complaints, one of which was that the document lacked the guarantee that the federal government would not interfere with the rights of citizens such as freedom of expression, freedom of religion, and so forth. Thomas Jefferson, who was in France, wrote a letter to James Madison complaining about the lack of a bill of rights. The anti-Federalists argued that the new Constitution would be the supreme law of

the land, and that state declarations of rights were of little value in the face of the powerful new charter. They pointed out that the new charter gave the Congress the power to do anything necessary and proper to carry out its responsibilities under the Constitution. Congress was given the right to make war. What if Congress decided that curtailing freedom of speech was necessary and proper to making war? What was to stop Congress from undertaking such a restriction?

Supporters of the Constitution, the Federalists, worked diligently to win passage of the new charter. As part of this campaign, John Jay, James Madison, and Alexander Hamilton published a series of letters in a New York newspaper. These eighty-five letters, known today as *The Federalist* papers, represent an eloquent argument for adoption of the new Constitution in which the authors attempted to refute the arguments of the opposition. In letter eighty-four Alexander Hamilton argued that a bill of rights was not needed. Specifically, Hamilton asked in respect to a provision which guaranteed the liberty of the press, "Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" He then added:

> What signifies a declaration that "the liberty of the press shall be inviolably preserved"? What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable: and from this I infer that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend upon public opinion, and on the general spirit of the people and the government.

When the states finally voted on the matter, the Constitution was approved, but only after the Federalists had promised in several states, such as Virginia, that the first Congress would add a bill of rights.

James Madison was elected from Virginia to the House of Representatives, defeating James Monroe for the House seat only after promising his constituents to work toward adoption of a declaration of human rights. When Congress convened, Madison worked diligently toward keeping his promise. He first proposed that the new legislature incorporate a bill of rights into the body of the Constitution, but the idea was later dropped. That the Congress would adopt the declaration was not a foregone conclusion. There was much opposition, but after several months, twelve amendments were finally approved by both houses and sent to the states for ratification. Madison's original amendment dealing with freedom of expression states: "The people shall not be deprived or abridged of their right to speak, to write or to publish their sentiments and freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." Congressional committees changed the wording several

times, and the section guaranteeing freedom of expression was merged with the amendment guaranteeing freedom of religion and freedom of assembly. The final version is the version we know today:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereon; 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 grievance.

The concept of the "first freedom" has been discussed often. Historical myth tells us that because the amendment occurs first in the Bill of Rights it was considered the most important right. In fact, in the Bill of Rights presented to the states for ratification the amendment was listed third. Amendments one and two were defeated and did not become part of the Constitution. The original First Amendment called for a fixed schedule that apportioned seats in the House of Representatives on a ratio many persons thought unfair. The Second Amendment prohibited senators and representatives from altering their salaries until after a subsequent election of representatives. Both amendments were rejected, and amendment three became the First Amendment.

Passage of the last ten amendments didn't occur without struggle. Not until two years after being transmitted to the states for approval did a sufficient number of states adopt the amendments for them to become part of the Constitution. Connecticut, Georgia, and Massachusetts didn't ratify the Bill of Rights until 1941, a kind of token gesture on the one hundred fiftieth anniversary of its constitutional adoption. In 1791 approval by these states was not needed since only two-thirds of the former colonies needed to agree to the measures.

The First Amendment in the Eighteenth Century

What did the First Amendment mean in 1790? What was the accepted definition of freedom of expression at that time? There is no easy answer to these questions. One theory, held by most scholars until about twenty years ago, is that freedom of expression included at least the right to criticize the government and the right to be free from prior restraint, or from prior censorship.

Freedom from prior restraint was supposedly guaranteed to all British subjects, as well as to American subjects, even before the Revolution. As has been noted, licensing of printers came to an end in England in the 1690s and in the colonies sometime in the 1720s. Between 1765 and 1769 Sir William Blackstone, the first professor of English law at Oxford University, published four volumes summarizing the common law at that time. In *Commentaries on the Law of England* Blackstone noted that liberty of the press was essential to the nature of a free state, and defined freedom of expression as "laying no previous restraints upon publication." The law professor asserted, however, that if something improper or mischievous or illegal is printed the publisher must then take the consequences. This obligation he said, is necessary for the

preservation of peace and good order and is the only solid foundation of civil liberty. The First Amendment contained at least the prohibition against prior censorship.

American legal scholars, however, contended until recently that it contained more. They argued that one of the reasons for the Revolution was to rid the nation of the hated British sedition law. Americans, they argued, fought for the right to criticize their government and their governors. The First Amendment is a guarantee of the unrestricted discussion of public affairs.

This notion was challenged in 1960 by Professor Leonard Levy in a book entitled *Legacy of Suppression.* Levy argued that the common definition of freedom of the press in 1790 included only freedom from prior restraint. The crime of seditious libel, Levy asserted, remained intact following the adoption of the First Amendment. Basing his argument upon eighteenth-century philosophical tracts plus a few court opinions from cases involving freedom of the press issues, Levy asserted that Americans in 1790 did not believe in the unrestricted criticism of government.

Levy's book provoked a good deal of comment and research. At the University of Wisconsin, for example, scholars examined Levy's thesis in light of how juries operated between the Revolution and 1800. They also closely examined what newspaper editors wrote and printed during the same period. On the basis of this evidence they concluded that discussion and criticism of government during the period were robust and relatively free and uninhibited. Even sharp criticism of the state brought little retaliation from official sources. The few trials which did result often ended in acquittal for the publisher or pamphleteer. This evidence suggests that Professor Levy was wrong, or at least not completely right, in his assertion that the people believed unrestricted criticism of government should not go unpunished.

It must be recognized that any attempt to discern what a concept meant almost two hundred years ago is not without problems. The written residue of the period reveals only a partial story. Undoubtedly, in 1790 the First Amendment's guarantee of freedom of expression meant different things to different people. In fact, one can speculate that the inherent vagueness in the constitutional guarantee enhanced its chances of being adopted. The First Amendment could mean almost anything a citizen wanted it to mean. A more specific definition might have prompted heated debate and endangered passage of the First Amendment.

This is not to say that there was no definition of freedom of expression in 1790. On the contrary, there were probably many definitions. There was probably little consensus on the exact meaning of the concept, even among the congressmen who drafted the First Amendment. There is little consensus today on the meaning of the First Amendment. Were it not for the Supreme Court, which periodically defines the First Amendment, the law would be in

a terrible state. One is not being facetious to say that in the 1980s the First Amendment means what the Supreme Court of the United States says it means—no more and no less. It should come as no surprise that many people, sometimes a majority of the people, disagree with the high Court's definition of freedom of expression. One person says it means freedom to publish anything, another person says it means the freedom to publish anything but obscenity, and a third person qualifies it even more and says it means freedom to print anything but obscenity or material which will hurt the nation. And so it goes.

The Supreme Court had barely begun operation in 1790, and the nation was thus denied its wisdom concerning the meaning of the First Amendment. In fact the high Court has taken nearly two centuries to offer, in its case-by-case approach, a comprehensive definition of the meaning of freedom of expression in the United States. Even today some questions remain completely unanswered. For example, does the First Amendment and freedom of the press guarantee the right of the press to gather news and information for publication? The Supreme Court has never fully answered this question.

The best practical definition of freedom of expression in 1790 is the one Professor John Roche gives, which we noted earlier. In 1790 freedom of the press meant that one could publish anything the community would tolerate. If a person's beliefs fit nicely with majority sentiment, freedom of expression was broad indeed. If a person was a political or religious heretic, freedom was narrow and tenuous, and the best solution was to find another place to live, a community whose people agreed with his ideas.

SEDITIOUS LIBEL AND THE RIGHT TO OPPOSE THE GOVERNMENT

The First Amendment of the United States Constitution states:

> 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 essence of a democracy is the participation by citizens in the process of government. At its most basic level this participation is selecting leaders for the nation, the state, and the various local governments through the electoral process. Popular participation also includes examination of government and public officials to determine their fitness for serving the people. Discussion, criticism, and suggestion all play a part in the orderly transition of governments and elected leaders. The right to speak and print, then, is inherent in a nation governed by popularly elected rulers.

Whether the rights of free expression as defined in 1790 included a broad right to criticize the government, this kind of political speech has emerged as a central element of our modern understanding of the First Amendment.

The right to discuss the government, the right to criticize the government, the right to oppose the government, the right to advocate the change of the government—all of these dimensions of free speech and free press are at the center of our political philosophy today. But this hasn't always been the case. Even today we are sometimes troubled when asked to decide just how far an individual can go in criticizing or opposing the government. Can the use of force or violence be advocated as a means of changing the government? Can a citizen use the essence of democracy, free expression, to advocate the violent abolition of democracy and the establishment of a repressive state in which the rights of free speech and free press would be denied? Americans familiar with the history of the past two hundred years know these are more than academic questions. Some of the fiercest First Amendment battles have been fought over exactly these issues. Indeed, the new nation was less than ten years old when its resolve regarding freedom of expression was first put to the test. The results of the test were not encouraging.

Alien and Sedition Acts

Some basic history is needed to put the affair in perspective. In 1798 John Adams was in the third year of his presidency. As Washington's successor to the high office, Adams was also the head of the nation's first political party, the Federalist party, the party of the Constitution. It was the party which favored a strong national government. It was the party of Alexander Hamilton and Timothy Pickering and John Marshall. Arrayed against the Federalists was the party of Thomas Jefferson, the Anti-Federalist (also called the Republican, the Democratic-Republican, and the Jeffersonian) party.

The young nation was experiencing policy difficulties with the French in 1798. Some persons—usually Federalists—said that war with France was imminent. The impact of democratic ideas generated by the French Revolution clearly stirred some segments of the American population, but the stories of French espionage and plots against the United States government were largely rumors. Nevertheless, antagonism to the French and French aliens ran high in many Federalist districts. The feud with France was fueled by the Republican press, which rarely missed an opportunity to attack Adams or the Federalists. Many Republican editors were French sympathizers, and a large number were aliens, some French aliens. Journalism was not as we know it today. Newspapers were tied closely to political parties and sought to interpret news and events in terms of political affairs. Editorials in 1798 were editorials, not tame explanatory "comment" so often present in the press today. Editors were outspoken and wrote in polemical terms—they were vicious, they were vitriolic. In many instances the papers were funded either by the government or by the political party out of power.

No one will ever know whether John Adams really feared war with France and sought to stifle dissent in order for the nation to present a united front to Europe, or whether the trouble with France was a convenient excuse to muzzle some of his political enemies. In either case Adams approved of the efforts of

some extremists in the Federalist party to curb the power of the aliens, the Republicans, and the Republican press. In 1798 the Federalist Congress passed four laws known today as the Alien and Sedition Acts of 1798. The first three acts dealt with aliens: the period of residence for naturalization was extended from five to fourteen years, and the president was given the power to apprehend, restrain, and deport aliens whom he deemed to be dangerous. The sedition law was aimed directly at the Jeffersonian press. It forbade false, scandalous, and malicious publications against the United States government, the Congress, and the president. It said nothing about scandalous and malicious writing against the vice-president because Thomas Jefferson was vice-president, and the last thing the Federalists wanted to do was silence criticism of their number one political enemy. The new law also punished persons who sought to stir up sedition or urged resistance to federal laws. The punishment was a fine of as much as $2,000 and a jail term of not more than two years.

Truth was a defense in a prosecution brought under the new law, and the jury was given the power to determine whether the words were seditious. However, these safeguards proved ineffective. The courts insisted that the defendant had to prove that his statements or opinions were true. This was a reversal of the normal criminal law presumption of innocence in which the state must prove that the words are false and scandalous. Since the trials were normally held in communities dominated by Federalists, both the judge and jury were highly sensitive to criticism of the Federalist government.

The fifteen prosecutions under the law ranged from ludicrous to absurd. Speaking for the Republican party were five major newspapers in Philadelphia, Boston, New York, Richmond, and Baltimore. The editors of four of the five newspapers were prosecuted, as well as the editors of four lesser Republican newspapers. Even Congressmen did not escape. Matthew Lyon, a Republican member of Congress from Vermont, was prosecuted for publishing an article in which he asserted that under President Adams, "every consideration of the public welfare was swallowed upon in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation and selfish avarice." He also printed a letter written by a friend that suggested the president be committed to a madhouse. For these offenses against the government Congressman Lyon was fined $1,000 and spent four months in jail. While he was in jail he was reelected to Congress.

In Massachusetts two residents erected the liberty pole, a kind of 1798 billboard, which carried this inscription: No Stamp Act, No Sedition, No Alien Bill, No Land Tax; downfall to the tyrants of America, peace and retirement to the President. The two men were indicted for this crime. One recanted, saying that he really didn't mean it, that he loved his president. He was sentenced to spend six hours in jail and fined $5—the lightest punishment any defendant received. His associate refused to recant and was fined $400 and sentenced to eighteen months in jail. When he couldn't pay the fine, he spent two years in jail.

The low comedy of the entire episode was furnished by the government prosecution of Luther Baldwin, a Newark tavern lounger who was elevated to the status of Republican hero overnight after the government prosecuted him for a drunken remark made against President Adams. The president was traveling through Newark on the way to his home in Massachusetts for summer vacation. Newark celebrated the event as a festive occasion; flags were everywhere, as was the local militia. As the church bells pealed and the town cannon fired a salute to the passing president, Baldwin struggled to get to the local dramshop. As Adams passed along the street, the cannon positioned several yards beyond the president nevertheless fired in the direction the presidential party moved. One drunken soul standing outside the tavern noted, "There goes the President and they are firing at his ass." To which Luther Baldwin loudly replied, "I don't care if they fire through his ass." This remark was seditious to the Federalists in the crowd, and Luther was indicted and convicted of violating the 1798 law. He was fined $150 and spent several days in jail until money to pay his fine was raised.

Baldwin became a martyr, as did the other citizens prosecuted under the punitive and repressive law. Far from striking down dissension, Adams succeeded only in generating dissension among many persons who were formerly his supporters. The constitutional issues raised by the law never reached the Supreme Court, although the validity of the measure was sustained by Federalist judges and by three Federalist Supreme Court justices hearing cases on the circuit. The people, however, acted as a kind of court and voted Adams out of office in 1800, replacing him with his Republican foe Thomas Jefferson. Other factors prompted public dissatisfaction with the Massachusetts nationalist to be sure, but unpopularity of the alien and sedition laws cannot be underestimated. The Sedition Act expired in 1801. Jefferson pardoned all persons convicted under it, and Congress eventually repaid most of the fines.

Several lessons emerge from the experience under that set of laws. Foremost is the proposition that the First Amendment does nothing, in and of itself, to guarantee freedom of expression. The people and the courts must support the proposition before it becomes workable. In 1798 the courts were staffed with Federalists who were basically sympathetic to the law, and juries sympathetic to the Federalist cause could also be drawn quite easily. In 1798 the defense of truth didn't help much when it was framed in such a way as to force the defendant to prove the truth of his assertions. The same difficulty exists for defendants today in civil libel cases. Truth is not a very effective defense because convincing a jury of the truth of a statement or of an allegation is often very difficult. More about that later.

We discovered that in 1798 there was little consensus on what freedom of the press really means. Some of the best writing ever on the topic was published during this period as the Republicans attempted to define free expression in a way which tolerated a broader range of governmental criticism.

Tracts by men like Tunis Wortman, forgotten by most scholars for more than one hundred fifty years, have emerged in the second half of the twentieth century and offer legal scholars profound insight into how freedom of expression and stability of the government can be balanced.

Another lesson is that the nation's first peacetime sedition law left such a bad taste that another peacetime sedition law was not passed until the Smith Act of 1940.

Our brief consideration of this episode also shows that Americans (to their probable chagrin) were not really so different from their colonial forebearers on the issue of free expression, that an American president and a Congress could be as ignorant of the importance of freedom of speech as a British king and parliament.

While the last three years of the eighteenth century in the United States can be considered a period of political repression, the period clearly was no Dark Ages for freedom of expression, as some authorities assert. In fact, the period might be better called a Renaissance, because during this period difficult questions for which there seemed to be few answers were asked. The period marked the rebirth of the entire concept of freedom of expression and its meaning, and a few halting first steps toward understanding were taken. Indeed, discussion of the meaning of freedom of expression continues today.

The conflict between political criticism and freedom of expression was not dormant for the next one hundred fifteen years, but neither was it at the forefront of public discussion as in 1800 and at the approach of World War I. Debate on freedom of expression arose again during the period in which abolitionist publishers worked to end slavery in the United States. Between 1830 and 1840 both the states and the members of the federal government made serious efforts to stop the circulation of abolitionist newspapers on the grounds that they tended to incite slave revolt. The legal moves were defeated in northern states, and the Congress, instead of bowing to President Andrew Jackson's request to ban these publications from the United States mail, insisted that local postmasters had to deliver all mail, even if it contained abolitionist sentiments. Informal pressure was far more effective in stifling publication and circulation of abolitionist newspapers. This was especially true in the South where community pressure was a far more effective censor, despite the existence of laws in a few states making circulation of some abolitionist tracts punishable by death. During the antebellum period freedom of expression in most of the South meant freedom to discuss or publish only the views with which a community did not disagree.

In the North the issue of liberty of the press received a substantial airing during debates over censorial statutes in many state legislatures. However, because slavery did not touch the lives of many Northerners, persons living north of the Mason-Dixon line found it easier to stand behind a more expansive definition of freedom of expression.

Freedom of expression was an issue during the Civil War also. Some newspapers were temporarily closed in the North. The government effectively screened most war news published in the press, and Lincoln showed little sensitivity to civil liberties on some occasions. Still, the war was a national crisis of unprecedented proportions, and one way or another most persons were intimately involved in the war. Freedom of the press paled somewhat when placed next to the life-and-death struggle many persons suffered.

The right to criticize the government did not again become a controversial issue in this nation until after the turn of the century when the political "isms" of the late 1800s (socialism, anarchism, syndicalism) fused with the war in Europe. The safety of the nation appeared to be at stake, and repression once again seemed to be the proper answer.

In the late nineteenth century hundreds of thousands of Americans began to realize that democracy and capitalism were not going to bring the prosperity promised by some obscure national compact. The right to pursue happiness did not assure that one would find it. The advancing rush of the new industrial society left many Americans behind, and they were unhappy. Some of the more dissatisfied persons wanted to do something about the situation and proposed new systems of government and advanced new economic theories. The spectre of revolution arose in the minds of millions of Americans. Emma Goldman, Big Bill Haywood, and Daniel DeLeon represented salvation and hope to their tens of thousands of followers, but they represented a violent change in the comfortable status quo to many other thousands of Americans. Hadn't the radicals caused a riot in 1886 in Chicago? Hadn't they killed President McKinley in 1902? Hadn't they planted bombs along the West Coast and in the Northwest? Didn't they advocate general strikes? Didn't they want to take over the plants and factories and let the workers control production? With this threat lurking in the background, the United States found a real live bogeyman in 1917 when the nation went to war against the Hun—to win the war that would make the world safe for democracy.

Sedition in the Twentieth Century

The history of sedition law in the United States during and since World War I centers upon the struggle by courts at all levels to fashion some kind of test which permitted the government to protect itself from damaging criticism without stifling expression which is protected by the First Amendment. Beginning with cases which grew out of dissent against the war in Europe through cases in the early 1970s, federal courts, especially the Supreme Court, have made numerous attempts to develop a satisfactory test or formula. In the following section these attempts are outlined through a discussion of many of the major cases which raised this difficult problem. But before the cases can be discussed, it is necessary to look briefly at the period which many regard as the most repressive in the history of the nation, the World War I era.

World War I is probably the most unpopular war this nation fought until the Vietnam conflict of the sixties and seventies. The war was a replay of the imperial wars of the seventeenth and eighteenth centuries in Europe, except that it was fought with more deadly new weapons. Patriots were thrilled that the United States was finally asked to fight in the big leagues. Farmers and industrialists saw vast economic gains. The military believed that no more than six months or so were needed to clean up what many called at the outset "that lovely little war." So most of the ins liked the idea of going to war. But most of the outs hated it because they had to fight the war, because many were born in nations now our enemies, and because a war always signals the beginning of a period of internal political repression for the outs. When persons who opposed the war in an organized way spoke out against it, their opposition became just another excuse for suppression, fines, and jail.

Suppression of freedom of expression reached a higher level during World War I than at any other time in our history. Government prosecutions during the Vietnam War, for example, were minor compared to government action between 1918 and 1920. Vigilante groups were active as well, persecuting when the government failed to prosecute.

Two federal laws were passed to deal with persons who opposed the war and United States participation in it. In 1917 the Espionage Act was approved by the Congress and signed by President Woodrow Wilson. The measure dealt primarily with espionage problems, but some parts were aimed expressly at dissent and opposition to the war. The law provided that it was a crime to willfully convey a false report with the intent to interfere with the war effort. It was a crime to cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the armed forces. It also was a crime to willfully obstruct the recruiting or enlistment service of the United States. Punishment was a fine of not more than $10,000 or a jail term of not more than twenty years. The law also provided that material which violated the law could not be mailed.

In 1918 the Sedition Act, an amendment to the Espionage Act, was passed, making it a crime to attempt to obstruct the recruiting service. It was criminal to utter or print or write or publish disloyal or profane language which was intended to cause contempt of or scorn for the federal government, or of the Constitution, or the flag, or of the uniform of the armed forces. Penalties for violation of the law were imprisonment for as long as twenty years and/or a fine of $10,000. Approximately two thousand offenders were prosecuted under these espionage and sedition laws, and nearly nine hundred were convicted. Offenders who found themselves in the government's dragnet were usually aliens, radicals, publishers of foreign-language publications, and other persons who opposed the war.

In addition the United States Post Office Department censored thousands of newspapers, books, and pamphlets. Some publications lost their right to the government-subsidized second-class mailing rates and were forced to use the costly first-class rates or find other means of distribution. Entire issues of magazines were held up and never delivered, on the grounds that they violated the law (or what the postmaster general believed to be the law). Finally, the states were not content with allowing the federal government to deal with dissenters, and most adopted sedition statutes, laws against criminal syndicalism, laws which prohibited the display of a red flag or a black flag, and so forth.

While the Congress adopted measures making it a crime to oppose the government or to oppose the recruiting service, the courts were given the task of reconciling these laws with the guarantee of freedom of expression in the First Amendment. The courts, ultimately the Supreme Court, had to specifically define what kinds of words were protected by the First Amendment and what kinds of words were outside the range of protected speech. The United State had been in the war but a short time when the case that would become the Supreme Court's first opportunity to reconcile the First Amendment and outlaw political speech began.

The Philadelphia Socialist party authorized Charles Schenck, the general secretary of the organization, to publish 15,000 antiwar leaflets. They were distributed through the party's bookshop and mailed directly to young men who had been drafted. The publication urged the young inductees to join the Socialist party and work for the repeal of the selective service law, told the young men that the law was a violation of the Thirteenth Amendment which abolished slavery, and told the draftees that they were being discriminated against because certain young men (Quakers and clergymen) didn't have to go to war. The pamphlet also described the war as a cold-blooded and ruthless adventure propagated in the interest of the chosen few of Wall Street. Schenck and other party members were arrested, tried, and convicted of violating the Espionage Act. The Socialist appealed to the high Court, asserting that the law denied him the right of freedom of speech and freedom of the press. Justice Oliver Wendell Holmes wrote the opinion in this important case (*Schenck* v. *U.S.*, 1919). Holmes initially asserted that the main purpose of the First Amendment is to prevent prior censorship, although he conceded that the amendment might not be confined to that. In ordinary times, such pamphlets might have been harmless and considered protected speech. "But the character of every act depends upon the circumstances in which it is done. . . . 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. It is a question of proximity and degree."

Translated, this is what Holmes's proposition means. Congress has a right to outlaw certain kinds of conduct which can be harmful to society. Words, as in publications or public speeches, which can result in persons undertaking the illegal conduct can also be outlawed, and publishers or speakers can be punished without infringing upon First Amendment rights. How great must be the connection between the forbidden conduct and the words? Holmes said the words must create a "clear and present danger" that the illegal activity will result.

Needless to say, in Holmes's view the requisite clear and present danger of obstructing the recruiting service existed in the *Schenck* case, and the conviction was upheld. In two other Espionage Act cases also decided in the spring of 1919, Holmes wrote the opinion for the Court and used the clear and present danger test to affirm the convictions of Jacob Frohwerk, editor of a German-language newspaper (*Frohwerk* v. *U.S.*, 1919) and Eugene V. Debs, leader of the American Socialist party during World War I (*Debs* v. *U.S.*, 1919). The requisite clear and present danger existed in both cases, Holmes said.

Many authorities consider Oliver Wendell Holmes to be one of the great civil libertarians to sit on the Supreme Court. Consequently, it is often erroneously assumed that Holmes's "clear and present danger" test was a truly liberal attempt designed to afford maximum protection for freedom of expression. The assumption is incorrect, Holmes seemed to admit as much later in 1919 in an important dissent he wrote in *Abrams* v. *U.S.* During the summer of 1919 civil libertarians criticized rulings of the Supreme Court in the *Schenck, Frohwerk,* and *Debs* cases. Many distinguished students of the law including friends of Holmes sharply attacked the clear and present danger test. In an interesting article in the *Journal of American History* (1971) Professor Fred D. Ragan states that Holmes was aware of the criticism and during that summer became convinced that the freedom of expression established by the First Amendment was far broader than championed in his spring decisions.

In November 1919 when the Court decided its first appeal of conviction under the Sedition Act, Holmes shifted dramatically to the left. In *Abrams* v. *U.S.* (1919) the high Court upheld the convictions of five young radicals who protested the movement of American troops into the Soviet Union and called for a general strike to stop the production of munitions and arms. In writing for the majority Justice John Clarke wrote that the leaflets published by the defendants "obviously intended to provoke and to encourage resistance to the United States in the war." Whether they intended to hurt the United States was not at issue. "Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce." As Professor Ragan notes: "Thus Clarke employed criteria used by Holmes earlier in the year . . . to sustain the conviction."

Holmes, on the other hand, joined his colleague Louis Brandeis in a dissent and wrote one of the most stirring defenses of freedom of expression of the twentieth century. The jurist wrote that the ultimate good desired is better reached by free trade in ideas, that the best test of truth is the power of a thought to get accepted in the marketplace. "That, at any rate, is the theory of our Constitution," he wrote. Holmes then argued that nobody could seriously believe that the silly leaflet published by the five defendants would hinder the war effort. He turned his back on notions of probable or indirect interference with the prosecution of the war. To be guilty of resistance meant direct and immediate opposition to some effort by the United States to prosecute the war. There was no evidence of that here, Holmes concluded.

Holmes's change of heart did not spell the demise of the clear and present danger test. It was used in other sedition cases by the high Court. However the only instances in which a majority of the high Court subscribed to the test were to uphold convictions under various sedition laws. Holmes and Brandeis used the test often to argue that the requisite clear and present danger was missing, that the utterances or published materials were protected by the First Amendment. These arguments, it should be noted, were in dissenting opinions.

Landmark Civil Rights Decision

The next sedition case of significance during the postwar era was *Gitlow* v. *New York* (1925). Many scholars argue that this decision by the Supreme Court ranks as one of the most important civil rights decisions of the twentieth century, despite the fact that defendant Benjamin Gitlow lost his First Amendment appeal. Gitlow and three other persons were arrested, tried, and convicted of publishing and distributing a pamphlet which, the state of New York argued, advocated the violent overthrow of the government—a violation of the New York Criminal Anarchy Law. The pamphlet, the *Left Wing Manifesto,* was a dreadfully dull thirty-four-page political tract on revolution and social and economic change. In his book *Free Speech in the United States,* Zechariah Chafee, a renowned legal scholar of Harvard University, accurately notes, "Any agitator who read these thirty-four pages to a mob would not stir them to violence, except possibly against himself. This manifesto would disperse them faster than the riot act." Nevertheless Gitlow was sentenced to ten years in prison. In his appeal to the high Court he argued that the state criminal anarchy statute violated his freedom of expression guaranteed by the United States Constitution. In making this plea, Gitlow was asking the Court to overturn a ninety-two-year-old precedent.

In 1833 the Supreme Court of the United States ruled that the Bill of Rights, the first ten amendments to the United States Constitution, were applicable only in protecting citizens from actions of the federal government (*Barron* v. *Baltimore,* 1833). Chief Justice John Marshall ruled that the

people of the United States established the United States Constitution for their government, not for the government of the individual states. The limitations of power placed upon government by the Constitution applied only to the government of the United States. Applying this rule to the First Amendment meant that neither Congress nor the federal government could abridge freedom of the press, but that the government of New York or the government of Detroit could interfere with freedom of expression without violating the guarantees of the Constitution. The citizens of the individual states or cities could erect their own constitutional guarantees in state constitutions or city charters. Indeed, such provisions existed in many places.

As applied to the case of Benjamin Gitlow, then, it seemed unlikely that the First Amendment (which prohibited interference by the federal government with freedom of speech and press) could be erected as a barrier to protect the radical from prosecution by the state of New York. Yet this is exactly what the young Socialist argued.

Gitlow's attorneys, especially Walter Heilprin Pollak, did not attack the rule directly; instead they went around it. Pollak constructed his argument upon the Fourteenth Amendment to the Constitution which was adopted in 1868, thirty-five years after the decision in *Barron* v. *Baltimore*. The attorney argued that there was general agreement that the First Amendment protected a citizen's right to liberty of expression. The Fourteenth Amendment says in part "no state shall deprive any person of life, liberty or property, without due process of law. . . ." Pollak asserted that included among the liberties guaranteed by the Fourteenth Amendment is liberty of the press as guaranteed by the First Amendment. Therefore, a state cannot deprive a citizen of the freedom of the press which is guaranteed by the First Amendment without violating the Fourteenth Amendment. By jailing Benjamin Gitlow for exercising his right of freedom of speech granted by the First Amendment, New York State denied him the liberty assured him by the Fourteenth Amendment. Simply, then, the First Amendment as applied through the Fourteenth Amendment prohibits states and cities and counties from denying an individual freedom of speech and press.

The high Court had heard this argument before, but apparently not as persuasively as Mr. Pollak presented it. In rather casual terms Justice Edward Sanford made a startlingly new constitutional pronouncement: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement 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."

Despite this important ruling, Gitlow lost his case. Justice Sanford said that the New York law was warranted and did not violate the First Amendment nor the Fourteenth Amendment. Sanford then went on to outline his own rather novel interpretation of Holmes's clear and present danger test. He said that in passing the Espionage Act, the Congress forbade certain deeds—interference with the recruiting service, for example. In such instances when the defendant is charged with using words to promote the forbidden deeds, the courts must decide whether the language used by the accused creates a clear and present danger for bringing about the forbidden deeds. In other words, does the defendant's pamphlet create the danger that persons will in fact interfere with the recruiting service?

However, in this case, Sanford said, the New York legislature outlawed certain words—that is, words advocating violent overthrow of the government are forbidden. The clear and present danger test doesn't apply, he said. The only issue the court has to decide is, Do the words in question, in this case the *Left Wing Manifesto,* fall within the class of forbidden words, words that advocate violent overthrow of the government? The court has no power to determine in such a case if in fact the defendant's pamphlet creates the danger of a violent revolt. It is sufficient that the state has outlawed such words. Only if the judgment of the legislature is completely without foundation can the court interfere. In this case the legislature's action is warranted: Gitlow's pamphlet falls within the category of proscribed words—ten years in jail!

Holmes and Brandeis vigorously dissented, arguing that it was absurd to think that Gitlow's small band of followers posed any danger at all to the government. "It is said that this manifesto was more than a theory," Holmes wrote, "that it was an incitement. Every idea is an incitement. . . . The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result." The argument was to no avail. After three years in prison Gitlow was pardoned by Governor Alfred Smith.

The importance of the *Gitlow* case is that the high Court acknowledged that the Bill of Rights places limitations upon the actions of states and local government as well as upon the federal government. The *Gitlow* case states that freedom of speech is protected by the Fourteenth Amendment. In later cases the Court placed freedom of the press, freedom of religion, freedom from self-incrimination, and freedom from illegal search and seizure under the same protection. Today, virtually all of the rights outlined in the Bill of Rights are protected via the Fourteenth Amendment from interference by states and cities as well as by the federal government. The importance of the *Gitlow* case cannot be underestimated. It truly marked the beginning of attainment of a full measure of civil liberties for the citizens of the nation. It was the key which unlocked an important door.

Threats of Violence as Sedition

The Sanford interpretation of the clear and present danger test was next used two years later when the Supreme Court reviewed the prosecution by California of sixty-year-old philanthropist Anita Whitney for threatening the security of the state (*Whitney* v. *California,* 1927). Miss Whitney, the niece of Justice Stephen J. Field who served on the Supreme Court from 1863 to 1897, joined the Socialist party in the early 1920s. At a convention in Chicago the chapter to which Miss Whitney belonged seceded from the Socialist party and formed the Communist Labor party. The Communist Labor party held a convention in Oakland to which Miss Whitney was a delegate. She worked hard as a delegate to ensure that the new party worked through political means to capture political power, but the majority of delegates voted instead for the party to dedicate itself to gaining power through revolution and general strikes in which the workers would seize power by violent means. After this convention Miss Whitney was not active in the party, but she was nevertheless arrested three weeks after the Oakland convention and charged with violating the California Criminal Syndicalism Act which prohibited advocacy of violence to change the control or ownership of industry or to bring about political change.

Following her conviction she appealed to the high Court, arguing that the law violated the guarantees of freedom of expression. Justice Edward Sanford, writing for the majority, again ruled that the clear and present danger test did not apply, that the Califoria state legislature outlawed certain kinds of words which it deemed a danger to public peace and safety, and that the Court could not hold that the action was unreasonable or unwarranted. There was therefore no infringement upon the First Amendment.

This time Holmes and Brandeis concurred with the majority, but only, Brandeis said, because the constitutional issue of freedom of expression had not been raised sufficiently at the trial to make it an issue in the appeal. In his concurring opinion, Brandeis disagreed sharply with the majority regarding the limits of free expression. In doing so he added flesh and bones to Holmes's clear and present danger test. Looking to the *Schenck* decision, the justice noted that the Court had agreed that there must be a clear and imminent danger of a substantive evil which the state has the right to prevent before an interference with speech can be allowed. Then he went on to describe what he believed to be the requisite danger (*Whitney* v. *California*):

> 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 law-breaking heightens it 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.

Brandeis concluded that if there is time to expose through discussion the falsehoods and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.

This truly is a clear and present danger test that even the most zealous civil libertarian can live with. And this is the test that many mistakenly confuse with Holmes's original pronouncement. Unfortunately, this version of the clear and present danger test has never found its way into a majority opinion in a sedition case.

Before the last two important sedition cases decided during this century are discussed, it should be noted that in 1927 the Supreme Court first struck down a state sedition conviction because the defendant's federal constitutional rights had been violated (*Fiske* v. *Kansas,* 1927). In Kansas a man named Fiske was arrested, tried, and convicted of violating that state's criminal anarchy statute. He was an organizer for the International Workers of the World (IWW), a radical union group. The evidence the state used against him was the preamble to the IWW constitution which discussed in vague terms the struggle between workers and owners and the necessity for workers to take control of the machinery of production and to abolish the wage system. No mention was made of violence, but the state supreme court upheld the conviction on the grounds that despite the lack of specific reference to violence it was possible for the jury to read between the lines in light of the reputation of the IWW. The United States Supreme Court reversed the conviction because there was no evidence on the record to support the conviction. There was no suggestion in the testimony that Fiske used anything but lawful methods, and thus the conviction was "an arbitrary and unreasonable exercise of the police power of the state, unwarrantably infringing upon the liberty of the defendant." While this was a terribly small victory and no major liberal interpretation of the First Amendment was announced, as Zechariah Chafee (*Free Speech in the United States*) notes, "the Supreme Court for the first time made freedom of speech mean something."

The Smith Act

The Congress adopted the nation's first peacetime sedition law in 1798 and approved the second law in 1940 when it ratified the Smith Act, a measure making it a crime to advocate the violent overthrow of the government, to conspire to advocate the violent overthrow of the government, to organize a group which advocates the violent overthrow of the government, or to be a member of a group which advocates the violent overthrow of the government.

When the Sedition Act of 1918 was repealed in 1921 (the Espionage Act is still on the books, but is applicable only during wartime), the United States Department of Justice and the military sought a replacement for the act. From the early 1920s to 1940 numerous attempts were made to pass such a bill, but were always unsuccessful because labor unions, civil rights groups, farm organizations, and even the United States press sent representatives to Washington to work against the law. But in 1940, America's second peacetime sedition law, buried in an innocuous omnibus bill called the Alien Registration Act, quietly wormed its way through Congress and was signed by the president. There is no doubt that the times were different. Hitler had won stunning victories in Europe and had recently forced the French to surrender. In the Far East, rumblings of war became louder each day, and rumors were rife that the Japanese would attack Indochina momentarily.

The Smith Act, which was aimed at the Communist party, was drafted by Congressman Howard Smith of Virginia and Congressman John McCormack of Massachusetts. It received little publicity, and many months elapsed before civil libertarians realized that the act had been passed. Among others Zechariah Chafee (*Free Speech in the United States*) writes, "Not until months later did I for one realize this statute contains the most drastic restriction on freedom of speech ever enacted in the United States during peace."

While the government suggested during hearings on the measure that Congress best act quickly, lest the Communists take over the nation, the first prosecution of Communists under the Smith Act did not take place until eight years later. A small band of Trotskyites, members of the Socialist Workers party, were prosecuted and convicted in 1943, but not until 1948 did a federal grand jury indict twelve of the nation's leading Communists for advocating the violent overthrow of the United States government. The trial began in January 1949 and lasted nine months. Eleven defendants (one became sick during the trial and was excused temporarily) were convicted, including Eugene V. Dennis, one of the party leaders in the United States. The trial judge, Harold Medina, who was presiding at his first criminal trial after being appointed a federal district judge, told the jury that the statute did not prohibit discussing the propriety of overthrowing the government by force or violence, but "the teaching and advocacy of action for the accomplishment of that purpose by language reasonably and ordinarily calculated to incite persons to such action." In other words, the Smith Act prohibited the teaching or advocacy of action aimed at the violent overthrow of the government.

The convictions were appealed all the way to the Supreme Court, and in *Dennis* v. *U.S.* (1951) the high Court once again was called upon to outline the limitations which might be constitutionally applied against persons who oppose the government. In arguing that the Smith Act violated the guarantees of freedom of speech and press in the First Amendment, the defendants raised

the almost thirty-year-old clear and present danger test as a barrier to the prosecution. The actions of this small band of Communists did not represent a clear and present danger to the nation, they argued. Chief Justice Fred Vinson wrote the opinion for the Supreme Court in the seven-to-two ruling that upheld the constitutionality of the federal sedition law. In considering the clear and present danger test, Vinson could have chosen to adopt the crabbed view of freedom of expression enunciated by Holmes in the *Schenck* case, or he could have followed Brandeis's more liberal exposition of the test from the *Whitney* decision. Vinson ended up creating a new test which fell politically somewhere between the tests outlined by Holmes in 1919 and Brandeis in 1927.

Vinson first insisted that the evil involved in the case (the evil which Congress has the right to prevent) was a substantial one, the overthrow of the government. That was the professed aim of the Communists, no doubt, but it wasn't very realistic. That doesn't matter, Vinson wrote, rejecting the contention that success or probability of success is the criterion, "Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt." However, Vinson equated advocacy of overthrow with actual attempt at overthrow. It could be asked, how likely is it that the words spoken or written by the defendants would lead even to an attempted overthrow? Vinson's opinion was a far cry from Justice Brandeis's statement in *Whitney*. Recall Brandeis's words: "But even advocacy of violation (of the law), 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 upon. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind."

Vinson outlined the test used by Judge Learned Hand when the Second United States Court of Appeals sustained the conviction of the eleven Communists. "In each case [courts] must ask whether the gravity of the 'evil,' discounted by improbability, justifies such invasion of free speech as is necessary to avoid the danger." Vinson said, "We adopt this statement of the rule."

The clear and probable danger test really says little more than the original Holmes clear and present danger test if Holmes's exposition in the *Debs*, *Frohwerk*, and *Schenck* cases are added. If the gravity of the evil is considered, Holmes said that the evil must be substantive or serious. Hand said that the probability of what might occur must be considered. What might occur?

Might the overthrow succeed? Might the overthrow be attempted? Might the words lead someone to attempt an overthrow? What kind of danger are we trying to avoid? The issue is so unclear.

One could speculate that if the clear and present danger test as articulated by Justice Brandeis had been applied in this case the convictions would have gone out the window. The danger wasn't clear, nor was it present. However, in the atmosphere of 1951, such was not likely. We were in the midst of both a cold war with the Soviet Union and a hot war with the North Koreans and Communist Chinese, and as was said previously, the Supreme Court (all courts for that matter) are political bodies at least to some extent.

Chief Justice Vinson made one additional important observation. Almost in passing, he noted that the Smith Act is aimed at advocacy, not at discussion. Judge Medina said the law is aimed at advocacy of action or at the teaching of action aimed at violent overthrow. Justice Vinson said the law is aimed at advocacy, and that is all.

After the government's success in the *Dennis* case, more prosecutions were initiated against Communists in the United States. Seven separate prosecutions were started in 1951, three in 1952, one in 1953, and five more during the next three years. One trial begun in late 1951 involved the top Communist leadership on the West Coast. At the trial after hearing both sides, Judge William C. Mathes told the jury that any advocacy dealing with the forcible overthrow of the government and presented with a specific intent to accomplish the overthrow is illegal under the Smith Act. This is about what Vinson said in the *Dennis* case, but is far different from the standard used by Judge Medina in the *Dennis* trial. The defendants appealed their conviction, and six years later, in 1957, the Supreme Court voted five to two to reverse the convictions (*Yates* v. *U.S.*, 1957). On what grounds? Several factors influenced the reversal in *Yates* v. *U.S.*, but the basic reason is that Judge Mathes failed to distinguish between the advocacy of forcible overthrow as an abstract doctrine and the advocacy of action aimed at the forcible overthrow of the government. The Smith Act reaches only advocacy of action for the overthrow of government by force and violence, Justice John Marshall Harlan wrote for the court. "The essential distinction," Harlan notes, "is that those to whom the advocacy is addressed must be urged to do something now or in the future, rather than merely to believe in something." How specific must this advocacy of action be? It does not have to be immediate action; it can be action in the future. But it must be an urge to do something: form an army, blow up a bridge, prepare for sabotage, train for street fighting, and so forth.

The government was unprepared to meet this new burden of proof. Far more evidence is needed to prove that someone has urged people to do something than to prove that someone has merely urged them to believe something. All but one of the cases pending were dismissed. The defendants in the single case that was tried were set free on an evidentiary issue (*Bary* v. *U.S.*, 1957)

and were never retried. In fact, there has not been a single successful prosecution for advocacy of violent overthrow since the *Yates* decision. One successful prosecution under the membership clause of the Smith Act has occurred, but it was in 1961 (*Scales* v. *U.S.*, 1961).

To his credit, Justice Harlan did not attempt to apply either the clear and present danger test or the clear and probable danger test. This consideration wasn't necessary since the constitutionality of the law is not the heart of the appeal in the *Yates* case as it is in *Dennis*. Still, the temptation to take a crack at defining that catchy little phrase must have been great.

Few sedition trials have occurred since 1957. In 1969, the Supreme Court once again looked at a state sedition law in *Brandenburg* v. *Ohio* (1969). In this case a Ku Klux Klan leader was prosecuted by the state of Ohio for advocating unlawful methods of terrorism and crime as a means of accomplishing industrial and political reform. The high Court voided his conviction on the grounds that the Ohio law failed to distinguish between the advocacy of ideas and the incitement to unlawful conduct. In its per curiam opinion the Court said, "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 or is likely to incite or produce such actions." This opinion came close to how Louis Brandeis outlined the clear and present danger test in 1927 in the *Whitney* case.

The famous Holmes test is not dead by any means. It still lives, for example, in criminal contempt law where the high Court has fashioned it into a workable test to protect both courts and defendants from the interference of the mass media in the judicial process. If it is not dead, the test is certainly lifeless with regard to sedition law, partly because sedition law is not nearly so robust as it was forty years ago. The Communists long since ceased to be a threat in this nation. In fact one author suggests that the party is currently alive only because it is subsidized by the United States government. Indeed, political scientist John Roche (*Shadow and Substance*) asserts that if the many undercover FBI agents who are members of the party were to withdraw their membership and stop paying dues the party would collapse.

More seriously, the federal government chose not to use sedition laws in prosecuting protestors and dissidents during the Vietnam War. Instead the government used rather exotic conspiracy laws and still enjoyed little success. The Smith Act is still on the books, and it probably could have been used against some antiwar leaders. But it was not. The law is not popular today. Sedition laws are not popular today. When people feel little direct threat to their well-being, they are willing to exercise a remarkable range of tolerance of unpopular ideas and suggestions. Unpopular or unorthodox speakers and writers are written off as kooks, which in many cases they are. However,

should there occur another serious war, a deep depression which causes loss of confidence in the government, or other situation in which people feel threatened, what could happen is difficult to predict.

Today, in the last quarter of the twentieth century, Americans probably enjoy as much right to oppose their government as do citizens in any other nation in the world, and more of this freedom is enjoyed now than at any other time during this century, perhaps during the lifetime of the Republic. If the legal tests used to measure the danger of words seem really to be silly little word games devised by grown men to fill their time, that outlook is in some respects correct. However, the games are devised more in desperation than for any other reason, for democracy has not yet solved the problem of determining how far to go in allowing dissent which attacks the system of government itself. Scholars continue to argue about using this test or that test. Judges and legal scholars continue to look for the correct formula, the key which will provide both maximum freedom and maximum safety. The key probably does not exist. But it is man's nature to continue to search.

THE PROBLEM OF PRIOR RESTRAINT

The great compiler of the British law William Blackstone defined freedom of the press in the 1760s as freedom from "previous restraint," or prior restraint. Regardless of the difference of opinion on whether the First Amendment is intended to protect political criticism, most students of the constitutional period agree that the guarantees of freedom of speech and press were intended to bar the government from exercising prior restraint. Despite the weight of such authority, the media in the United States in the 1980s still faces instances of prepublication censorship. The issue is clearly not completely settled.

Prior censorship, or prior restraint, is probably the most insidious kind of government control. Speakers and publishers are stopped before they can speak or print. The people are not allowed to discover what was going to be said or published. We are denied the benefit of these ideas or suggestions or criticisms.

Prior censorship is difficult to define, as scores of laws or government actions hold the potential for a kind of prior restraint. In privacy law, for example, it is possible under some statutes to stop the publication of material which illegally appropriates a person's name or likeness. In extreme cases the press can be stopped from publishing information it has learned in a criminal case. The two instances just mentioned as well as others will be discussed fully in later, more appropriate sections of this book. The purpose of this section is to outline those kinds of prior restraint that seem to fall outside the boundaries of other chapters in the book. We will therefore discuss injunctions against public nuisances, laws which place limits on when and where materials may be distributed, cases involving national security matters, and other topics.

Public Nuisance Statutes

The Supreme Court did not consider the issue of prior restraint until more than a decade after it had decided its first major sedition case. In 1931 in *Near* v. *Minnesota* the high Court struck an important blow for freedom of expression.

Near v. *Minnesota*

City and county officials in Minneapolis, Minnesota, brought a legal action against Jay M. Near and Howard Guilford, publishers of the *Saturday Press*, a small weekly newspaper. Near and Guilford were reformers whose purpose was to clean up city and county government in Minneapolis. In their attacks upon corruption in city government, they used language which was far from temperate and defamed some of the town's leading government officials. Near and Guilford charged that Jewish gangsters were in control of gambling, bootlegging, and racketeering in the city, and that city government and its law enforcement agencies did not perform their duties energetically. They repeated these charges over and over in a highly inflammatory manner.

Minnesota had a statute which empowered a court to declare any obscene, lewd, lascivious, malicious, scandalous, or defamatory publication a public nuisance. When such a publication was deemed a public nuisance, the court issued an injunction against future publication or distribution. Violation of the injunction resulted in punishment for contempt of court.

In 1927 County Attorney Floyd Olson initiated an action against the *Saturday Press*. A district court declared the newspaper a public nuisance and "perpetually enjoined" publication of the *Saturday Press*. The only way either Near or Guilford would be able to publish the newspaper again was to convince the court that their newspaper would remain free of objectionable material. In 1928 the Minnesota Supreme Court upheld the constitutionality of the law, declaring that under its broad police power the state can regulate public nuisances, including defamatory and scandalous newspapers.

The case then went to the United States Supreme Court which reversed the ruling by the state supreme court. The nuisance statute was declared unconstitutional. Chief Justice Charles Evans Hughes wrote the opinion for the Court in the five-to-four ruling, saying that the statute in question was not designed to redress wrongs to individuals attacked by the newspaper. Instead, the statute was directed at suppressing the *Saturday Press* once and for all. The object of the law, Hughes wrote, was not punishment but censorship—not only of a single issue, but also of all future issues—which is not consistent with the traditional concept of freedom of the press. That is, the statute constituted prior restraint, and prior restraint is clearly a violation of the First Amendment.

One maxim in the law holds that when a judge writes an opinion for a court he should stick to the problem at hand, that he shouldn't wander off and talk about matters that don't really concern the issue before the court.

Such remarks are considered dicta, or words that don't really apply to the case. These words, these dicta, are never really considered an important part of the ruling in the case. Chief Justice Hughes's opinion in *Near* v. *Minnesota* contains a good deal of dicta.

In this case Hughes wrote that the prior restraint of the *Saturday Press* was unconstitutional, but in some circumstances, he added, prior restraint might be permissible. In what kinds of circumstances? The government can constitutionally stop publication of obscenity, the government can stop publication of material which incites people to acts of violence, and it may prohibit publication of certain kinds of materials during wartime. Hughes admitted, on the other hand, defining freedom of the press as the only freedom from prior restraint is equally wrong, for in many cases punishment after publication imposes effective censorship upon the freedom of expression.

Near v. *Minnesota* stands for the proposition that under American law prior censorship is permitted only in very unusual circumstances; it is the exception, not the rule. Courts have reinforced this interpretation many times since 1931. Despite this considerable litigation, we still lack a complete understanding of the kinds of circumstances in which prior restraint might be acceptable under the First Amendment, as a series of recent cases (some of which are concerned with national security) illustrate.

Austin v. *Keefe*

A case that to some extent reinforced the *Near* ruling involved the attempt of a real estate broker to stop a neighborhood community action group from distributing pamphlets about him (*Organization for a Better Austin* v. *Keefe,* 1971). The Organization for a Better Austin was a community organization in the Austin suburb of Chicago. Its goal was to stabilize the population in the integrated community. Members were opposed to the tactics of certain real estate brokers who came into white neighborhoods, spread the word that blacks were moving in, bought up the white-owned homes cheaply in the ensuing panic, and then resold them at a good profit to blacks or other whites. The organization received pledges from most real estate firms in the area to stop these blockbusting tactics. But Jerome Keefe refused to make such an agreement. The comunity group then printed leaflets and flyers describing his activities and handed them out in Westchester, the community in which Keefe lived. Group members told the Westchester residents that Keefe was a "panic peddler" and said they would stop distributing the leaflets in Westchester as soon as Keefe agreed to stop his blockbusting real estate tactics. Keefe went to court and obtained an injunction which prohibited further distribution by the community club of pamphlets, leaflets, or literature of any kind in Westchester on the grounds that the material constituted an invasion of Keefe's privacy and caused him irreparable harm. The Organization for a Better Austin appealed the ruling to the United States Supreme Court. In May 1971 the high Court dissolved the injunction. Chief Justice Warren Burger wrote,

"The injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights." He said that the injunction, as in the *Near* case, did not seek to redress individual wrongs, but instead sought to suppress on the basis of one or two handbills the distribution of any kind of literature in a city of 18,000 inhabitants. Keefe argued that the purpose of the handbills was not to inform the community, but to force him to sign an agreement. The Chief Justice said this argument was immaterial and was not sufficient cause to remove the leaflets and flyers from the protection of the First Amendment. Justice Burger added (*Austin* v. *Keefe):*

> Petitioners [the community group] were engaged openly and vigorously in making the public aware of respondent's [Keefe's] real estate practices. Those practices were offensive to them, as the views and practices of the petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.

The *Keefe* case did a good job of reinforcing the high Court's decision in *Near* v. *Minnesota.*

National Security Issues

While it is more famous, another 1971 decision is not as strong a statement in behalf of freedom of expression as either *Near* or *Keefe.* This is the famous Pentagon Papers decision (*New York Times Co.* v. *U.S.; U.S.* v. *Washington Post,* 1971). While the political implications of the ruling are very important, the ruling itself is legally quite unsatisfying.

Pentagon Papers Case

As many remember, the case began in the summer of 1971 when the *New York Times,* followed by the *Washington Post* and a handful of other newspapers, began publication of a series of articles based on a top-secret forty-seven-volume government study entitled "History of the United States Decision-Making Process on Vietnam Policy." The day after the initial article on the Pentagon Papers appeared, Attorney General John Mitchell asked the *New York Times* to stop publication of the material. When the *Times*'s publisher refused, the government went to court to get an injunction to force the newspaper to stop the series. A temporary restraining order was granted as the case wound its way to the Supreme Court. Such an order was also imposed upon the *Washington Post* after it began to publish reports based on the same material.

At first the government argued that the publication of this material violated federal espionage statutes. When that assertion didn't satisfy the lower federal courts, the government argued that the president had inherent power under his constitutional mandate to conduct foreign affairs to protect the national security, which includes the right to classify documents secret and top secret. Publication of this material by the newspapers was unauthorized

disclosure of such material and should be stopped. This argument didn't satisfy the courts either, and by the time the case came before the Supreme Court the government argument was that publication of these papers might result in irreparable harm to the nation and its ability to conduct foreign affairs. The *Times* and the *Post,* consistently made two arguments. First, they said that the classification system is a sham, that people in the government declassify documents almost at will when they want to sway public opinion or influence a reporter's story. Second, the press also argued that an injunction against the continued publication of this material violated the First Amendment. Interestingly, the newspapers did not argue that under all circumstances prior restraint is in conflict with the First Amendment. Defense Attorney Professor Alexander Bickel argued that under some circumstances prior restraint is acceptable, for example, when the publication of a document has a direct link with a grave event which is immediate and visible. Former Justice William O. Douglas noted that this is a strange argument for newspapers to make—and it is. Apparently both newspapers decided that a victory in that immediate case was far more imporant than to establish a definitive and long-lasting constitutional principle. They therefore concentrated on winning the case, acknowledging that in future cases prior restraint might be permissible.

On June 30 the high Court ruled six to three in favor of the *New York Times* and the *Washington Post.* The Court did not grant a permanent injunction against the publication of the Pentagon Papers, but the ruling was hardly the kind which strengthened the First Amendment. In a very short per curiam opinion the majority said that in a case involving the prior restraint of a publication the government bears a heavy burden to justify such a restraint. In this case the government failed to show the Court why such a restraint should be imposed upon the two newspapers. In other words, the government failed to justify its request for the permanent restraining order.

The decision rested upon a First Amendment doctrine called the preferred position doctrine. Normally, when a legislature passes a law, or the government takes some action based upon a law, it is presumed that these laws or actions are constitutional. In other words, the laws or actions do not violate the Constitution. Therefore when the constitutionality of a law or a government action is challenged, the Court presumes constitutionality, and the challenger bears the burden of proof to show that the law or action is not constitutional. For example, if someone challenges the constitutionality of laws making it a crime to transport dangerous drugs across state lines on the grounds that Congress has no power to regulate such material, it is up to the challenger to prove that Congress in fact has no power. All the government technically has to do is say that Congress does have the power. The challenger must prove that it does not. This principle is called the presumption of constitutionality.

However, when the issue involved is freedom of expression, the presumption of constitutionality does not apply. In 1938 in *U.S.* v. *Carolene Products Co.*, Justice Harlan Fiske Stone suggested obliquely that when the government passes a law or takes an action involving basic civil liberties, when it does something which appears on the face to be prohibited by the Bill of Rights, the government bears the burden of justifying its action. A citizen should not have to prove that what the government did is unconstitutional. This principle is called the preferred-position doctrine, and while it applies to all rights guaranteed by the first ten amendments to the Constitution, the doctrine has been fully developed with regard to the First Amendment.

Applying that doctrine in *New York Times Co.* v. *U.S.*, the Supreme Court simply said that the government failed to show the Court why its request for an injunction was not a violation of the First Amendment. The Court did not say that in all similar cases an injunction would violate the First Amendment; it did not even say that in this case an injunction was a violation of the First Amendment. It merely said that the government had not shown why the injunction was not a violation of freedom of the press. The decision is not what you would call a ringing defense of the right of free expression.

In addition to the brief unsigned opinion from the majority, the Chief Justice and each of the eight associate justices wrote short individual opinions. They were not very instructive, but should be noted anyway.

Justices Black and Douglas clung to their absolute position and argued that they could conceive of no circumstance under which the government can properly interfere with freedom of expression. Debate on public questions must be open and robust, Justice Douglas wrote. Justice William Brennan echoed the Court's opinion: there was no proof that the publication of the papers would damage the national security or the nation. Justice Potter Stewart agreed and attacked the notion of classifying public documents and excessive secrecy in government. "For when everything is classified," he wrote, "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."

Justice Byron White supported the notion that the government lacked the evidence needed to sustain an injunction. But Justice White added that he believed the publication of the material would damage the national interest, and if the government chose to bring the newspapers back to court for criminal prosecution for violating an espionage statute, he could surely support a conviction. These last remarks are another example of dicta. The last member of the majority, Justice Thurgood Marshall, said he did not believe the president has the right to classify documents in the first place, that Congress has consistently rejected giving the executive this power, and that consequently the Court should not support such questionable authority.

All three of the dissenters, Chief Justice Warren Burger, Justice John M. Harlan, and Justice Harry Blackmun, complained that there had not been sufficient time to properly consider the case. The issues were too important for such a rush to judgment, Justice Burger said, noting his dissent was not based upon the merits of the case. Harlan and Blackmun did dissent on the merits. Harlan argued that foreign relations and national security are both concerns of other branches of the government, and the Court should accept the government's assertions in this case—even without evidence—that disclosure of the material in the Pentagon Papers would substantially harm the government. Justice Blackmun wanted to send the case back to the trial courts for fuller exposition of the facts and to allow the government more time to prepare its case.

What many people at first called the case of the century ended in a fizzle, at least with regard to developing First Amendment law. The press won the day; the Pentagon Papers were published. But thoughtful observers expressed concern over the ruling. A majority of the Court had not ruled that such prior restraint was unconstitutional—only that the government had failed to meet the heavy burden of showing such restraint was necessary in this case.

Progressive Magazine Case

The fragile nature of the Court's holding became clear in early 1979 when the government again went to court to block the publication of material it claimed could endanger the national security (*U.S.* v. *Progressive*, 1979). Free-lance writer Howard Morland had prepared an article entitled "The H-Bomb Secret: How We Got It, Why We're Telling It." The piece was scheduled to be published in the April edition of the *Progressive* magazine, a seventy-year-old political digest founded by Robert M. LaFollette as a voice of the progressive movement.

Morland had gathered the material for the article from unclassified sources. After completing an early draft of the piece, he sought technical criticism from various scholars. Somehow a copy found its way to officials in the federal government. With the cat out of the bag, *Progressive* editor Erwin Knoll sent a final draft to the government for prepublication comments on technical accuracy. The government said the piece was too accurate and moved into federal court to stop the magazine from publishing the story.

The defendants in the case argued that all the information in the article was in the public domain, that any citizen could have gotten the same material by going to the Department of Energy, federal libraries, and the like. Other nations already had this information or could easily get it. Experts testifying in behalf of the magazine argued that the article was a harmless exposition of some exotic nuclear technology.

The government disagreed. It said that while some of the material was in the public domain much of the data were not publicly available. Prosecutors and a battery of technical experts argued that the article contained a core of information that had never before been published. The United States also

argued that it was immaterial where Morland had got his information and whether it had come from classified or public documents. Prosecutors argued that the nation's national security interest permitted the classification and censorship of even information originating in the public domain if, when such information is drawn together, synthesized, and collated, it acquires the character "of presenting immediate, direct and irreparable harm to the interests of the United States." The United States was arguing, then, that some material is automatically classified as soon as it is created if it has the potential to cause harm to the nation. The information in Morland's article met this description, prosecutors argued.

It fell to United States District Judge Robert Warren to evaluate the conflicting claims and reach a decision on the government's request to enjoin the publication of the piece. In a thoughtful opinion in which Warren attempted to sort out the issues in the case, he agreed with the government that there were concepts in the article not found in the public realm—concepts vital to the operation of a thermonuclear bomb. Was the piece a do-it-yourself-guide for a hydrogen bomb? No, Warren said, it was not. "A number of affidavits make quite clear that a sine qua non to thermonuclear capability is a large, sophisticated industrial capability coupled with a coterie of imaginative, resourceful scientists and technicians." But the article could provide some nations with a ticket to bypass blind alleys and help a medium-sized nation to move faster in developing a hydrogen bomb.

To the *Progressive*'s argument that the publication of the article would provide people with the information needed to make an informed decision on nuclear issues, Warren wrote, "This Court can find no plausible reason why the public needs to know the technical details about hydrogen bomb construction to carry on an informed debate on this issue."

Looking to the legal issues in the case Warren said he saw three differences between this case and the *Pentagon Papers* ruling of 1971. The Pentagon Papers themselves were a historical study; the Morland article was of immediate concern. In the *Pentagon Papers* case there had been no cogent national security reasons advanced by the government when it sought to enjoin the publication of the study. The national security interest is considerably more apparent in the *Progressive* case, Warren noted. Finally, the government lacked substantial legal authority to stop the publication of the Pentagon Papers. The laws raised by the government were vague, not at all appropriate. But Section 2274 of the Atomic Energy Act of 1954 is quite specific in prohibiting anyone from communicating or disclosing any restricted data to any persons "with reasons to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation." Section 2014 of the same act defined restricted data to include information on the design, manufacture, or utilization of atomic weapons.

Warren concluded that the government had met the heavy burden of showing justification for prior restraint. The judge added that he was not convinced that suppression of the objected-to technical portions of the article would impede the *Progressive* in its crusade to stimulate public debate on the issue of nuclear armament. "What is involved here," Warren concluded, "is information dealing with the most destructive weapon in the history of mankind, information of sufficient destructive potential to nullify the right to free speech and to endanger the right to life itself."

When the injunction was issued, the editors of the *Progressive* and their supporters inside and outside the press vowed to appeal the ruling—to the Supreme Court if necessary. Yet there was a distinct uneasiness among even many persons who sided with the publication. Judge Warren had done a professional job of distinguishing this case from the *Pentagon Papers* ruling. There were important differences. The membership on the high Court had changed as well. Black and Douglas, who both voted against the government in 1971, had left the Court, as had Harlan who voted with the government. Some newspapers, the *Washington Post* and the *New York Times*, for example, expressed the fear that a damaging precedent could emerge from the Supreme Court if the *Progressive* case ultimately reached the high tribunal.

Then in September of 1979, as the *Progressive* case began its slow ascent up the appellate ladder, a small newspaper in Madison, Wisconsin, published a story containing much of the same information in the Morland article. When this occurred, the Department of Justice unhappily withdrew its suit against the *Progressive* (*U.S.* v. *Progressive*, 1979). The confrontation between the press and the government in the Supreme Court was averted. Many journalists expressed relief.

But the victory in the *Progressive* case was bittersweet at best. The publication of the article had been enjoined. A considerable body of legal opinion supported the notion that the injunction would have been sustained by the Supreme Court, rightly or wrongly. Prior restraint, which had seemed quite distant in the years succeeding *Near* v. *Minnesota* and in the afterglow of the press victory in the *Pentagon Papers* case, took on realistic and frightening new proportions.

"Fighting-Words" Doctrine

While national security issues are frequently the source of prior restraint problems, other issues can provoke authorities to the application of restraint. In 1942, in the case of *Chaplinsky* v. *New Hampshire*, the Supreme Court identified one category of speech in which the application of prior censorship is not necessarily a violation of the First Amendment. Justice Frank Murphy wrote:

> There are certain well-defined and narrowly limited classes of speech, the *prevention* [emphasis added] and punishment of which have never been thought to raise any constitutional problems. These include . . . fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the

> peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

In the *Chaplinsky* case a Jehovah's Witness, who sought to distribute pamphlets denouncing religion as a fraud in Rochester, New Hampshire, angered citizens. When warned by a law officer of the danger to his safety, the Witness called the marshal a "God-damned racketeer" and a "damned Facist." He was convicted of violating a state statute which forbid any person to "address any offensive, derisive, or annoying words, to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name."

The prohibition of this kind of verbal assault is permissible so long as the statutes are carefully drawn and do not permit the application of the law to protected speech. Also, the "fighting words" must be used in a personal, face-to-face encounter—a true verbal assault. In 1972 the Supreme Court ruled that laws on the subject must be limited to words "that have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed" (*Gooding* v. *Wilson*, 1972).

The 1977 confrontation in Skokie, Illinois, between Nazi protesters and city officials presents a contemporary example of a multitude of free-speech problems including the so-called fighting-words doctrine. In 1976 members of the National Socialist party said they planned to peacefully demonstrate in Skokie, a community with a large Jewish population, to protest the racial integration of nearby Chicago schools. The protest was prohibited by village officials who said the Nazis had failed to obtain $350,000 worth of liability and property damage insurance as required by a Skokie Park District ordinance.

After the Nazis announced that they planned to protest against the insurance ordinance, the village obtained a temporary restraining order blocking the demonstration and then adopted three new ordinances regarding public marches and protests. In addition to the insurance requirements, the village ruled that a member of a political party cannot march in a military-style uniform and ruled that it is not permissible to disseminate material intended to incite racial hatred. State and federal courts in Illinois invalidated all the ordinances, ruling that they were discriminatory or abridged constitutionally protected rights of free speech (*Collin* v. *Smith*, 1978; *Village of Skokie* v. *Nationalist Socialist Party*, 1978).

The Illinois Supreme Court, in refusing to enjoin the display of the swastika and other Nazi symbols, rejected the contention that such display constituted "fighting words" sufficient "to overcome the heavy presumption against the constitutional validity of a prior restraint" (*Village of Skokie* v. *National Socialist Party*, 1978). "Peaceful demonstrations cannot be totally

precluded solely because that display [of the swastika] may provoke a violent reaction by those who view it. . . . A speaker who gives prior notice of his message has not compelled a confrontation with those who voluntarily listen."

In the *Handbook of Free Speech and Free Press*, authors Jerome Barron and C. Thomas Dienes suggest two key questions in determining whether so-called fighting words might be suppressed. First, is there imminent danger of disorder? Second, does the speaker use provocative language which constitutes fighting words or which incites his audience to a clear and present danger of disorder? Both questions must be answered in the affirmative before the speech can reasonably be restrained.

Free Speech in Schools

The prior restraint of speech and press in schools is also permissible in circumstances that run parallel to the fighting-words doctrine, but fall far short of its ultimate protection of free expression. The unequivocal regulation of expression in the schools—high schools, colleges, universities—was the rule in this country until the 1960s.

In 1967 a federal district court in Alabama ruled that suspension from school of the editor of the Troy State College campus newspaper for publishing an editorial critical of state legislators was a violation of the student's First Amendment rights. The court ruled that the First Amendment provides protection for the expression of students and school children. School officials cannot infringe upon such rights unless the student publications or speeches "materially and substantially interfere with requirements of appropriate discipline in the operation of the school" (*Dickey* v. *Alabama*, 1967). In a subsequent case, *Tinker* v. *Des Moines School District* (1969), in which the expression at issue was the wearing of an armband as a symbolic protest, the United States Supreme Court accepted the rule as established in the *Dickey* case.

Yet recent cases have made it clear that prior restraint of student expression is clearly acceptable, provided there is sufficient reason to believe that disruption or other harm might result. In 1977 a federal appeals court in New York ruled that school officials can stop students from surveying their classmates' attitudes on certain sexual matters if the school officials showed they have a reasonable basis for believing the survey would cause significant psychological harm to some students. The court said both the distribution of the voluntary survey and the subsequent publication of an article in the high school newspaper on findings elicited by the survey could be stopped so long as school officials showed that *some* psychological experts predicted that *some* students would experience *some* level of stress from confronting *some* of the questions which were asked in the questionnaire. The court added that school officials might be legitimately concerned that the proposed interpretive article would draw misleading conclusions about the sexual behavior of the students at the school (*Trachtman* v. *Anker*, 1977).

The following year a federal district court in New York upheld the restraint by the principal of an entire edition of the Sewanhaka High School newspaper on the grounds that he (the principal) believed that two letters published in the paper might substantially disrupt school activities and might harm the personal reputation of a student. The principal said he feared that one letter, which was vulgar but clearly not obscene, might provoke a violent confrontation between members of the paper's staff and the lacrosse team. The second letter, which criticized the conduct of a student government leader, could have been libelous or a violation of the student's right to privacy, the principal said.

Later examination and investigation proved that the principal's fears were probably groundless, but the court ruled that the judiciary cannot be in the business of second guessing school authorities after the fact. The question to be asked was: Did school authorities demonstrate a substantial basis for their conclusion that harm might result? The principal apparently consulted with members of his staff as well as with students at the time he seized the copies of the newspaper and concluded that distribution of the edition could cause a substantial risk of disruption and harm. "It is not terribly important what can be proved about the truth or falsity of material after the fact," the court said. The crucial question is whether the principal made a reasonable determination based on the information he had at the time (*Frasca* v. *Andrews*, 1978).

School officials, then, are granted significantly more leeway in applying prior restraints than are civil authorities outside the educational setting. Some authorities believe that the decisions in both the *Trachtman* and *Frasca* cases substantially undercut what was seen as a broad protection for student expression following *Dickey* and *Tinker*. As courts consider more specific instances of school censorship, the broadly drawn rules of *Dickey* and *Tinker* will probably be tightened.

Time, Place, and Manner Restrictions

Justification of the previously-noted instances of prior restraint—both inside and outside the schools—was based on the content of the article or the speech. That is, what was written or said provoked the prior censorship. Prior censorship can also be justified, however, on the basis of **where or when** a particular expression is scheduled to occur. In these instances the content of the publication or speech is not considered material in determining whether the prior restraint is justified or whether it is prohibited by the First Amendment. Such rules are called "time, place, and manner restrictions" and focus on when, where, or how the expression is to be made public. Sometimes these rules involve the need for licenses prior to the public distribution of printed matter; sometimes restrictions on door-to-door solicitation are concerned. In all cases, however, courts insist that such rules be applied without regard to

the content of the publication or message. For example, when the city of Brentwood, Tennessee, adopted a rule which said that commercial handbills could not be delivered in any public place, but that newspapers, political, and religious material could be delivered in this manner, the Tennessee Supreme Court invalidated the ordinance because it was not content neutral (*H & L Messengers* v. *Brentwood*, 1979). Similarly, a federal district court in New Mexico ruled that an Alamogordo city ordinance which exempted religious and charitable organizations from a general ban on door-to-door solicitation was invalid because it allowed the city manager discretion in determining what is and what is not a religious cause. This is a content consideration (*Weissman* v. *Alamogordo*, 1979).

Consideration of such time, place, and manner rules by the Supreme Court dates to the 1930s.

Public Forums

The preeminent judicial ruling on the question of the validity of licensing laws is the case of *Lovell* v. *Griffin* decided by the nation's high Court in 1938. The city of Griffin, Georgia, had an ordinance which prohibited distribution of circulars, handbooks, advertising, and literature of any kind without first obtaining written permission from the city manager. Under the law, the city manager had considerable discretion as to whether he gave permission. Alma Lovell was a member of the Jehovah's Witnesses religious sect, an intense and ruggedly evangelical order which suffered severe persecutions in the first half of this century. But the Witnesses doggedly continued to spread the Word, passing out millions of leaflets and pamphlets and attempting to proselytize anyone who would listen. Laws like the distribution ordinance were common in many communities in the United States and were directed at stopping the distribution of material by groups such as the Witnesses.

Alma Lovell didn't even attempt to get a license before she circulated pamphlets, and she was arrested, convicted, and fined fifty dollars for violating the city ordinance. When she refused to pay the fine, she was sentenced to fifty days in jail. At the trial the Jehovah's Witnesses freely admitted the illegal distribution, but argued that the statute was invalid on its face because it violated the First Amendment guarantees of freedom of the press and freedom of religion.

On appeal the Supreme Court agreed that the law did indeed violate freedom of the press. Chief Justice Charles Evans Hughes wrote, "We think that the ordinance is invalid on its face" because it strikes at the very foundation of freedom of the press by subjecting it to license and censorship. The city argued that the First Amendment applies only to newspapers and regularly published materials like magazines. The high Court disagreed, ruling that the amendment applies to pamphlets and leaflets as well: "These indeed have been historic weapons in the defense of liberty, as the pamphlets of

Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."

Lawyers for Griffin also argued that the First Amendment was not applicable because the licensing law said nothing about publishing, but only concerned distribution. Again the high Court disagreed, noting that liberty of circulation is as essential to freedom of expression as liberty of publication. Chief Justice Hughes wrote, "Without the circulation, the publication would be of little value."

Nineteen months after the *Lovell* decision the Supreme Court decided a second distribution case, a case which involved licensing laws in four different cities. The four cases were decided as one (*Schneider* v. *New Jersey*, 1939). A Los Angeles ordinance prohibited the distribution of handbills on public streets on the grounds that distribution contributed to the litter problem. Ordinances in Milwaukee, Wisconsin, and Worcester, Massachusetts, were justified on the same basis—keeping the city streets clean.

An Irvington, New Jersey, law was far broader, prohibiting street distribution or house-to-house calls unless permission was first obtained from the local police chief. The police department asked distributors for considerable personal information and could reject applicants the law officers deemed not of good character. This action was ostensibly to protect the public against criminals.

Justice Owen Roberts delivered the opinion of the Court which struck down each of the four laws. Justice Roberts said that a city can enact regulations in the interest of public safety, health, and welfare, but not regulations which interfere with the liberty of the press or freedom of expression. He then gave some examples of what he meant, examples which have proved most helpful in framing such ordinances. Cities, he said, have the responsibility to keep the public streets open and available for the movement of people and property, and laws to regulate the conduct of those who would interfere with this legitimate public problem are constitutional (*Schneider* v. *New Jersey*, 1939):

> For example, a person could not exercise this liberty [of free expression] by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature in the streets.

These kinds of activities, Roberts said, bear no relationship to the freedom to speak, write, print, or distribute information or opinion. The justice closed by saying that the high Court characterized freedom of speech and freedom of the press as fundamental personal rights and liberties: "The phrase is not

an empty one and was not lightly used. . . . It stresses, as do many opinions of this Court, the importance of preventing the restriction of enjoyment of these liberties."

A somewhat different dimension of this same problem arose in a Connecticut case in which, again, members of Jehovah's Witnesses faced criminal prosecution under an ordinance which limited the solicitation of funds (*Cantwell* v. *Connecticut*, 1940). Jesse Cantwell and his two sons attempted to carry their religious message along the streets of a heavily Catholic neighborhood in New Haven, Connecticut. They were arrested for violating a state law which prohibited the solicitation of money by a religious group without first gaining approval from the local public official whose job it was to decide whether the religious cause in question was a "bona fide object of charity" and whether it conformed to "reasonable standards of efficiency and integrity." The Supreme Court tossed out the law as a violation of the First Amendment. For the unanimous Court, Justice Roberts wrote that the state could, in order to protect its citizens from fraudulent solicitations, require strangers in the community to establish identity and authority to act for the cause he purports to represent before permitting any solicitation in the community. And the state could pass rules setting reasonable regulatory limits on the time of day solicitations could be made (no solicitations before 9 A.M. or after 10 P.M., for example):

> But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.

Each of these three cases concerned restrictions of expression in the so-called public forum—public streets and parks. Other recent cases have focused on this same problem. Airports, for example, have become a popular place for solicitors for various religious and political causes. Milwaukee County was one of many governing bodies which tried to restrict such solicitation on the grounds that the passageways and corridors at General Billy Mitchell Field were too narrow and crowded to allow such activity. The United States District Court for Eastern Wisconsin ruled that the county airport is a public forum and that county rules which require prior permission before any solicitation can take place violate the First Amendment: "Crowded conditions may require restrictions to ensure the efficient operation of the airport," the court ruled. But such conditions did not justify sweeping rules which totally excluded solicitation by many persons and groups (*International Society for Krishna Consciousness* v. *Wolke*, 1978). Other courts have made similar rulings with regard to airport regulations.

Restrictions regarding the placement of news racks on city streets have also been scrutinized by the courts in recent years. So long as these rules do not discriminate unfairly against one particular publication or one kind of publication, rules which limit the number of racks on any one corner are generally considered permissible time, place, and manner restrictions. Glendale, California, for example, adopted an ordinance which said that no more than eight news racks could be on a public sidewalk in a space of 200 feet in any direction within the same block of the same street. In setting priorities to determine which publications could use the limited number of news racks, the city gave preference to "newspapers of general circulation for Los Angeles County." The county code defined a newspaper of general circulation as one with a subscription list of paying customers that has been published at least weekly within the district for at least three years. Also, according to the code, a newspaper of general circulation must have substantial distribution and contain at least 25 percent news in each edition. Papers not meeting this description were given a lower priority under the city ordinance. Because its paper did not contain at least 25 percent news, the Socialist Labor party challenged the ordinance as a violation of the First Amendment. The California Court of Appeals rejected the challenge. The court said:

> When the law, ordinance, or other rule is aimed directly at pure speech or content, it is examined for constitutionality by strait and narrow measures and almost no interference is allowed. On the other hand, when only the mechanical means or particular time or place of dissemination is involved, some reasonable limitation is recognized.

The court said sidewalk space is limited; the city has an obligation to allocate it. The ordinance was not intentionally aimed at the Socialist Labor party paper, but at any publication which did not contain 25 percent news. The preference for newspapers of general circulation is "simply a means of balancing the problem of public demand and its supply" (*Socialist Labor Party* v. *Glendale*, 1978).

Finally, the Washington State Supreme Court recently upheld a state law which banned billboards along highways for safety and aesthetic reasons. The court ruled that the measure did not violate the First Amendment since the interest in public safety outweighed the minimal restraints on expression. The law did not control content, but was aimed at all billboards—and as such was an acceptable place and manner restriction on speech (*Washington* v. *Lotze*, 1979).

Private Forums

The cases just discussed concern public forums. Courts have generally tolerated more restrictions upon expression exercised in private forums, shopping centers and private residences, for example. Residential distribution and solicitation have consistently been a vexing problem, as the rights of freedom of expression are measured against the rights of privacy and private property.

In 1943 the Supreme Court faced an unusual ordinance adopted by the city of Struthers, Ohio, which totally prohibited door-to-door distribution of handbills, circulars, and other advertising materials.

The law also barred anyone from ringing doorbells to summon householders for the purpose of distributing literature or pamphlets. Justice Hugo Black wrote the opinion for the majority in the divided Court. He said the arrest of Thelma Martin, another Jehovah's Witness, for ringing doorbells in behalf of her religious cause was a violation of her First Amendment rights. Door-to-door distributors can be a nuisance and can even be a front for criminal activities, Justice Black acknowledged. Further, door-to-door distribution can surely be regulated, but it cannot be altogether banned. It is a valuable and useful means of the dissemination of ideas and is especially important to those groups which are too poorly financed to use other expensive means of communicating with the people. Black said a law which makes it an offense for a person to ring the doorbell of householders who have appropriately indicated that they are unwilling to be disturbed would be lawful and constitutional. However, the city of Struthers cannot by ordinance make this decision on behalf of all its citizens—especially when such a rule clearly interferes with the freedom of speech and of the press. "The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance" (*Martin* v. *Struthers*, 1943).

Nearly ten years later, in 1951, the high Court was confronted with still another case of door-to-door solicitation. This case, however, concerned solicitation of subscriptions for nationally circulated magazines (*Breard* v. *Alexandria*, 1951). The Alexandria, Louisiana, ordinance in question prohibited door-to-door solicitation for sale of goods, wares, or merchandise without the prior consent or invitation of the homeowner. Jack H. Breard, who was employed by a Pennsylvania magazine subscription company, appealed his conviction all the way to the Supreme Court on the grounds that the law violated his First Amendment rights. This time the divided Court ruled against the solicitor, stating that the restriction was not a violation of the First Amendment.

Justice Stanley Reed distinguished the early cases from the *Breard* case by arguing that *Breard* was a case of door-to-door sale of wares, not of propagation of ideas or religious faith. "This kind of distribution is said to be protected because the mere fact that money is made out of the distribution does not bar the publications from First Amendment protection. We agree that the fact that periodicals are sold does not put them beyond the protection of the First Amendment. The selling, however, brings into the transaction a commercial feature," Reed wrote. He added that there are many other ways

to sell magazines besides intruding upon the privacy of a householder through door-to-door techniques. Justices Black, Douglas, and Vinson disagreed with Justice Reed, arguing that the high Court turned its back on earlier free expression decisions. "The constitutional sanctuary for the press must necessarily include liberty to publish and circulate. In view of our economic system, it must also include freedom to solicit paying subscribers," Black wrote. The jurist added that homeowners could themselves place the solicitor on notice by using a sign that they do not wish to be disturbed.

The majority opinion in the *Breard* case which distinguishes commercial solicitation and distribution from noncommercial solicitation and distribution has been seriously undercut recently by the Supreme Court's rulings that commercial speech is also entitled to the protection of the First Amendment (these rulings are discussed in chapter 10). Still, a properly drafted ordinance can withstand judicial scrutiny. A federal district court in Pennsylvania recently upheld a township ordinance which prohibited the distribution of advertising material at residences without the consent of the owners. The restriction was adopted to stop the accumulation of advertising material at the doorstep or in the mailbox of persons who were on vacation or away from home for several days. The accumulation of such material can signal thieves as to whether someone is home. The court said where there are adequate and reasonable alternatives for advertisers to reach homeowners, limiting door-to-door distribution is permissible when it protects a significant community interest (*Pennsylvania* v. *Sterlace*, 1978).

The problem of dealing with distribution of materials at privately owned shopping centers has also been a troubling one. In 1968, in *Amalgamated Food Employees Local 590* v. *Logan Valley Plaza*, the Supreme Court ruled that the shopping center was the functional equivalent of a town's business district and permitted informational picketing by persons who had a grievance against one of the stores in the shopping center. Four years later in *Lloyd Corp.* v. *Tanner* (1972), the high Court ruled that a shopping center can prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center operation. Protesters against nuclear power, for example, cannot use the shopping center as a forum. Persons protesting against the policies of one of the stores in the center, however, can use the center to distribute materials.

In 1976 the Supreme Court recognized the distinctions it had drawn between the rules in the *Logan Valley* case and the rules in the *Lloyd Center* case for what they were—restrictions based on content. The distribution of messages of one kind was permitted, while the distribution of messages about something else was banned. In *Hudgens* v. *NLRB* (1976), the high Court ruled that if in fact the shopping center is the functional equivalent of a municipal street, then restrictions based on content cannot stand. But rather

than to open the shopping center to the distribution of all kinds of material, *Logan Valley* was overruled, and the high Court announced that "only when . . . property has taken all the attributes of a town" can property be treated as public. Distribution of materials at private shopping centers can be prohibited.

But just because the First Amendment does not include within its protection of freedom of expression the right to circulate material at a privately owned shopping center does not mean that such distribution might not be protected by legislation, or by state constitution. The California Constitution explicitly authorizes individuals to exercise their free speech rights on privately owned shopping center property. In 1980 the United States Supreme Court ruled that such a provision was valid and did not violate the property rights of the owners of the shopping center (*Pruneyard Shopping Center* v. *Robins*, 1980).

It is only with great difficulty that generalizations regarding time, place, and manner restrictions can be drawn. Each specific ordinance needs to be examined closely. The guidelines the courts have provided suggest that such rules must be drawn reasonably in an effort to protect a community interest such as safety or crime prevention. Such rules must be content neutral—that is, their application cannot be based on the content of the materials or messages. And they must be applied in an evenhanded manner to all persons seeking to use a particular forum. Such rules must be narrow and must restrict only to the extent needed to protect the community interest. Distribution cannot be totally banned, for example, simply to reduce the congestion in an airport corridor. Finally, communities can probably draw somewhat tighter rules regarding commercial solicitation than regarding noncommercial solicitation, but only if these rules serve a significant governmental interest and if ample alternative channels of communication for the advertiser are available. The rules on commercial speech are evolving slowly.

As noted previously, other examples of prior restraint can be found within the law. Films may be censored before they are shown, for example (see chapter 9). Under certain circumstances the press may be prohibited from publishing material which might prejudice a defendant's chance for a fair trial (see chapter 8). Such examples will be noted as other aspects of mass media law are discussed.

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3 Gathering News and Information

One of the truly revolutionary changes in American journalism in the past two hundred years has been the fundamental shift in emphasis in the American press from journals of opinion, commentary, and some small bits of "intelligence" to the predominance of publications which offer readers a steady diet of news and information. The "news" paper as we know it simply did not exist in the era of the founding of the Republic. And the significant legal battles which faced the eighteenth-century editor developed over the right to criticize, ridicule, and even libel the government and government officials. Sedition law was the primary legal problem faced by leading journalists who used their newspapers and pamphlets to form and lead political opinion.

To the editor of the 1980s the law of sedition is about as relevant as a hand-operated printing press. News and information are today the lifeblood of most newspapers, many magazines, and significant sections of the radio and television industry. Gathering and publishing news about government and government officials has become the central task of many journalists. As the emphasis on the information-gathering functions of journalism increased, the legal problems associated with information gathering increased as well. Today, many editors list limitations upon news gathering as the primary governmental restraint upon the press.

Most journalists consider the press in the United States as the eyes and ears of the people with regard to their government, a function often referred to as "a watchdog role." It is the responsibility of the press to inform the people about their government—whether it is operating efficiently, whether it is living up to its constitutional requirements, whether it is treating its citizens fairly, whether its officials are acting responsibly and honestly. This interest in reporting on the activities of government has grown markedly since