The First Amendment and the Fourth Estate

COMMUNICATIONS LAW FOR UNDERGRADUATES

MARC A. FRANKLIN

THE FIRST AMENDMENT AND THE FOURTH ESTATE

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for

UNDERGRADUATES

By

MARC A. FRANKLIN
Frederick I. Richman Professor of I
Stanford University

in collaboration with

RUTH KORZENIK FRANKLIN
A.B., M.S. in Journalism

Mineola, N. Y.
THE FOUNDATION PRESS, INC.
1977

Library of Congress Catalog Card Number: 77-72638

Franklin First Amend.–Fourth Estate MCB

For Alison and Jonathan
with love and hope
—and thanks for their patience.

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PREFACE

This collaborative effort by the authors, one trained in law and one in journalism, reflects our awareness of the perils of mistrust or misunderstanding on the part of one profession toward the other, and our observation that many persons professionally active in the mass media are only vaguely aware of the range of possible interpretations of the First Amendment and other legal concepts. Some journalists are eager to believe that the stirring words of the First Amendment have only one meaning and are all they need to know. Such an approach offers an unrealistic view of the world in which journalists must operate, and can become a serious professional handicap. Journalists who lack an understanding of the legal meaning of freedom of expression cannot argue effectively against legal assaults on that freedom.

The goals of this book are to clarify the major legal doctrines that affect mass media, to explain their origins and asserted justifications, and to evaluate their soundness. In these efforts we focus upon the language of the Supreme Court of the United States, whose interpretations of the First Amendment provide the essential starting point. We must scrutinize the reasoning of the majority and of the dissenting and concurring justices. It is no longer acceptable, if it ever was, for students of Communications Law to read commentaries on the law adorned with selected paragraphs from Justices Black and Douglas.

It is definitely not necessary to be a lawyer to understand the cases in this field. After each principal case or article, notes and questions explain unusual points, highlight particularly significant parts, and suggest possible consequences. These notes and questions include few legal citations, since it is not necessary to explore all the scholarly comments or relevant cases in order to develop a fundamental understanding of the major principles and problems. Those who wish to pursue the legal subleties of particular topics will be able to do so through basic sources available in any law library. References to Supreme Court decisions have been included because of their importance and because most colleges and universities have copies of recent decisions of the Supreme Court even if they do not have law libraries. Discussions of legal questions in communications periodicals are cited because they are likely to be available and the articles are not unduly technical.

The organization of this book reflects the goals set forth above. Chapter I reviews traditional and contemporary justifications for

freedom of expression. These philosophical and analytical discussions provide the setting in which the First Amendment may best be understood.

Chapter II undertakes two basic tasks. The first is to survey the structure and functions of our judicial system. This illuminates such matters as how cases arise and are decided, and the role of the Supreme Court. The second part of Chapter II explores views of the First Amendment expressed by Supreme Court justices and other influential commentators, providing further background for the specific constitutional problems raised by mass media.

Chapter III discusses legal problems that journalists may encounter in their efforts to gather information. Chapter IV explores the problems they may encounter in trying to publish information already gathered. These form the practical core of the book. The organization is functional, presenting problems as journalists are likely to think about them rather than as lawyers and judges have come to conceptualize them.

Most of the discussion in Chapters III and IV applies to both print and broadcast media. The last three chapters deal with problems unique to broadcasting. Chapter V discusses the technology and organization of broadcasting and explores the constitutional justifications for treating broadcasting differently from print media. Chapter VI analyzes the licensing of broadcasters. Chapter VII considers in detail some government restrictions that uniquely affect what broadcasters may transmit. These chapters reveal much about the federal administrative process in general, as well as its impact on broadcasting in particular.

Finally, we should note that it is impossible, as well as undesirable, to detach legal considerations from related ethical questions of journalism. Questions of ethics and law overlap in several actual situations and in some areas we will see that the legal controls are minimal and that the decisive standards are the judgments of editors.

Readers will become aware that the words of the First Amendment are not a magical formula that protects the freedom of the mass media in all situations. The words do have a powerful thrust in the direction of freedom, but there are also times when strong arguments may be made to justify legal controls on expression. To the extent that readers come to understand the opposing arguments and develop an active interest in these issues, this book will be a success.

MARC A. FRANKLIN
RUTH K. FRANKLIN

San Francisco
March, 1977

ACKNOWLEDGMENTS

Several students at the Stanford Law School have contributed to the completion of this book. Charles W. Cunningham, Daniel J. Gonzalez, Joseph E. Mais, Jacqueline U. Moore and Gregory M. Schmidt, student assistants, performed general research functions. Others helped on particular parts of the book: Mary Ellen Richey on Chapter I; David C. Spielberg on the nature of the spectrum; and Ronald K. Meyer, whose efforts contributed significantly to the sections on regulation of broadcasting. Sherrie K. Fyfe ably performed the major typing and preparatory work with a helpful assist from Doris Reed.

Invaluable support toward the completion of this book came from the Project in Law for Undergraduates at Stanford University. That project has been generously financed by the National Endowment for the Humanities, The Claremore Fund of Los Angeles, the George H. Sandy Foundation of San Francisco, the Andrew Norman Foundation of Los Angeles, and the Swig Foundation of San Francisco. No statements in this book necessarily express the view of the National Endowment for the Humanities or of any other source of financial support.

Thanks are due the authors and copyright holders who permitted excerpts from the following works to be included in this book:

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THE FIRST AMENDMENT AND THE FOURTH ESTATE: COMMUNICATIONS LAW FOR UNDERGRADUATES

PROLOGUE

This book explores the legal relationships between the mass media and the several branches of government. The goal is to develop an understanding of the interactions and the tensions between the two. Mass media as a general term will refer essentially to newspapers and broadcasting, with occasional specific reference to magazines, books and motion pictures.

We shall be particularly interested in situations in which the assertion of a media claim to gather information or to communicate it is in conflict with another social interest. To indicate the contours of this inquiry, the examples that follow are patterned after actual cases. In each one there will be arguments that favor the interest in communication, and arguments that suggest subordinating that interest. Some of these arguments are political, some philosophical, some economic, some moral. Weigh them carefully and decide how you would resolve the issue, anticipating the consequences of your decision and of alternative decisions. If you think you need more information in certain situations before reaching a decision, specify what you need and how it might influence your decision.

1. *Reporters as Witnesses.* An investigative reporter was doing a story about drug traffic in his community. To learn about it first hand, he promised not to reveal the identity of his sources. His stories indicated that he had personally witnessed the manufacture and sale of illegal drugs. A grand jury investigating drug crimes in this community calls the reporter as a witness and he refuses to testify. Should it be possible for the prosecutor to take the recalcitrant reporter before a judge and ask that the reporter be ordered to testify or be held in contempt?

2. *Rape Victims.* A woman was raped and her alleged assailant has been apprehended. In reporting the episode, should the local newspaper be allowed to identify the victim? The accused?

3. *Attack on Candidate.* During a political campaign a local candidate for the state legislature has been sharply attacked by the only local newspaper. The candidate writes a letter to the editor rebutting the editorial and setting forth his own position. The newspaper refuses to publish the letter or anything submitted by the candidate or by his supporters. Should the newspaper be required to publish his reply? Should it be required to sell him space for a political advertisement? Should it matter whether the paper's allegations are false? Would your opinion be different if the local radio station is involved rather than a newspaper?

4. *Group Attacks.* A state statute has been proposed that would prohibit any publications that "portray depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion" as well as any publication that "exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy . . . ." Would you vote for it?

5. *Sordid Crimes.* The defendant is being prosecuted for a particularly sordid offense. He wants to make a motion before the trial begins to prevent the prosecution from presenting in evidence a confession he says was coerced from him and a gun he says was illegally seized from him without a search warrant. These claims are to be presented to the judge at a hearing some weeks before the trial. The defendant wants this hearing closed to the press and public to avoid publicity about these items if he should win the motion. Several newspapers demand admission to the court. What interests are at stake here?

6. *Drug Prices.* The State Board of Pharmacy forbids the advertising of prices that pharmacists charge on prescription drugs. The ban is attacked by (a) some pharmacists, (b) local newspapers, and (c) a group of local citizens. Why might each be objecting, and should the ban be permitted?

7. *Discrimination in Employment.* The appropriate government agency received a complaint from female reporters on a daily newspaper. The women claimed to be victims of discrimination because they were being given routine assignments that did not enable them to distinguish themselves and thus earn promotions. Should the agency be authorized to order the newspaper to assign reporters to stories without regard to gender except where the agency agrees with the paper that the gender of the reporter is relevant?

The First Amendment to the Constitution of the United States says, in part, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." Does this help to resolve any of the above questions? We will first consider the various arguments for, and definitions of, freedom of expression; next, explore the background and meaning of the First Amendment; and then follow the various approaches and formulations developed by the United States Supreme Court. This should prepare us to better evaluate situations like those above. We will then see how courts and administrative agencies have handled similar problems and others. The cases are arranged so that we first consider access to sources of information, then restrictions on what may be published, and then see what happens when broadcast media seek protections like those available to the print media.

Chapter I

THE DEVELOPMENT OF THE CONCEPT OF FREEDOM OF EXPRESSION

Our inquiry into the law as it relates to mass media must be conducted against a background of several centuries of English history, for it was the gradually increasing demand for freedom of expression in England that led ultimately to its central position in the United States today.

A. ANTECEDENTS

1. The English Background

a. History of Legal Restrictions

LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY

Leonard W. Levy

7-15 (1960).

Just as many torts or private wrongs became crimes, or offenses against the king's peace, so too certain libels, once only civilly redressable, became the objects of criminal retribution. As early as 1275 Parliament outlawed "any false news or tales whereby discord or occasion of discord or slander may grow between the king and his people or the great men of the realm . . . ." The statute was reenacted in 1379 for the prevention of the "subversion and destruction of the said realm" by means of false speech. Punishment was to be meted out by the king's council sitting in the "starred chamber." These were the earliest statutes making dangerous utterances a crime, and together with the ecclesiastical laws against heresy and other religious crimes they began the long history of the suppression of opinions deemed pernicious.

The invention of printing, of course, magnified the danger of such opinions. The crown claimed an authority to control printing presses as a right of prerogative. A system for the censorship of heretical manuscripts, long established by the English church and approved by Parliament, was taken over by Henry VIII and soon applied by him to writings on any subject. The manuscript of any work intended for publication had to be submitted to crown officials

empowered to censor objectionable passages and to approve or deny a license for the printing of the work. Anything published without an *imprimatur* was criminal. Under Elizabeth the system of prior restraints upon the press was elaborately worked out, with the administration of the complex licensing system divided between three crown agencies: the Stationers Company, a guild of master publishers chartered to monopolize the presses and vested with extraordinary powers of search and seizure; the Court of High Commission, the highest ecclesiastical tribunal, which controlled the Stationers Company and did the actual licensing; and the Court of Star Chamber which issued the decrees defining criminal matter and shared with the Court of High Commission jurisdiction over the trial of offenders. The agencies for enforcement changed during the Puritan Revolution, but the licensing system continued. Under the Restoration, the system was based principally on an act of Parliament, rather than royal prerogative; it continued until 1694.[12] But the expiration of the system at that time did not remotely mean that the press had become free. It was still subject to the restraints of the common law.

One might publish without a license, but he did so at the peril of being punished for libel. The point of departure for the modern law of criminal libels was Sir Edward Coke's report of a Star Chamber case of 1606, in which the following propositions were stated. A libel against a private person might be punished criminally on the theory that it provokes revenge and therefore tends, however remotely, to a breach of the peace. But a libel against a government official is an even greater offense "for it concerns not only the breach of the peace, but also the scandal of government . . . ." [13] The essence of the crime as fixed by the medieval statutes was the falsity of the libel, but the Star Chamber ruled in 1606 that truth or falsity was not material, and ruled too that the common-law courts also possessed jurisdiction over criminal libels.

Four major classes of criminal libel emerged from subsequent decisions in the common-law courts. Blasphemous libel, together with laws against heresy and the establishment of a state church, made freedom of expression on matters of religion a risk. The law of obscene or immoral libel crimped literary, artistic, and other forms of personal expression. So did the law of private libel which protected individual reputations by making possible civil suits for damages; but a private libel could also be prosecuted by the state to prevent supposed bad tendencies to a breach of the peace. By far the most repressive class of libel, however, was seditious libel. It can be de-

12. For an excellent discussion of the licensing system from its origins in England to its demise in 1694, see Fredrick S. Siebert, *Freedom of the Press in England*, 1476–1776 (Urbana, 1952), chs. 2–3, 6–12.

13. *De Libellis Famosis*, 3 Coke's *Reports* 254 (1606). . . .

fined in a quite elaborate and technical manner in order to take into account the malicious or criminal intent of the accused, the bad tendency of his remarks, and their truth or falsity. But the crime has never been satisfactorily defined, the necessary result of its inherent vagueness. Seditious libel has always been an accordion-like concept. Judged by actual prosecutions, the crime consisted of criticizing the government: its form, constitution, officers, laws, symbols, conduct, policies, and so on. In effect, any comment about the government which could be construed to have the bad tendency of lowering it in the public's esteem or of disturbing the peace was seditious libel, subjecting the speaker or writer to criminal prosecution.

Underlying the concept of seditious libel was the notion, expressed by Chief Justice Holt in Tuchin's case (1704), that "a reflection on the government" must be punished because, "If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it."[14] . . . Treason as a purely verbal crime, unconnected with some overt act beyond the words themselves, died out after the execution of Mathews in 1720, convicted under a special statute rather than at common law. Utterances once held to be treasonable became wholly assimilated within the concept of seditious libel. As a lesser crime or misdemeanor, seditious libel was punished less severely: by imprisonment, fines, the pillory, and whipping. But prosecution for seditious libel became the government's principal instrument for controlling the press; according to Professor Siebert's excellent study of freedom of the press in England, "convictions for seditious libel ran into the hundreds" in both the seventeenth and eighteenth centuries.

The procedure in prosecuting a seditious libel was even more objectionable in the minds of the libertarian theorists, than the fact that the accused could be punished for words alone. . . . The attorney-general might proceed against all misdemeanors by an information, that is, by determining the libelous character of a publication, bringing it to the attention of the Court of the King's Bench, and securing a warrant for the arrest and trial of the offender. Prosecuting by information rather than by indictment bypassed the Englishman's beloved institution, the grand jury, which in felony cases stood between him and the government. At the trial of a seditious libel, the defendant was not even judged by his peers in any meaningful way. Despite the ambiguity of earlier practice the judges in the eighteenth century permitted juries to decide only the fact of the

14. Rex v. Tuchin, Howell's State Trials, 14:1095, 1123 (1704), quoted in Stephen, *History of the Criminal Law in England*, 2:318.

publication. That is, the only question which the jury passed upon was whether the defendant did or did not publish the remarks charged against him and whether they carried the innuendo as alleged. The judges reserved exclusively for themselves as a matter of law the decision on the crucial question whether the defendant's remarks were maliciously intended and of a bad tendency. The judges also refused to permit the defendant to plead the truth as a defense. Indeed, they proceeded on the theory that the truth of a libel made it even worse because it was more provocative, thereby increasing the tendency to breach of the peace or exacerbating the scandal against the government. As a result of these rules applicable to criminal or crown libels, a man might be arrested on a general warrant, prosecuted on an information without the consent of a grand jury, and convicted for his political opinions by judges appointed by the government he had aspersed.

Thus the disappearance of the prior restraints which had been imposed by the licensing system until 1694 did not meaningfully free the press. Theoretically one might say or print what he pleased, but he was responsible to the common law for allegedly malicious, scurrilous, scandalous, or derogatory utterances which supposedly tended towards the contempt, ridicule, hatred, scorn, or disrepute of other persons, religion, government, or morality. Blackstone, the oracle of the common law in the minds of the American Framers, summarized the law of crown libels as follows:

> where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law . . . the liberty of the press, properly understood, is by no means infringed or violated. The *liberty of the press* is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. . . . But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial [20] be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, a government and religion, the

20. Blackstone's endorsement of a "fair and impartial" trial was meaningless to the libertarians of the time, since he explicitly repudiated one of their two major gauges of fairness, the right of the defendant to prove the truth of his alleged libel; moreover, Blackstone ignored the other libertarian gauge of fairness at a time when it was the principal issue of contention: the right of the jury rather than of the judge to decide the criminality of the alleged libel.

only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free-will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or enquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects.[21]

The common law's definition of freedom of the press meant merely the absence of censorship in advance of publication. But the presence of punishment afterwards, for "bad sentiments," oral or published, had an effect similar to a law authorizing previous restraints. A man who may be whipped and jailed for what he says or prints is not likely to feel free to express his opinions even if he does not need a government license to do so. The common-law definition of freedom of the press left the press at the mercy of the crown's prosecutors and judges. Freedom of discussion and the law of libel were simply incompatible; the first could not coexist with the second.

Notes and Questions

1. Blackstone is central to this analysis because he was a major influence on English and American legal thinking in the period when our Constitution was taking shape. Under the Blackstone definition of liberty of the press, it is only "publications" that receive protection. Speech, since it was not subject to prior restraints, was not included in his concern at all. Nevertheless it was generally accepted that both speech and the printed word were subject to similar subsequent sanctions. One difference was that speech was protected if truthful, but this protection faded when opinions were involved. In criminal prosecutions for libel one serious concern was the rejection of truth as a defense, on the ground that a true statement was "even worse because it was more provocative." This gave rise to the phrase "the greater the truth the greater the libel."

2. Until 1688, even members of Parliament were occasionally imprisoned for discussing forbidden subjects. Parliament had long struggled with the king to assure freedom of speech for its Speaker, and this was gradually extended to all members. The privilege to initiate discussion on any subject was recognized in 1649, and in 1668 the House of Lords declared that seditious words uttered in Parliament could not be punished in court. Full freedom of speech and debate, including the right to criticize the crown, had been assured in Parliament well before the time of Blackstone. See F. Siebert, Freedom of the Press in England 1476–1776, 100–02, 112–16 (1965 ed.).

21. Sir William Blackstone, *Commentaries on the Laws of England* (London, 1765–1769), Book 4, ch. II, pp. 151–152. . . .

3. Levy states that the disappearance of the licensing system "did not meaningfully free the press." In addition to the criminal prosecutions for libel, which he describes, the English government found taxation to be an effective way to control the press. The effect of the Stamp Act of 1711 and its successors is described in M. Konvitz, Fundamental Liberties of a Free People, 202–03 (1957):

> A special effort was made to reduce the circulation of newspapers by forcing them to increase the sales price. . . . The act imposed a tax on newspapers and pamphlets, on advertisements, and on paper. In the first year after its enactment, approximately half of the newspapers were forced out of existence. Loopholes were, however, soon discovered in the act, with the result that the tax fell more heavily on printers who supported the government and felt themselves compelled not to evade payment of the tax. . . .
>
> These taxes, it has been said, operated as an effective control over the periodical press. "By making it difficult to operate newspapers at a profit, the government forced the publishers to accept subsidies and political bribes." . . . The stamp tax prohibited the existence of the cheap newspaper and prevented the general spread of knowledge.

4. The earlier taxes on newspapers were levied by Parliament only on British newspapers, and were intended to be repressive. According to C. Miller in The Supreme Court and the Uses of History 76–79 (1969), the Stamp Act of 1765 was directed only against the colonies and was in fact enacted to offset "the expense of defending, protecting and securing" the colonies, including the high cost of the conduct of the Seven Years' War just ended. The 1765 act taxed legal documents, including college diplomas and liquor licenses; publications, advertisements, gambling dice and playing cards. This was "taxation without representation and had nothing to do with freedom of the press."

5. Blackstone's definition of freedom of the press as the absence of "previous restraints upon publications," and the distinction between liberty thus defined, and licentiousness, for which punishment was considered legitimate, made clear that freedom of expression meant, as a minimum, rejection of prior restraint; uncertainty remains as to the legitimacy of subsequent punishment for seditious libel, and as to what types of expression constitute punishable "licentiousness."

b. Early Philosophical Justifications for Freedom of Expression

Although the Star Chamber was abolished in 1641, in 1643 another Licensing Order prohibited the printing of any book, pamphlet, or paper without prior approval and official licensing. In that year

John Milton published his tract on divorce, in defiance of the Order, and a year later, in Areopagitica, he addressed to Parliament an elaborate philosophical defense of freedom of expression urging that the Order be withdrawn. He first observed that, given the current state of man,

> [W]hat wisdom can there be to choose, what continence to forbear, without the knowledge of evil? He that can apprehend and consider vice with all her baits and seeming pleasures, and yet abstain, and yet distinguish, and yet prefer that which is truly better, he is the true warfaring Christian. I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary.

Milton proclaimed his faith in the ultimate victory of truth in words that suggest encouragement of the widest variety of views:

> And though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; who ever knew truth put to the worse, in a free and open encounter? . . .
>
> . . . For who knows not that truth is strong, next to the Almighty? She needs no policies, nor stratagems, nor licensings to make her victorious; those are the shifts and the defences that error uses against her power. Give her but room, and do not bind her when she sleeps, for then she speaks not true. . . .

Yet there were limits to Milton's position:

> I mean not tolerated popery and open superstition, which as it extirpates all religions and civil supremacies, so itself should be extirpate, provided first that all charitable and compassionate means be used to win and regain the weak and the misled; that also which is impious or evil absolutely, either against faith or manners, no law can possibly permit that intends not to unlaw itself; but those neighboring differences, or rather indifferences, are what I speak of. . . .

In his concluding section, Milton offered another set of qualifications. He advocated a system whereby "no book [could] be printed unless the printer's and author's name or at least the printer's be registered. Those which otherwise come forth, if they be found mischievous and libellous, the fire and the executioner will be the timeliest and most effectual remedy that man's prevention can use." Yet he also asserted that evil would not disappear by being eliminated from books since "sects and schisms could spread without the aid of books," and he thought the Licensing Order futile because the tedious and repellent

nature of censorship would attract only incompetent persons to serve as licensors.

Perhaps Milton's most enduring contribution to the philosophy of freedom of expression was his statement that unrestricted debate would lead to the discovery of truth. Writing in England some 50 years later, John Locke retained some of this faith that truth would prevail. In "A Letter Concerning Toleration" (1689), he wrote:

> [T]ruth certainly would do well enough if she were once left to shift for herself. She seldom has received, and I fear never will receive, much assistance from the power of great men, to whom she is but rarely known and more rarely welcome. She is not taught by laws, nor has she any need of force to procure her entrance into the minds of men. Errors indeed prevail by the assistance of foreign and borrowed succors. But if truth makes not her way into the understanding by her own light, she will be but the weaker for any borrowed force violence can add to her.

Locke's regard for freedom of expression arose out of a skepticism about the state or any individual as a source of guidance in seeking truth, and he shared Milton's view that governmental restrictions on freedom of inquiry would increase the likelihood of error. He condemned those "places where care is taken to propagate the truth without knowledge." Like Milton, Locke opposed prior restraints, and in 1694, he joined the opposition that finally obtained the abolition of the Licensing Order. Yet also like Milton, Locke did not question the common law punishment for expression after publication, and advocated the suppression of "opinions contrary to human society or to those moral rules which are necessary to the preservation of civil society."

Locke further defined the advantages of free inquiry in his "Essay Concerning Human Understanding" (1690):

> [W]e cannot reasonably expect that any one should readily and obsequiously quit his own opinion, and embrace ours, with a blind resignation to an authority which the understanding of man acknowledges not. For however it may often mistake, it can own no other guide but reason, nor blindly submit to the will and dictates of another. . . . For where is the man that has incontestable evidence of the truth of all that he holds, or of the falsehood of all he condemns; or can say that he has examined to the bottom all his own, or other men's opinions? The necessity of believing without knowledge, nay often upon very slight grounds, in this fleeting state of action and blindness we are in should make us more busy and careful to inform ourselves than constrain others.

In this Essay, Locke presented in detail his views of man as a thinking, reasoning being, whose "materials of reason and knowledge"

come wholly from experience. This view of human nature dominated the 18th century and was basic to Locke's ideas on the natural rights of man, the origins of civil government, the limitations on governmental power, and the people's right to rebel against the government, ideas that became fundamental to the American Revolution. In his Treatise Concerning Civil Government he wrote, "the natural liberty of man is to be free from any superior power on earth. . . . The liberty of man in society is to be under no legislative power but that established by consent in the commonwealth. . . ." The government would establish rules "common to everyone of that society" and the citizen would have a "liberty to follow [his] own will in all things, where that rule prescribes not."

By 1776 the pendulum had swung still further away from government restriction of expression, on both sides of the Atlantic. In England Jeremy Bentham in his "Fragment on Government" was waging war against Blackstone. He wrote that one of the differences between a free and a despotic government was "the security with which malcontents may communicate their sentiments, concert their plans, and practise every mode of opposition short of actual revolt, before the executive power can be legally justified in disturbing them."

We can trace the regard for freedom of expression and skepticism about the wisdom of an absolute authority, be it church or state, back to Milton and perhaps earlier, but we must not ignore a current of English thinking that condemned individual freedom and advocated an all-powerful authority that would wisely govern all civil affairs. This was represented in the mid-17th century by Thomas Hobbes, who, while Milton was squirming under the constraints of the Licensing Order, advocated in The Leviathan that a wise and absolute sovereign was essential: ". . . it is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man." In the absence of such a power, there is no industry, no art, no knowledge; only fear, "and the life of man, solitary, poor, nasty, brutish and short." Furthermore, he noted, without that power "nothing can be unjust. The notions of right and wrong, justice and injustice, have there no place. Where there is no common power, there is no law; where no law, no injustice." The Leviathan must wield "an absolute and arbitrary power; for want whereof, the civil sovereign is fain to handle the sword of justice unconstantly, and as if it were too hot for him to hold."

Hobbes' major influence was felt on the continent, beginning a century later, in the writing of Jean-Jacques Rousseau. Until Rousseau, individual freedom had been defined in terms of the absence of institutional restraint: "freedom from" externally imposed controls.

Rousseau emphasized that freedom is not solely the lack of coercion: in fact, coercion may be required by the morality of the general will, freedom is positive and must be "freedom for" something.

The views of Hobbes and Rousseau remained conspicuous on the continent, while those of Milton and Locke and their adherents became part of the heritage of England that crossed the Atlantic Ocean.

2. Freedom of Expression in Colonial America

The law that applied to the press in England during the 17th and 18th centuries was also applied to the emerging colonial press, and the licensing of presses in the colonies closely paralleled the English practice. After Parliament abolished licensing at the end of the 17th century, the colonial governors managed to retain it for several years more. In both places, however, after the end of licensing, there was still the threat of punishment after the fact for matters the authorities deemed licentious. Contempt of the legislative branch was a real risk and prosecutions for seditious libel occurred.

In 1721, some years before the Zenger trial, the colonies first discovered the ardent views of "Cato" on Freedom of Speech in Benjamin Franklin's Pennsylvania Gazette. Cato was the pseudonym for two Whig journalists whose essays in London newspapers became very popular and were widely reprinted in the colonies. Cato described free speech as "the Right of every Man, as far as by it he does not hurt or controul the Right of another; And this is the only Check which it ought to suffer, the only Bounds it ought to know." Free speech and free government thrived together, or they failed together: "in those wretched Countries where a Man cannot call his Tongue his own he can scarce call any Thing else his own," and "Freedom of Speech is ever the Symptom as well as the Effect of good Government." In Reflections upon Libelling, Cato favored the fullest freedom of expression but conceded that extreme libels might be punished, if they were false. These essays are reprinted in Levy, Freedom of the Press from Zenger to Jefferson 10–24 (1966).

These letters also appeared in another journal that criticized the administration. In addition to reprinting Cato's letters in 1734, the New York Weekly Journal published several anonymous essays that echoed these sentiments: ". . . Liberty of the Press . . . is a Curb, a Bridle, a Terror, a Shame, and Restraint to evil Ministers; and it may be the only Punishment, especially for a Time. But when did Calumnies and Lyes ever destroy the Character of one good Minister? . . . Truth will always prevail over Falsehood." Levy, supra at 29.

In 1734 John Peter Zenger, who printed the Weekly Journal, was charged with seditious libel by the Governor General of New

York whom Zenger had criticized. Since the grand jury refused to indict, the prosecution was begun by the filing of an information. Zenger, unable to post the high bail imposed, spent almost a year in jail awaiting trial. By the traditional common law standards he was surely guilty because he had published the articles in question and the law did not recognize truth as a defense. Until 1670 in England the judge had the power to coerce juries into following his instructions by imprisonment or by levying fines to ensure compliance. Then, in Bushell's Case 6 St.Tr. 99, 124 Eng.Rep. 1006 (1670), it was held that jurors who decided cases "against the manifest evidence" could not be punished. This gave jurors the power to nullify disliked legal rules by refusing to follow the judge's instructions. Zenger's lawyer, Andrew Hamilton, convinced the jury that the only question in the case involved the liberty to write the truth and the jury, despite the judge's instructions, acquitted Zenger. Although the verdict set no precedent (because a jury verdict is not a legal ruling), it did signal a change in the political climate.

Before the Stamp Act of 1765, most newspapers and pamphlets were produced by printers who had learned their trade as apprentices and who had earned enough to buy their own press equipment. The structure of the period is suggested in Mott, American Journalism,* 46–47, 59 (3rd ed. 1962):

> A master printer ordinarily expected to publish a newspaper, and he commonly edited it himself. With but four exceptions, all the American newspapers of this period (as indeed virtually all those of the eighteenth century) were edited and published by printers. This does not mean that these printer-editors wrote all or any considerable parts of their papers. They or their journeymen usually wrote what few local items appeared, compiled foreign news and miscellany by means of scissors and paste-pot, and edited the meagre news from other colonial towns. In some cases, the printer wrote occasional contributions over classical pen-names, addressed "To the Printer of the Gazette." But those to whom the editor referred as his "authors" were commonly professional men with a turn for writing who supplied him with contributions on social topics or public affairs more or less faithfully. . . .
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> Thus, the editor is to be thought of chiefly as an entrepreneur. He had other affairs besides his newspaper on his hands. He was a job-printer and usually a publisher of books and pamphlets. He was often the local postmaster, sometimes a

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> magistrate, and in many cases public printer. Frequently he kept a bookstore, where he sold his own publications and books imported from London; and occasionally he branched out into general merchandise lines. . . .
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> Circulations in the period ending in 1765 ranged from a few hundred to a thousand or more. At the middle of the century the Boston papers had an average circulation of .600. Possibly five per cent of the white families in the colonies in 1765 received a newspaper weekly; but papers were passed from hand to hand, and each had many readers.

This meant that a person wanting to run a newspaper had to work his way up and become a printer, or outfit a print shop and hire a printer to operate it, or try to influence the views of someone who already operated a paper. One way or another, the printer had the central role. The character of journalism began to change as the Revolution approached, due largely to the major role that printers played in opposing and circumventing the hated Stamp Act. As Mott describes it:

> Royal Governors and Judges found their efforts to curb the growing boldness of utterance on the part of newspapers during this period to be limited by the unwillingness of grand juries to indict for such offences. To proceed to more high-handed measures would, they recognized, invite a violent opposition.
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> But although there was little censorship of newspapers by legal means in the Revolutionary period, there was much invasion of liberty of the press by mobs and threats of violence on the part of the Sons of Liberty and kindred organizations.
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> Circulations increased in the years immediately preceding the war. The largest claimed by papers before the war were Rivington's 3,600 in 1774 and Isaiah Thomas's 3,500 in the next year. . . .
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> . . .
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> The student of the times cannot doubt that printers and publishers bore their full share of the sufferings of the country during the Revolution. But by the end of the war journalism had made a distinct gain in prestige. This gain began with the Stamp Act, the repeal of which was recognized as due, to a large extent, to a united opposition to it on the part of the newspapers. "The press hath never done greater service since its first invention," exclaimed one admirer of the campaign against the Stamp Act. Such a triumph not only emboldened the newspapers to

defy English authority, but also taught the political organizers and the manipulators of public opinion how useful newspapers could be to them. From this time forward the press was recognized as a strong arm of the Patriot movement. Of the three great media of propaganda in the Revolution—the omnipresent pamphlet, the sermons of the political clergy, and the newspaper —it was the last which made the greatest gain.

Notes and Questions

1. Mott states that although the newspapers were relatively free from legal censorship during the Revolution, a new type of censorship was developing "by mobs and threats of violence." John Tebbel (The Compact History of the American Newspaper, 51 (1963)) has observed that some editors found public opinion "harsher than the old order. Governments could be conciliated, bargained with, and dealt with by various political means, but there was no way to argue with an angry mob of patriots who insisted that a paper print only the propaganda of the cause."

According to Arthur M. Schlesinger, some attempted to justify the suppression of opposition writings by contending that "liberty of speech belonged solely to those who spoke the speech of liberty . . . 'My paper is sacred to the cause of truth and justice, and I have preferred the pieces, that in my opinion, are the most necessary to the support of that cause rather than to propagate barefaced attempts to deceive and impose upon the ignorant'." Prelude to Independence, 189 (1958).

2. Mott describes the use of the press as a medium of propaganda by the "manipulators of public opinion" during the Revolution. Schlesinger elaborates on this idea: "From the inception of the controversy the patriots exhibited extraordinary skill in manipulating public opinion, playing upon the emotions of the ignorant as well as the minds of the educated. Though they had never before faced a like situation and were unaccustomed to co-operate across provincial lines, no disaffected element in history has ever risen more splendidly to the occasion." (Prelude to Independence, 20).

3. Although the American press assumed a larger and more dynamic role in expressing and shaping opinion during the Revolutionary period, this was essentially a pragmatic process that did not arise out of, nor give rise to, much innovation in the concept of freedom of expression during that time. In his Legacy of Suppression, Professor Levy summarized the situation (126–27):

> The American contribution to libertarian theory on freedom of speech and press, so strikingly absent prior to the Zenger case of 1735, was inconspicuous for long after. Even in the celebrated

case America produced no broad concept of freedom of expression. That did not come until the very close of the eighteenth century. In pre-Zenger America, no one had ever published an essay on the subject, let alone repudiate the concept of seditious libel or condemn its conventional application by the common-law courts or by parliamentary punishment for breach of privilege. To be sure, Englishmen in America admiringly read and quoted Cato, particularly if his grandiloquence suited a momentary purpose. But the colonists gave little independent thought and even less expression to a theory of unfettered debate. . . .

If, indeed, we do not dignify as a definition of freedom of the press, or of speech, the right to say anything that the community or the law agrees with or is indifferent to, it is difficult to find a libertarian theory in America before the American Revolution—or even before the First Amendment. . . .

B. THE FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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1. THE CONTROVERSY OVER A BILL OF RIGHTS

FREEDOM OF SPEECH AND PRESS IN AMERICA

Edward G. Hudon *

1-6 (1963).

The excuse given for the omission [of guarantees of individual liberties in the original Constitution] was that the idea for a bill of rights had not been thought of until three days before the end of the Convention, and that it had then been dismissed in a short conversation without formal debate or a definite proposal. . . .

A further examination of the *Records of the Federal Convention* reveals that among the propositions referred to the Committee of Five on August 20, 1787, one provided that "the liberty of the Press shall be inviolably preserved." The *Records* also indicate that on

* Hudon, Edward G., *Freedom of Speech and Press in America*, Public Affairs Press, Washington, D.C., 1963.

September 14, Mr. Pinkney and Mr. Gerry moved to insert a declaration "that the liberty of the Press should be Inviolably observed." Mr. Sherman objected again: "It is unnecessary—the power of Congress does not extend to the press." The matter was finally rejected by a vote of 7 to 4.

. . .

No sooner had the proposed Constitution been published than a clamor for a national bill of rights arose. It was strongest among the more radical and democratic elements including Jefferson, Monroe, Gerry, and Patrick Henry, but it also came from the farmers and the country people, the professional and the mercantile classes. They were familiar with the history of personal rights in England, and the recollections of experience under English rule were still vivid. Although the law of seditious libel had been repudiated by a New York jury in the case of Peter Zenger, there was general knowledge of the numerous English prosecutions since 1760 of which fifty had ended in convictions under the common law rule. As a consequence, immediately after separation from England most of the former colonies had enacted bills of rights and other barriers against similar despotism by their state legislatures. Now they demanded the same protection from the new national government.

The debate over a federal bill of rights was carried on in print, in the various conventions that met to consider the adoption of the proposed constitution, and by private correspondence. The subject of the debate was not whether man does or does not have rights that are natural, inherent, and inalienable. It was generally agreed that he did. To deny this would have meant not only to repudiate the very principles over which the Revolution had been fought, but also to reduce the Revolution to the level of successful banditry. Instead, the subject of the debate was what measures were necessary to preserve the natural, inherent and inalienable rights of man from being infringed upon in the future. Some felt reassured that the Constitution as proposed to the states was adequate, others feared that it was not. The former favored its adoption without modification; the latter insisted on a bill of rights.

The Federalist, letters written by Madison, Jay, and Hamilton under the name of Publius for publication in New York newspapers, presented the most forceful arguments in favor of the adoption of the Constitution as it was proposed. . . .

On the subject of liberty of the press, Publius asked, "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?" To which he answered, "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 on public opinion, and on the general spirit of the people and of the government. And here, after all, as is intimated upon another occasion, must we seek for the only solid basis of all our rights." [Federalist No. 84]

In his speech before the Pennsylvania convention in which he defended the absence of a bill of rights, James Wilson probably best summarized the arguments of those who claimed that a bill of rights was not necessary. Although he admitted that he might be mistaken in the matter, he stated that he did not remember having heard the subject mentioned until about three days before the end of the convention, and then not by direct motion. He believed that in a government of enumerated powers not only is a bill of rights not necessary but imprudent. Should an attempt at enumeration be made, everything not included would be presumed to be given. Therefore, he considered the omission of a bill of rights itself neither so dangerous nor as important as some omission in such a bill should one be included.

From Paris Jefferson took issue with those who argued that a bill of rights was not necessary. In his correspondence with Madison he wrote: "a bill of rights is what the people are entitled to against every government on earth, general or particular; and what no just government should refuse, or rest on inference." He stated his dislike for the lack of a declaration in a letter to Washington and added, "I am in hopes that the opposition of Virginia will remedy this, & produce such a declaration." Jefferson mistrusted the majority and he feared for the rights of the minority: "The executive, in our government, is not the sole, it is scarcely the principal object of my jealousy," he argued. "The tyranny of the legislatures is the most formidable dread at the present, and will be for many years." In this fear he was not alone. Madison had expressed similar concern during the Federal Convention when he had asked, "how is the danger, in all cases of interested coalitions, to oppress the minority, to be guarded against?" Now Publius recognized the problem even as he defended the Constitution. But perhaps no one put it more cogently than did James Iredell. He exclaimed: "The pleasure of a majority of the Assembly? God forbid! How many things have been done by majorities of a large body in *heat* and *passion*, that they themselves afterwards have repented of!"

In the Virginia convention, James Monroe and Patrick Henry probably best summarized the arguments of the proponents of a bill of rights.

Monroe, the more moderate of the two, feared the necessary and proper clause which granted to Congress the power "to make all

Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." He believed that because of the general and unqualified powers that this clause granted, not only could the right to trial by jury be infringed but also "the liberty of the press, and every right that is not expressly secured and excepted from the general power." Without an express provision that would secure inalienable rights he saw the Constitution as a dangerous instrument calculated to secure neither the interests nor the rights of anyone.

. . .

Notwithstanding controversies in the state conventions, by the end of May, 1790, the Constitution had been adopted by thirteen states. But even in adopting it five states expressed dissatisfaction over the absence of a bill of rights. . . .

The First Amendment

When the First Congress met, James Madison offered amendments embodying the state recommendations for a bill of rights. He deemed it "a desirable thing to extinguish from the bosom of every member of the community, any apprehensions that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled."

Madison's original recommendation provided not only that "the people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press as one of the great bulwarks of liberty, shall be inviolable," but also that "No state shall violate equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." The select committee of the House of Representatives to which this was referred added freedom of speech. As it was adopted by the House it read, "the equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases, shall not be infringed by any state." . . .

Madison had supported this amendment as the most valuable of the list. He had asserted that it was as important to secure essential rights against state action as against action by the central government, but much to his disappointment the Senate struck out the provision restricting the powers of the states, a move in which the House later concurred. Of the twelve amendments submitted to the states, the third provided: "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 re-

dress of grievances." Ten of the proposed amendments were adopted and this one became the First Amendment to the Constitution of the United States.

Notes and Questions

1. *The Nature of the Federal Constitution.* After the successful American revolution the governments of the former colonies sought to come together to form a nation. Their internal structures were similar, reflecting common antecedents, but no overarching government controlled relations among these new political entities. A central government could provide security against foreign attack and could ease the movement of goods and persons among the former colonies. A loose confederation devised in 1783 had proven inadequate. The new Constitution (reprinted in Appendix A) created a national government with a tripartite structure: Art. I created the Congress; Art. II created the office of the President; and Art. III created the Supreme Court and authorized the Congress to create additional federal courts if Congress thought such action appropriate.

Other provisions were addressed to the relationship between the state governments and the national government. Art. IV provided that the official government acts of each state were to be granted "full faith and credit" in other states, so that all states had to recognize the legal acts of one another. Art. I Sec. 8 empowered Congress to legislate on specific subjects and Art. I Sec. 9 forbade Congress from legislating in certain other areas. Art. I Sec. 10 barred certain actions to the states—though some could be undertaken with Congressional consent.

Beyond that, Art. VI Sec. 2—the so-called Supremacy Clause—provided that the Constitution and the "Laws of the United States" made pursuant thereto "shall be the supreme Law of the Land" and binding on state government officials despite any contrary provisions in state law or the state constitution. This means that if no provision in the federal Constitution bars a state from exercising a certain power, the state is free to exercise that power so long as it does so consistently with its own state constitution. Thus, a state legislature considering a statute must first ascertain whether the state constitution permits the exercise of such power. If so, it must see if it is consistent with federal law, including not only the federal Constitution, but also, because of the Supremacy Clause, federal statutes and judicial decisions.

The Constitution envisioned a federal government with three major branches, each having specified functions, and coordinated relationships between the federal government and the states and among the several states. Except for such incidental provisions as the pro-

hibitions on ex post facto laws contained in Art. I Secs. 9 and 10, there was little attention given to protecting individual citizens against government. Some states in their own constitutions had protected citizens against state government action, but the federal Constitution was not primarily concerned with that problem. As Hudon indicates, this omission led some critics to oppose ratification because the new government might itself threaten the freedom of citizens of the new country.

2. The debate over the Bill of Rights emphasized the need to protect minorities from the will of the majority. In 1788 Madison saw the "turbulence, violence, and abuse of power, by the majority trampling on the rights of the minority" as a frequent cause of despotism. The Forging of America 46–47 (S. Padover ed. 1965). Is this the same concern that Iredell expressed? Protecting the minority does not necessarily lead to support for a Bill of Rights, as the debates indicate, and yet Madison ultimately favored such a Bill in the hope that the solemn declaration of these rights would emphasize their importance.

3. Although it was later argued that the Bill of Rights was intended to protect citizens against invasions by the state as well as the federal government, this was rejected in Barron v. Baltimore, 7 Peters (32 U.S.) 243 (1833) when the Supreme Court decided that the Bill of Rights applied solely against the federal government. Constraints on the states were those specified in Art. I Sec. 10 and in such other provisions as the Supremacy Clause. It was only after the Civil War, when states were placed under the additional restraints of the Thirteenth, Fourteenth and Fifteenth Amendments, that they came under a federal requirement to accord freedom of speech and press. This development is discussed in Chapter II. The Constitution restrains only governments, not private individuals, from interfering with the exercise of freedom of expression.

4. During the ratification controversy, according to Levy, "[m]any of the principal advocates of a Bill of Rights had only a nebulous idea of what it ought to contain. Freedom of the press was everywhere a grand topic for declamation, but the insistent demand for its protection on parchment was not accompanied by a reasoned analysis of what it meant, how far it extended, and under what circumstances it might be limited. . . . Nor do the newspapers, pamphlets, or debates of the state ratifying conventions offer illumination." Of the eleven states that had their own constitutions in 1789, nine protected freedom of the press and only Pennsylvania protected freedom of speech. Thus Levy condemns the characterization of the colonies as dedicated to freedom of expression as an "hallucination of sentiment that ignores history."

LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY

Leonard W. Levy

221, 224–25, 236–38 (1960).

If the controversy in the states over the ratification of the Constitution without a bill of rights revealed little about the meaning and scope of freedom of speech-and-press, the debates by the First Congress, which framed the First Amendment, are even less illuminating.

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. . . The First Amendment imposed limitations upon only the national government. The limitations seemed clear enough, but the meanings of the subjects protected were not. The Congressional debate on the amendment, even as to its clause on establishments of religion as well as the free speech-and-press clause, was unclear and apathetic; ambiguity, brevity, and imprecision in thought and expression characterize the comments of the few members who spoke. It is doubtful that the House understood the debate, cared deeply about its outcome, or shared a common understanding of the finished amendment. The meager records of the Senate tell us only that a motion was voted down to alter the amendment so that freedom of the press should be protected "in as ample a manner as hath at any time been secured by the common law." There is no way of knowing whether the motion was defeated on the ground that it was too narrow, too broad, or simply unnecessary. But its phraseology reflects a belief in the mind of its proposer that the common law adequately protected freedom of the press.

State action on the proposed Bill of Rights apparently occasioned slight comment either in or out of the legislatures, except in Virginia. Nine states perfunctorily approved the Bill of Rights by mid-June of 1790. Since records of legislative debates are nonexistent, there is no way of expressly knowing what the First Amendment freedoms were understood to mean. Private correspondence, newspapers, and tracts are unilluminating. Many may have cared about protecting freedom of speech-and-press, but no one seems to have cared enough to clarify what he meant by the subject upon which he lavished praise. If definition were unnecessary because of the existence of a tacit and widespread understanding of "liberty of the press," only the received or traditional understanding could have been possible. To assume the existence of a general, latitudinarian understanding that veered substantially from the common-law definition is incredible, given the total absence of argumentive analysis of the meaning of the clause on

speech and press. Any novel definition expanding the scope of free expression or repudiating, even altering, the concept of seditious libel would have been the subject of public debate or comment. Not even the Anti-Federalists offered the argument that the clause on speech and press was unsatisfactory because insufficiently protective.

. . .

No one can say for certain what the Framers had in mind, for although the evidence all points in one direction there is not enough of it to justify cocksure conclusions. It is not even certain that the Framers themselves knew what they had in mind; that is, at the time of the drafting and ratification of the First Amendment, few among them if any at all clearly understood what they meant by the free speech-and-press clause, and it is perhaps doubtful that those few agreed except in a generalized way and equally doubtful that they represented a consensus. Considerable disagreement existed, for example, on the question whether freedom of expression meant the right to print the truth about government measures and officials if the truth was defamatory or revealed for unworthy motives. There was also disagreement about the function of juries in trials for criminal libel.

What is clear is that there exists no evidence to suggest an understanding that a constitutional guarantee of free speech or press meant the impossibility of future prosecutions of seditious utterances. The traditional libertarian interpretation of the original meaning of the First Amendment is surely subject to the Scottish verdict: not proven. Freedom of speech and press, as all the scattered evidence suggests, was not understood to include a right to broadcast sedition by words. The security of the state against libelous advocacy or attack was always regarded as outweighing any social interest in open expression, at least through the period of the adoption of the First Amendment. The thought and experience of a lifetime, indeed the taught traditions of law and politics extending back many generations, supplied an a priori belief that freedom of political discourse, however broadly conceived, stopped short of seditious libel. As Maitland observed, "Taught law is tough law," and its survival power was sufficient to carry it through the American Revolution with its principles unbroken except for a few feudal relics such as those relating to primogeniture and entail. The fact is scarcely even remarkable since the origins and conduct of the American Revolution were unrelated to any hostility to the common law, and surely not to its doctrines of verbal crime which were given statutory recognition and carried to extremes during the Revolution itself. Moreover, the Sedition Act, passed less than seven years after the ratification of the First Amendment, suggests that suppression of seditious libel was not considered to be an abridgment of freedom of speech or press.

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Notes and Questions

1. What does Levy conclude from the fact that the meaning of the phrases in the First Amendment was not clarified by debate? Zechariah Chafee has suggested that the lack of debate may be explained by the fact that "[e]verybody was for freedom of speech." An illuminating political debate, he felt, could occur only when a "forked road" necessitated a decision. How Human Rights Got Into the Constitution 8–9 (1952). If Professor Chafee is correct that the framers of the First Amendment were all in accord, what was the consensus? Were they preserving the freedom of the press as limited by Blackstone to "no prior restraint?" Were the innovators afraid that a debate about specifics would sharpen the differences and lead to defeat? Answers to these questions cannot be found in the debates over the Amendment, nor do any of the state constitutions provide clues.

2. In Free Speech in the United States (1941), Chafee, while acknowledging that very little was said about the meaning of freedom of speech, reviews some contemporary statements that suggest that in the years before the First Amendment "freedom of speech was conceived as giving a wide and genuine protection for all sorts of discussion of public matters." He argues that "such a widely recognized right must mean something," and that merely reaffirming the freedom of the press from previous censorship would have been pointless. During the eighteenth century, besides the narrow legal meaning of liberty of the press there existed "a definite popular meaning: the right of unrestricted discussion of public affairs," and Chafee thinks the framers were aware of basic differences between Great Britain and the former colonies.

3. One aspect of freedom of expression that was retained was the complete parliamentary privilege for legislators, even including attacks on the crown. The scope of the legislator's free expression is found in Article I, § 6 of the United States Constitution, providing that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." This has been taken to mean that such speech may not form the basis for criminal or civil liability. A comparable provision is contained in virtually every state constitution to protect members of the state legislatures. These are collected in Tenney v. Brandhove, 341 U.S. 367 n.5 (1951).

4. The nature and structure of the press at the time of the adoption of the First Amendment may provide some insight into the meaning of the words used. The following excerpt describes that situation.

AMERICAN JOURNALISM

Frank Luther Mott*

113–14, 122–26 (3d ed. 1962).

In the matter of the incidence of individual newspapers, there was a remarkably clean break between the Revolutionary period and the one which followed it. Many of the old papers dropped out of the picture about the time of the peace treaty with England, and others began to sink slowly toward oblivion; while more than sixty new papers were started in the mid-eighties. This furore of newspaper founding increased in the next decade, and altogether about 450 new papers were begun in the period now under consideration. Many of these existed but briefly; others lasted—some brilliantly and some obscurely—for many years. But of the old papers which were important in the early years of the Revolutionary War, only about a dozen persisted to the end of the century or beyond.

Yet the most noticeable feature of the journalism of the years 1783–1801 had its roots deep in the Revolutionary press. This was the ardent partisan political propaganda of the period. It was inevitable that political leaders, once they had discovered the usefulness of the press in the heats of controversy, should employ such newspapers as they could enlist to help them fight the battles which presently developed along the new Federalist versus Republican alignment.

Indeed, as party feeling grew, a new reason for the existence of newspapers came to be recognized. Whereas nearly all newspapers heretofore had been set up as auxiliaries to printing establishments and had been looked upon merely as means which enterprising printers used to make a living, now they were more and more often founded as spokesmen of political parties. This gave a new dignity and a new color to American journalism.

It resulted also in the emergence of the newspaper editor. Up to this time, conducting a newspaper had been chiefly a matter of selecting, without much initiative, the conventional items of newspaper content, and printing and distributing them. Newspaper conductors were, in the main, mere printers and publishers, and they so regarded themselves. But now we have one newspaper after another coming forward as the expression of the personality of an "able editor" who may or may not be a printer himself; and we find one leading editor writing contemptuously of papers "conducted by mere mechanicks."

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When the new federal government was established under the Constitution, with its capital in New York, there was, oddly enough, no strong paper of Federalist convictions at the seat of government. Federalist leaders felt the need for such a paper—one which should be distinctively a political organ, and not a mercantile paper incidentally interested in politics. And so when John Fenno appeared in New York early in 1789 with letters from leading Boston Federalists recommending his abilities as writer, editor, and party man, he was encouraged to establish forthwith an administration paper in the capital. The *Gazette of the United States*, semiweekly, was the result; its first issue came out April 15, 1789, in time to tell of preparations for Washington's inauguration.

. . .

It was in the second year of Washington's first administration that the breach between Hamilton and Jefferson became apparent. Now, Hamilton, who was always journalistically minded, had his newspaper organ at the national capital—the Federalist *Gazette of the United States*—and it was soon suggested to his rival that a strong Republican paper was necessary to protect party interests. Thereupon James Madison, a close friend of Jefferson, undertook to bring Philip Freneau to Philadelphia to edit and publish the desired newspaper. Jefferson's chief contribution to the project was the offer of a position as translator in the State Department to Freneau—a job which required little work and paid only $250 a year. But Freneau eventually accepted it, came to the capital and founded the *National Gazette*, a semiweekly, on October 31, 1791.

. . .

It was this wit and adventurer who, in the next two years, did more than anyone else to make American political journalism a kind of Donnybrook Fair of broken heads and skinned knuckles. His paper widened the breach between Hamilton and Jefferson, was influential in consolidating the Republican party as an effective opposition, and probably had more than a little to do with the ultimate dissolution of the Federalist party.[19] Freneau's own favorite method was satire, in parable, versified lampoon, and hyperbole; but such contributors as Madison and Brackenridge supplied profound disquisitions.

. . .

The end of the *National Gazette* came suddenly at the close of its second year. Three causes brought about its demise: Jefferson,

19. Jefferson wrote in 1793: "His paper has saved our constitution which was galloping fast into monarchy, & has been checked by no one means so powerfully as by that paper." P. L. Ford, ed., *Writings of Thomas Jefferson*, Vol. I, p. 231.

Freneau's idol and sponsor, had recently retired from the cabinet; the yellow fever epidemic, which had caused the temporary suspension of other Philadelphia papers, including Fenno's was still raging; and Freneau and his printers were virtually bankrupt. . . .

Notes and Questions

1. A new element was the emergence of an editor, who ran the newspaper as "the expression of [his] personality." Would the "furore of newspaper founding" and the extreme partisanship of the press imply easier access to outlets of opinion?

2. Although the partisan political propaganda of the press in the 1790's resembled what took place during the Revolution, the candor and fervor of expression were less widely admired once the national consensus weakened and factions began to appear. Was it predictable that freedom of expression, when exercised in such circumstances, would be less welcome?

3. In 1947 a Commission on the Freedom of the Press, chaired by Robert M. Hutchins, speculated as to the meaning of freedom of the press at the time of the Constitution. At that time, "anybody with anything to say had little difficulty getting it published," and governmental interference was seen as the sole constraint:

> It was not supposed that any one newspaper would represent all, or nearly all, of the conflicting viewpoints regarding public issues. Together they could be expected to do so, and, if they did not, the man whose opinions were not represented could start a publication of his own.

Furthermore the literacy rate was low and the property requirements for voters limited the real audience for journalists: "less than 6 percent of the adult population voted for the conventions held to ratify the Constitution. . . ."

The Commission quoted Jefferson's statement that if he had to choose either newspapers or government he would choose newspapers, "But I should mean that every man should receive those papers and be capable of reading them." Does the contemporary structure of the press or the suggestion that literacy was a luxury help to clarify what the framers may have meant by freedom of the press?

2. The First Showdown: The Sedition Act of 1798

FREEDOM OF SPEECH AND PRESS IN AMERICA

Edward G. Hudon *

44–48 (1963).

In 1798, less than ten years after the adoption of the First Amendment, the Alien and Sedition Laws were enacted by the Federalist majority in Congress. . . . The last of these laws, the Sedition Act, provided in part as follows in Section 2: "And be it further enacted, That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, or uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States . . . shall be punished by a fine not exceeding two thousand dollars and by imprisonment not exceeding two years."

It is true that by the third section of the Sedition Act the truth of the matter charged as a libel could be given in evidence in defense and a jury could determine both law and fact under a court's direction. Nevertheless, this was strange legislation for a government that had so recently insisted that guarantees against the infringement of speech and press be incorporated into its constitution. The safeguards of the third section of the act notwithstanding, the implications of the second section were altogether too evident. . . .

. . .

Widespread resentment against the Federalist party and its Alien and Sedition Laws burst forth as soon as the contents of these became generally known. Although Jefferson apparently did not object when the legislation was first proposed and he heard of it, later he added kindling to the fire of resentment with the nine Kentucky resolutions that he drafted and which were adopted by the Kentucky legislature November 10, 1798. The third of these declared that as a general principle and expressly so by the Constitution as amended, all powers neither delegated to the United States nor prohibited to the states were reserved to the latter; that no power over religion, speech

* Hudon, Edward G., *Freedom of Speech and Press in America*, Public Affairs Press, Washington, D.C., 1963.

or press was delegated to the United States or forbidden to the states by the Constitution. Therefore, because of this and because of the express prohibition of the First Amendment, it stated that the Sedition Act "which does abridge the freedom of the press, is not law, but is altogether void, and of no force."

When Jefferson sent him a copy of these resolutions, Madison took the cue, rewrote them, and had his version presented to the Virginia legislature along with a report that he wrote. The Virginia legislature reacted favorably and adopted Madison's measures December 21, 1798. This version protested the Alien and Sedition Laws as unconstitutional and called for the cooperation of all of the states "in maintaining unimpaired the authorities, rights, and liberties, reserved to the states respectively, or to the people." In his report Madison denied the existence of a federal common law that could sanction the Sedition Act, and he denied that the Federal government had the power to legislate to the abridgment of the freedom of the press.

The states that did respond to the call for cooperation opposed the resolution, but the people at large reacted with a bountiful crop of remonstrances, petitions and memorials condemning the laws which they addressed to Congress.

. . .

How many prosecutions took place for violations of the Sedition Law is not accurately known. Anderson states that twenty-four or twenty-five persons were arrested, at least fifteen indicted, ten or possibly eleven tried, and ten pronounced guilty. . . .

By its terms the Sedition Act expired with the 5th Congress, and as soon as Jefferson became President all persons convicted or awaiting trial for its violation were immediately pardoned or released. For these reasons no trial ever reached the Supreme Court of the United States and the constitutionality of the act was never finally determined. . . .

Notes and Questions

1. Although after Jefferson's election in 1800, the Sedition Act expired without further use, the forces unleashed by the controversy have surfaced periodically ever since. Those who were unimpressed by the provisions that truth might be a defense and that the jury could determine questions of both law and fact, saw instead the irony of providing severe penalties for political speech that could paralyze opponents of the party in power.

They asserted that such terms as "license" and "licentiousness," "truth" and "falsehood," "good motives" and "criminal intent" were useless as guidelines for a judge or jury considering a particular ut-

terance. James Madison regarded punishment for "malice" as a blow to the basis of open discussion, since most criticisms of government were designed to encourage opposition and thus became criminal libels.

The availability of truth as a defense when expressions of opinion were at issue brought particular ridicule. As George Hay noted, "there are many truths, important to society, which are not susceptible of that full, direct, and positive evidence, which alone can be exhibited before a court and a jury." John Thompson echoed this when he observed that having a jury decide the "truth" of an opinion was like having them determine the most delicious food or drink, or the most pleasing color.

These attacks on the specifics of the Sedition Act were to culminate in the assertion that in a free society there could be no crime of seditious libel, since the citizen should be able to "say everything which his passions suggest." In the words of George Hay, he should be "safe within the sanctuary of the press" even if he "censures the measures of our government, and every department and officer thereof . . . even if he ascribes to them measures and acts, which never had existence; thus violating at once, every principle of decency and truth." The spirit of this period is captured in L. Levy, Jefferson and Civil Liberties: The Darker Side 51–54 (1963).

2. The Sedition Act is traditionally regarded as an example of repressive legislation, but the Act did provide both of the protections that earlier critics had demanded: the jury was to decide questions of law as well as fact, and truth was available as a defense to criminal libel. In 1792 in England, Fox's Libel Act, which did only the former, was hailed as a major gain for freedom of expression. Truth was not accepted as a defense in such cases in England until 1843.

3. In his draft of the Virginia resolutions, Madison argued that in the British form of government Parliament was omnipotent and the apparent threat was the crown. "In the United States, the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power." Thus the Constitution secures the people against invasions by both branches: "This security of the freedom of the press requires, that it should be exempt, not only from previous restraint by the executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licensers, but from the subsequent penalty of laws." The Virginia Report of 1799, 225–227 (J. Randolph ed. 1850). Madison also observed that

> Whether it has, in any case, happened that the proceedings of either, or all of those branches, evince such a violation of duty

as to justify a contempt, a disrepute or hatred among the people, can only be determined by a free examination thereof, and a free communication among the people thereon.

. . .

Let it be recollected, lastly, that the right of electing the members of the government, constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right, depends on the knowledge of the comparative merits and demerits of the candidates for public trust; and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.

Madison's rationale for freedom of expression represents a significant departure from the English thinking of that period, and is a more far-reaching conception of that freedom than Madison had expressed previously. Why did this view not emerge in 1791?

4. The language in the Virginia Report does not answer the question of Madison's views at the time of the adoption of the First Amendment. In Legacy of Suppression Professor Levy presents evidence that is mainly negative, such as Madison's silence at the Virginia ratifying convention of 1788 when a close ally of his defined freedom of the press as the absence of a licensing act. Levy concludes that the later exposition is "not a reliable statement of the understanding prevalent at the time of the framing and ratifications of the First Amendment. It was, rather, a major step in the evolution of the meaning of the free speech-and-press clause."

5. Jefferson's position during the Sedition Act controversy and afterward is conveyed by the famous statement in his First Inaugural Address (1801):

But every difference of opinion is not a difference of principle. We have called by different names brethren of the same principle. We are all republicans; we are all federalists. If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated, where reason is left free to combat it. I know, indeed, that some honest men fear that a republican government cannot be strong; that this government is not strong enough. But would the honest patriot, in the full tide of successful experiment, abandon a government which has so far kept us free and firm, on the theoretic and visionary fear that this government, the world's best hope, may by possibility want energy to preserve itself? I trust not. I believe this, on the contrary, the strongest government on earth. I believe it the only one where every man,

> at the call of the law, would fly to the standard of the law and would meet invasions of the public order as his own personal concern.

Again, in a letter to John Tyler (1804):

> No experiment can be more interesting than that we are now trying, and which we trust will end in establishing the fact, that man may be governed by reason and truth. Our first object should therefore be, to leave open to him all the avenues to truth. The most effectual hitherto found, is the freedom of the press. It is, therefore, the first shut up by those who fear the investigation of their actions. The firmness with which the people have withstood the late abuses of the press, the discernment they have manifested between truth and falsehood, show that they may safely be trusted to hear everything true and false, and to form a correct judgment between them. . . .

6. Despite his commitment to a broad philosophy of freedom of expression, Jefferson wrote to the Governor of Pennsylvania in 1803 deploring the "licentiousness" of the Federalist press that was pushing its "lying to such a degree of prostitution as to deprive it of all credit," and suggesting that "a few prosecutions of the most prominent offenders would have a wholesome effect." Here he was writing to a governor and was referring to state, not federal, prosecutions. Thus, as late as 1803, Jefferson had not repudiated the law of seditious libel in the realm of state prosecutions.

C. LATER INTERPRETATIONS OF FREEDOM OF EXPRESSION

In England the heirs to Locke, and his view that freedom meant the absence of restraint, continued to stress freedom for the individual. Yet they valued freedom of expression on broader bases than did their predecessors. Compare the arguments of John Stuart Mill in 1859 with those of Milton, Locke, Madison and Jefferson.

ON LIBERTY

John Stuart Mill

The Utilitarians (Dolphin ed. 1961) 490–94, 502–03, 509–14, 520–22, 528–30.

The time, it is to be hoped, is gone by, when any defense would be necessary of the 'liberty of the press' as one of the securities against corrupt or tyrannical government. No argument, we may

suppose, can now be needed against permitting a legislature or an executive, not identified in interest with the people, to prescribe opinions to them, and determine what doctrines or what arguments they shall be allowed to hear. . . . Let us suppose, therefore, that the government is entirely at one with the people, and never thinks of exerting any power of coercion unless in agreement with what it conceives to be their voice. But I deny the right of the people to exercise such coercion, either by themselves or by their government. The power itself is illegitimate. The best government has no more title to it than the worst. It is as noxious, or more noxious, when exerted in accordance with public opinion, than when in opposition to it. If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind. Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race: posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

It is necessary to consider separately these two hypotheses, each of which has a distinct branch of the argument corresponding to it. We can never be sure that the opinion we are endeavoring to stifle is a false opinion; and if we were sure, stifling it would be an evil still.

First: the opinion which it is attempted to suppress by authority may possibly be true. Those who desire to suppress it, of course deny its truth; but they are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging. To refuse a hearing to an opinion, because they are sure that it is false, is to assume that *their* certainty is the same thing as *absolute* certainty. All silencing of discussion is an assumption of infallibility. Its condemnation may be allowed to rest on this common argument, not the worse for being common.

. . .

. . . There is the greatest difference between presuming an opinion to be true because, with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose of not permitting its refutation. Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assum-

ing its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right.

. . .

But, indeed, the dictum that truth always triumphs over persecution is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes. History teems with instances of truth put down by persecution. If not suppressed forever, it may be thrown back for centuries.

. . . It is a piece of idle sentimentality that truth, merely as truth, has any inherent power denied to error of prevailing against the dungeon and the stake. Men are not more zealous for truth than they often are for error, and a sufficient application of legal or even of social penalties will generally succeed in stopping the propagation of either. The real advantage which truth has, consists in this, that when an opinion is true, it may be extinguished once, twice, or many times, but in the course of ages there will generally be found persons to rediscover it, until some one of its reappearances falls on a time when from favorable circumstances it escapes persecution until it has made such head as to withstand all subsequent attempts to suppress it.

. . .

Let us now pass to the second division of the argument, and dismissing the supposition that any of the received opinions may be false, let us assume them to be true, and examine into the worth of the manner in which they are likely to be held, when their truth is not freely and openly canvassed. However unwillingly a person who has a strong opinion may admit the possibility that his opinion may be false, he ought to be moved by the consideration that, however true it may be, if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth.

There is a class of persons (happily not quite so numerous as formerly) who think it enough if a person assents undoubtingly to what they think true, though he has no knowledge whatever of the grounds of the opinion, and could not make a tenable defense of it against the most superficial objections. . . . This is not knowing the truth. Truth, thus held, is but one superstition the more, accidentally clinging to the words which enunciate a truth.

If the intellect and judgment of mankind ought to be cultivated, a thing which Protestants at least do not deny, on what can these faculties be more appropriately exercised by anyone, than on the things which concern him so much that it is considered necessary for him to hold opinions on them? If the cultivation of the understanding consists in one thing more than in another, it is surely in learning the

grounds of one's own opinions. Whatever people believe, on subjects on which it is of the first importance to believe rightly, they ought to be able to defend against at least the common objections. . . . He who knows only his own side of the case, knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion. The rational position for him would be suspension of judgment, and unless he contents himself with that, he is either led by authority, or adopts, like the generality of the world, the side to which he feels most inclination. Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them. He must know them in their most plausible and persuasive form; he must feel the whole force of the difficulty which the true view of the subject has to encounter and dispose of; else he will never really possess himself of the portion of truth which meets and removes that difficulty. Ninety-nine in a hundred of what are called educated men are in this condition; even of those who can argue fluently for their opinions. . . .

. . .

It still remains to speak of one of the principal causes which make diversity of opinion advantageous, and will continue to do so until mankind shall have entered a stage of intellectual advancement which at present seems at an incalculable distance. We have hitherto considered only two possibilities: that the received opinion may be false, and some other opinion consequently true; or that, the received opinion being true, a conflict with the opposite error is essential to a clear apprehension and deep feeling of its truth. But there is a commoner case than either of these: when the conflicting doctrines, instead of being one true and the other false, share the truth between them; and the nonconforming opinion is needed to supply the remainder of the truth, of which the received doctrine embodies only a part. . . . Hence, even in revolutions of opinion, one part of the truth usually sets while another rises. Even progress, which ought to superadd, for the most part only substitutes, one partial and incomplete truth for another; improvement consisting chiefly in this, that the new fragment of truth is more wanted, more adapted to the needs of the time, than that which it displaces. Such being the partial character of prevailing opinions, even when resting on a true foundation, every opinion which embodies somewhat of the portion of

truth which the common opinion omits, ought to be considered precious, with whatever amount of error and confusion that truth may be blended. . . .

Before quitting the subject of freedom of opinion, it is fit to take some notice of those who say that the free expression of all opinions should be permitted, on condition that the manner be temperate, and do not pass the bounds of fair discussion. Much might be said on the impossibility of fixing where these supposed bounds are to be placed. . . . Undoubtedly the manner of asserting an opinion, even though it be a true one, may be very objectionable, and may justly incur severe censure. But the principal offenses of the kind are such as it is mostly impossible, unless by accidental self-betrayal, to bring home to conviction. The gravest of them is, to argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion. But all this, even to the most aggravated degree, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct. With regard to what is commonly meant by intemperate discussion, namely invective, sarcasm, personality, and the like, the denunciation of these weapons would deserve more sympathy if it were ever proposed to interdict them equally to both sides; but it is only desired to restrain the employment of them against the prevailing opinion: against the unprevailing they may not only be used without general disapproval, but will be likely to obtain for him who uses them the praise of honest zeal and righteous indignation. . . . In general, opinions contrary to those commonly received can only obtain a hearing by studied moderation of language, and the most cautious avoidance of unnecessary offense, from which they hardly ever deviate even in a slight degree without losing ground; while unmeasured vituperation employed on the side of the prevailing opinion really does deter people from professing contrary opinions, and from listening to those who profess them. For the interest, therefore, of truth and justice, it is far more important to restrain this employment of vituperative language than the other; and, for example, if it were necessary to choose, there would be much more need to discourage offensive attacks on infidelity than on religion. It is, however, obvious that law and authority have no business with restraining either. . . .

Notes and Questions

1. What new arguments does Mill add to those of the 17th and 18th century theorists? How does he view the invincibility of truth, the

issue that divided Milton and Locke? Do these views stress individual or social values of free expression?

2. Although his arguments are general and applicable to any form of government, Mill is careful to point out that even a government that is fully representative of the people has no right to "exercise such coercion" since it would result in "robbing the human race."

The question of the link between freedom of expression and certain forms of government had been considered earlier by his father. In an essay, Liberty of the Press, in response to the suggestion that freedom of the press would be unnecessary in a representative government, James Mill replied: "So far is this from being true, that it is doubtful whether a power in the people of choosing their own rulers, without the liberty of the press, would be an advantage." A free press could serve three essential functions: (1) to provide the voters with information to form the basis for intelligent choice; (2) to make the conduct of the rulers known to the people; and (3) to bring to the attention of the rulers current public opinion with respect to the improvements in government. Essays on Government, Jurisprudence, Liberty of the Press and Law of Nations 19, 28 (1825). What expression would be protected under this view? Would J. S. Mill have considered this sufficient?

3. John Stuart Mill expressed a limited faith in the value of liberty when he wrote in chapter I of On Liberty that "Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion. Until then, there is nothing for them but implicit obedience to an Akbar or a Charlemagne, if they are so fortunate as to find one." Mill's antagonist, Sir James Stephen, seized on this passage in his Liberty, Equality, Fraternity 68 (R. White ed. 1967): "Why then may not educated men coerce the ignorant? What is there in the character of a very commonplace ignorant peasant or petty shopkeeper in these days which makes him a less fit subject for coercion on Mr. Mill's principle than the Hindoo nobles and princes who were coerced by Akbar?" How might Mill respond?

4. Carl Becker, in Freedom and Responsibility in the American Way of Life (1949), discusses the view of human nature derived from Mill that he sees as having shaped our concept of freedom and the "stupendous gamble" of democracy (31–32):

> Since primitive times virtually all religious or social systems have attempted to maintain themselves by forbidding free criticism and analysis either of existing institutions or of the doctrine that sustains them; of democracy alone is it the cardinal principle that free criticism and analysis by all and sundry is the

highest virtue. In its inception modern democracy was, therefore, a stupendous gamble for the highest stakes. It offered long odds on the capacity and integrity of the human mind. It wagered all it had that the freest exercise of the human reason would never disprove the proposition that only by the freest exercise of the human reason can a tolerably just and rational society ever be created.

5. The respect for human reason that Mill voiced for his time has continued into the present. Yet the promise of the Enlightenment had perhaps been overstated, and mankind is still far from the condition envisaged by Mill. Does this mean that we should look elsewhere for the key to human nature?

The amorphousness of a free society, in which the individual must sink or swim on his own, is rejected by a strand of conservative thinking discussed by Robert Paul Wolff in A Critique of Pure Tolerance (1965). In that view the "involvement of each with all" is "the greatest virtue of society" and man's true being "lies in his involvement in a human community." This view is relevant to our discussion of freedom because it arises out of the menacing and disconcerting aspects of freedom perceived by a leading French sociologist, Emile Durkheim, who found a correlation between proneness to suicide and the "loosening of the constraints of traditional and group values" that produces in some persons "an absence of limits on desire and ambition," a lawless condition that he called "anomie."

Wolff argues that if Durkheim is correct, "the very liberty and individuality which Mill celebrates are deadly threats to the integrity and health of the personality." The "invasive intimacy of each with each which Mill felt as suffocating is actually our principal protection against the soul-destroying evil of isolation." Wolff notes that Mill concedes that individual liberty does not apply to children, who are not ready for "the burden of freedom," and he suggests that "men are the children of their societies throughout their lives."

In this context Wolff sees the problem "for the unillusioned supporter of liberal principles" as that of defining a "social philosophy which achieves some consistency between the ideals of justice and individual freedom on the one hand" and the formulation of Durkheim that he accepts as "the facts of the social origin and nature of personality on the other."

6. The surge of nationalism in 19th century Europe brought increased interest in the view of men as "the children of their societies." Hegel, for example, regarded the nation-state as the major force in human history, and the role of the individual as incidental. The individual's freedom *from* restraint was less valuable than the "real" freedom for self-realization that could be achieved through

service to a state. Thus Hegel wrote: "law, morality, the State, and they alone, are the positive reality and satisfaction of freedom. The caprice of the individual is not freedom. . . . Only the will that obeys the law is free." Reason in History: A General Introduction to the Philosophy of History 50, 53 (R. Hartman transl. 1953). Hegel had placed little value on freedom of the press as we know it, and seemed to consider liberty as tantamount to licentiousness, with little regard for either one. Philosophy of Right § 318 (1821) (T. Knox transl. 1942):

> To define freedom of the press as freedom to say and write whatever we please is parallel to the assertion that freedom as such means freedom to do as we please. Talk of this kind is due to wholly uneducated, crude, and superficial ideas. Moreover, it is in the very nature of the thing that abstract thinking should nowhere be so stubborn, so unintelligent, as in this matter of free speech, because what it is considering is the most fleeting, the most contingent, and the most personal side of opinion in its infinite diversity of content and tergiversation.

The continental idealists or "neo-Hegelians" expanded upon Rousseau's theories of the primacy of the community and the "general will."

7. Hegel's approach was criticized extensively by Harold J. Laski in his Liberty in the Modern State (1930). Rejecting the time-honored view that man's freedom had been "born of a limitation upon what his rulers may exact from him," Rousseau and Hegel had upended "the classic antithesis between liberty and authority" (1930 ed. at 24–25):

> Before I seek to analyse this view, I would point out how simply this argument enables us to resolve the very difficult problem of social obligation. When I obey the State, I obey the best part of myself. The more fully I discover its purposes the more fully, also, there is revealed to me their identity with that at which, in the long view, I aim. So that when I obey it, I am, in fact, obeying myself; in a real sense its commands are my own. Its view is built upon the innumerable intelligences from the interplay of which social organization derives its ultimate form; obviously such a view is superior in its wisdom to the result my own petty knowledge can attain. My true liberty is, therefore, a kind of permanent tutelage to the State, a sacrifice of my limited purpose to its larger end upon the ground that, as this larger end is realized so I too am given realization. I may, in fact, be most fully free when I am most suffused with the sense of compulsion.
>
> To me, at least, this view contradicts all the major facts of experience: It seems to me to imply not only a paralysis of the

will, but a denial of that uniqueness of individuality, that sense that each of us is ultimately different from his fellows, that is the ultimate fact of human experience. For as I encounter the State, it is for me a body of men issuing orders. Most of them, I can obey either with active good will or, at least, with indifference. But I may encounter some one order, a demand, for instance, for military service, a compulsion to abandon my religious faith, which seems to me in direct contradiction to the whole scheme of values I have found in life. How I can be the more free by subordinating my judgement of right to one which directly changes that judgement to its opposite, I cannot understand. If the individual is not to find the source of his decisions in the contact between the outer world and himself, in the experience, that is, which is the one unique thing that separates him from the rest of society, he ceases to have meaning as an individual in any sense that is creative. For the individual is real to himself not by reason of the contacts he shares with others, but because he reaches those contacts through a channel which he alone can know. His true self is the self that is isolated from his fellows and contributes the fruit of isolated meditation to the common good which, collectively, they seek to bring into being.

But Laski valued freedom for the society as well as for the individual. In another book, A Grammar of Politics 118–21 (2nd ed. 1930), he emphasized the role of free expression—even including a call to armed revolution—as contributing to the stability of the state:

> . . . Men who are prevented from thinking as their experience teaches them will soon cease to think at all. Men who cease to think cease also to be in any genuine sense citizens. The instrument which makes them able to make effective their experience rusts into obsolescence by disuse.
>
> It is no answer to this view to urge that it is the coronation of disorder. If views which imply violence have a sufficient hold upon the State to disturb its foundations, there is something radically wrong with the habits of that State. Men cling so persistently to their accustomed ways that the departure from them implied in violence is almost always evidence of deep-seated disease. . . . Freedom of speech, in fact, with the freedom of assembly therein implied, is at once the katharsis of discontent and the condition of necessary reform. A government can always learn more from the criticism of its opponents than from the eulogy of its supporters. To stifle that criticism is—at least ultimately—to prepare its own destruction.

8. Laski says that "men who are prevented from thinking as their experience teaches them will soon cease to think at all." Is this sim-

ply a restatement of Mill's position that a truth held without full and free discussion becomes a "dead dogma" or Milton's that such a truth is a "heresy"? Another version of this viewpoint comes from George Orwell: "All propaganda is lies, even when one is telling the truth." "War Time Diary: 1942," in Essays, Journalism and Letters of George Orwell, Vol. II p. 411 (S. Orwell & I. Angus ed. 1968).

9. During the 20th century free expression has been increasingly defended as vital to the well-being of democracy, as well as being "a means of assuring individual self-fulfillment." The author of the following excerpt retired in 1976 as a professor at the Yale Law School.

THE SYSTEM OF FREEDOM OF EXPRESSION

Thomas I. Emerson

6–9 (1970).

The system of freedom of expression in a democratic society rests upon four main premises. These may be stated, in capsule form, as follows:

First, freedom of expression is essential as a means of assuring individual self-fulfillment. The proper end of man is the realization of his character and potentialities as a human being. For the achievement of this self-realization the mind must be free. Hence suppression of belief, opinion, or other expression is an affront to the dignity of man, a negation of man's essential nature. Moreover, man in his capacity as a member of society has a right to share in the common decisions that affect him. To cut off his search for truth, or his expression of it, is to elevate society and the state to a despotic command over him and to place him under the arbitrary control of others.

Second, freedom of expression is an essential process for advancing knowledge and discovering truth. An individual who seeks knowledge and truth must hear all sides of the question, consider all alternatives, test his judgment by exposing it to opposition, and make full use of different minds. Discussion must be kept open no matter how certainly true an accepted opinion may seem to be; many of the most widely acknowledged truths have turned out to be erroneous. Conversely, the same principle applies no matter how false or pernicious the new opinion appears to be; for the unaccepted opinion may be true or partially true and, even if wholly false, its presentation and open discussion compel a rethinking and retesting of the accepted opinion. The reasons which make open discussion essential for an intelligent individual judgment likewise make it imperative for rational social judgment.

Third, freedom of expression is essential to provide for participation in decision making by all members of society. This is particularly significant for political decisions. Once one accepts the premise of the Declaration of Independence—that governments "derive their just powers from the consent of the governed"—it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment. The principle also carries beyond the political realm. It embraces the right to participate in the building of the whole culture, and includes freedom of expression in religion, literature, art, science, and all areas of human learning and knowledge.

Finally, freedom of expression is a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus. This follows because suppression of discussion makes a rational judgment impossible, substituting force for reason; because suppression promotes inflexibility and stultification, preventing society from adjusting to changing circumstances or developing new ideas; and because suppression conceals the real problems confronting a society, diverting public attention from the critical issues. At the same time the process of open discussion promotes greater cohesion in a society because people are more ready to accept decisions that go against them if they have a part in the decision-making process. Moreover, the state at all times retains adequate powers to promote unity and to suppress resort to force. Freedom of expression thus provides a framework in which the conflict necessary to the progress of a society can take place without destroying the society. It is an essential mechanism for maintaining the balance between stability and change.

The validity of the foregoing premises has never been proved or disproved, and probably could not be. Nevertheless our society is based upon the faith that they hold true and, in maintaining a system of freedom of expression, we act upon that faith. . . .

Two basic implications of the theory underlying our system of freedom of expression need to be emphasized. The first is that it is not a general measure of the individual's right to freedom of expression that any particular exercise of that right may be thought to promote or retard other goals of the society. The theory asserts that freedom of expression, while not the sole or sufficient end of society, is a good in itself, or at least an essential element in a good society. The society may seek to achieve other or more inclusive ends—such as virtue, justice, equality, or the maximum realization of the potentialities of its members. These are not necessarily gained by accepting the rules for freedom of expression. But, as a general proposition, the society may not seek them by suppressing the beliefs or

opinions of individual members. To achieve these other goals it must rely upon other methods: the use of counter-expression and the regulation or control of conduct which is not expression. Hence the right to control individual expression, on the ground that it is judged to promote good or evil, justice or injustice, equality or inequality, is not, speaking generally, within the competence of the good society.

The second implication, in a sense a corollary of the first, is that the theory rests upon a fundamental distinction between belief, opinion, and communication of ideas on the one hand, and different forms of conduct on the other. For shorthand purposes we refer to this distinction hereafter as one between "expression" and "action." As just observed, in order to achieve its desired goals, a society or the state is entitled to exercise control over action—whether by prohibiting or compelling it—on an entirely different and vastly more extensive basis. But expression occupies an especially protected position. In this sector of human conduct, the social right of suppression or compulsion is at its lowest point, in most respects nonexistent. A majority of one has the right to control action, but a minority of one has the right to talk.

This marking off of the special status of expression is a crucial ingredient of the basic theory for several reasons. In the first place, thought and communication are the fountainhead of all expression of the individual personality. To cut off the flow at the source is to dry up the whole stream. Freedom at this point is essential to all other freedoms. Hence society must withhold its right of suppression until the stage of action is reached. Secondly, expression is normally conceived as doing less injury to other social goals than action. It generally has less immediate consequences, is less irremediable in its impact. Thirdly, the power of society and the state over the individual is so pervasive, and construction of doctrines, institutions, and administrative practices to limit this power so difficult, that only by drawing such a protective line between expression and action is it possible to strike a safe balance between authority and freedom.

Notes and Questions

1. Although Emerson values freedom of expression for the individual, he is at least equally emphatic about its value to a democratic society. In earlier writings, freedom of expression served the individual and the search for truth itself. The new focus on its importance to the state reflects the secular nature of modern democracy, and the reaction to political heresies that seemed threatening in the 20th century. The view of freedom of expression as essential to the survival of society was also developed by Henry Steele Commager in Freedom, Loyalty and Dissent 91 (1954): "If in the name of security or of loyalty we start hacking away at our freedoms . . . we

will in the end forfeit security as well." Also, "A society that repudiates free enterprise in the intellectual arena under the deluded notion that it can flourish in the economic alone will find that without intellectual enterprise, economic enterprise dries up. A society that encourages state intervention in the realm of ideas will find itself an easy prey to state intervention in other realms as well."

2. During that period of pressure for political conformity, the defenders of liberty rose to the occasion courageously and eloquently, from various philosophical viewpoints. Judge Learned Hand, reacting to the pervasive concern about Communism in the early 1950's, made his own comparison of risks in a 1952 address, "A Plea for the Open Mind and Free Discussion," in The Spirit of Liberty 208, 216 (I. Dilliard ed. 1959):

> . . . God knows, there is risk in refusing to act till the facts are all in; but is there not greater risk in abandoning the conditions of all rational inquiry? Risk for risk, for myself I had rather take my chance that some traitors will escape detection than spread abroad a spirit of general suspicion and distrust, which accepts rumor and gossip in place of undismayed and unintimidated inquiry. I believe that that community is already in process of dissolution where each man begins to eye his neighbor as a possible enemy, where non-conformity with the accepted creed, political as well as religious, is a mark of disaffection; where denunciation, without specification or backing, takes the place of evidence; where orthodoxy chokes freedom of dissent; where faith in the eventual supremacy of reason has become so timid that we dare not enter our convictions in the open lists, to win or lose. Such fears as these are a solvent which can eat out the cement that binds the stones together; they may in the end subject us to a despotism as evil as any that we dread; and they can be allayed only in so far as we refuse to proceed on suspicion, and trust one another until we have tangible ground for misgiving. The mutual confidence on which all else depends can be maintained only by an open mind and a brave reliance upon free discussion.

3. While political philosophers were addressing themselves to the importance of freedom of expression to the society, behavioral scientists were considering the impact of freedom on the individual, and their conclusions were in general much more affirmative than those of Durkheim a century earlier.

4. Another strain in 20th century thinking combines approval of freedom of expression in principle, with the claim that freedom as the absence of governmental restraint is made illusory by the technology and economics of modern communication.

One example is the following excerpt from The Law of the Soviet State by Andrei Vyshinsky, 610–14, 617 (1948):

> Freedom of speech, of the press, of assembly, of meetings, of street parades and of demonstrations, being natural and indispensable conditions precedent to the manifestation of freedom of thought and freedom of opinion, are among the most important political freedoms. No society can be called democratic which does not afford its citizens all of them. Only in a state which actually guarantees these most important political freedoms, and in behalf of all citizens without exception, is expanded and completely logical democracy to be found.
>
> While constitutions of bourgeois-democratic states ordinarily make a formal grant of these freedoms to all citizens without exception, every sort of limitation thereupon and all the capitalist social order in its entirety, have turned what are, in form, rights possessed by all citizens into rights actually possessed by a narrow and privileged minority only. . . .
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> . . .
>
> To make the press actually free "it is necessary at the outset to take away from capital the possibility of hiring writers, buying printing houses, and bribing papers, to which end it is necessary to overthrow the yoke of capital and to overthrow the exploiters and crush their resistance."
>
> . . .
>
> The victory of the Socialist Revolution in the USSR, which transferred to the hands of the worker class, along with the basic means and instruments of production, buildings for meetings, printing houses, and stores of printing paper, meant the broad realization of freedom of speech, of the press, of assembly, and of meetings. For the first time in the world, these became genuine freedoms of the masses.
>
> . . .
>
> In our state, naturally, there is and can be no place for freedom of speech, press, and so on for the foes of socialism. Every sort of attempt on their part to utilize to the detriment of the state—that is to say, to the detriment of all the toilers—these freedoms granted to the toilers must be classified as a counter-revolutionary crime . . . .

5. In another critique from the Marxist viewpoint, an American philosopher, Herbert Marcuse, observes that "the democratic argument for abstract tolerance tends to be invalidated by the invalidation of the democratic process itself." In an essay entitled "Repressive Tolerance" in A Critique of Pure Tolerance (1965), he begins from the premise that "the people must be capable of deliberating

and choosing on the basis of knowledge." He is appalled by the blandness of the newspaper layout that intermingles advertisements and disasters and trivia, and the broadcaster's reporting of the momentous and the mundane in the same monotone: "it offends against humanity and truth by being calm where one should be enraged, by refraining from accusation where accusation is in the facts themselves." More than that, "in endlessly dragging debates over the media, the stupid opinion is treated with the same respect as the intelligent one, the misinformed may talk as long as the informed and propaganda rides along with education, truth with falsehood."

The "concentration of economic and political power" allows "effective dissent" to be blocked where it could freely emerge, and the "monopolistic media" prejudge "right and wrong, true and false . . . wherever they affect the vital interests of the society." The situation is so dangerous that Marcuse recommends "suspension of the right of free speech and free assembly" so that "spurious objectivity" is replaced by "intolerance against movements from the Right, and toleration of movements from the Left."

6. In effect, both writers advocate the silencing of certain views in order to achieve true freedom, a view that has been heard, with various justifications, ever since Plato's Republic:

> . . . [T]he only poetry that should be allowed in a state is hymns to the gods and paeans in praise of good men; once you go beyond that and admit the sweet lyric or epic muse, pleasure and pain become your rulers instead of law and the rational principles commonly accepted as best.

7. Assuming that manipulation of opinion does exist, can the present system be reformed? We shall consider legal arguments based on claims of closed control of mass media.

8. Marcuse was distressed by too much structure in the media, which seemed "mere instruments of economic and political power." Erich Fromm, writing in 1941, indicted the mass media for presenting information in too unstructured a way. In his "Escape From Freedom," Fromm echoed some of Durkheim's qualms about the burden that freedom creates for the individual. He also described the destructive role of the media:

> Another way of paralyzing the ability to think critically is the destruction of any kind of structuralized picture of the world. Facts lose the specific quality which they can have only as parts of a structuralized whole and retain merely an abstract, quantitative meaning; each fact is just another fact and all that matters is whether we know more or less. Radio, moving pictures, and newspapers have a devastating effect on this score.

> The announcement of the bombing of a city and the death of hundreds of people is shamelessly followed or interrupted by an advertisement for soap or wine. The same speaker with the same suggestive, ingratiating, and authoritative voice, which he has just used to impress you with the seriousness of the political situation, impresses now upon his audience the merits of the particular brand of soap which pays for the news broadcast. Newsreels let pictures of torpedoed ships be followed by those of a fashion show. Newspapers tell us the trite thoughts or breakfast habits of a debutante with the same space and seriousness they use for reporting events of scientific or artistic importance. Because of all this we cease to be genuinely related to what we hear. We cease to be excited, our emotions and our critical judgment become hampered, and eventually our attitude to what is going on in the world assumes a quality of flatness and indifference. In the name of "freedom" life loses all structure; it is composed of many little pieces, each separate from the other and lacking any sense as a whole. The individual is left alone with these pieces like a child with a puzzle; the difference, however, is that the child knows what a house is and therefore can recognize the parts of the house in the little pieces he is playing with, whereas the adult does not see the meaning of the "whole," the pieces of which come into his hands. He is bewildered and afraid and just goes on gazing at his little meaningless pieces.

Is Fromm's indictment of the media similar to that of Marcuse?

9. In recent years, some commentators have asserted that the freedom debated here was not of central importance. As Prof. Walter Berns indicates in Freedom, Virtue and the First Amendment 228, 240–41, 246–47 (1957), he has other priorities:

> The argument for freedom is distinctly a modern one. This does not mean that before a certain time—say the seventeenth century—political writers were unmindful of the advantages of freedom and the disadvantages of slavery; but it does mean that freedom was not the central political principle that it was to become after the influence of Hobbes, Locke, and Rousseau had made itself felt. Instead of freedom, other writers considered virtue the organizing principle; and the virtue of particular concern to politics was justice.
>
> . . .
>
> The political tradition until the advent of liberalism in the seventeenth century did not struggle with the modern problem of freedom primarily because the purpose of government was not to preserve freedom but rather to establish justice. In this process the role of law was not essentially that of subsequent censor, but

> rather that of the promoter of a certain character; the essential purpose of law was, stated simply and roughly, to prevent the problem of freedom from arising in the first place. This it was supposed to do through moral education. . . .
>
> . . .
>
> . . . The purpose of government, according to the Declaration of Independence, is to secure the rights of man. The attempt, however, to regard these liberties as natural rights which Congress "shall make no law abridging" or no state shall "deprive any person of," failed despite the most assiduous efforts of the libertarians of contract and the libertarians of speech. They failed because of the demands of social life, the demands of justice. They failed because American lawmakers recognize, however dimly, the role of law in the civilizing process; because they recognize the necessary relation between law and custom; because they recognize that man is not a being who is naturally good, a being who needs no guidance, or who may be left free to live as he will. Man is by nature not an individual with inalienable rights, but a political being, who can achieve his nature, his end, only in the *polis*, if at all. Law directs man to this end; it "civilizes" him, for the "cityless" man is "either low in the scale of humanity" or a god. Despite two hundred years of the liberal influence, our lawmakers, if not always our jurists, still know that the law cannot assume that men will be civilized if left free.

Berns is a direct descendant of Hobbes, for whom the legislator and the law were essential to the survival of the social order. He urges that the courts take a more active role in promoting virtue, aware "that the law cannot assume that men will be civilized if left free." When Berns says that law was intended "to prevent the problem of freedom from arising in the first place," might he have in mind the problems discussed by Durkheim and Fromm? His argument, in fact, returns to the fundamental justifications for freedom of expression. Does freedom serve the individual or the state? Is it valuable as an end in itself, or as a means to an end such as the discovery of truth, the security of society, or informed self-government? And how are these values to be weighed when their fulfillment would infringe on other primary values? These basic questions underlie many court decisions on the issue in the 20th century.

Chapter II

THE JUDICIARY AND THE FIRST AMENDMENT

There are basically two kinds of disputes that lead to the courtroom. In one, the more mundane kind, the facts of a particular incident are in dispute: whether the light was red or green at the intersection; whether the train sounded a warning; whether the patron was obviously intoxicated before the bartender served him "one for the road." Once the fact dispute is resolved, the legal consequences are clear. The second kind of dispute, the one that interests us, involves a disagreement about the legal consequences of an agreed-upon fact situation. The situations in the Prologue indicate the kinds of issues that can lead to such legal tangles.

Even lawyers and judges are astonished to discover how many unanswered questions remain, within our elaborate legal system. Is this a failing of the legal machinery, or is it inherent in the way law develops? Most students of the subject would assert that when a complex social order encourages individual action, the legal system cannot possibly anticipate every problem that will arise. If a legislature wanted to resolve all future disputes, it could either be very specific, or very general. Unless it could identify and devise a rule for every conceivable situation, it might try to develop general principles at a highly abstract level to cover clusters of similar cases. In such a system, however, many fact situations would come within at least two such clusters, each dictating a different legal result.

Even an omniscient legislature that could foresee every problem would not necessarily design a solution that would be appropriate by the time the problem actually arose. Values and mores change, and one of the strengths of a systematic interaction between courts and legislatures, is that there is room for flexibility and growth, as well as enough consistency to ensure stability.

We have been implying that the sole lawmaking power is in the legislature—and that the judicial task is only to fill gaps left by inevitably incomplete legislation. In our system, courts do more than ascertain the facts of the case and fill in legislative gaps. Our common law tradition has allotted to the judicial branch a primary role in developing particular areas of the law. This occurs in the course of deciding cases. For some disputes that reach the courts it may appear that no statute controls—or is even remotely relevant. This means that the courts must develop their own rules. They do this by deciding the case at hand and rendering an opinion in which they announce the principles that led to the result. This decision becomes a precedent for future cases. But, as with legislation, clusters of

cases may emerge that point in different directions and the parties may disagree as to which principle governs their dispute. This disagreement is similar to those produced by divergent statutes. Moreover, since judicial decisions are invariably addressed to specific known conflicts, the language used is specific, rather than the general terminology of legislation addressed to the future.

Another factor accounting for so many unresolved questions is the rule that courts will decide only real disputes. If a particular fact pattern doesn't happen to give rise to a dispute, courts may not have occasion to consider the question for years. Moreover, even if a dispute does arise the parties may wish to avoid the uncertainty and settle the case before the court decides it. In short, courts exist to resolve disputes and not to fill gaps in the law by announcing abstract general rules as a legislature might.

The very specificity of judicial regulation creates uncertainty about meaning that must be solved by litigation. The courts thus play a central role in the development of law—whether filling in legislative gaps, or developing a primarily common law area through the rendering of a series of judicial opinions, or by engaging in the separate task of interpreting state and federal constitutions.

In the law of mass communications, some areas, such as defamation and privacy, are common law subjects that also have constitutional implications. Here statutes have been incidental and the courts have been central. In other areas of importance to the media the courts have played a central role because of the nature of the First Amendment and the litigation that has reached the Supreme Court. A clearer understanding of the role and functioning of the judiciary in our society will facilitate our subsequent study of the cases.

A. THE STRUCTURE OF THE JUDICIARY AND THE NATURE OF LITIGATION

1. The American System of Courts

Before the Constitution, each state had its own judicial system of trial and appellate courts. A litigant who lost a case in the trial court might appeal for reconsideration to a court of several judges.

In the federal Constitution the judicial branch, created in Art. III, consisted solely of the Supreme Court of the United States. A national supreme court was essential for several reasons: first, to implement the Supremacy Clause, some final arbiter must decide whether a state provision or a federal provision controls when the two are claimed to conflict. A national court must also regulate disputes about which state's laws are to apply to a case, guided by such pro-

visions as the Full Faith and Credit Clause. For example, if one state has a long residence requirement for divorce and another has a short one, what happens when one spouse leaves the first state and seeks a divorce in the second state? Third, since the Constitution created a federal legislature, and executive, a court was needed to resolve the non-constitutional disputes that might arise under the legislation and executive orders—the sorts of cases for which the states wanted to create their own state supreme courts.

Another predictable form of controversy within a federal government is one that arises between two states. This would involve disputes about such issues as boundaries and water rights. Art. III Sec. 2 of the Constitution provides that in this unusual situation, the Supreme Court functions as a trial court rather than in its usual posture as an appellate tribunal. In such cases, the Court appoints a "master" to gather evidence and file a report with the Court.

The power to declare an action of the federal or state government unconstitutional because it infringed on individual freedoms was not among the original justifications for the Supreme Court, although we have come to think of the Court as exercising that function primarily, particularly in the First Amendment area. It was the voice of Chief Justice John Marshall, early in the 19th century, that was crucial in securing for the judiciary the power to invalidate acts of other branches of the federal government and of the state governments because they violated federal constitutional provisions.

A federal system might conceivably have used the already existing state courts, allowing appeals to the state appellate courts and then having the Supreme Court resolve disputes that raised federal questions. Some countries have a federal structure and only a single national court. In fact, however, Art. III authorized Congress to create whatever other federal courts it thought appropriate, and Congress quickly established a full system of federal courts. This means that the country has two parallel court systems: there are state trial and appellate courts and a similar structure of federal courts. Among other reasons, Congress wanted to instill a sense of national pride and a feeling of unity among the citizenry of the various states. Post Offices and other federal buildings such as courthouses symbolized the existence of the new national government.

a. Cases in State Courts

With parallel court systems, it is not always clear which cases should originate in which system. In general, cases arising under state substantive law are brought in the state courts, while cases involving questions of federal regulation are brought in the federal courts. Since defamation is a traditional subject of state regulation,

for example, such cases would belong in state courts. The same would be true of divorce cases and automobile accident cases, as well as one company's claims against another for breach of contract. On the other hand, cases dealing with the armed forces or federal income tax involve federal substantive law and would be brought in federal courts. Alexander Hamilton noted the logic of this allocation in The Federalist No. 80 when he observed that "If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number."

The interplay of this axiom with the Supremacy Clause is significant. The Supremacy Clause authorizes the federal government to exercise its constitutional powers despite any contrary assertions of power by the states. The Supreme Court of the United States is empowered to resolve disputes arising under the Clause, which makes the Supreme Court the final arbiter of the meaning of the provisions of the federal Constitution. The state supreme courts are likewise the final arbiters of the meanings of their own constitutions and statutes and laws, but they are not, and cannot be, the final arbiters of disputes between state and federal law. That power resides in the Supreme Court of the United States.

This means that if a state statute is alleged to be in conflict with the First Amendment to the federal Constitution, the state supreme court is the final authority on the meaning and construction to be given to its own state statute. It may also pass on the question of whether the statute as thus interpreted violates the First Amendment, but its decision on this latter point is not final and may be appealed to the Supreme Court of the United States. The Supreme Court must accept as final the state court's conclusion on the first question, but will then make its own determination about whether the provision as construed violates the First Amendment.

One other possibility should be noted here. Since most state constitutions contain their own bills of rights, a party may claim that a state statute or judicial ruling violates both the state and federal constitutional protections of free expression. In such a case, the state supreme court is the final authority on two questions: how the state statute or judicial decision should be interpreted, and how the state constitutional provision should be interpreted. If the state court should decide that a challenged state statute violates both the state and federal constitutions, the losing party may not appeal to the Supreme Court of the United States. The state court's decision that the statute violates its own constitution is sufficient to determine the victor—and the Supreme Court of the United States cannot modify a state court's interpretation of its own statutes and constitution. Whatever the Supreme Court might say about the federal Constitution could not change the result in the case.

b. Cases in Federal Courts

In keeping with Hamilton's axiom, Art. III Sec. 2 provided that the federal judicial power should extend to cases including matters of federal law and controversies between states. But in a major departure from the Hamilton view, the federal judiciary was given jurisdiction to hear disputes "between Citizens of different States" no matter what their dispute involved. This has meant that many lawsuits brought by citizens of one state against citizens of another state may be tried in federal courts even though the dispute between the parties involves a matter of state law. (Congress has sought to reduce this burden on federal courts by requiring that such a case must be brought in state courts unless the amount in controversy exceeds $10,000.) If a citizen of Virginia claims large damages for a defamation in a book published by a New York company, the Virginia citizen may litigate this claim in a federal court even though the legal basis for the claim is based on a rule of state law. This unusual provision, which is called "diversity of citizenship jurisdiction," was thought of by the framers of the original Constitution and utilized by members of the First Congress because they were skeptical about the fairness with which state courts would adjudicate disputes between their own citizens and those who came from other states. It was particularly important to provide a neutral forum for disputes between buyers and sellers that would encourage interstate commerce.

It may be asked why a Virginia merchant who goes to New York and sues in the federal court in New York is likely to be treated more fairly there than in the state courts of New York. The answer is in part historical but still has some validity. There are various ways to facilitate impartiality. The federal judge, though a New Yorker, has life tenure, whereas most state judges are elected, often for short terms, and are thus dependent upon public favor for continuation in office. Federal courts are located in the larger metropolitan areas of each state, but state courts are sprinkled throughout the state. This may mean that jurors in federal cases will be drawn from a broader cross-section and thus have a less provincial attitude than those state jurors who are drawn from rural areas. Perhaps the most important reason is the appearance of neutrality. A litigant who fails in the courts of another state might very well feel that he had not had a fair hearing, but the litigant who loses in federal court is less likely to blame it on bias. In these "diversity" cases, the federal courts attempt to decide the merits of the controversy from the standpoint of a state judge relying on state law.

c. *Types of Cases*

The judicial system must deal with several kinds of controversies. What they all have in common is that one party (a person, group or government) claims its rights or, in the case of government its laws, are being violated by a second party. The controversies we consider in this book have arisen primarily in three contexts.

One is the criminal case in which a government seeks to punish a party, perhaps a reporter, for illegal behavior. The defense may claim that the legal rule allegedly violated is invalid because it conflicts with the First Amendment. The court must decide whether the statute in question is constitutional.

The second form of litigation also arises from the passage of a statute. Here, however, those restricted by the statute do not wait to be prosecuted for a violation of the statute, but instead initiate a suit to have the statute or regulation declared unconstitutional. The court is asked to render a "declaratory judgment" that it would be unconstitutional for the government to enforce the statute against the complaining parties. Another way to test a statute's constitutionality without risking criminal prosecution is to seek an injunction to prohibit state officials from enforcing the statute—again on the ground that to do so would violate the constitutional rights of the plaintiff.

The third type of case involves "tort" litigation between two private parties for harm that one has caused the other. Examples include auto accidents and injuries caused by defective products. A tort action is usually brought for damages for alleged violation of a common law right. We shall be concerned mainly with tort actions for damages for defamation and for invasion of privacy. In these cases it is possible for the defendant to argue that if the state court finds the defendant liable and orders it to pay damages to plaintiff, the action of the court would be "state action" that would infringe the defendant's constitutional right to freedom of expression.

Note that all three situations raise the question of whether a government's action, be it legislation or a court order, violates a party's constitutional right to be free from government interference.

We will encounter a fourth type of legal conflict, the administrative proceeding, when we discuss broadcasting. A party who wishes to acquire a license to broadcast, for example, must apply to the Federal Communications Commission. We shall consider the nature of the administrative process in detail in Chapter VI.

The courtroom drama that comes to mind in terms of litigation, actually occurs primarily in criminal cases, where facts are disputed:

can the victim accurately identify the defendant or is the jury persuaded by the defendant's alibi witnesses? In conventional criminal cases or suits arising out of automobile accidents, the parties agree on the legal rules but they disagree about the facts—and a trial is needed to determine the facts governed by these rules.

In most of the cases in this book, and most First Amendment cases generally, the crucial questions that will determine the outcome do not depend on disputed facts. Rather, the parties usually disagree over what legal rule applies to an accepted set of facts. Such a dispute raises legal questions to be resolved by a judge with no need for a trial.

The judge can be called upon to rule at any one of several stages in the litigation. We shall focus here upon one that arises frequently. A lawsuit starts when the plaintiff's lawyer prepares a "complaint" and conveys a copy of it to the defendant. The complaint states the facts that the plaintiff alleges occurred and that entitle plaintiff to legal relief against the defendant. At this point the defendant might assert that even if the facts are accurately asserted in the complaint the plaintiff is not entitled to any relief—that the plaintiff has misinterpreted the legal rules applicable to such facts. In other words, the defendant is willing to agree to the facts alleged in the complaint because they raise no legal consequences. In such a situation, the defendant files a "motion to dismiss," sometimes called a "demurrer," which asks the judge to terminate the proceedings at once since the plaintiff's legal theory is incorrect. The judge will hear legal arguments by both sides—either orally or in written briefs or both. If the judge agrees with the defendant the case will be dismissed and the matter ended, unless the plaintiff successfully appeals the decision.

If the judge decides that the plaintiff's legal theory is correct, then the judge will reject the defendant's motion and order that the case proceed. At this point, the defendant may decide, despite the previous maneuver, to challenge the facts as alleged in the complaint. If so, a fact dispute is presented and the case will move to trial. The alternate course is for the defendant to seek a reversal of the judge's rejection of its motion to dismiss before deciding whether to contest the facts.

This focus on legal and factual questions in a case occurs at several steps along the way—and the dispute may be terminated at any one of these points or it may proceed through trial. The duration will depend on whether the parties disagree about law or fact or both and at what stage their disputes crystallize. For more extensive discussion of the procedures followed in different types of disputes, see M. Franklin, The Biography of a Legal Dispute (1968)

(a newspaper defamation case) and J. Poulos, The Biography of a Homicide (1976).

2. The Appellate Process and the Supreme Court

The federal judicial system rests on a network of trial courts located mainly in the larger cities of each state. Appeals from the decisions of these "district" courts may be taken to the appropriate regional "court of appeals". Thus, appeals from the federal district courts in New York, Connecticut and Vermont are taken to the United States Court of Appeals for the Second Circuit. The judges on this court are drawn from these three states. Ten of these courts, often called "circuit" courts, cover groups of states and territories; the eleventh is limited to the District of Columbia, but draws its judges from throughout the country. This circuit plays a crucial role in broadcasting cases, as we shall see later. A decision by one of these eleven courts may be reviewed by the Supreme Court of the United States whether or not it involves a federal constitutional question, because in this context the Supreme Court is simply the top tier of the federal court system, comparable to the supreme courts in each state. The major role of the United States Supreme Court today, however, is to determine the meaning of the federal Constitution and to regulate relationships among the states and between the states and the federal government. For this reason, although the Supreme Court is empowered to review the decision of a lower federal court on a point of state law in a "diversity" case, it will rarely do so.

With two parallel systems, important federal questions may arise in either system and may reach the Supreme Court by either route because the Supreme Court is the apex of both. Let us consider, for example, a case in which a plaintiff believes that he has been defamed by the local newspaper. Since recovery of damages for defamation is authorized by state law and there is no diversity of citizenship between the plaintiff and the defendant, the case must be brought in the state court system. The defendant may claim that it would be unconstitutional for the state to order the paper to pay the plaintiff because that would conflict with the First Amendment. The defendant will make that argument in the state courts. The state trial judge will first rule on that contention. If the losing party appeals, the state appellate courts decide whether the trial judge ruled correctly. Recall that the highest court in the state, usually called the supreme court, but sometimes given other names, has the last word as to the interpretation of state law. (The larger states usually have a system of intermediate appellate courts between their trial courts and their supreme court.) Since state courts do not have the last word on federal questions, if the result turns on such a question, the losing party

may seek review of that decision by the Supreme Court. Thus, a case from a state court may eventually reach the Supreme Court of the United States if federal constitutional questions control the result.

In most instances the Supreme Court has been given discretion by Congress to choose what cases it will hear, and of the many thousands of cases that are brought each year, the Court accepts only some 200 for hearing and decision. To seek review by the Supreme Court the litigant who lost the case in the lower court files what is called a "petition for certiorari" stating the nature of the dispute, the decision below, and the reasons why the Court should review this case. Since a case usually reaches the Supreme Court only after several lower courts, state or federal, have considered it, it rarely suffices for the petitioner to allege that the judges below made a mistake—a better reason is necessary. Thus, in cases coming from the lower federal courts the Supreme Court is likely to accept a case from one circuit that appears to conflict with a ruling in another circuit on a subject on which uniformity is required. The Court is also likely to accept cases raising important questions that have not been decided by it previously, or cases that provide an opportunity to reconsider an earlier decision that no longer seems satisfactory.

In cases coming from state court systems, the Supreme Court has indicated in Rule 19 of its rules, that it is most likely to agree to hear a case in which the state court "has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." Uniformity among states on federal questions is as important as uniformity among circuits.

After the petition for certiorari is filed, the party who won below will usually file a memorandum trying to persuade the Court either that the case is not important, that there is no conflict with other decisions, or that the decision is clearly correct in light of previous Supreme Court cases. In deciding whether or not to grant a petition for certiorari, all the justices will meet in conference and vote. The Court follows the so-called "rule of four" under which, if four justices believe the case should be heard, the petition for certiorari will be granted.

If the Supreme Court decides not to hear the case, it will usually not state its reasons and will issue an order that says simply "The petition for certiorari is denied." In this book that procedure is indicated when "certiorari denied" is part of the citation. Although this outcome favors the party that won in the lower court, the legal effect is different from having the Supreme Court listen to the case on the merits and decide to affirm the decision of the lower court. When the Supreme Court denies certiorari all that is clear is that the

Court did not think the case worthy of full consideration. This does not mean that the Court believes that the case was correctly decided below.

Certiorari is usually granted or denied by the Court as a group with no announcement of individual votes. Occasionally, however, a justice feels strongly enough to record disagreement. This dissent usually says only that the particular justice "would grant the petition for certiorari," meaning that the justice wanted to consider this case and to decide it; it does not indicate how the justice would decide the case. Even more rarely a justice will write an opinion supporting the view that the case should be heard. For some justices the situation is so clear that they would "grant the petition for certiorari and summarily reverse the decision below." This means that the justice knows enough about the case to grant the petition and immediately reverse the lower court.

When the Supreme Court decides it will listen to a case, it will generally issue an order "granting" the petition for certiorari and directing the parties to file formal briefs arguing the merits of the controversy. The losing party below, the petitioner, prepares a brief, trying to persuade the Court to decide the case on the merits in petitioner's favor. The respondent's brief seeks to persuade the Court to affirm the result reached by the lower court.

One procedural point must be kept in mind. When the losing party in the lower court files a petition for certiorari, the petitioner's name comes first in the title of the case. The initial plaintiff thus may later become the respondent and be listed second in the title in the Supreme Court. A few other appellate courts follow the practice of putting the losing party's name first. As you read the appellate cases in this book, do not assume that the party named first in the title was the original plaintiff.

On a related point, every title of a case is followed by a group of numbers and abbreviations called a "citation." This tells which volumes in the law library contain the full report of the opinions in the case. For example, the citation to Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), means that the case can be found in volume 408 of the United States Reports at page 665, and likewise volume and page for the other systems of court reporting. Current decisions of the United States Court of Appeals are found in the Federal Reporter Second Series (F.2d). Decisions of the United States District Courts are found in the Federal Supplement (F.Supp.). State decisions usually have two citations: one to a state reporter and one to a private service that groups state decisions in regional volumes. Thus, in Barber v. Time, Inc., 348 Mo. 1199, 159 S.W. 291 (1942), the first reference is to volume 348 of the official Missouri reports at page 1199, and the second is to the Southwestern Reporter in which the Missouri case will also be found.

After briefs are submitted, the Court hears oral argument. Shortly thereafter the justices will discuss the case in conference. At that time they will vote tentatively on the result. Based on those tentative votes, the Chief Justice, if he is voting with the majority, will assign one of the justices who has voted in the majority to write the opinion of the Court. If the Chief Justice is in dissent, then the member of the majority who is senior in length of service, will make the opinion-writing assignment.

Dissenters will often wait until the majority opinion is prepared and circulated in draft form. Unless they are persuaded by it they will then circulate opinions seeking to persuade colleagues to change their minds. When all the justices have either joined a majority or a dissenting opinion or have written their own concurring or dissenting opinion, or have both joined someone else's opinion and also written separately, the decision will be ready for public announcement. This takes place at a public session of the Court. The author of the majority opinion may summarize its reasoning and dissenters may announce the reasons for their votes. Written copies of the opinions are then distributed publicly.

A single opinion that has the support of a majority of the participating justices is denominated an "opinion of the Court." As such it becomes binding on the Court, establishing a precedent for subsequent decisions. Sometimes six of the nine justices may vote to affirm a lower court decision, but four will do it for one reason and two will do it for a different reason. In such a case, the opinion written by the four justices is a "plurality" opinion, but not a majority opinion. Such an opinion is entitled to substantially less precedential value than an opinion of the Court. The first line of the reported decision will indicate the nature of the opinion—a named justice either delivers the "opinion of the Court" or announces "the judgment of the Court and an opinion joined by" up to three other justices. The "judgment of the Court" means the bare result, such as affirmance or reversal. The reasons for the judgment are found in the opinions.

In a few types of cases Congress requires the Supreme Court to rule on the merits. In such cases the losing party below does not file a petition for certiorari, but instead "appeals" as a matter of right to the Supreme Court. In such cases the Court must decide the case, and it usually proceeds much as in a case in which certiorari has been granted. The losing party below is called the appellant and the winner is the appellee or, sometimes, respondent. The most common basis for an "appeal" is a case in which a state court has upheld a state statute against a claim that the statute violates a provision of the United States Constitution.

The foregoing discussion of litigation and the role of the Supreme Court, vital to an understanding of what follows, has necessarily been

general and abstract. As we turn to actual cases you should review this information if some aspect of a case puzzles you. Any unusual matters will be discussed in the introduction to the case or in the notes that follow the opinions.

3. Contempt of Court

Contempt of court involves actions that substantially obstruct the administration of justice. They include disturbance of a judicial proceeding by shouting in the courtroom, wilful refusal to obey a court order to pay alimony, and refusal to answer a grand jury question after a judge has ordered the witness to do so. Since we shall read several major cases that arose out of citations for contempt of court, we should know what this charge involves.

The power of the courts to punish for contempt originated in feudal England. At that time the power of the king was complete and any disrespect shown the monarch by disobedience to his orders was punishable on the spot ("summarily"). The judges of early England acted as agents of the king and disobeying them or their orders was tantamount to defying the king. As the courts gained independence from the crown, the power to demand obedience was claimed by the judiciary for itself and has been considered its prerogative ever since. The most frequent justification for the contempt power is that order and regularity in judicial proceedings are essential to the proper functioning of the judicial system, and that as an independent branch of government the courts have an inherent right of self-preservation.

A major distinction is drawn between civil contempt and criminal contempt—though the line between them is sometimes unclear. Criminal contempt occurs when the authority of the court has been challenged in such a way that the harm has already been done. This might include abusive language in the courtroom, attempts to bribe or influence jurors, or the violation of an injunction prohibiting strikers from entering certain premises. In such cases the contempt has already occurred and cannot be undone, and the normal sanction is imprisonment or a fine.

The civil contempt power is used by courts to enforce compliance with judicial orders, as in the case of improper refusals by witnesses to answer questions of a grand jury or at a trial. These contempts may be treated as criminal and punished as such. Alternatively, however, the judge may order the recalcitrant party to be confined in a civil jail and to remain there until he agrees to comply with the judicial order in question. Some imprisonments for civil contempt have lasted for several years. At the point at which compliance is no

longer possible—such as after a grand jury has been disbanded—civil contempt can no longer be justified and the judge must either release the person or begin a criminal contempt proceeding for violation of the order. It is often said in civil contempt cases that "the prisoner carriers the keys to the jail in his own pocket", meaning that any time the party is prepared to obey the order, the contempt ruling will be withdrawn and the normal judicial process will resume. The defendant in a civil contempt proceeding has the rights of any civil litigant, but there is no right to a jury trial. Since the action is fundamentally a coercive civil proceeding, courts have rejected the claim that indefinite imprisonment is cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

Contempts of court may also be divided into those that occur in the courtroom, directly and immediately affecting the judicial process, and those that happen at a distance. This has given rise to a distinction between "direct," and "indirect" or "constructive," contempts. A judge who witnesses a contemptuous act within the courtroom is permitted to find the offender guilty and to pronounce sentence on the spot. This "summary" power is justified by the need to maintain order in the courtroom. The accused is usually given an opportunity to speak in his own behalf. The power to punish contempts summarily is limited by Supreme Court rulings that without a jury trial an offender may be sentenced to no more than six months' imprisonment for contempt. If several contempts occur in the courtroom the judge may summarily impose a sentence of up to six months for each, even though the cumulative sentence exceeds six months.

Rather than interrupt the proceeding to find litigants or attorneys in contempt (thereby perhaps affecting the outcome of that case), the judge may allow the pending case to conclude—and then call the offending parties before the bench to announce that certain acts that occurred during the proceedings were contemptous. If the judge waits until the end, the Supreme Court has held that his powers are reduced. First, the cumulative sentence for multiple contempts may not exceed six months. Second, if the contempts involved vilification of the judge, that judge may not preside at the hearing. Third, the judge who presides at the hearing must afford the accused notice of the charges and a reasonable opportunity to be heard. This does not mean that a full scale trial need be held—only that the accused be given the chance for self-defense. When the judge delays acting, the justification of preserving order or decorum disappears and stronger due process protections are demanded before the accused can be imprisoned.

Another possibility is for the judge to refer the matter to the prosecutor's office for treatment like any other criminal case. This route might lead to indictment, trial before a jury, and the other

phases of the criminal process. This procedure must be used whenever the judge believes a sentence of longer than six months is appropriate for an act of contempt.

Indirect contempts, those that occur outside the presence of the court, cannot be punished without giving the defendant notice and an opportunity to defend and are subject to the six months maximum. They too may be handled as criminal matters.

For further consideration of courtroom contempt questions, see Codispoti v. Pennsylvania, 418 U.S. 506 (1974) and Taylor v. Hayes, 418 U.S. 488 (1974) and the cases discussed therein.

Although most of our contempt questions will arise in the context of a court, it is also possible to commit a contempt of a legislative branch. Contempt of the legislature also derives from English law. Prior to 1857, each house of Congress claimed an inherent right to punish offending individuals for contempt of that house. In such cases the members of the offended house would vote the contempt and the sergeant-at-arms would escort the person found in contempt to prison facilities. Such imprisonments could not last any longer than the session of Congress during which the contempt occurred. In 1857, Congress provided that contempt of Congress be treated as other federal crimes. If a witness refuses to testify at a legislative hearing, the committee before which the action took place must first vote to seek a citation of contempt from the full house. If that chamber agrees and votes contempt, the local prosecutor will be asked to present the case to a grand jury and the criminal process will begin. The statute provides for imprisonment for not less than one month nor more than one year and a fine of no more than $1000. In this book, we shall see two situations in which Congress considered but rejected the possibility of proceeding against a journalist for contempt of Congress.

Bibliographical Note. This book will provide relatively few references to technical legal sources. Most legal writing is addressed to the reader with full legal training and is more complex than is necessary or desirable for our purposes. Moreover, much legal literature is unavailable at colleges or universities without law school libraries. One exception is the citation to decisions of the Supreme Court of the United States. These reports are likely to be available in academic libraries and are vital to an understanding of the underlying legal questions. Those who wish to pursue more technical aspects of material discussed in this book may begin their search by consulting the extensive references and bibliographies in M. Franklin, Mass Media Law (1977).

Virtually every periodical devoted to activities of the media, such as Editor & Publisher, Broadcasting, The Quill, Access, MORE,

and the Columbia Journalism Review, faithfully reports legal developments of interest to media. This book contains numerous citations to law-related articles in these publications, as well as in more academic publications such as Journalism Quarterly. In addition, the FOI Digest, published bimonthly by the Freedom of Information Center, School of Journalism of the University of Missouri, reports legal developments and provides a bibliography of current articles, technical and nontechnical, on recent legal developments affecting media.

References to ethical problems occur at several points in the book. Since these problems are discussed in other communications courses they will not be explored at length here, but the Ethics Code proposed by Sigma Delta Chi is reprinted in Appendix C.

B. FIRST AMENDMENT THEORY *

The role of history in constitutional interpretation varies with the content of the provision and the force of the historical evidence. In the case of the First Amendment the history of its gestation and adoption adds little. Those who framed the First Amendment apparently gave scant attention to such matters as seditious libel and whether speech and press were to be treated differently. And we cannot be certain whether the Sedition Act controversy reveals the thinking of a decade earlier, when the First Amendment was adopted, or a reaction against that thinking for permitting the Sedition Act. Even if the history were absolutely clear, it need not dictate the development of freedom of expression two centuries later. Freedom of expression has become more important for society and for the individual as we have learned more about the nature of freedom and the meaning of its absence.

The point is well made by Leonard Levy, whose historical research has brought about so much rethinking of the development of the First Amendment. In Legacy of Suppression he concludes (308–09):

> [T]here is no evidence to warrant the belief, nor is there valid cause or need to believe, that the Framers possessed the ultimate wisdom and best insights on the meaning of freedom of expression. It is enough that they gave constitutional recognition to the principle of freedom of speech and press in unqualified and undefined terms. That they were Blackstonians does not mean that we cannot be Brandeisians.

* Text omissions throughout the book are indicated by the use of dots. Omitted citations are indicated by [ ]. There is no indication when footnotes are omitted. When they do appear, footnotes are numbered as in the material quoted.—Ed.

Because of the lack of guidance from history, we today have flexibility in approaching the First Amendment, defining it, and applying it. We shall look at a few approaches to gain some idea of their scope and variety. This is necessary because as Emerson put it in his 1970 volume, "The outstanding fact about the First Amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases." We shall have occasion throughout this book to analyze the Supreme Court's handling of First Amendment issues in mass media cases. For now it is sufficient to sample the array of general approaches that have been suggested.

After the Civil War, the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution introduced a series of inhibitions against state action. The Fourteenth Amendment provided that states were forbidden to deprive persons of life, liberty or property without "due process of law" and were forbidden to deny any person "equal protection of the laws." The definition of due process of law has been evolving continually since its first appearance in the Fifth Amendment. By the early 1930's, the Supreme Court had concluded that the due process clause of the Fourteenth Amendment required states to observe the same restraints with regard to freedom of expression that the First Amendment imposed on the federal government. Thus, if a party charges that a state government has violated rights protected by the First Amendment, this is an elliptical way of referring to rights identified in the First Amendment that states are now obligated, by the Fourteenth Amendment, to respect. Courts often use the term "First Amendment rights" regardless of whether state or federal action is being challenged.

Since the standards imposed under the state and federal constitutions are now the same, rulings applicable to one level of government may illuminate lawsuits against the other. For example, if a Supreme Court decision interpreting the First Amendment has concluded that Congress may not coerce an editor to print a particular statement in his newspaper, that decision would be relevant in a later case in which a state government sought to impose the same burden on an editor, even though the latter case technically is being decided under the Fourteenth Amendment rather than the First Amendment.

Even though the minimal standards established by the federal Constitution may be the same for the two governments, the state's own constitution could inhibit actions by the state to a greater extent than does the federal Constitution via the Fourteenth Amendment. Although state constitutional provisions have usually been interpreted as having the same meaning as parallel federal provisions, occasional-

ly a state court will interpret its own constitution as being more restrictive than the federal Constitution. The reverse situation has little significance because if the state court construes its constitution as being less rigorous than the Fourteenth Amendment, the more stringent standards of the latter would prevail under the Supremacy Clause.

During the nineteenth century the Supreme Court was concerned with other issues and had no occasion to think about the First Amendment. The beginning of serious awareness of First Amendment issues coincided with the litigation provoked by the Espionage Act of 1917 and related state statutes designed to unify the nation during and after World War I. The Espionage Act banned attempts to cause insubordination in the armed forces or to obstruct military recruiting or to conspire to achieve these results. Most of these cases, which confronted the Court from 1919 until the mid-1920's, involved radical speakers who opposed the war effort and criticized the political and economic structure of the country.

In early cases the Court seemed to suggest that language could be subjected to criminal liability only if the words uttered created a clear and present danger of an evil the state might properly prevent. The statutes that gave rise to these cases did not specifically address the question of liability for words. Then came Gitlow v. New York, 268 U.S. 652 (1925). Gitlow was the business manager of a newspaper that was published by the Left Wing Section of the Socialist Party. One issue carried a "Manifesto" urging a Communist revolution in the United States. Gitlow was convicted under New York's Criminal Anarchy Act which, among other things, made it a crime to advocate the overthrow of the government by violence. He argued that this publication had not caused any danger at all, much less one that was clear and present. The majority decided that the clear and present danger test was not applicable to cases in which the legislature had explicitly found that certain language was dangerous:

> By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. [ ] And the case is to be considered "in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare;" and that its police "statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the State in the public in-

terest." [ ] That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency. . . .

. . .

. . . In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.

It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the con-

stitutional protection. In such cases it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent. . . .

Justice Holmes, with whom Justice Brandeis joined, dissented in an opinion that rejected a "natural tendency" test:

> . . . I think that the criterion sanctioned by the full Court in Schenck v. United States, 249 U.S. 47, 52, applies. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the State] has a right to prevent." It is true that in my opinion this criterion was departed from in Abrams v. United States, 250 U.S. 616, but the convictions that I expressed in that case are too deep for it to be possible for me as yet to believe that it and Schaefer v. United States, 251 U.S. 466, have settled the law. If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

Among the most influential attacks on measures like the Espionage Act and New York's Criminal Anarchy Act from outside the Court was Zechariah Chafee's *Freedom of Speech* (1921), reprinted in 1941. Chafee (1885–1957) was a professor at the Harvard Law School.

FREE SPEECH IN THE UNITED STATES

Zechariah Chafee

31–35, 564–65 (1941).

The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion, for, as Bagehot points out, once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantage in the contest. Nevertheless, there are other purposes of government, such as order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale. The First Amendment gives binding force to this principle of political wisdom.

Or to put the matter another way, it is useless to define free speech by talk about rights. The agitator asserts his constitutional right to speak, the government asserts its constitutional right to wage war. The result is a deadlock. . . . To find the boundary line of any right, we must get behind rules of law to human facts. In our problem, we must regard the desires and needs of the individual human being who wants to speak and those of the great group of human beings among whom he speaks. That is, in technical language, there are individual interests and social interests, which must be balanced against each other, if they conflict, in order to determine which interest shall be sacrificed under the circumstances and which shall be protected and become the foundation of a legal right. It must never be forgotten that the balancing cannot be properly done unless all the interests involved are adequately ascertained, and the great evil of all this talk about rights is that each side is so busy denying the other's claim to rights that it entirely overlooks the human desires and needs behind that claim.

The rights and powers of the Constitution, aside from the portions which create the machinery of the federal system, are largely means of protecting important individual and social interests, and because of this necessity of balancing such interests the clauses cannot be construed with absolute literalness. . . .

The First Amendment protects two kinds of interests in free speech. There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the coun-

try may not only adopt the wisest course of action but carry it out in the wisest way. This social interest is especially important in war time. Even after war has been declared there is bound to be a confused mixture of good and bad arguments in its support, and a wide difference of opinion as to its objects. Truth can be sifted out from falsehood only if the government is vigorously and constantly cross-examined, so that the fundamental issues of the struggle may be clearly defined, and the war may not be diverted to improper ends, or conducted with an undue sacrifice of life and liberty, or prolonged after its just purposes are accomplished. Legal proceedings prove that an opponent makes the best cross-examiner. Consequently it is a disastrous mistake to limit criticism to those who favor the war. Men bitterly hostile to it may point out evils in its management like the secret treaties, which its supporters have been too busy to unearth. If a free canvassing of the aims of the war by its opponents is crushed by the menace of long imprisonment, such evils, even though made public in one or two newspapers, may not come to the attention of those who had power to counteract them until too late.

. . .

The great trouble with most judicial construction of the Espionage Act is that this social interest has been ignored and free speech has been regarded as merely an individual interest, which must readily give way like other personal desires the moment it interferes with the social interest in national safety. . . .

The true boundary line of the First Amendment can be fixed only when Congress and the courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth. Every reasonable attempt should be made to maintain both interests unimpaired, and the great interest in free speech should be sacrificed only when the interest in public safety is really imperiled, and not, as most men believe, when it is barely conceivable that it may be slightly affected. In war time, therefore, speech should be unrestricted by the censorship or by punishment, unless it is clearly liable to cause direct and dangerous interference with the conduct of the war.

Thus our problem of locating the boundary line of free speech is solved. It is fixed close to the point where words will give rise to unlawful acts. . . . We can insist upon various procedural safeguards which make it more probable that a tribunal will give the value of open discussion its proper weight in the balance. Fox's Libel Act is such a safeguard. . . . And we can with certitude declare that the First Amendment forbids the punishment of words merely for their injurious tendencies. The history of the Amendment and the po-

litical function of free speech corroborate each other and make this conclusion plain.

. . .

This brings me to my final argument for freedom of speech. It creates the happiest kind of country. It is the best way to make men and women love their country.

. . .

. . . You make men love their government and their country by giving them the kind of government and the kind of country that inspire respect and love: a country that is free and unafraid, that lets the discontented talk in order to learn the causes for their discontent and end those causes, that refuses to impel men to spy on their neighbors, that protects its citizens vigorously from harmful acts while it leaves the remedies for objectionable ideas to counter-argument and time.

Notes and Questions

1. The argument made by Chafee is descended from that of Milton: that freedom of expression is essential to the emergence of truth and advancement of knowledge. This is often referred to as "the marketplace of ideas" concept, a theme restated by Mr. Justice Holmes in a World War I case, Abrams v. United States, 250 U.S. 616 (1919): "[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market." This productive clash of ideas is also described as "the self-righting process." Are these modern American arguments closer to a "Miltonian faith" in an objectively discoverable truth that can defeat error, or to Locke's assertion that the imperfections of human knowledge require an openness to new ideas? Compare Judge Hand's suggestion that the spirit of liberty is "the spirit which is not too sure that it is right." For an illuminating insight into the views of the First Amendment held by Justice Holmes, Judge Learned Hand, and Professor Chafee, see Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 Stan.L.Rev. 719 (1975).

2. Chafee questions Milton's argument "because truth does not seem to emerge from a controversy in the automatic way [his] logic would lead us to expect," and he concludes that "Reason is more imperfect than we used to believe. Yet it still remains the best guide we have, better than our emotions, better even than patriotism, better than any single human guide, however exalted his position." Free Speech in the United States 559–61 (1941).

Can the marketplace be relied on to produce truth under modern conditions? Is any other mechanism likely to serve this purpose at least as well?

3. Chafee's final argument for freedom, which appears almost as an afterthought in this excerpt, was given more prominence in his later works as "the strongest of all": the preservation of a country with "fewer suspicions, animosities, informers, heresy trials, and more scope for initiative and originality." See "Thirty-Five Years with Freedom of Speech" 34 (1952).

4. Much of Chafee's discussion in this excerpt is centered on "locating a boundary line of free speech." He assumes the obvious necessity of drawing such a line—somewhere. Why must such a boundary be set? Did others disagree?

5. The primary function of the judiciary is to resolve disputes in a way that is, and appears to be, consistent with rational policies rather than caprice or bias. If courts were merely arbiters solving individual disputes, ad hoc decision-making might be desirable since it would give the greatest weight to the individual claims at stake in a particular controversy. But there is more to the question. Broadly based and predictable decisions enable others to act with some assurance that they know what the rules are. This suggests a need to consider both the general and the particular in deciding cases. Similar rulings in similar situations convey a sense of fairness to litigants. Tensions between the general and the particular are suggested in P. Freund, The Supreme Court of the United States 89 (1961), discussing the Court:

> It serves as a symbol, and particularly so in the area of civil liberties. When great classic utterances in this field are invoked, the English are apt to call upon Milton and Mill, while we are likely to summon up Holmes and Hughes and Brandeis. Jefferson apart, our preceptors in civil liberties have tended to be judges, whose opinions imponderably but surely influence our course of action far beyond the occasions that have called them forth. Of course the Court does not sit as a symbol or to compose for the anthologies. We accept the Court as a symbol in the measure, that, while performing its appointed tasks, it manages at the same time to articulate and rationalize the aspirations reflected in the Constitution.

6. Aside from cases arising out of the Espionage Act and similar state statutes like that in *Gitlow*, during the 1920's the Supreme Court was preoccupied largely with challenges to governmental regulation of economic activity, a problem that had been simmering since the 1860's. In the 1930's the economic upheaval of the depression and political changes accompanying the New Deal, along with new social

attitudes, greatly changed the nature of the cases reaching the Supreme Court and the decisions of that Court.

A new majority of the justices was more receptive to economic legislation. Perhaps the most explicit statement of the change is to be found in United States v. Carolene Products Co., 304 U.S. 144 (1938), involving the validity of the federal Filled Milk Act. In upholding the Act, Justice Stone, writing the opinion for the majority, stated:

> [R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

At this point Justice Stone appended what has become one of the Supreme Court's most famous footnotes:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .

What might "more exacting judicial scrutiny" mean?

7. Chafee's discussion of the process of balancing interests is the process that we will encounter most often in our study of Supreme Court decisions. Chafee's focus on the interests at stake in the individual case is commonly characterized as "ad hoc" balancing: the specific interests applicable to the facts of the particular case are considered. A more general process, called "definitional" balancing, is also utilized. Here the interests analyzed transcend the merits of a particular case. Rather than asking, for example, whether the value of speech in a particular case outweighed the arguments for proscribing it, the Court might generalize and consider the values of that category of speech, or that category of speaker, and develop a more general analysis. This approach makes it easier to predict outcomes because of the explicit generalized quality of the decision.

8. Gerald Gunther opposes highly specific balancing, but also objects to definitional balancing because it might lead to such unduly broad generalizations as Justice Murphy's statement in Chaplinsky v. New

Hampshire, 315 U.S. 568 (1942), that there were "certain well-defined and narrowly limited classes of speech" that "have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words' . . . ." This language, which later raised problems, may reflect undue attention to broad categories rather than to the facts of each case. Professor Gunther suggests a middle ground: "A Supreme Court opinion should strive for more than a 'fair balancing' in the individual case before the Court. It should also provide the maximum possible guidance for lower courts and litigants. An excessively particularized opinion lacks that quality. There must at least be an articulation of the criteria that guide the resolution of the value conflicts in a particular case . . . . Moreover, especially when sensitive First Amendment values are involved, the risks of case-by-case adjudication may be too great and broader prophylactic rules may be appropriate." The judge "must guard against succumbing to excessive particularization and losing sight of the weighty reasons for greater generality." Gunther, In Search of Judicial Quality on a Changing Court: The Case of Justice Powell, 24 Stan.L.Rev. 1001, 1026–27 (1972).

9. What appear to be the strengths and weaknesses of the various balancing approaches?

10. Whatever type of balancing is utilized, the process requires consideration of how to value the several factors. In the early 1940's several justices of the Supreme Court came to refer to speech as having a "preferred position" in constitutional adjudication. This did not mean that claims of free speech always prevailed over countervailing interests, but rather that government regulation of speech was to receive "more exacting scrutiny" than government regulation in certain other areas. The issue came to the forefront in Kovacs v. Cooper, 336 U.S. 77 (1949), in which the Court upheld the validity of a local ordinance regulating, but not prohibiting, use of sound trucks. Justice Frankfurter, in a concurring opinion, attacked the "preferred position" language of the majority because he feared it was leading justices to view government restraint in the speech area as presumptively invalid. Though he could not accept such a presumption, Justice Frankfurter did recognize that speech was an interest different from others protected by the Bill of Rights:

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

protection of freedom of speech derive essentially from the opinions of Mr. Justice Holmes.

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

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

How might the Frankfurter approach to a statute restricting speech differ from that of justices who espoused the "preferred position" view?

11. Other justices have found special significance in the First Amendment. Discussing the various parts of the Constitution, Justice Cardozo observed that "one may say that [freedom of speech] is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal." Palko v. Connecticut, 302 U.S. 319, 327 (1937).

12. Perhaps the most expansive judicial view of the history of free expression, elaborating the famous "clear and present danger" approach, was the concurring opinion of Justice Brandeis, joined by Justice Holmes, in the Whitney case. It involved a prosecution for advocating criminal syndicalism.

WHITNEY v. CALIFORNIA

Supreme Court of the United States, 1927.
274 U.S. 357, 375–77, 47 S.Ct. 641, 648–649, 71 L.Ed.2d 1095.

MR. JUSTICE BRANDEIS, concurring.

. . .

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[2] They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denuncia-

2. Compare Thomas Jefferson: "We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by the false reasonings; these are safer corrections than the conscience of the judge." Quoted by Charles A. Beard, The Nation, July 7, 1926, vol. 123, p. 8. . . .

tion 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 still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.[4] Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. Thus, a State might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this Court would hold constitutional a statute which punished as a felony the mere voluntary

4. Compare Z. Chafee, Jr., "Freedom of Speech", pp. 24–39, 207–221, 228, 262–265; H. J. Laski, "Grammar of Politics", pp. 120, 121. . . .

assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech and assembly.

Notes and Questions

1. Is the clear and present danger test formulated by Justice Brandeis a kind of balancing test?

2. Paul Freund is dissatisfied with the clear and present danger test. He has suggested that the classic example of falsely crying "Fire!" in a crowded theater is not a helpful example because it "is not the ordinary communication of information, or argument, or exhortation, or entertainment. It is in the nature of a preset signal to action, which could have been conveyed by lanterns in a belfry." Would the same analysis apply to a press report in wartime that a troop transport is sailing at a certain hour from a certain port?

Professor Freund also notes that several relevant factors are not explicitly part of the test. For example, the test "does not analyze the causal link between the speech and the danger: although the speech may be moderate and rational, the audience may be hostile and emotional."

Finally, and perhaps most importantly for our purposes, he notes that the clear and present danger test, although "it has its uses in the area of seditious speech where it arose, is not a broad-spectrum sovereign remedy for such other complaints as defamation, obscenity, and invasions of privacy, where the complex of interests at stake requires closer diagnosis and more refined treatment." Freund, The Great Disorder of Speech, 44 The American Scholar 541, 544–45 (1975). See also P. Freund, The Supreme Court of the United States 42–44 (1961) in which he observes that "No matter how rapidly we utter the phrase . . . or how closely we hyphenate the words, they are not a substitute for the weighing of values."

3. In Dennis v. United States, 341 U.S. 494 (1951), the plurality opinion refused to apply the Brandeis approach to a prosecution of 11 leading members of the Communist Party for conspiring to advocate the forcible overthrow of the government of the United States. Justices Brandeis and Holmes wrote in cases involving "comparatively

isolated" events "bearing little relation . . . to any substantial threat to the safety of the community. . . . They were not confronted with any situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis." Instead of the Brandeis formulation, the plurality adopted a test framed by Judge Learned Hand in the lower court decision in *Dennis:* "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

4. Some have rejected attempts to proscribe certain speech. Professor Alexander Meiklejohn, like the other commentators quoted in this section, was distressed by the political and social pressures of the "cold war," and he proposed still another approach to free speech. Professor Meiklejohn (1872–1964) taught Philosophy at several universities and was President of Amherst College.

FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT

Alexander Meiklejohn *

22–27, 37–39, 88–89 (1948).

The difficulties of the paradox of freedom as applied to speech may perhaps be lessened if we now examine the procedure of the traditional American town meeting. That institution is commonly, and rightly, regarded as a model by which free political procedures may be measured. It is self-government in its simplest, most obvious form.

In the town meeting the people of a community assemble to discuss and to act upon matters of public interest—roads, schools, poorhouses, health, external defense, and the like. Every man is free to come. They meet as political equals. Each has a right and a duty to think his own thoughts, to express them, and to listen to the arguments of others. The basic principle is that the freedom of speech shall be unabridged. And yet the meeting cannot even be opened unless, by common consent, speech is abridged. A chairman or moderator is, or has been, chosen. He "calls the meeting to order." And the hush which follows that call is a clear indication that restrictions upon speech have been set up. The moderator assumes, or arranges,

* Abridged from pp. 22–27, 37–39, 88–89 in *Free Speech and Its Relation to Self-Government* by Alexander Meiklejohn.

that in the conduct of the business, certain rules of order will be observed. Except as he is overruled by the meeting as a whole, he will enforce those rules. His business on its negative side is to abridge speech. For example, it is usually agreed that no one shall speak unless "recognized by the chair." Also, debaters must confine their remarks to "the question before the house." If one man "has the floor," no one else may interrupt him except as provided by the rules. The meeting has assembled, not primarily to talk, but primarily by means of talking to get business done. And the talking must be regulated and abridged as the doing of the business under actual conditions may require. If a speaker wanders from the point at issue, if he is abusive or in other ways threatens to defeat the purpose of the meeting, he may be and should be declared "out of order." He must then stop speaking, at least in that way. And if he persists in breaking the rules, he may be "denied the floor" or, in the last resort, "thrown out" of the meeting. The town meeting, as it seeks for freedom of public discussion of public problems, would be wholly ineffectual unless speech were thus abridged. It is not a Hyde Park. It is a parliament or congress. It is a group of free and equal men, cooperating in a common enterprise, and using for that enterprise responsible and regulated discussion. It is not a dialectical free-for-all. It is self-government.

These speech-abridging activities of the town meeting indicate what the First Amendment to the Constitution does not forbid. When self-governing men demand freedom of speech they are not saying that every individual has an unalienable right to speak whenever, wherever, however he chooses. . . .

What, then, does the First Amendment forbid? Here again the town meeting suggests an answer. That meeting is called to discuss and, on the basis of such discussion, to decide matters of public policy. For example, shall there be a school? Where shall it be located? Who shall teach? What shall be taught? The community has agreed that such questions as these shall be freely discussed and that, when the discussion is ended, decision upon them will be made by vote of the citizens. Now, in that method of political self-government, the point of ultimate interest is not the words of the speakers, but the minds of the hearers. The final aim of the meeting is the voting of wise decisions. . . . As the self-governing community seeks, by the method of voting, to gain wisdom in action, it can find it only in the minds of its individual citizens. If they fail, it fails. That is why freedom of discussion for those minds may not be abridged.

The First Amendment, then, is not the guardian of unregulated talkativeness. It does not require that, on every occasion, every citizen shall take part in public debate. Nor can it even give assurance that everyone shall have opportunity to do so. If, for example, at a

town meeting, twenty like-minded citizens have become a "party," and if one of them has read to the meeting an argument which they have all approved, it would be ludicrously out of order for each of the others to insist on reading it again. . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said. . . . And this means that though citizens may, on other grounds, be barred from speaking, they may not be barred because their views are thought to be false or dangerous. . . . When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American. Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.* The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.

[Meiklejohn discusses the privilege of freedom of speech and debate guaranteed to members of Congress by Article I, section 6 of the Constitution, which he describes as "absolute and unconditional."]

And that fact throws strong and direct light upon the provisions of the First Amendment that the public discussions of "citizens" shall have the same immunity. In the last resort, it is not our representatives who govern us. We govern ourselves, using them. And we do so in such ways as our own free judgment may decide. And, that being true, it is essential that when we speak in the open forum, we "shall not be questioned in any other place." It is not enough for us, as self-governing men, that we be governed wisely and justly, by someone else. We insist on doing our own governing. The freedom which we grant to our representatives is merely a derivative of the prior freedom which belongs to us as voters. In spite of all the dangers which it involves, Article I, section 6, suggests that the First Amendment means what it says: In the field of common action, of public discussion, the freedom of speech shall not be abridged.

And, second, the Fifth Amendment—by contrast of meaning, rather than by similarity—throws light upon the First. By the relevant clause of the Fifth Amendment we are told that no person within the jurisdiction of the laws of the United States may be "deprived of life, liberty, or property, without due process of law." And, what-

ever may have been the original reference of the term "liberty," as used in that sentence when it was written, it has been, in recent times, construed by the Supreme Court to include "the liberty of speech." The Fifth Amendment is, then, saying that the people of the United States have a civil liberty of speech which, by due legal process, the government may limit or suppress. But this means that, under the Bill of Rights, there are two freedoms, or liberties, of speech, rather than only one. There is a "freedom of speech" which the First Amendment declares to be non-abridgable. But there is also a "liberty of speech" which the Fifth Amendment declares to be abridgable. And for the inquiry in which we are engaged, the distinction between these two, the fact that there are two, is of fundamental importance. The Fifth Amendment, it appears, has to do with a class of utterances concerning which the legislature may, legitimately, raise the question, "Shall they be endured?" The First Amendment, on the other hand, has to do with a class of utterances concerning which that question may never legitimately be raised.

. . .

The nature of this difference comes to light if we note that the "liberty" of speech which is subject to abridgment is correlated, in the Fifth Amendment, with our rights to "life" and "property." These are private rights. They are individual possessions. And there can be no doubt that among the many forms of individual action and possession which are protected by the Constitution—not from regulation, but from undue regulation—the right to speak one's mind as one chooses is esteemed by us as one of our most highly cherished private possessions. Individuals have, then, a private right of speech which may on occasion be denied or limited, though such limitations may not be imposed unnecessarily or unequally. So says the Fifth Amendment. But this limited guarantee of the freedom of a man's wish to speak is radically different in intent from the unlimited guarantee of the freedom of public discussion, which is given by the First Amendment. The latter, correlating the freedom of speech in which it is interested with the freedom of religion, of press, of assembly, of petition for redress of grievances, places all these alike beyond the reach of legislative limitation, beyond even the due process of law. With regard to them, Congress has no negative powers whatever. There are, then, in the theory of the Constitution, two radically different kinds of utterances. The constitutional status of a merchant advertising his wares, of a paid lobbyist fighting for the advantage of his client, is utterly different from that of a citizen who is planning for the general welfare. And from this it follows that the Constitution provides differently for two different kinds of "freedom of speech."

. . .

. . . No one can deny that the winning of the truth is important for the purposes of self-government. But that is not our deepest need. Far more essential, if men are to be their own rulers, is the demand that whatever truth may become available shall be placed at the disposal of all the citizens of the community. The First Amendment is not, primarily, a device for the winning of new truth, though that is very important. It is a device for the sharing of whatever truth has been won. Its purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal. When a free man is voting, it is not enough that the truth is known by someone else, by some scholar or administrator or legislator. The voters must have it, all of them. The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them. Under the compact upon which the Constitution rests, it is agreed that men shall not be governed by others, that they shall govern themselves. . . .

Notes and Questions

1. In addition to relying on the legislators' privilege of Article I, § 6, Meiklejohn cited other sections in support of his interpretation of the First Amendment: the Preamble, which indicated that the "people" are forming the government; the Tenth Amendment, which provides that some powers are reserved to the "people" as well as to the states; Article I, § 2, which provides that the House of Representatives be chosen "by the people of the several States," and the Privileges and Immunities clause of the Fourteenth Amendment. See The First Amendment Is An Absolute, 1961 Supreme Court Review 245, 253–54 and Political Speech and Its Relation to Self-Government 59–61 (1948).

2. How far does Meiklejohn carry his metaphor of the town meeting? At one point he rejects an analogy to "Hyde Park." Is our entire process of self-government one continuing "town meeting?" Does this analysis leave room for First Amendment protection of the type of unrestricted soapbox oratory of Hyde Park?

3. Would Meiklejohn's emphasis on freedom of speech not as an end in itself, but as the one means of achieving self-government, be accepted by any of the other commenators we have read so far?

4. Meiklejohn states that "the point of ultimate interest is not the words of the speakers, but the minds of the hearers," and that "what is essential is not that everyone shall speak, but that everything worth

saying shall be said." Does his approach change the nature, or even the ownership of the right of freedom of speech?

Meiklejohn's assertion that it is not important that all 20 speakers who share the same view be heard, is challenged in Karst, Equality as a Central Principle in the First Amendment, 43 U.Chi.L.Rev. 20, 40 (1975):

> Meiklejohn's rather strained example does not even typify the expression in town meetings, let alone the sort of freewheeling expression characteristic of debate in the public forum. But Meiklejohn is wrong in a more fundamental way. The state lacks "moderators" who can be trusted to know when "everything worth saying" has been said, and the legislature lacks the capacity to write laws that will tell a moderator when to make such a ruling. And even the repetition of speech conveys the distinctive message that an opinion is widely shared. The impression of a mounting consensus is of great importance in an "other-directed" society where opinion polls are self-fulfilling prophecies. A vital public forum requires a principle of equal liberty of expression that is broad, protecting speakers as well as ideas.

5. Meiklejohn's emphasis on the self-governing focus of the First Amendment led him to reject more individualistic and subjective justifications for free speech. In Free Speech and Its Relation to Self-Government at 65–66 (1948) he says:

> Shall we, then, as practitioners of freedom, listen to ideas which, being opposed to our own, might destroy confidence in our form of government? Shall we give a hearing to those who hate and despise freedom, to those who, if they had the power, would destroy our institutions? Certainly, yes! Our action must be guided, not by their principles, but by ours. We listen, not because they desire to speak, but because we need to hear. If there are arguments against our theory of government, our policies in war or in peace, we the citizens, the rulers, must hear and consider them for ourselves. That is the way of public safety. It is the program of self-government.

Also, in The First Amendment Is An Absolute, 1961 Supreme Court Review, 245, 263, he states:

> I have never been able to share the Miltonian faith that in a fair fight between truth and error, truth is sure to win. . . . In my view, "the people need free speech" because they have decided, in adopting, maintaining, and interpreting their Constitution, to govern themselves rather than to be governed by others.

6. In his book review of Free Speech and Its Relation to Self-Government, Chafee criticized Meiklejohn's excessive preoccupation with self-government. After finding no support for the division of speech

into two categories of protection, Chafee observed that the "individual interest in freedom of speech, which Socrates voiced when he said that he would rather die than stop talking, is too precious to be left altogether to the vague words of the due process clause. Valuable as self-government is, it is in itself only a small part of our lives." 62 Harvard Law Review 891, 900 (1949).

Meiklejohn's emphasis on self-government might have suggested that the First Amendment would protect only what we conventionally regard as political speech. His vagueness on this point in his 1948 edition was criticized by Chafee, who was concerned about what types of speech were being relegated to the Fifth Amendment's protection. Chafee observed that "there are public aspects to practically every subject." The citizen gains understanding from many sources: "He can get help from poems and plays and novels. No matter if Shakespeare and Whitehead do seem very far away from the issues of the next election." If Meiklejohn intended this broad view of the First Amendment, then Chafee wondered how there could be any limitations in such traditionally regulated areas as obscenity and libel. If, however, Meiklejohn were to place scholarship and the arts in the category of private speech, Chafee would regard it as "shocking to deprive these vital matters of the protection of the inspiring words of the First Amendment." Book Review, 62 Harvard Law Review 891, 900 (1949).

In his 1961 article, Meiklejohn resolved this question in favor of the broad view of the First Amendment:

> Second, there are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express. These, too, must suffer no abridgment of their freedom. I list four of them below.
>
> 1. Education, in all its phases, is the attempt to so inform and cultivate the mind and will of a citizen that he shall have the wisdom, the independence, and, therefore, the dignity of a governing citizen. Freedom of education is, thus, as we all recognize, a basic postulate in the planning of a free society.
>
> 2. The achievements of philosophy and the sciences in creating knowledge and understanding of men and their world must be made available, without abridgment, to every citizen.
>
> 3. Literature and the arts must be protected by the First Amendment. They lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created.

> 4. Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power.

His inclusion of literature and the arts within the categorical protection of the First Amendment led Meiklejohn to rule out prosecutions even for obscenity. He regretted that "Our dominant mood is not the courage of people who dare to think. It is the timidity of those who fear and hate whenever conventions are questioned." Can this breadth be reconciled with Meiklejohn's earlier view that "a merchant advertising his wares [and] a paid lobbyist fighting for the advantage of his client" are covered only by the limited protection of the Fifth Amendment?

As to libel, Meiklejohn argued that the libel of a private person "if it has no relation to the business of governing" could lead to liability, but criticism of candidates or government officials should be protected. Yet, "vituperation which fixes attention on the defects of an opponent's character or intelligence and thereby distracts attention from the question of policy under discussion may be forbidden as a deadly enemy of peaceable assembly." (260) Is this consistent with his views on political freedom?

7. Chafee's detailed review of Meiklejohn's 1948 volume, quoted in several notes, praised its political wisdom but regretted that Meiklejohn, a philosopher, had attempted to read his political ideas into the Constitution. Chafee thought Meiklejohn's claim "of a firmly established purpose to make all political discussion immune" was negated by actions for civil and criminal libels in state courts after the Revolution, and asserted that although the framers "had no very clear idea as to what they meant" in the First Amendment, they intended the amendment to give speech "all the protection they desired, and had no idea of supplementing it by the Fifth Amendment." Book Review, 62 Harv.L.Rev. 891, 897–98 (1949). In his 1961 article, Meiklejohn acknowledged the lack of historical support but argued that the constitutional principle of self-government was capable of development and changing consequences as its implications became understood.

Chafee also claimed that Meiklejohn's constitutional approach would be unworkable in litigation because "few judges" would grant protection to certain types of inciting speech clearly within the realm of "public discussion." Also, the line between public and private speech might well be elusive. Chafee thought that his balancing approach would produce more thoughtful decisions than would Meiklejohn's approach. Does Meiklejohn's later adoption of the "broad

view" of what speech is covered by the First Amendment weaken or strengthen Chafee's argument?

8. Others have suggested different versions of the role of political speech in terms of the First Amendment. After reviewing several justifications for protecting speech in his Neutral Principles and Some First Amendment Problems, 47 Indiana L.J. 1, 23–35 (1971), Robert Bork suggests that the only acceptable basis for protecting speech more than other activities is the importance of the "discovery and spread of political truth" facilitated by the unique ability of speech to deal "explicitly and specifically and directly with politics and government." But this difference "exists only with respect to one kind of speech: explicitly and predominantly political speech. This seems to me the only form of speech that a principled judge can prefer to other claimed freedoms. All other forms of speech raise only issues of human gratification. . . ."

9. In commenting on the Chafee and Meiklejohn approaches to the First Amendment, Alexander Bickel observed:

> Now, the interest in truth of which Chafee spoke is not inconsistent with the First Amendment's protection of demonstrable falsehood for, as I have indicated, men may be deterred from speaking what they believe to be true because they fear that it will be found to be false, or that the proof of its truth will be too expensive. Moreover, the individual interest that Chafee mentioned has its truth-seeking aspect. Yet the First Amendment does not operate solely or even chiefly to foster the quest for truth, unless we take the view that truth is entirely a product of the marketplace and is definable as the perceptions of the majority of men, and not otherwise. The social interest that the First Amendment vindicates is rather, as Alexander Meiklejohn and Robert Bork have emphasized, the interest in the successful operation of the political process, so that the country may better be able to adopt the course of action that conforms to the wishes of the greatest number, whether or not it is wise or is founded in truth.

Professor Bickel then concluded that discussion and exchange of views were "crucial to our politics. . . . It would follow, then, that the First Amendment should protect and indeed encourage speech so long as it serves to make the political process work, seeking to achieve objectives through the political process by persuading a majority of voters. . . ." But it should not protect speech that was directed toward disrupting or coercing the process nor "when it constitutes a breach of an otherwise valid law, a violation of majority decisions embodied in law." A. Bickel, The Morality of Consent 62–63 (1976).

10. How might Meiklejohn have responded to Professors Bork and Bickel?

11. Perhaps spurred by the way the Dennis case altered the clear and present danger test, Justices Black and Douglas moved toward what has become known as an "absolutist" view of the protections offered by the First Amendment. We shall see this position in several cases. One who has been sympathetic to it is Professor Emerson.

After setting forth his philosophy of freedom of expression, Emerson developed a system for approaching cases that dealt with these problems. He had two basic concerns: that all limitations on expression "must be applied by one group of human beings to other human beings," and that pressures toward elimination of unpopular opinion occur in times of crisis. With his awareness that "suppression of opinion may . . . seem an entirely plausible course of action; tolerance a weakness or a foolish risk," Emerson advocated a system in which "exceptions must be clear-cut, precise, and readily controlled." He rejected "balancing" as too fragile to protect expression in difficult times.

THE SYSTEM OF FREEDOM OF EXPRESSION

Thomas I. Emerson

17–20 (1970).

(1) The root purpose of the First Amendment is to assure an effective system of freedom of expression in a democratic society. . . .

(2) The central idea of a system of freedom of expression is that a fundamental distinction must be drawn between conduct which consists of "expression" and conduct which consists of "action." "Expression" must be freely allowed and encouraged. "Action" can be controlled, subject to other constitutional requirements, but not by controlling expression. A system of freedom of expression cannot exist effectively on any other foundation, and a decision to maintain such a system necessarily implies acceptance of this proposition.

(3) The character of the system is such that freedom of expression can flourish, and the goals of the system can be realized, only if expression receives full protection under the First Amendment. This is to say that expression must be protected against governmental curtailment at all points, even where the results of expression may appear to be in conflict with other social interests that the government is charged with safeguarding. The government may protect or advance other social interests through regulation of action.

but not by suppressing expression. Full protection also means that regulations necessary to make the system work, or to improve the system, must be based upon principles which promote, rather than retard, the system in terms of its basic nature and functions.

(4) In constructing specific legal doctrines which, within the framework just outlined, will govern concrete issues, the main function of the courts is not to balance the interest in freedom of expression against other social interests but to define the key elements in the First Amendment: "expression," "abridge," and "law." These definitions must be functional in character, derived from the basic considerations underlying the system of freedom of expression.

(5) The definition of "expression" involves formulating in detail the distinction between "expression" and "action." The line in many situations is clear. But at some points it becomes obscure. All expression has some physical element. Moreover, a communication may take place in a context of action, as in the familiar example of the false cry of "fire" in a crowded theater. Or, a communication may be closely linked to action, as in the gang leader's command to his triggerman. Or, the communication may have the same immediate impact as action, as in instances of publicly uttered obscenities which may shock unforewarned listeners or viewers. In these cases it is necessary to decide, however artificial the distinction may appear to be, whether the conduct is to be classified as one or the other. This judgment must be guided by consideration of whether the conduct partakes of the essential qualities of expression or action, that is, whether expression or action is the dominant element. And the concept of expression must be related to the fundamental purposes of the system and the dynamics of its operation. In formulating the distinction there is a certain leeway in which the process of reconciling freedom of expression with other values and objectives can remain flexible. But the crucial point is that the focus of inquiry must be directed toward ascertaining what is expression, and therefore to be given the protection of expression, and what is action, and thus subject to regulation as such.

(6) The definition of "abridge" is not difficult in most situations in which the government seeks to limit expression in order to protect some other social interest. But it is likely to become more complex when the government controls undertake to regulate the internal operations of the system of freedom of expression itself, or when the status of an individual in an organization imposes obligations different from those of the ordinary citizen to the general community. In any case the decision as to whether there has been an "abridgment" turns on the actual impact of the regulation upon the system.

(7) The definition of "law" arises largely in cases, such as those involving the right of expression within private associations, in which the question is whether the First Amendment applies at all. The problem is thus usually the same as that of defining the scope of "state action."

(8) Different legal doctrines, derived from the definition of the foregoing terms, apply to different kinds of protection which legal institutions must provide for a system of freedom of expression. Most of the issues fall into three categories:

(a) First is the protection of the individual's right to freedom of expression against interference by the government in its efforts to achieve other social objectives or to advance its own interests. In the past this has been the chief area of legal controversy. The principal issue is one of distinguishing "expression" from "action" and giving full protection to expression. . . .

(b) Second is the utilization and simultaneous restriction of government in regulating conflicts between individuals or groups within the system of free expression; in protecting individuals or groups from nongovernmental interference in the exercise of their right to expression; and in eliminating obstacles to, or affirmatively promoting, effective functioning of the system. These are all problems of fashioning controls within the system of freedom of expression itself, not of adjusting the system to other social interests or to other systems. The key concept in resolving such issues is "abridgment." . . .

(c) Third is the restriction of the government insofar as the government itself participates in the system of expression. Here the applicable doctrines derive both from "abridgment" and from "law." The issues turn on the special character of government expression and the need for special protection to the system through rules such as requiring the government to make a balanced presentation of the issues.

(9) Other legal doctrines are necessary to solve particular problems. These pertain to the place where First Amendment rights may be exercised, the relationship of the system of freedom of expression to the system of privacy, and similar matters. Such issues likewise must be resolved on a functional basis, taking into account the objectives and operation of the system.

(10) Finally, it is necessary to define the "system" to which the foregoing principles are applicable. For reasons peculiar to each case, certain sectors of social conduct, though involving "expression" within the definition here used, must be deemed to fall outside the system with which we are now concerned. The areas which must be excluded embrace certain aspects of the operations of the military, of

commercial activities, of the activities of children, and of communication with foreign countries. This does not mean that the First Amendment has no application in these sectors. It simply recognizes that the functions of expression and the principles needed to protect expression in such areas are different from those in the main system, and that different legal rules may therefore be required.

Notes and Questions

1. What are the strengths and weaknesses of Emerson's approach?

2. Is this system consistent with Emerson's philosophical discussion at p. 42, supra?

3. How does Emerson's system compare with Chafee's? With Meiklejohn's?

4. Although all of the justices of the present era have recognized that there is something special about speech, some have not articulated the reasons and others disagree about the reasons and the consequences for the decision of specific cases. The state of the law in this area today is suggested in Emerson, The System of Freedom of Expression 15–16 (1970):

> The outstanding fact about the First Amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases. At various times the Court has employed the bad tendency test, the clear and present danger test, an incitement test, and different forms of the ad hoc balancing test. Sometimes it has not clearly enunciated the theory upon which it proceeds. Frequently it has avoided decision on basic First Amendment issues by invoking doctrines of vagueness, overbreadth, or the use of less drastic alternatives. Justice Black, at times supported by Justice Douglas, arrived at an "absolute" test, but subsequently reverted to the balancing test in certain types of cases. The Supreme Court has also utilized other doctrines, such as the preferred position of the First Amendment and prior restraint. Recently it has begun to address itself to problems of "symbolic speech" and the place in which First Amendment activities can be carried on. But it has totally failed to settle on any coherent approach or to bring together its various doctrines into a consistent whole.

No justice has ever taken the position that *all* speech under *all* circumstances is protected against any regulation or punishment by government. Even the "absolute" position of Justices Black and Douglas, while perhaps the most consistent and predictable, did not go this far. In the absence of a coherent doctrine most justices have de-

veloped a variety of approaches. The lack of any general theory has meant that decisions give little guidance for future cases.

The scope of freedom of expression is vast. Since we are concerned with mass media, we will not explore certain forms of individual expression that do not relate to mass media but would be relevant to a comprehensive theory of the First Amendment. It will be our goal to develop a working understanding of the relationship between the First Amendment and the mass media, and that in itself should be challenge enough.

5. Indeed, as an indication of how little is clear, it has only recently been suggested that the scope of the protections of speech and of the press might differ. See Stewart, "Or of the Press," 26 Hastings L.J. 631 (1975); Nimmer, Introduction—Is Freedom of the Press A Redundancy: What Does It Add to Freedom of Speech?, 26 Hastings L.J. 639 (1975); Lange, The Speech and Press Clauses, 23 UCLA L. Rev. 77 (1975); Nimmer, Speech and Press: A Brief Reply, 23 UCLA L.Rev. 120 (1975). Virtually all commentators in the past treated the use of "speech" and "press" in the First Amendment as indicating the same treatment for both. The suggestion now is that the press as an institution might be treated differently from individuals. We shall have occasion to consider this position as we pursue our study of the First Amendment.

C. REGULATING COMMERCIAL ASPECTS OF MASS MEDIA

In the last section, in considering some general approaches the Supreme Court has taken toward the First Amendment, we were concerned primarily with the general language of the approaches. In this section we begin our structured study of the law of freedom of expression.

The source of litigation is not within the control of the judicial branch. What cases arise and the order in which they arise depend upon the members of society, the kinds of disputes they have, and how readily they are able to settle them. A settlement means that the parties can reach agreement on their own, usually a compromise, without bringing their disputes to court or while the case is proceeding through the judicial process. In automobile accidents and contractual disputes it is often in the interests of the parties to settle their disputes cheaply and quickly because money more than principle is usually involved. But in the First Amendment area, principle plays a critical role in litigation and relatively few disputes that reach the judicial arena are settled. Since most of the cases we shall study involve government action, the critical decision is whether the government will attempt to impose a particular regulation or restriction on the

media. If the political battles are too difficult, the regulation is not enacted and no case arises. But if the regulation is adopted, litigation will probably follow—either prosecution of alleged violators or efforts by those affected to enjoin the government from proceeding or to obtain a declaratory judgment that the legislation is invalid. These disputes are not likely to be settled—either by repeal of the legislation or by some compromise. The perceived stakes—legal, political and practical—are now too high for settlement, and there is little room for compromise on such matters.

Perhaps the first significant mass media case to arise from the welter of post-World War I litigation, was Near v. Minnesota, 283 U.S. 697 (1931), involving the efforts of a state to stop a publication from venomous attacks on public officials who were alleged to be under the control of a Jewish gangster. This case arose from a local situation and an effort to invoke a unique statute. The Court, as we shall see when we consider *Near* at p. 378, infra, was required to attempt to fit the case into a newly emerging pattern of First Amendment law without any really close analogies. Further emphasizing the peculiarity of *Near* is the fact that in the next few years, the Supreme Court was confronted by a cluster of cases that raised a common and totally different question: how far states and the federal government may go in regulating the business aspects of media operations. We shall see that a coherent pattern emerges from this group of cases—but again an aberrational case starts the sequence.

1. Taxation

In the early 1930's Governor Huey Long of Louisiana sought to silence criticism of his actions by the state's largest newspapers. The Louisiana legislature enacted a tax of two percent on the gross receipts received by newspapers, magazines and other periodicals that circulated in the state. A critical provision limited the statute to enterprises having a circulation of more than 20,000 copies per week, which affected only a dozen publications, all but one of which strongly opposed the Governor's actions. The Supreme Court unanimously held the tax unconstitutional. Grosjean v. American Press Co., 297 U.S. 233 (1936). The Court's opinion did not stress the unique political situation in Louisiana in which Long was appropriating virtually all power. Rather, drawing on the heritage of concern about prior restraint, the Court held that limiting the tax to large newspapers effectively induced them to cut their circulation and inhibited the public's access to information. This operated as an impermissible prior restraint on their operations.

The very next year, the Court made it clear that *Grosjean* was based on unusual factors. Arizona had imposed a gross receipts tax on "practically every person or concern engaged in selling merchan-

dise or services in the state." A newspaper seller, relying on *Grosjean*, challenged the tax. The state courts upheld the tax and distinguished *Grosjean* on the basis of the peculiar Louisiana political situation, the 20,000 copy requirement and the limitation of the tax to media. The publisher appealed to the Supreme Court claiming that Arizona had failed to follow the controlling decision in *Grosjean*. The Supreme Court decided the case summarily saying only that it was dismissing the appeal "for want of a substantial federal question." Giragi v. Moore, 301 U.S. 670 (1937). By this formula the Court conveyed the idea that it saw nothing in the Arizona tax statute that raised any arguably serious question under the United States Constitution. The fact that Arizona had not limited its tax to print media nor uniquely burdened larger media undoubtedly led the Court to the result.

Another step was taken the next year when the Court ruled that media involved in interstate circulation and advertising were still subject to state and municipal taxes so long as the taxes were fairly apportioned. State taxation that burdened the flow of interstate commerce was not permissible—but this raised no problem unique to media since most large corporations engage in interstate business.

The result of these cases is the principle that media must pay their fair share of state and local taxation so long as they are not singled out for discriminatory treatment. Does that result expose the media to unwise risks of government interference?

2. Labor Relations

In the midst of the tax cases, the Court was confronted with the assertion that the First Amendment barred the government from imposing upon the press New Deal legislation regulating the relationship of employees and management. In Associated Press v. National Labor Relations Board, 301 U.S. 103 (1937), the AP fired Watson, an editor who thereupon filed unfair labor practice charges with the Labor Board. The National Labor Relations Act provided, among other things, that no employee could be fired for membership in, or activities in behalf of, a union. After an administrative proceeding, the Board's hearing officer found that Watson had been fired for "his activities in connection with the Newspaper Guild." When the Board ordered that Watson be reinstated and that AP desist from such practices, AP argued that it could not furnish unbiased and impartial news unless it could freely choose its employees and that under the First Amendment it had "absolute and unrestricted freedom to employ and to discharge those who, like Watson, edit the news."

The Court, 5–4, rejected this contention. It said that AP could fire Watson for editorial bias, but not for union activities:

> The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher

> of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. Like others he must pay equitable and nondiscriminatory taxes on his business. The regulation here in question has no relation whatever to the impartial distribution of news. The order of the Board in nowise circumscribes the full freedom and liberty of the petitioner to publish the news as it desires it published or to enforce policies of its own choosing with respect to the editing and rewriting of news for publication, and the petitioner is free at any time to discharge Watson or any editorial employee who fails to comply with the policies it may adopt.

Speaking for the four dissenters, Justice Sutherland emphasized that Watson's conspicuous sympathy for unions in general and for the Guild in particular might affect management's assessment of his impartiality. Although the case suggests that the First Amendment raises no special problems in the labor relations field, we should consider some of the major issues of labor relations in media.

a. *Ethics Codes.* Labor statutes require that management and labor negotiate about certain subjects, primarily changes in wages and working conditions. The meaning of this became an issue when a newspaper owner attempted to impose unilaterally—without first negotiating with labor—an ethics code that barred reporters from accepting free travel, free tickets to sporting events and other gifts. These are generally known as "freebies." In addition, the newspaper required its employees to report outside activities that might create conflicts of interest with their newspaper work. The newspaper had committed itself to reimburse employees for legitimate expenses incurred in pursuit of news stories, and disputes over legitimacy were subject to grievance procedures. The Board concluded that all concerned had treated these items as gifts and not wages. Thus, there was no change in working conditions—and no need to negotiate before imposing the new rules. The Board also concluded that requiring employees to report, but not stop, outside activities that might represent a conflict of interest, did not constitute a change in working conditions and could be instituted unilaterally. The Board did find, however, that the newspaper had committed an unfair labor practice in failing to bargain on the subject of penalties to be imposed for violation of the code. The Capital Times Co., 223 N.L.R.B. No. 87 (1976). The vote was 3–1, with the dissenter arguing that the Board had previously held that anything of value routinely received by employees in connection with their employment could not be subject to new rules without mandatory bargaining; although management

could ultimately institute its standards if they were lawful, it first had to exhaust its bargaining obligation.

b. *Professional Employees.* The question whether editors and reporters are "professional employees" as that term is defined in the statute may be significant because nonprofessionals and professionals must be placed in separate bargaining units for voting on labor contracts unless the professionals agree to a single unit. Perhaps because separating the two groups might reduce the solidarity of the employees negotiating with management, newspapers have tended to argue that reporters are professionals while labor argues that they are not. The statutory definition includes four criteria—three of which reporters surely meet: the work is predominantly intellectual and varied in character; it involves constant exercise of discretion and judgment; and its yield cannot be measured by the hour or any time period.

The fourth requirement is that the job involve "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes. . . ."

In 1976 the Board adhered to earlier rulings that reporters were not professionals, as defined in the Act. By a vote of 3–1, the Board concluded that journalists did not generally require such an education to perform their work, even though such training might be desirable. The employer testified that the paper sought persons with a broad education but the Board noted that the statute differentiates "general academic education" from "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. . . ." The dissent argued that "customarily" indicated that a professional's knowledge could be obtained elsewhere. The Express-News Corp., 223 N.L.R.B. No. 97 (1976).

c. *Editorial Writers.* A general labor question is whether certain fairly high level employees are to be allowed to vote in union elections, or are to be treated as management. In one case the Board held that two editorial writers who conferred every morning with top management to determine content of that day's editorials were to be treated as reporters and permitted to participate in union activities. On appeal to the courts, management won on the ground that the Board's ruling came "perilously close" to infringing upon the "newspaper's freedom to determine the content of its editorial voice in an atmosphere of free discussion of ideas." The writers were "so close-

ly aligned with the newspaper's management in the formulation, determination, and effectuation, not to mention expression, of the newspaper's management's policies, through its editorials as to be properly excluded from the collection bargaining unit of news department employees." Wichita Eagle & Beacon Pub. Co. v. National Labor Relations Board, 480 F.2d 52 (10th Cir. 1973) certiorari denied 416 U.S. 982 (1974).

d. *Requiring Payment of Union Dues.* The Supreme Court has refused to become involved in the recent efforts to spell out the details of the accommodation between the media and national labor policy. The closest it came was in a case involving two broadcast commentators who were required to join a union—or to pay the union an amount equivalent to dues—before they could be considered for broadcast work. The union, the American Federation of Television and Radio Artists (AFTRA), included such a provision in the contracts that it negotiated with various broadcast organizations, under which the stations or networks agreed not to hire anyone who did not join AFTRA or pay the equivalent of dues. The commentators challenged the arrangement but the court of appeals upheld it on the ground that Congress may properly conclude that such a provision would reduce industrial strife. The existence of "free riders" who got advantages from union activities but who did not share in their costs might "eventually seriously undermine the union's ability to perform its bargaining function." Buckley v. AFTRA, 496 F.2d 305 (2d Cir. 1974). The commentators' petition for certiorari was denied over the lengthy dissent of Justice Douglas, with whom Chief Justice Burger concurred. 419 U.S. 1093 (1974). They argued that the case presented the serious question whether a union dues requirement should be characterized as a prior restraint upon free speech rights. They thought that further consideration might lead to the conclusion that the dues were "the functional equivalent of a 'license' to speak."

e. *Equal Employment Opportunities.* Finally the emerging area of equal employment opportunity is beginning to present troublesome questions. In one case, female reporters at the Washington Post complained to the Equal Employment Opportunity Commission that they were being discriminated against by being given routine assignments, such as writing obituaries, that offered no chance to earn promotions. The Post argued that "the giving of individual reportorial assignments is protected by the First Amendment" and is therefore beyond the power of the EEOC. The EEOC rejected the contention:

> The commission has no interest in attempting to regulate Respondent's editorial policies or functions nor in attempting to dictate who should be assigned what stories. Job assignments, however, are clearly a condition of employment and this Commission is authorized to investigate allegations regarding disparate

> job assignments based on sex. If the investigation supports a conclusion that females are indeed denied equal terms and conditions of employment with respect to story assignments, we would insist as a remedy that female reporters be given equal consideration for story assignments with male reporters. Such a remedy in no way interferes with Respondent's right to carry out its editorial functions as it sees fit.

Is this an adequate response to the Post's contention? The case resulted in an EEOC finding that it had "probable cause to believe" that female reporters have been "denied equal consideration with male reporters for story assignments on the city and suburban desks." Conciliation was recommended. For background see Washington Post, June 21, 1974, § B, p. 1, and Media Report to Women, Aug. 1, 1974, p. 1. Equal opportunity legislation provides for specific exceptions when such matters as race, sex, religion and ethnic background are bona fide requirements of a job. Normally, a government commission decides such questions. Should the commission or the media have the last word in deciding what type of racial, religious or other characteristics are essential for particular reporting assignments?

3. Antitrust Law

The goals of American antitrust law were set in 1890, with the enactment of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2. Section 1 states a desire to "protect trade and commerce against unlawful restraints and monopolies," and then declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade, or commerce." Section 2 provides that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be guilty of a misdemeanor." (U.S.C. stands for the United States Code, in which most federal statutes are arranged according to subject matter. Thus, most legislation relating to broadcasting is found in title 47 of U.S.C. and antitrust legislation is in title 15.)

The economic development of the newspaper industry as we observed it during the framing of the Constitution, continued well into the 19th century. The number of dailies increased and the period up to the Civil War was one in which "the newspaper was still basically individualistic and political—the creature of an individual editor/publisher, devoted to his personal views and those of his friends." B. Owen, Economics and Freedom of Expression 45 (1975). Changes began around 1880 that continued well into this century. Economies of scale in printing and distribution favored

newspapers with large circulations and competition in the cities intensified. By 1920 newspaper circulation was at a saturation point and there was no further opportunity to produce a specialized product for a specific untapped audience. (Owen 47):

> Editors could no longer afford to put the stamp of their personal biases on the entire range of editorial content; they had increasingly to include content of appeal to diverse groups. The editor as an institution receded into the background. The publisher's success formula was to take advantage of scale economies with respect to the physical size of the newspaper by including content that was specialized to serve subgroups of the population, and at the same time to generate demand for circulation by broadening (and perhaps lowering) the appeal of the basic news content of the newspaper. The newspapers in their search for mass audiences interacted directly with the political environment of the day: boosterism, muck-raking, progressivism, yellow journalism, even a war promoted by a newspaper publisher. Newspaper publishers scrambled for huge circulation because that was the key to profit and survival and the newspaper ceased to be the instrument of an individualistic editor or his political cronies.

These developments led to the inevitable demise of many city newspapers, first in the smaller cities where the more homogeneous population included few specialized audiences. Thus, Owen reports that while in 1923, 60 percent of newspaper publishers had direct competition, by 1973 the figure had dropped to 5.4 percent. But this small percentage produces 32 percent of the nation's circulation. (p. 49) Virtually all American cities have one newspaper or combined ownership of more than one, but these few surviving urban papers compete for circulation and advertising with suburban papers and for advertising with broadcasting as well. Economists suggest that the economies of scale were bound to reduce the number of newspapers regardless of efforts of the antitrust law to save competition. Professor Owen provides extensive discussion of the economics of newspapers in his book at pp. 33–85.

The quoted provisions of the Sherman Act have been applied against business enterprises engaged in manufacturing or marketing tangible products. Whether they can as readily be invoked against organizations involved in gathering and disseminating news was first considered in the early 1940's when the Associated Press was charged with violating both sections by creating a system of by-laws that prohibited local AP members from selling "spontaneous" news (as opposed to researched news) to non-members, and granted to its one member in each city the effective power to block all non-member local

competitors from membership in AP. Among other findings, the lower court determined that because of these restrictions 1,179 English language dailies with a circulation of 42 million were obligated not to supply AP news or their own "spontaneous" news to any nonmembers of AP. The lower court concluded that the AP By-Laws "unlawfully restricted admission to AP membership, and violated the Sherman Act insofar as the By-Laws' provisions clothed a member with powers to impose or dispense with conditions upon the admission of his business competitor." Over three dissents, the Supreme Court affirmed. Associated Press v. United States, 326 U.S. 1 (1945). In doing so, the majority had to respond to the wire service's First Amendment argument:

> That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.

In a concurring opinion, Justice Frankfurter observed:

> To be sure, the Associated Press is a cooperative organization of members who are "engaged in a commercial business for profit." [ ] But in addition to being a commercial enterprise, it has a relation to the public interest unlike that of any other enterprise pursued for profit. A free press is indispensable to the workings of our democratic society. The business of the press, and therefore the business of the Associated Press, is the promotion of truth regarding public matters by furnishing the basis for an understanding of them. Truth and understanding are not wares like peanuts or potatoes. And so, the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect. I find myself entirely in agreement with Judge Learned Hand that "neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it pre-

supposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." 52 F.Supp. 362, 372.

The Supreme Court has decided a variety of newspaper antitrust cases since Associated Press v. United States.

One type is suggested by Lorain Journal v. United States, 342 U.S. 143 (1951), in which the Justice Department charged that the Lorain (Ohio) Journal's conduct constituted an attempt to monopolize interstate commerce in violation of the Sherman Act. From 1933 to 1948, the Journal had a substantial monopoly of the mass dissemination of news and advertising in Lorain. In 1948, however, the FCC licensed the Elyria-Lorain Broadcasting Company to operate WEOL radio in Elyria, Ohio, eight miles south of Lorain. In an effort to preserve its monopoly, the Lorain Journal attempted to prevent WEOL from selling any advertising, by refusing to accept advertising from any Lorain County advertiser who advertised or whom the newspaper believed to be about to advertise over WEOL. The trial court found that "the purpose and intent of this procedure was to destroy the broadcasting company," and issued an injunction enjoining such behavior. The Supreme Court affirmed, noting that the Journal's coverage of 99% of Lorain families made it an indispensable medium of advertising for Lorain businesses, and that the publisher's refusals to print advertising of those also using WEOL, if unchecked, would cut off WEOL's revenues and destroy it as a competitor.

In Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953), the publisher of a morning and an afternoon paper in New Orleans set a unit rate that required an advertiser to place his ads in both papers or in neither but did not bar those who also chose to advertise in the one afternoon competitor. The Department of Justice claimed that unit rates were really "tying agreements" that violated the Sherman Act. The District Court agreed that the power of the unopposed morning paper was forcing advertisers to place ads in the related afternoon paper, hurting the other afternoon paper because some advertisers who wanted the morning space would not also be able to afford both afternoon papers. On appeal, the Supreme Court, 5–4, reversed and held that the government had failed to establish its case. The majority viewed the "market" as including all three dailies, which meant that the morning paper did not hold a dominant position in the market, and therefore that the fairly strong afternoon partner was not being forced on unwilling advertisers. The dissenters thought the morning and afternoon markets were separate and agreed with the government's and the District Court's view of the case. The situation is discussed extensively in Barber, Newspaper

Monopoly in New Orleans: The Lessons for Antitrust Policy, 24 La. L.Rev. 503 (1964).

Another type of problem is suggested by United States v. Times Mirror Co., 274 F.Supp. 606 (C.D.Cal.1967), affirmed without opinion, 390 U.S. 712 (1968). The Justice Department sought to prevent the Times Mirror Company, publisher of the Los Angeles Times, the largest daily newspaper in southern California, from acquiring the Sun Company, publisher of the largest "independent" daily newspaper in southern California. The Justice Department charged that the effect of the acquisition would be to "substantially lessen competition" in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, a major addition to the antitrust arsenal. The District Court focused on the elements of the acquisition relevant to the effects on competition: whether the Times and the Sun were in the same product and geographical markets so as to be in competition for the consumer's dollar, the existing concentration in the southern California newspaper industry, and the degree of control exercised by Times Mirror over the Sun's policies. The District Court concluded that the acquisition would substantially lessen competition in violation of the Clayton Act.

a. The Newspaper Preservation Act

The most significant recent antitrust confrontation between the Justice Department and the newspaper industry occurred in Citizen Pub. Co. v. United States, 394 U.S. 131 (1969). In 1940, the only two daily newspapers in Tucson, Arizona, the Citizen, an evening paper, and the Star, a daily and Sunday paper, negotiated a 25-year joint operating agreement. The agreement provided that each paper would retain its own editorial and news departments and its corporate identity, but that business operations would be integrated "to end any business or commercial competition between the two papers." The agreement was implemented in three ways. One was price fixing. Newspapers were sold and distributed by a single circulation department and advertising placed in either paper was sold through a single advertising department. Second, all profits realized were pooled and distributed to the Star and Citizen pursuant to an agreed ratio. Third, the Star and the Citizen agreed that neither paper nor any person affiliated with either would engage in any business in the metropolitan area of Tucson in conflict with the agreement. Prior to 1940 the two papers competed vigorously with each other. Though their circulations were about equal, the Star sold 50 percent more advertising than the Citizen and operated at an annual profit of about $26,000, while the Citizen's annual losses averaged about $23,550. Following the agreement, all commercial rivalry between the papers ceased. Combined profits rose from $27,531 in 1940 to $1,727,217 in 1964.

The government charged violations of the Sherman and Clayton Acts. The District Court found that the agreement violated the antitrust laws and the Supreme Court affirmed. Its opinion focused on the applicability to the defendants of the "failing company doctrine." This judicially created doctrine held that the acquisition of one company by another did not violate the antitrust laws when "the resources of the one company were so depleted and the prospect of rehabilitation so remote that 'it faced the grave probability of a business failure,' " and there was "no other prospective purchaser." But the District Court had found that at the time the Star and Citizen entered into the operating agreement, there was no serious probability that the Citizen was on the verge of going out of business or that, even had the Citizen been contemplating liquidation, the Star was the only available purchaser. The Supreme Court rejected the defense and affirmed the lower court's decree.

Congressional reaction was swift, largely because the decision raised doubt about the validity of similar agreements in 22 other cities. The result was the passage, in 1970, of the Newspaper Preservation Act, 15 U.S.C. § 1801 et seq. Congress declared its purpose to maintain "a newspaper press editorially and reportorially independent and competitive in all parts of the United States." Joint newspaper operating agreements were authorized to link virtually all mechanical and commercial aspects of the newspaper but there was to be no combination of editorial or reportorial staffs. A "failing newspaper" was defined as one that "regardless of its ownership or affiliation, is in probable danger of financial failure." The Act provided that joint agreements previously entered into are valid if when started, "not more than one of the newspaper publications involved . . . was likely to remain or become a financially sound publication." Future joint operating agreements required the approval of the Attorney General, who must first "determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper" and that approval of the agreement would advance the policy of the Act. Predatory practices that would be unlawful if engaged in by a single entity may not be engaged in by the members of the joint operating agreement.

This Act is an exception to the general hostility between press and government. Here, the press actively sought Congressional intervention, whereas the press is usually protesting against government action and relying upon the First Amendment for protection. Apart from the obvious political pressures, why might Congress have passed such legislation? The Act has had its most important role in preserving the 22 joint operating agreements that were in existence at the time of *Citizen Publishing*. Only an agreement in Anchorage has been proposed and approved since then.

A few figures will show the effect of these agreements on advertisers and potential competitors. Studies have shown that advertising provides 75 to 80 percent of the income of most newspapers. Joint operators and monopolists are asserted to charge about the same advertising rates—rates significantly higher than duopolists. Owen, Newspaper and Television Station Joint Ownership, 18 Antitrust Bull. 787 (1973). The situation in San Francisco is illustrative. The basic display rate of the Chronicle rose from $1.20 a line to $2.32 per line ten months after the agreement. The Chronicle's increase may well have been due to the fact that as part of the agreement a third paper ceased publication and the Chronicle obtained a monopoly in the morning. The afternoon paper's rate rose from $1.03 to $1.55 during the same period. More significantly, an advertiser could buy space in both papers for $2.50 per line after the agreement. This is the common result of such agreements and presents obvious problems to prospective competitors. See Note, 46 Ind.L.J. 392 (1971).

The only challenge to the Act came in San Francisco. A small paper that had hoped to move into competition with the large papers filed an antitrust action claiming that their agreement made it virtually impossible for another paper to break in. Advertisers whose rates had been increased by the agreement joined the challenge. The defendants asserted that the Act validated their agreement. Plaintiffs moved to dismiss the defense on the ground that the Act was unconstitutional. Bay Guardian Co. v. Chronicle Pub. Co., 244 F.Supp. 1155 (N.D.Cal.1972). A First Amendment challenge to the Act was rejected:

> Plaintiffs contend that the Act is unconstitutional because it permits the defendant newspapers to combine so as to prevent the plaintiffs' newspaper from publishing. This effect of the Act, they contend, causes it to be in violation of the freedom of the press guarantee of the First Amendment.
>
> The simple answer to the plaintiffs' contention is that the Act does not authorize any conduct. It is a narrow exception to the antitrust laws for newspapers in danger of failing. Thus it is in many respects merely a codification of the judicially created "failing company" doctrine. See, 83 Harv.L.R. 673 (1970).
>
> . . .
>
> 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.

Other constitutional challenges were rejected and the issue remaining to be tried was the plaintiff's contention that the defendants did not meet the Act's "failing" requirement and that the Act did not authorize the closing of a third paper as part of the agreement. Just before trial, the parties settled the case for $1,350,000 to be apportioned among 17 plaintiffs. The settlement details are reported in Editor & Publisher, May 31, 1975, p. 7. Shortly thereafter another group of advertisers began suit, raising the same statutory questions.

b. Syndication Exclusivity

One other antitrust issue should be mentioned—the problem of exclusive syndication. Nationally syndicated features, primarily political columns and comics, may be offered to certain large newspapers on an exclusive basis, and no other newspaper within a defined area may carry the feature. The Justice Department has contended that the exclusivity provision is defensible only to the extent that it is ancillary to the underlying license arrangement. The company must show that the exclusivity contributes "in some demonstrable way" to its ability to sell its papers in its exclusive territory. Otherwise the exclusivity is an unjustifiable restraint of trade. Thus, the government has sought to show that a particular newspaper's circulation would not be affected if some or all of its syndicated features were in some of the competing papers. Beyond that the government has also argued that even if the paper were to establish some relationship between the exclusivity and circulation, the exclusivity "must nonetheless be terminated if the Court finds that the demonstrated justification is insufficient to outweigh the public interest in the broad dissemination of information."

These contentions were raised in a case brought against the Boston Globe and three syndicators. The background for the case is reported in Editor & Publisher, Feb. 1, 1975, p. 14. During the trial, the Globe settled with the government, agreeing to decrease the scope of its exclusivity, relinquishing its power over 46 dailies, all weeklies and all other media in the three northern New England states and in much of Massachusetts. Exclusive rights were limited to six nearby counties and even within that area the Globe had to yield its exclusive rights for newspapers with a home route circulation of fewer than 11,750 households. The Justice Department has decided to move against other "target" papers throughout the country on similar claims and has moved to dismiss its case against the three syndicators in the Globe case.

For studies of the impact on readers of newspaper competition, see Schweitzer and Goldman, Does Newspaper Competition Make a Difference to Readers?, 52 Journ.Q. 706 (1975); Rarick and Hart-

man, The Effects of Competition on One Daily Newspaper's Content, 43 Journ.Q. 459 (1966); Nixon and Jones, The Content of Non-Competitive vs. Competitive Newspapers, 33 Journ.Q. 299 (1956).

4. Distribution Problems

Another large area of business operations involves the distribution of the completed newspapers or magazines. Many of the problems may involve peripheral First Amendment areas. For an extended consideration of these issues, see M. Franklin, Mass Media Law, Chap. V (1977). We shall consider here the most important distribution issues confronting today's publishers: the daily distribution of newspapers, mail fraud and the postal subsidy for periodicals.

a. *Newspaper Racks.* As the proverbial newsboy has tended to disappear from the scene, various replacements have appeared. The one causing the greatest legal difficulty is the vending machine.

We will consider the problem of offensive front-page portrayals of sexual activity, when we consider the general subject of obscenity at p. 424, infra. But some municipalities have attempted to bar all vending racks—for reasons unrelated to offensiveness. These include efforts to protect local distributors as well as to relieve congested vehicular and pedestrian traffic. The courts so far have held that such concerns do not justify total bans on the racks. They have emphasized how important these boxes are to the distribution of the newspaper and have concluded that the municipality may regulate locations so as to prevent traffic congestion and similar evils, but may not ban them outright.

The reasoning of these cases is that the interests protected by the First Amendment extend to distribution of the completed product and that, although a city has legitimate interests in cleanliness and safety, these must not be used to inhibit the press to a greater extent than necessary to achieve the desired governmental purposes. This requires that the racks be allowed except to the extent that they seriously interfere with a legitimate and important governmental interest.

This strongly held philosophy carries over to other areas as well. In Young v. Municipal Court, 16 Cal.App.3d, 766, 94 Cal.Rptr. 331 (1971), the defendant was arrested for hawking the Berkeley Barb while sitting near a busy intersection and holding the paper up to passing motorists. A county ordinance barred selling products "along or upon any public road or highway" in the county. The court found that although the hawker's actions might adversely affect traffic safety, the ordinance was written too broadly because it also proscribed sales on public sidewalks that might present no traffic dangers whatever since sidewalks run "along" public roads. In essence the court

was concerned that the statute was so indefinite that it barred more sales of newspapers than might properly be needed in order to meet any real traffic danger. The solution was to write a statute in terms of the traffic dangers that justified the limitation. The decision overturning the statute prevented prosecution of this hawker—even though he might have been convicted under a proper ordinance. The reason the hawker escapes in this case is that the Supreme Court has developed a doctrine that allows persons who are prosecuted under unduly broad statutes to challenge the constitutionality of the statute even though they themselves might properly have been convicted under a narrower version of the statute. The overbreadth doctrine is defended on the ground that it encourages governments to draft narrow legislation that will not deter people from engaging in legitimate conduct.

b. *Mail Fraud.* Fraud committed using mail, whether by advertisement or other technique, has long been recognized to be subject to the control of the Postmaster General. The power to return mail addressed to a fraudulent mailer marked "Fraudulent" was upheld in Public Clearing House v. Coyne, 194 U.S. 497 (1904). The suggestion that the development of the First Amendment had undermined the *Coyne* philosophy was rejected in an opinion by Justice Black: "None of the recent cases . . . provide the slightest support for a contention that the constitutional guarantees of freedom of speech and freedom of press include complete freedom, uncontrollable by Congress, to use the mails for perpetration of swindling schemes." Later, "A contention cannot be seriously considered which assumes that freedom of the press includes a right to raise money to promote circulation by deception of the public." Donaldson v. Read Magazine, 333 U.S. 178, 191, 192 (1948).

c. *Second-Class Postal Subsidy.* Historically, one of the principal means of circulation of magazines, and to a lesser extent newspapers, has been through the United States mail. Periodicals have received the benefit of rates lower than private mail rates since the creation of the Post Office. The lower rates were designed "to encourage the dissemination of news and of current literature of educational value." Note that the First Amendment does not enter into the question of whether to establish subsidies for media. It has not been argued that the Constitution requires Congress to subsidize the media. Rather, this is a question for Congress to decide—at least in the absence of such evils as discrimination for or against periodicals taking certain editorial positions.

The subsidies have always been significant. Early postal rates for letters ranged from 12½ cents for one-page letters travelling between 100 and 150 miles to 75 cents for three-page letters travelling over 450 miles. Newspapers, on the other hand, had a maximum rate

of 1½ cents if sent more than 100 miles. In 1970, it was estimated that although periodicals comprised 11 percent of the material circulated in the mail, they paid only three percent of the postal costs. When "institutional," or fixed overhead costs are figured in, the Postal Service has argued that even these figures grossly underestimate the size of the subsidy.

With the size of these subsidies, noted Zechariah Chafee, it should come as no surprise that a "newspaper editor fears being put out of business by the administrative denial of the second-class mailing privilege much more than the prospect of prison subject to a jury trial." Z. Chafee, Freedom of Speech 199 (1920).

In the Classification Act of 1879, Congress created the four classes of mail that still exist and established eligibility requirements for second-class mail that are virtually unchanged today: publication in unbound form at regular intervals at least four times a year, issued from a known office of publication and "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry."

The limitations on postal authority control over second-class mails have been developed through interpretation of these criteria. In one case, the statute required publishers to publish and file with the Postmaster General sworn statements giving average circulation figures and names of editors, publishers, owners, stockholders and creditors. In addition it required all advertisements in publications to be labelled as such. The Court held that these conditions were permissible as "incidental" to the power of Congress to subsidize circulation for the purpose of promoting dissemination of information. Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913). Chief Justice White in effect accepted the legislative position:

> The extremely low postage rate accorded to second-class matter gives these publications a circulation and a corresponding influence unequaled in history. It is a common belief that many periodicals are secretly owned or controlled, and that in reading such papers the public is deceived through ignorance of the interests the publication represents. We believe that, since the general public bears a large portion of the expense of distribution of second-class matter, and since these publications wield a large influence because of their special concessions in the mails, it is not only equitable but highly desirable that the public should know the individuals who own or control them.

The Court, however, read the statute only as sanctioning denial of the privilege of second-class rates and not total denial of the use of the mails, thus avoiding the question of whether the latter course would be constitutional.

The discretion of postal officials reached its outermost limits in Milwaukee Publishing Co. v. Burleson, 255 U.S. 407 (1921). The Postmaster General had revoked the second-class privileges of the Milwaukee Leader, a left-wing newspaper critical of United States involvement in World War I. The second-class privilege was available only to "mailable" matter, and the Court found authorization for the ban in the Espionage Act of 1917, which provided that any newspaper that published false statements intended to promote the success of the enemies of the United States was "nonmailable." Furthermore, the Court reasoned that once an unspecified number of issues of a newspaper had revealed its "nonmailable" character, it was a "reasonable presumption" that future issues would be nonmailable, thus justifying the indefinite revocation.

Justice Brandeis, dissenting, argued that the nonmailability provisions gave the Postmaster General authority only to exclude from the mails specific issues that he found to be nonmailable and he could not close the mails to future issues of the same publication or future mail tendered by a particular person. To allow more would be to attribute to Congress the desire to create a "universal censor of publication" because "a denial of the use of the mail would be for most publications tantamount to a denial of the right of circulation."

Finally, in Hannegan v. Esquire, Inc., 327 U.S. 146 (1946), the Court in effect adopted Justice Brandeis' approach and drastically restricted the discretion of the Postmaster General, who had revoked the second-class privileges of Esquire Magazine. He had expressly stipulated that he was not finding the magazine to be obscene and thus "nonmailable" under the obscenity provisions but argued that the "public character" eligibility requirement gave him the power to exclude publications that, though not "obscene in a technical sense," are "morally improper and not for the public welfare and the public good." Justice Douglas concluded that such a view would "grant the Postmaster General a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not easily be inferred." He then interpreted the second-class eligibility provisions as providing "standards which relate to the format of the publication and to the nature of its contents, but not to their quality, worth, or value." Since the publisher won on the interpretation of the statute, there was no need to reach the constitutional issue.

In the Postal Reorganization Act of 1970, Congress established the United States Postal Service as an independent corporation. Congress relinquished its control over mail rates, mandated that mail service was, for the first time, to become self-sufficient, and directed the rate setters to consider several factors including the requirement that "each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type." At the same time, how-

ever, the statute forbids apportioning the costs of the Postal Service so as "to impair the overall value of such service to the people."

In 1971, the Postal Service approved a 138 percent rate increase for regular second-class service to be phased in over several years and approved an additional phased 91 percent raise in 1973. In 1975, the Postal Service, claiming it faced a $2.5 billion deficit, announced temporary additional rate increases of about 25 percent, with further increases pending as of 1976. In 1976, legislation gave the Postal Service a subsidy of $1 billion and froze rate hikes until 1977. Publishers have denounced the higher rates, claiming they will kill off small specialty journals and have already been at least partially responsible for the demise of some mass circulation periodicals. It appears, however, that the greatest threat may be to "medium-circulation comment" magazines such as The Atlantic Monthly and The New Republic. As a result of this series of rate hikes, most of the larger publishing companies, such as Time, Inc., Readers Digest and the Wall Street Journal have been investigating the use of private independent distributors and newspaper delivery systems. Given the present rate of postal increases, some of these alternatives may soon be competitive with the Postal Service. On postal subsidies generally, see G. Cullinan, The United States Postal Service (1973).

Chapter III

LEGAL PROBLEMS OF GATHERING INFORMATION

We turn now to problems that are unique to media. We will follow the procedures of the media: gathering information and then publishing it. In this chapter we focus on the process of gathering what might be called "raw" information. One continuing question will be what the eager gatherer may legally obtain from various sources. A second question is the relevance of whether the gatherer is an individual citizen or a media employee.

The government's involvement may take several forms. First, the government may possess information that the gatherer seeks. In this situation, government is not acting as arbiter of disputes but rather as possessor of information. Government may also act solely in its more traditional role, seeking to regulate the relationship between the gatherer and private sources. If the private source is unwilling, may the gatherer persist? Even if the source is willing, may government still impose barriers? We will approach this set of problems, beginning with the gatherer who is seeking information from private persons. We will then turn to the special problems raised when the government is the source.

A. PRIVATE SOURCES

1. Unwilling Private Sources

In this section we see what procedures are legally available to one seeking to acquire information from a private person who is not willing to part with it. Our present concern is with activities in the news gathering stage—not liability for what is ultimately printed. These situations raise both civil and criminal issues. In addition to the conspicuous legal questions, serious ethical problems arise.

DIETEMANN v. TIME, INC.

United States Court of Appeals, Ninth Circuit, 1971.
449 F.2d 245.

[Plaintiff, "a disabled veteran with little education, was engaged in the practice of healing with clay, minerals, and herbs." He had no listings and did not advertise; he did not own a telephone and made no charges for his diagnoses or his prescriptions. Two employees of defendant's Life Magazine, Mrs. Metcalf and Mr. Ray, arranged with

the office of the District Attorney of Los Angeles County to go to plaintiff's home. On the day in question they rang the bell outside plaintiff's locked gate. When he appeared they falsely stated that they had been sent by a certain person. Plaintiff unlocked the gate, admitted them to his house and brought them to his den. After using some equipment and holding what appeared to be a wand, plaintiff told Metcalf that she had a lump in her breast from having eaten rancid butter 11 years, 9 months and 7 days earlier. While plaintiff was examining Metcalf, Ray took photographs with a hidden camera. A radio transmitter hidden in Metcalf's purse transmitted the entire conversation to another Life employee and two government officials parked in a nearby automobile. Life subsequently ran a story on plaintiff's activities, including a photograph and reference to the recorded conversation. Thereafter when plaintiff was arrested for his activities Life and newspaper photographers accompanied the police and took photographs. Plaintiff sued for damages on the ground that his privacy had been invaded by the intrusion. Suit was brought in federal court because of the diversity of citizenship. The district judge concluded that California would hold plaintiff entitled to damages and he awarded $1,000 general damages for injury to plaintiff's "feelings and peace of mind." Defendant appealed.]

Before CARTER and HUFSTEDLER, CIRCUIT JUDGES, and VON DER HEYDT, DISTRICT JUDGE.

HUFSTEDLER, CIRCUIT JUDGE:

. . .

The appeal presents three ultimate issues: (1) Under California law, is a cause of action for invasion of privacy established upon proof that defendant's employees, by subterfuge, gained entrance to the office portion of plaintiff's home wherein they photographed him and electronically recorded and transmitted to third persons his conversation without his consent as a result of which he suffered emotional distress? (2) Does the First Amendment insulate defendant from liability for invasion of privacy because defendant's employees did those acts for the purpose of gathering material for a magazine story and a story was thereafter published utilizing some of the material thus gathered? (3) Were the defendant's employees acting as special agents of the police and, if so, did their acts violate the First, Fourth, and Fourteenth Amendments of the Federal Constitution, thereby subjecting defendant to liability under the Civil Rights Act (42 U.S.C. § 1983)? Because we hold that plaintiff proved a cause of action under California law and that the First Amendment does not insulate the defendant from liability, we do not reach the third issue.

Were it necessary to reach the Civil Rights Act questions, we would be obliged to explore the relationship between the defendant's

employees and the police for the purpose of ascertaining the existence of the "color of law" element of the Act. Because we do not reach the issue, we can and do accept the defendant's disclaimer that its employees were acting for or on behalf of the police.

In jurisdictions other than California in which a common law tort for invasion of privacy is recognized, it has been consistently held that surreptitious electronic recording of a plaintiff's conversation causing him emotional distress is actionable. Despite some variations in the description and the labels applied to the tort, there is agreement that publication is not a necessary element of the tort, that the existence of a technical trespass is immaterial, and that proof of special damages is not required. [ ]

Although the issue has not been squarely decided in California, we have little difficulty in concluding that clandestine photography of the plaintiff in his den and the recordation and transmission of his conversation without his consent resulting in his emotional distress warrants recovery for invasion of privacy in California. . . .

. . .

Concurrently with the development of privacy law, California had decided a series of cases according plaintiffs relief from unreasonable penetrations of their mental tranquility based upon the tort of intentional infliction of emotional distress. [ ] Although these cases are not direct authority in the privacy area, they are indicative of the trend of California law to protect interests analogous to those asserted by plaintiff in this case.

We are convinced that California will "approve the extension of the tort of invasion of privacy to instances of intrusion, whether by physical trespass or not, into spheres from which an ordinary man in plaintiff's position could reasonably expect that the particular defendant should be excluded." (Pearson v. Dodd, 410 F.2d at 704.)

Plaintiff's den was a sphere from which he could reasonably expect to exclude eavesdropping newsmen. He invited two of defendant's employees to the den. One who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves. But he does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording, or in our modern world, in full living color and hi-fi to the public at large or to any segment of it that the visitor may select. A different rule could have a most pernicious effect upon the dignity of man and it would surely lead to guarded conversations and conduct where candor is most valued, e. g., in the case of doctors and lawyers.

The defendant claims that the First Amendment immunizes it from liability for invading plaintiff's den with a hidden camera and

its concealed electronic instruments because its employees were gathering news and its instrumentalities "are indispensable tools of investigative reporting." We agree that newsgathering is an integral part of news dissemination. We strongly disagree, however, that the hidden mechanical contrivances are "indispensable tools" of newsgathering. Investigative reporting is an ancient art; its successful practice long antecedes the invention of miniature cameras and electronic devices. The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. 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.[2] It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.

Defendant relies upon the line of cases commencing with New York Times Co. v. Sullivan, 376 U.S. 254 (1964) . . . to sustain its contentions that (1) publication of news, however tortiously gathered, insulates defendant from liability for the antecedent tort, and (2) even if it is not thus shielded from liability, those cases prevent consideration of publication as an element in computing damages.

As we previously observed, publication is not an essential element of plaintiff's cause of action. Moreover, it is not the foundation for the invocation of a privilege. Privilege concepts developed in defamation cases and to some extent in privacy actions in which publication is an essential component are not relevant in determining liability for intrusion conduct antedating publication. [ ] Nothing in *New York Times* or its progeny suggests anything to the contrary. Indeed, the Court strongly indicates that there is no First Amendment interest in protecting news media from calculated misdeeds. [ ]

No interest protected by the First Amendment is adversely affected by permitting damages for intrusion to be enhanced by the fact of later publication of the information that the publisher improperly acquired. Assessing damages for the additional emotional distress suffered by a plaintiff when the wrongfully acquired data are purveyed to the multitude chills intrusive acts. It does not chill freedom of expression guaranteed by the First Amendment. A rule forbidding the use of publication as an ingredient of damages would deny to the injured plaintiff recovery for real harm done to him without any countervailing benefit to the legitimate interest of the

2. In this respect the facts of this case are different from those in Pearson v. Dodd, supra, 410 F.2d 701 (D.C.Cir. 1969). In *Pearson*, the defendant received documents knowing that they had been removed by the donor without the plaintiff's consent. But the donor was not the defendant's agent, and the defendant did not participate in purloining the documents.

public in being informed. The same rule would encourage conduct by news media that grossly offends ordinary men.

The judgment is affirmed.

JAMES M. CARTER, CIRCUIT JUDGE (concurring and dissenting).

I concur in all of the majority opinion except that portion refusing to meet the issue of the liability of defendants' agents, acting as agents of the police. . . .

. . .

Notes and Questions

1. Is the court correct in saying that one "who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves?" If the court is correct, how does the actual case differ from that situation? Is it relevant that Dietemann's premises were not open to the public?

2. What actions of the defendants might warrant liability?

3. Does the court meet the First Amendment argument satisfactorily? Would the case be different if Dietemann had been a lay member of the state's board of medical examiners? Or a candidate for school board?

4. One party to a phone conversation taped the conversation without informing the plaintiff. During the conversation plaintiff allegedly indicated that he could arrange a "fix" in a divorce case. The party who made the recording gave a copy to the defendant newspaper, which published it. Plaintiff sued the newspaper for damages. The court held that the recorder was not liable and that "it could not in any way be wrongful for that person to later disclose the contents of that conversation. Each party to a conversation, telephonic or otherwise, takes the risk that the other party may divulge the contents. . . ." Smith v. Cincinnati Post & Times-Star, 475 F.2d 740 (6th Cir. 1973). Compare this case with *Dietemann*. If the plaintiff had been assured in advance that no recording was being made would the recorder's conduct be "wrongful?" In some states interception or recording of a telephone conversation without the consent of both parties is illegal.

5. Early in 1975 it was disclosed that a reporter had been sifting through the contents of garbage cans outside the home of Secretary of State Henry Kissinger. Does that raise a *Dietemann* problem? In a very short editorial, Editor & Publisher (July 19, 1975, p. 6) attacked such practices: "Pawing through someone else's garbage is a revolting exercise and doing it in the name of journalism makes it none the less so." Do you agree?

6. The practice of reporters accompanying public officials to scenes of crimes and fires on private property is not a new one, but there is some question as to how far into the premises they may go. In Fletcher v. Florida Pub. Co., 319 So.2d 100 (Fla.App.1975), plaintiff was away from her home when it was severely damaged by fire. After the fire was extinguished, the fire marshal and a police sergeant, accompanied by media representatives, entered the building and discovered the body of plaintiff's 17-year-old daughter on the floor of a second story bedroom. When the body was removed a silhouette remained on the floor. Defendant published a photograph captioned "Silhouette of Death." Plaintiff learned of the tragedy from a newspaper story. Her major claim was for trespass and resulting damages from the invasion of privacy. The trial judge awarded summary judgment to the paper on this count, based on assertions that the press had a long standing practice of entering private property where disaster has struck. The district court of appeal reversed, 2–1. The majority thought the affidavits showed that in such situations the consent implied was to go onto the premises but not into the house. The dissenter argued that consent to enter should be implied unless actually denied, and observed that arson was suspected and that the news media often help in official investigations by developing leads. Also, "the fire was a disaster of great public interest and it is clear that the photographer and other members of the news media entered the burned home at the invitation of the investigating officers." The Florida Supreme Court reversed, along the lines of the dissent below. It found a clear showing "that it was common usage, custom, and practice for news media to enter private premises and homes *under the circumstances present here*"—which it did not further identify. 340 So.2d 914 (1976).

7. Compare *Fletcher* with a case in which a CBS television crew entered a restaurant "with cameras rolling" as the reporter approached a staff member and identified herself. She was ordered to leave and did. The confrontation was televised on that night's news as part of a story on restaurants charged with violating New York City's health regulations. The restaurant, Le Mistral, sued for trespass and a jury awarded over $250,000 in compensatory and punitive damages. Post-trial motions are pending. N.Y. Times, June 5, 1976, p. 1. Is it a trespass to enter a restaurant solely to take photographs and not to eat? If a sign on the door says "No reporters or photographers allowed inside" can violators be subject to trespass actions? Is it critical here that the reporters' interest may be adverse to that of the restaurant? Is the disruptive nature of a television crew relevant? An attorney for CBS is quoted as having said that it would "chill" ef-

forts to cover stories to have to request an interview in advance from a party who would probably not comply. Is that relevant? Suppose the restaurant is one frequented by celebrities and others who thrive on publicity? What about food critics who enter a restaurant to eat and to criticize?

8. Should different principles apply if reporters knowingly accept material improperly obtained by others? In a case cited in *Dietemann*, aides to a United States Senator removed numerous documents from his files, copied them, and passed the copies to columnists who knew how they had been obtained. The court held that the columnists had committed no tort:

> 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. A person approached by an eavesdropper with an offer to share in the information gathered through the eavesdropping would perhaps play the nobler part should he spurn the offer and shut his ears. However, it seems to us that at this point it would place too great a strain on human weakness to hold one liable in damages who merely succumbs to temptation and listens.

Pearson v. Dodd, 410 F.2d 701 (D.C.Cir.) cert. den. 395 U.S. 947 (1969). Should the result change if a reporter had said to the aide "I'd sure love to see your file on" a particular matter—and three days later the aide presented the file?

9. It is common practice for courts to cite earlier decisions of the same, or other, courts in their opinions. This may show that other courts have reached the same result as the court is reaching in the present case, or that earlier situations that were similar justify the outcome in this particular instance. Sometimes the earlier case is cited by a litigant, and the court then explains why it agrees or disagrees with the party's assertion of what that earlier case stands for.

In *Dietemann* the defendant relies on a line of cases beginning with New York Times v. Sullivan. As we shall see at p. 284, infra, that important case developed a protection for newspapers when they defamed public officials. The defendant here is arguing that the Supreme Court, whose ruling is of course binding on the *Dietemann* court, has protected newspapers in cases that the defendant says are like this one. The court, however, rejects the analogy and observes that the Supreme Court in New York Times v. Sullivan was not addressing the question of whether newspapers might engage in intrusive conduct to get information. Thus, the court sets that case aside as not being helpful on the question before it.

Throughout this book, as already noted, many citations to cases have been omitted. This is shown by the use of the brackets [ ]. When case names are retained in the course of an opinion, it is because the cited case is an important one, and usually one that we have already discussed or will discuss elsewhere in the book. Thus this case includes the citation of Pearson v. Dodd, which is then discussed in a note after *Dietemann*. Most case references that have been retained will thus be discussed in one way or another somewhere in the book. These cases can be conveniently located through the Table of Cases that follows the Table of Contents.

10. Assume a private citizen has a document that shows that an elected official has taken a bribe. If a reporter breaks into the citizen's house and steals the document and uses the information therein, should the reporter be liable for damages? Should the answer depend on whether the reporter's story leads to the official's defeat in a forthcoming election or his conviction for bribery?

11. Photography has presented other problems, as the next case suggests.

GALELLA v. ONASSIS

United States Court of Appeals, Second Circuit, 1973.
487 F.2d 986.

[Photographer Ron Galella sued Jacqueline Kennedy Onassis for false arrest and malicious prosecution after he was arrested by Secret Service agents protecting Mrs. Onassis' children. She denied the charges and counterclaimed for damages and injunctive relief against Galella's continuous efforts to photograph her and her children. The trial judge, who heard the case without a jury, believed Onassis and not Galella. He dismissed Galella's claim but awarded Onassis an injunction against Galella's practices. The court of appeals affirmed the dismissal of Galella's claim. The portion of the opinion that follows deals with the propriety of the District Court's grant of injunctive relief to Mrs. Onassis and to the government, which had been involved in the suit in its capacity as protector of the children's safety.]

Before SMITH, HAYS and TIMBERS, CIRCUIT JUDGES.

J. JOSEPH SMITH, CIRCUIT JUDGE:

. . .

Galella fancies himself as a "paparazzo" (literally a kind of annoying insect, perhaps roughly equivalent to the English "gadfly.") Paparazzi make themselves as visible to the public and obnoxious to

their photographic subjects as possible to aid in the advertisement and wide sale of their works.

Some examples of Galella's conduct brought out at trial are illustrative. Galella took pictures of John Kennedy riding his bicycle in Central Park across the way from his home. He jumped out into the boy's path, causing the agents concern for John's safety. The agents' reaction and interrogation of Galella led to Galella's arrest and his action against the agents; Galella on other occasions interrupted Caroline at tennis, and invaded the children's private schools. At one time he came uncomfortably close in a power boat to Mrs. Onassis swimming. He often jumped and postured around while taking pictures of her party notably at a theater opening but also on numerous other occasions. He followed a practice of bribing apartment house, restaurant and nightclub doormen as well as romancing a family servant to keep him advised of the movements of the family.

. . .

After a six-week trial the court dismissed Galella's claim and granted relief to both the defendant and the intervenor. Galella was enjoined from (1) keeping the defendant and her children under surveillance or following any of them; (2) approaching within 100 yards of the home of defendant or her children or within 100 yards of either child's school or within 75 yards of either child or 50 yards of defendant. . . .

. . .

Discrediting all of Galella's testimony [10] the court found the photographer guilty of harassment, intentional infliction of emotional distress, assault and battery, commercial exploitation of defendant's personality, and invasion of privacy. Fully crediting defendant's testimony, the court found no liability on Galella's claim. Evidence offered by the defense showed that Galella had on occasion intentionally physically touched Mrs. Onassis and her daughter, caused fear of physical contact in his frenzied attempts to get their pictures, followed defendant and her children too closely in an automobile, endangered the safety of the children while they were swimming, water skiing and horseback riding. Galella cannot successfully challenge the court's finding of tortious conduct.[11]

10. The court's findings on credibility are indeed broad, but they are supported in the record. Galella demonstrated a galling lack of respect for the truth and gave no indication of any consciousness of the meaning of the oath he had taken. Not only did he admit blatantly lying in his testimony, he admitted attempting to have other witnesses lie for him.

11. Harassment is a criminal violation under New York Penal Law § 240.25 (McKinney's Consol.Laws, c. 40, 1967) when with intent to harass a person follows another in a public place, inflicts physical contact or engages in any annoying conduct without legitimate cause. Galella was found to have engaged in this proscribed conduct. Conduct sufficient to invoke criminal liability for harassment may be the basis for private action. [ ]

Finding that Galella had "insinuated himself into the very fabric of Mrs. Onassis' life . . ." the court framed its relief in part on the need to prevent further invasion of the defendant's privacy. Whether or not this accords with present New York law, there is no doubt that it is sustainable under New York's proscription of harassment.

Of course legitimate countervailing social needs may warrant some intrusion despite an individual's reasonable expectation of privacy and freedom from harassment. However, the interference allowed may be no greater than that necessary to protect the overriding public interest. Mrs. Onassis was properly found to be a public figure and thus subject to news coverage. [ ] Nonetheless, Galella's action went far beyond the reasonable bounds of news gathering. When weighed against the *de minimis* public importance of the daily activities of the defendant, Galella's constant surveillance, his obtrusive and intruding presence, was unwarranted and unreasonable. If there were any doubt in our minds, Galella's inexcusable conduct toward defendant's minor children would resolve it.

Galella does not seriously dispute the court's finding of tortious conduct. Rather, he sets up the First Amendment as a wall of immunity protecting newsmen from any liability for their conduct while gathering news. There is no such scope to the First Amendment right. Crimes and torts committed in news gathering are not protected. See Branzburg v. Hayes, [ ], Dietemann v. Time, Inc., 449 F.2d 245, 249–250 (9th Cir. 1971). [ ] There is no threat to a free press in requiring its agents to act within the law.

. . .

Injunctive relief is appropriate. Galella has stated his intention to continue his coverage of defendant so long as she is newsworthy, and his continued harassment even while the temporary restraining orders were in effect indicate that no voluntary change in his technique can be expected. New York courts have found similar conduct sufficient to support a claim for injunctive relief. [ ]

The injunction, however, is broader than is required to protect the defendant. Relief must be tailored to protect Mrs. Onassis from the "paparazzo" attack which distinguishes Galella's behavior from that of other photographers; it should not unnecessarily infringe on reasonable efforts to "cover" defendant. Therefore, we modify the court's order to prohibit only (1) any approach within twenty-five (25) feet of defendant or any touching of the person of the defendant Jacqueline Onassis; (2) any blocking of her movement in public places and thoroughfares; (3) any act foreseeably or reasonably calculated to place the life and safety of defendant in jeopardy; and (4) any conduct which would reasonably be foreseen to harass, alarm or frighten the defendant.

Any further restriction on Galella's taking and selling pictures of defendant for news coverage is, however, improper and unwarranted by the evidence. [ ]

Likewise, we affirm the grant of injunctive relief to the government modified to prohibit any action interfering with Secret Service agents' protective duties. Galella thus may be enjoined from (a) entering the children's schools or play areas; (b) engaging in action calculated or reasonably foreseen to place the children's safety or well being in jeopardy, or which would threaten or create physical injury; (c) taking any action which could reasonably be foreseen to harass, alarm, or frighten the children; and (d) from approaching within thirty (30) feet of the children.

[Judge Timbers dissented from the majority's refusal to uphold the trial judge's injunction.]

Notes and Questions

1. During the trial Mrs. Onassis testified on cross-examination that shopping was a private activity although it took her to a public store; that visiting a friend was private although she had to go through public streets; and that a walk alone in Central Park was private, although the park was public. (N.Y. Times, Mar. 10, 1972, p. 31) Are these claims tenable? Some more than others? What are the implications of calling such activities "private?"

2. What is the significance of the distances chosen by the trial judge? Why did the court of appeals reject those figures?

3. Would the analysis differ if a newspaper employee had been trying to photograph Mrs. Onassis without the accompanying paparazzo behavior?

4. Would the analysis differ if a media photographer spent a day covertly following and photographing an ordinary citizen chosen at random, for a feature on "a day in the life of an ordinary citizen?"

5. When AFL-CIO president George Meany was at a hotel in Miami, a wire service directed a photographer to get an informal bathing suit shot of Meany, "who takes a dim view of such photographs." The photographer registered as a guest. The next day, dressed in a bathing suit, he paid a pool attendant to put him in a secluded spot. When Meany appeared, the photographer began taking pictures. When he moved closer he was spotted by Meany's "daughter and secretary and associates who promptly circled around screening Meany from further view." Editor & Publisher, Mar. 8, 1975, p. 18. Any legal problems? Any ethical problems? (One of the shots—showing Meany in bathing trunks sitting in a chair and yawning—was widely used.)

6. Photographers who are on public sidewalks are entitled to take pictures of what they observe. In Channel 10, Inc. v. Gunnarson, 337 F.Supp. 634 (D.Minn.1972), a television photographer was at the scene when police led two burglars from a building late at night. The photographer turned on his lighting device and began taking pictures. When defendant police officers shouted "No pictures!" the photographer turned off his light, but he refused to allow the Detective Bureau to determine whether he had filmed anything detrimental to the prosecution, or whether either subject was a juvenile and thus photographed illegally. For failure to allow inspection of the film, police confiscated plaintiff's camera.

In a declaratory judgment action, the judge decided that the photographer was free to take pictures from the sidewalk and could use lights if necessary unless police or fire authorities objected on grounds of public safety or an emergency, such as the fear of a sniper attack. The police concerns about photographing juveniles did not justify their interference, though it might warrant subsequent punishment of the photographer if the statute were violated.

In the course of investigating a double murder in midtown Manhattan, the police brought several persons to the scene. Officers were concerned that those who could help solve the crime would be driven away by the presence of television cameramen. One officer is quoted as having told a television crew that although he couldn't tell them what to do, "it would help us a lot if you didn't take any pictures." According to the news report the crew "thereupon returned to their vehicle." N. Y. Times, Dec. 10, 1976, p. B3. What would you have done?

7. Occasionally, the government can restrain the photographing of individuals. The United States District Court in Kansas promulgated a rule that banned photographs in any courtroom or its "environs," defined to include all parking areas and entrances and exits to the two-story building. During a celebrated case a court official read the rule to a group that included Mazzetti, a reporter-photographer. As some prisoners were being moved out of the courthouse and into a bus, Mazzetti left the sidewalk, entered the parking area, and came within ten feet of the bus. Marshals escorted him back to the sidewalk but he returned, claiming a right as a member of the press. He was arrested and later held in contempt and sentenced to 15 days' imprisonment. On appeal the conviction was affirmed. Mazzetti v. United States, 518 F.2d 781 (10th Cir. 1975).

8. *Criminal Liability.* The cases in this section have dealt solely with the question of civil liability for allegedly improper newsgathering activities by the media but implicitly or explicitly, they suggest the possibility of criminal liability for certain types of behavior.

Thus, for example, the court indicates that Galella was guilty of the crime of harassment.

Two general types of crimes against individuals are likely to occur in the course of newsgathering. The first involves direct actions taken to obtain information from unwilling sources. This might include engaging in, or procuring others to engage in, such activities as burglary, wiretapping or trespassing. Most states and the federal government have general prohibitions against these activities that would seemingly apply against newsmen among others. E. g., 18 U. S.C. § 2511 and West's Ann.Cal.Penal Code § 631. Electronic eavesdropping may also be proscribed, as may secret recording of a face-to-face conversation. Cal.Penal Code § 632.

The more common situation that may entail criminal liability for the media resembles the *Dodd* situation: accepting information from someone who has, on his own authority, covertly acquired secret information that he wants made public. The *Dodd* court's narrow interpretation of tort law does not mean that the very same behavior was not, or could not be made, criminal. Indeed, it may well be the crime loosely called "knowingly receiving stolen property," though most jurisdictions use a much more elaborate formulation. The most important attempt to apply such general legislation against media defendants occurred in a case in which a mail clerk in the California Attorney General's office obtained a copy of the names, addresses, and telephone numbers of 80 undercover state narcotics agents. He delivered it to the offices of the Los Angeles Free Press and asked payment of $20 and the return of the list when the newspaper no longer needed it. The state alleged that at this point the crime was complete. The editor and the reporter who accepted delivery of the document (and published it on the front page) were prosecuted under California Penal Code § 496 providing that "every person who buys or receives any property which has been stolen or which has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained" commits a crime. The defendants' conviction was affirmed by the Court of Appeal, People v. Kunkin, 100 Cal.Rptr. 845 (Cal.App.1972), by a 2–1 vote.

The Supreme Court of California reversed the conviction because of insufficient proof that the defendant knew the document had been stolen. This was based largely on the fact that the clerk had insisted that he wanted the document back and that he had not told the editors that he was no longer employed at the same place. People v. Kunkin, 9 Cal.3d 345, 507 P.2d 1392, 107 Cal.Rptr. 184 (1973).

2. Government Action Affecting Willingness of Sources—Reporter's Privilege

a. The Role of Confidentiality

It has been generally accepted that persons thought to have relevant information may be subpoenaed to testify as witnesses at certain governmental proceedings. Nevertheless, some relationships have been held to give rise to "privileges" permitting a party to withhold information he has learned in a confidential relationship. The most venerable of these relationships have been those of physician and patient, lawyer and client, and priest and penitent. In each of these the recipient may be prevented by the source from testifying as to information learned in confidence in that professional capacity. A relatively new privilege has now emerged: that of the reporter not to divulge the source of certain information and, sometimes, the information itself. The assertion of this privilege at common law was generally rejected, but it has made headway as a statutory protection. Since the first reporter's privilege statute was enacted in Maryland in 1896, half the states have enacted so-called "shield" laws.

In states without privilege statutes, reporters tried, with little success, to claim such a privilege under common law. Then in 1958 columnist Marie Torre tried a different approach. She had reported that a CBS executive had made certain disparaging remarks about Judy Garland. Garland sued CBS for defamation and sought by deposition to get Torre to identify the particular executive. Torre attacked the effort as a threat to freedom of the press, refused to answer the question, and asserted that the First Amendment protected her refusal. The court, though seeing some constitutional implications, held that even if the First Amendment were to provide some protection, the reporter must testify when the information sought goes to the "heart" of the plaintiff's claim. Garland v. Torre, 259 F. 2d 545 (2d Cir.) certiorari denied 358 U.S. 910 (1958). Torre ultimately served ten days in jail for criminal contempt.

After *Garland*, reporters continued to assert First Amendment claims, still with little success. In the late 1960's the situation became more serious as the federal government began to serve subpoenas on reporters more frequently. The media asserted that this made previously willing sources of information unwilling because of fear that the courts would not protect the reporter or the source and reporters would violate confidences when pressed by the government.

This raised an empirical question about the effect of subpoenas on the flow of information. Professor Vince Blasi explored this in a

study that pursued three paths. First he conducted 47 interviews with reporters and editors of newspapers in seven large cities. Second, he sent a questionnaire to 67 reporters familiar with the subpoena problem. The questionnaire was designed to elicit "qualitative" rather than "quantitative" information. Finally, he sent 1470 questionnaires to reporters on large newspapers, editors of underground papers, news magazine and broadcasting journalists. Before he could publish the results, the Supreme Court announced that it would review three cases dealing with reporters' subpoenas. Branzburg v. Hayes, infra. In the following excerpts, Professor Blasi suggests several broad perspectives from which to view privilege cases and also summarizes his general empirical conclusions. He is a professor of law at the University of Michigan.

THE NEWSMAN'S PRIVILEGE: AN EMPIRICAL STUDY

Vince Blasi

70 Michigan Law Review 229, 231–235, 284 (1971).

The three cases on the Court's docket all concern one variant of the press subpoena problem: a grand jury's effort to acquire from a reporter information about possible law violations committed by his news sources. While this is currently the most common posture in which the issue presents itself, one must take cognizance of many other manifestations of the controversy before deciding what general principles, let alone detailed standards, ought to govern press subpoena disputes. Congressional committees, such as the panel that was looking into the CBS documentary *The Selling of the Pentagon*, may wish to subpoena newsmen to scrutinize the accuracy and balance of certain reporting efforts. Criminal defendants have an explicit sixth amendment right to compel the attendance of witnesses in their favor; this right may at times conflict with the reporter's interest in honoring confidences with sources, such as police officers or prosecutors, who may have given the reporter information that would be helpful to the defense. On occasion, information in the hands of newsmen might enable the police to prevent future crimes or to apprehend fugitive felons. Some journalistic endeavors border on criminal activity, such as participation in acts of demonstrative vandalism or receiving stolen documents. . . . These and other situations raise considerations that are not present in the cases that are currently before the Court, and that may call for a quite different reconciliation of the conflicting interests.

. . .

Modern developments in the journalism profession comprise still another background against which the subpoena issue should be ex-

amined. As the broadcast media have gradually assumed predominance in the provision of hot news, the print media have turned increasingly to in-depth, interpretive reporting. This latter variety of news coverage depends heavily on "not for attribution" quotes, "off the record" background sessions, leads, and continuing relationships with sources. The spectacular growth of the underground press has ushered in other important trends in the profession, including what might be termed "participant-observer" reporting, an approach that is particularly implicated in the subpoena controversy. Perhaps the most significant recent development in American journalism, however, is the pronounced disillusionment that many reporters have come to experience with regard to the nation's political leadership. This feeling is not traceable solely to President Nixon's treatment of the press. Indeed, the disillusionment traces back to the Kennedy Administration's more subtle manipulation of the media and to the credibility gap of the Johnson years. Nor is the attitude limited to the young reporters whose naive idealism has been punctured. The "old pros," men who have covered the tough beats, who have "seen it all," and who used to cooperate willingly with law enforcement officials and investigatory bodies, now say they are so alienated that they feel no obligation to assist the processes of government. The press subpoena controversy is in the courts today largely because the sensitivity to each other's needs that used to characterize government-press relations is now virtually nonexistent.

. . .

The results of a wide-ranging empirical study of the sort that I have undertaken cannot be telescoped into a tidy conclusion. Nevertheless, it may be useful for me to identify those findings and impressions that I regard as the most important and the most interesting. They are as follows: (1) good reporters use confidential source relationships mainly for the assessment and verification opportunities that such relationships afford rather than for the purpose of gaining access to highly sensitive information of a newsworthy character; (2) the adverse impact of the subpoena threat has been primarily in "poisoning the atmosphere" so as to make insightful, interpretive reporting more difficult rather than in causing sources to "dry up" completely; (3) understandings of confidentiality in reporter-source relationships are frequently unstated and imprecise; (4) press subpoenas damage source relationships primarily by compromising the reporter's independent or compatriot status in the eyes of sources rather than by forcing the revelation of sensitive information; (5) only one segment of the journalism profession, characterized by certain reporting traits (emphasis on interpretation and verification) more than type of beat, has been adversely affected by the subpoena threat; (6) reporters feel very strongly that any resolution of their

conflicting ethical obligations to sources and to society should be a matter for personal rather than judicial determination, and in consonance with this belief these reporters evince a high level of asserted willingness to testify voluntarily and also a very high level of asserted willingness to go to jail if necessary to honor what they perceive to be their obligation of confidentiality; (7) newsmen prefer a flexible ad hoc qualified privilege to an inflexible per se qualified privilege; (8) newsmen regard protection for the *identity* of anonymous sources as more important than protection for the *contents* of confidential information given by known sources; (9) newsmen object most of all to the frequency with which press subpoenas have been issued in what these reporters regard as unnecessary circumstances when they have no important information to contribute; and (10) newsmen fear that an outright rejection by the Supreme Court of any sort of newsman's privilege would "poison the atmosphere" considerably and thus they regard the symbolic aspect of the current constitutional litigation to be of the utmost importance.

b. The Supreme Court Considers the Privilege

BRANZBURG v. HAYES

(Together with In re Pappas and United States v. Caldwell.)

Supreme Court of the United States, 1972.
408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626.

[This group of cases involved demands on three reporters by grand juries. In *Branzburg*, the reporter wrote a newspaper article about persons supposedly using a chemical process to change marijuana into hashish. He was called before a grand jury and directed to identify the two individuals. He refused and sought an order from the Kentucky Court of Appeals prohibiting the trial judge from insisting that he answer the questions. He based his claim on both the Kentucky privilege statute and the First Amendment. The Court of Appeals construed the statute to protect a reporter who refused to divulge the identity of an informant who supplied him with information but not to protect the silence of a reporter about his personal observations. Constitutional arguments were rejected.

In a second episode, Branzburg wrote a story after interviewing drug users and watching some of them smoking marijuana. He was again subpoenaed before a grand jury but before he was due to appear he again asked the Kentucky Court of Appeals to prevent the grand jury from forcing him to appear. Again the court denied his requested relief.

In *Pappas*, a Massachusetts television reporter recorded and photographed statements of local Black Panther Party officials during a period of racial turmoil. He was allowed to enter the Party's headquarters to cover an expected police raid in return for his promise to disclose nothing he observed within. He stayed three hours, no raid occurred, and he wrote no story. He was summoned before the county grand jury but refused to answer any questions about what had taken place while he was there. When he was recalled, he moved to quash the second summons. The motion was denied by the trial judge who noted the absence of a statutory newsman's privilege in Massachusetts and denied the existence of a constitutional privilege. The Supreme Judicial Court of Massachusetts affirmed.

In the third case, Caldwell had been assigned by the New York Times to cover the Black Panther Party and other black militant groups. He was subpoenaed to appear before a federal grand jury and to bring with him notes and tape recordings of interviews given to him for publication by officers and spokesmen on the Black Panther Party concerning aims, purposes and activities of the group. The court held that in the absence of a compelling showing of need by the prosecution, Caldwell need not even appear before the grand jury, much less answer its questions.]

Opinion of the Court by MR. JUSTICE WHITE, announced by the CHIEF JUSTICE [BURGER].

. . .

II

. . . Although the newsmen in these cases do not claim an absolute privilege against official interrogation in all circumstances, they assert that the reporter should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure. Principally relied upon are prior cases emphasizing the importance of the First Amendment guarantees to individual development and to our system of representative government, decisions requiring that official action with adverse impact on First Amendment rights be justified by a public interest that is "compelling" or "paramount," and those precedents establishing the principle that justifiable governmental goals may not be achieved by unduly broad

means having an unnecessary impact on protected rights of speech, press, or association. The heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information.

We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. But these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.

The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime. Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence. . . .

It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed. [The Court here referred to the taxation, labor, and antitrust cases discussed in Chapter II.]

. . .

It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. Zemel v. Rusk, 381 U.S. 1, 16–17 (1965); [ ]. In Zemel v. Rusk, supra, for example, the Court sustained the Government's refusal to validate passports to Cuba even though that restriction "render[ed] less than wholly free the flow of information concerning that country." Id., at 16. The ban on travel was held constitutional, for "[t]he right to speak and

publish does not carry with it the unrestrained right to gather information." Id., at 17.[22]

Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal. . . .

It is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation. At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury. . . .

The prevailing constitutional view of the newsman's privilege is very much rooted in the ancient role of the grand jury that has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions. Grand jury proceedings are constitutionally mandated for the institution of federal criminal prosecutions for capital or other serious crimes. . . . The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." . . . Although state systems of criminal procedure differ greatly among themselves, the grand jury is similarly guaranteed by many state constitutions and plays an important role in fair and effective law enforcement in the overwhelming majority of the States. Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad. . . .

A number of States have provided newsmen a statutory privilege of varying breadth, but the majority have not done so, and none has been provided by federal statute. Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-in-

22. "There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right." 381 U.S., at 16–17.

crimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.[29] Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

. . .

. . . It would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wire tapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news. Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial. . . .

Thus, we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. . . .

There remain those situations where a source is not engaged in criminal conduct but has information suggesting illegal conduct by others. Newsmen frequently receive information from such sources pursuant to a tacit or express agreement to withhold the source's name and suppress any information that the source wishes not published. . . .

The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational, nor are the records before us silent on the matter. But we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury. The available data indicate that some newsmen rely a great deal on confidential sources and that some informants are particularly sensitive to the threat of exposure

29. The creation of new testimonial privileges has been met with disfavor by commentators since such privileges obstruct the search for truth. . . .

and may be silenced if it is held by this Court that, ordinarily, newsmen must testify pursuant to subpoenas, but the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen. Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative.[32] It would be difficult to canvass the views of the informants themselves; surveys of reporters on this topic are chiefly opinions of predicted informant behavior and must be viewed in the light of the professional self-interest of the interviewees.[33] Reliance by the press on confidential informants does not mean that all such sources will in fact dry up because of the later possible appearance of the newsman before a grand jury. The reporter may never be called and if he objects to testifying, the prosecution may not insist. . . . Moreover, grand juries characteristically conduct secret proceedings, and law enforcement officers are themselves experienced in dealing with informers, and have their own methods for protecting them without interference with the effective administration of justice. . . .

. . .

We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country the press has operated without constitutional protection for press informants and the press has

32. Cf. e. g., the results of a study conducted by Guest & Stanzler, which appears as an appendix to their article, [64 Nw.U.L.Rev. 18]. A number of editors of daily newspapers of varying circulation were asked the question, "Excluding one- or two-sentence gossip items, on the average how many stories based on information received in confidence are published in your paper each year? Very rough estimate." Answers varied significantly, e. g., "Virtually innumerable," Tucson Daily Citizen (41,969 daily circ.), "Too many to remember," Los Angeles Herald-Examiner (718,221 daily circ.), "Occasionally," Denver Post (252,084 daily circ.), "Rarely," Cleveland Plain Dealer (370,499 daily circ.), "Very rare, some politics," Oregon Journal (146,403 daily circ.). This study did not purport to measure the extent of deterrence of informants caused by subpoenas to the press.

33. In his Press Subpoenas: An Empirical and Legal Analysis, Study Report of the Reporters' Committee on Freedom of the Press 6–12, Prof. Vince Blasi discusses these methodological problems. Prof. Blasi's survey found that slightly more than half of the 975 reporters questioned said that they relied on regular confidential sources for at least 10% of their stories. Id., at 21. Of this group of reporters, only 8% were able to say with some certainty that their professional functioning had been adversely affected by the threat of subpoena; another 11% were not certain whether or not they had been adversely affected. Id., at 53.

flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.

It is said that currently press subpoenas have multiplied, that mutual distrust and tension between press and officialdom have increased, that reporting styles have changed, and that there is now more need for confidential sources, particularly where the press seeks news about minority cultural and political groups or dissident organizations suspicious of the law and public officials. These developments, even if true, are treacherous grounds for a far-reaching interpretation of the First Amendment fastening a nationwide rule on courts, grand juries, and prosecuting officials everywhere. . . .

. . .

The privilege claimed here is conditional, not absolute; given the suggested preliminary showings and compelling need, the reporter would be required to testify. Presumably, such a rule would reduce the instances in which reporters could be required to appear, but predicting in advance when and in what circumstances they could be compelled to do so would be difficult. Such a rule would also have implications for the issuance of compulsory process to reporters at civil and criminal trials and at legislative hearings. If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem. For them it would appear that only an absolute privilege would suffice.

We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. . . . The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury.

. . .

Thus, in the end, by considering whether enforcement of a particular law served a "compelling" governmental interest, the courts

would be inextricably involved in distinguishing between the value of enforcing different criminal laws. By requiring testimony from a reporter in investigations involving some crimes but not in others, they would be making a value judgment that a legislature had declined to make since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. The task of judges, like other officials outside the legislative branch, is not to make the law but to uphold it in accordance with their oaths.

At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.

In addition, there is much force in the pragmatic view that the press has at its disposal powerful mechanisms of communication and is far from helpless to protect itself from harassment or substantial harm. . . .

Finally, as we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.

III

We turn, therefore, to the disposition of the cases before us. From what we have said, it necessarily follows that the decision in United States v. Caldwell, must be reversed. . . .

The decisions in Branzburg v. Hayes and Branzburg v. Meigs, must be affirmed. . . . In both cases, if what petitioner wrote was true, he had direct information to provide the grand jury concerning the commission of serious crimes.

The only question presented at the present time in In re Pappas is whether petitioner Pappas must appear before the grand jury to testify pursuant to subpoena. . . . We affirm the decision of the Massachusetts Supreme Judicial Court and hold that petitioner must appear before the grand jury to answer the questions put to him, subject, of course, to the supervision of the presiding judge as to "the propriety, purposes, and scope of the grand jury inquiry and the pertinence of the probable testimony." [ ]

So ordered.

MR. JUSTICE POWELL, concurring.

I add this brief statement to emphasize what seems to me to be the limited nature of the Court's holding. The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. Certainly, we do not hold, as suggested in MR. JUSTICE STEWART's dissenting opinion, that state and federal authorities are free to "annex" the news media as "an investigative arm of government." The solicitude repeatedly shown by this Court for First Amendment freedoms should be sufficient assurance against any such effort, even if one seriously believed that the media —properly free and untrammeled in the fullest sense of these terms —were not able to protect themselves.

As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.*

* It is to be remembered that Caldwell asserts a constitutional privilege not even to appear before the grand jury unless a court decides that the Government has made a showing that meets the three preconditions specified in the dissenting opinion of MR. JUSTICE STEWART. To be sure, this would require a "balancing" of interests by the court, but under circumstances and constraints significantly different from the balancing that will be appropriate under the court's decision. The newsman witness, like all other witnesses, will have to appear; he will not be in a position to litigate at the threshold the State's very authority to subpoena

In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.

MR. JUSTICE DOUGLAS, dissenting in United States v. Caldwell [and the other two cases].

. . .

It is my view that there is no "compelling need" that can be shown which qualifies the reporter's immunity from appearing or testifying before a grand jury, unless the reporter himself is implicated in a crime. His immunity in my view is therefore quite complete, for, absent his involvement in a crime, the First Amendment protects him against an appearance before a grand jury and if he is involved in a crime, the Fifth Amendment stands as a barrier. Since in my view there is no area of inquiry not protected by a privilege, the reporter need not appear for the futile purpose of invoking one to each question. . . .

The starting point for decision pretty well marks the range within which the end result lies. The New York Times, whose reporting functions are at issue here, takes the amazing position that First Amendment rights are to be balanced against other needs or conveniences of government. My belief is that all of the "balancing" was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they repudiated the timid, watered-down, emasculated versions of the First Amendment which both the Government and the New York Times advance in the case.

. . .

The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people, to paraphrase Alexander Meiklejohn. Knowledge is essential to informed decisions.

. . .

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The Court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in

him. Moreover, absent the constitutional preconditions that Caldwell and that dissenting opinion would impose as heavy burdens of proof to be carried by the State, the court—when called upon to protect a newsman from improper or prejudicial questioning—would be free to balance the competing interests on their merits in the particular case. The new constitutional rule endorsed by that dissenting opinion would, as a practical matter, defeat such a fair balancing and the essential societal interest in the detection and prosecution of crime would be heavily subordinated.

our society. The question whether a reporter has a constitutional right to a confidential relationship with his source is of first impression here, but the principles that should guide our decision are as basic as any to be found in the Constitution. While MR. JUSTICE POWELL's enigmatic concurring opinion gives some hope of a more flexible view in the future, the Court in these cases holds that a newsman has no First Amendment right to protect his sources when called before a grand jury. The Court thus invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government. Not only will this decision impair performance of the press' constitutionally protected functions, but it will, I am convinced, in the long run harm rather than help the administration of justice.

I respectfully dissent.

. . .

After today's decision, the potential informant can never be sure that his identity or off-the-record communications will not subsequently be revealed through the compelled testimony of a newsman. A public-spirited person inside government, who is not implicated in any crime, will now be fearful of revealing corruption or other governmental wrongdoing, because he will now know he can subsequently be identified by use of compulsory process. The potential source must, therefore, choose between risking exposure by giving information or avoiding the risk by remaining silent.

The reporter must speculate about whether contact with a controversial source or publication of controversial material will lead to a subpoena. In the event of a subpoena, under today's decision, the newsman will know that he must choose between being punished for contempt if he refuses to testify, or violating his profession's ethics [10] and impairing his resourcefulness as a reporter if he discloses confidential information.

. . .

The impairment of the flow of news cannot, of course, be proved with scientific precision, as the Court seems to demand. Obviously, not every news-gathering relationship requires confidentiality. And it is difficult to pinpoint precisely how many relationships do require a promise or understanding of nondisclosure. But we have never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist; we have never before required proof of the exact

10. The American Newspaper Guild has adopted the following rule as part of the newsman's code of ethics: "[N]ewspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigating bodies." G. Bird & F. Merwin, The Press and Society 592 (1971).

number of people potentially affected by governmental action, who would actually be dissuaded from engaging in First Amendment activity.

. . .

To require any greater burden of proof is to shirk our duty to protect values securely embedded in the Constitution. We cannot await an unequivocal—and therefore unattainable—imprimatur from empirical studies.[19] We can and must accept the evidence developed in the record, and elsewhere, that overwhelmingly supports the premise that deterrence will occur with regularity in important types of news-gathering relationships.

. . .

Accordingly, when a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.

. . .

Notes and Questions

1. Since Justice Powell's was the vital fifth vote that made Justice White's opinion an opinion for the Court, it becomes important to understand his position. Is Justice White's opinion based on balancing? Is it the same kind of balancing that Justice Powell calls for in his concurring opinion? Recall the different types of balancing discussed at p. 73, supra.

2. Justice Powell suggests some grounds for protecting reporters from grand jury investigations. Does Justice White's opinion suggest the same protections?

3. In what ways do Justices Powell and Stewart disagree?

4. Justice Douglas notes with obvious dismay that the reporters did not seek "absolute" privilege. What would such a privilege have

19. Empirical studies, after all, can only provide facts. It is the duty of courts to give legal significance to facts; and it is the special duty of this Court to understand the constitutional significance of facts. We must often proceed in a state of less than perfect knowledge, either because the facts are murky or the methodology used in obtaining the facts is open to question. It is then that we must look to the Constitution for the values that inform our presumptions. And the importance to our society of the full flow of information to the public has buttressed this Court's historic presumption in favor of First Amendment values.

meant in this case? Why do you think such an argument was not made?

5. How important are the empirical questions? In addition to Blasi's work, see the study in D. Gordon, Newsman's Privilege and the Law (1974). We shall have occasion at several points to observe the Supreme Court grappling with difficult areas in which unknown facts might be thought crucial to the resolution of the legal question. Can you find a pattern in the way the Court handles these situations?

6. Justice White observes that the Court would get into "practical and conceptual difficulties of a high order" if it were to develop a constitutional privilege for newsmen. Among the problems he sees is that of having to decide who is entitled to such a privilege. Could the Supreme Court rule that the privilege belongs to reporters who work for mass media but not to "the lonely pamphleteer who uses carbon paper or a mimeograph?" What about academic researchers?

7. The Supreme Court is generally skeptical about claims of privilege. In United States v. Nixon, 418 U.S. 683 (1974), the special prosecutor served a subpoena on then President Nixon seeking certain tapes and documents that might be relevant to the Watergate cover-up trial. The President asked the courts to have the subpoena withdrawn—or quashed—on the grounds (1) that the separation of powers doctrine precluded judicial review of the President's decision that it would not be in the public interest to disclose the contents of confidential conversations between a President and his close advisers, and (2) that as a matter of constitutional law, executive privilege prevailed over the subpoena. Although granting that the need for "complete candor and objectivity from advisers calls for great deference from the courts," the Court decided that absent a claim of "need to protect military, diplomatic, or sensitive national security secrets," the Court must weigh the competing interests to determine which should prevail:

> . . . We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Only recently the Court restated the ancient proposition of law, albeit in the context of a grand jury inquiry rather than a trial,

> "that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege, [ ] . . . ." Branzburg v. Hayes, 408 U.S. 665, 688 (1972).
>
> . . .
>
> In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of his responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.
>
> On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

8. The problem of reporter's privilege arises most frequently in the context of material that has been published without attribution of source. In *Branzburg*, however, several of the cases involved incomplete reports and efforts to get more information, such as what happened inside the building in *Pappas*. This may involve "outtakes," a term usually used to refer to parts of film or videotape that have been cut and not shown on the air. It may indeed refer to film, but might also refer to notes taken by a reporter that never appear in the story or, indeed, perceptions or observations that are not even written down. Are government efforts to obtain this unpublished or unrecorded information different from the more conventional effort to get a reporter to identify a source of published information? Does Jus-

tice White suggest a distinction between the two situations? Outtakes are essential when the goal is to try to judge the fairness of what was actually presented. This was the situation when a House committee sought outtakes from the CBS program, The Selling of the Pentagon, referred to by Blasi. On outtakes, see Schonfeld, The Film on the Cutting Room Floor, Columbia Journalism Rev., Nov./Dec. 1974, p. 52.

9. The courts are even less sympathetic when unsolicited information has been thrust on the reporter. See Lewis v. United States, 517 F.2d 236 (9th Cir. 1975), upholding the contempt conviction of a manager of a radio station for refusing to produce the original of a "communique" he received from an underground group that claimed responsibility for a bombing. Does this situation differ greatly from those presented in *Branzburg*?

10. Police have sought to obtain documents by bypassing the subpoena-litigation route in favor of the use of search warrants in which the police appear without notice at the editorial offices of a newspaper or broadcaster. This route was rejected in the first decision on the question, Stanford Daily v. Zurcher, 353 F.Supp. 124 (N.D.Cal.1972) a case in which the police had been seeking photographs to help identify persons who had engaged in a violent attack. The judge held that a search warrant could be used against media in such cases only if there was a clear showing that the materials sought would be destroyed or hidden, and that an order not to destroy or hide materials would be futile. The entire subject is discussed in Note, Search and Seizure of the Media, 28 Stan.L.Rev. 957 (1976). The court of appeals affirmed in February, 1977.

11. Professor Blasi observes that the *Branzburg* group all involved the same limited question: appearance before a grand jury investigating possible crimes. How different is a demand that a reporter testify at a trial from a demand he testify before a grand jury? Might it matter if the defendant is the one seeking the testimony? Consider the defendant's Sixth Amendment right to call witnesses in his own defense.

12. *Civil cases.* When we turn to civil cases, the differences are greater. Shortly after *Branzburg*, an action was brought on behalf of "all Negroes in the City of Chicago who purchased homes from approximately 60 named defendants between 1952 and 1969." The claim was that the real estate brokers had engaged in "blockbusting," a discriminatory practice that involved buying homes at low prices and reselling them at high prices. To help prove their case the plaintiffs asked a reporter, Balk, to identify the source of an article he wrote in 1962 about real estate practices in Chicago, entitled "Confessions of a Block-Buster." Although sympathetic to the plaintiffs'

position, Balk refused to testify because he got the story in confidence. The trial judge's refusal to order Balk to testify was affirmed on appeal. Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972).

The court read *Branzburg* as offering reporters some First Amendment protection and relied heavily on Justice Powell's statement that "these vital constitutional and societal interests" should be decided on a case-by-case basis. The court observed the great weight that Justice White gave to the role of the grand jury and to the "importance of combatting crime." Since Justice Powell suggested that for him (and also the four dissenters) situations existed in criminal cases in which the First Amendment might override the interest in disclosure of information about crime, "surely in civil cases, courts must recognize that the public interest in non-disclosure of journalists' confidential sources will often be weightier than the private interest in compelled disclosure." The court found no compelling interest in disclosure in the facts of the case because the identity of the source "simply did not go to the heart of" plaintiffs' case.

13. A special problem in civil cases is the defamation action. In Torre's case she was not a party but was thought to hold vital information not otherwise available. The case for disclosure is stronger when the defamation action is brought against the media defendant. In Cary v. Hume, 492 F.2d 631 (D.C.Cir.) cert. dismissed 417 U.S. 938 (1974), the general counsel of the United Mine Workers sued two columnists for stating that he had removed files from union headquarters and had then reported to the police that the files had been stolen. The columnists had refused to retract because "our report was based upon information supplied by eyewitnesses." A pretrial order was entered requiring Hume to name the eyewitnesses. He refused and appealed. The court of appeals affirmed. The parties agreed that to prevail in the defamation action plaintiff would have to show that defendant either lied or had behaved recklessly. (See discussion of defamation in Chap. IV.) The court held that it would be virtually impossible for plaintiff to show deliberate falsity unless he could learn the basis for the defendant's story.

c. Statutory Developments

The unpredictability of case-by-case constitutional adjudication has brought renewed legislative efforts. To assess possible legislation, we should first review some constitutional issues. Among them is the Sixth Amendment right of defendants in criminal cases to have compulsory process to obtain witnesses in their favor. Another is the limited effect of state statutes, in light of uncertainty about whether the disclosure effort will be made in a federal forum—or in another state without similar protection. Still another, though less

common problem is suggested by the case of William Farr, a newspaper reporter covering the lurid Manson trial in Los Angeles. To reduce potentially prejudicial publicity in that case, the trial judge ordered the attorneys and certain others not to speak about specific phases of the case. Farr reported certain facts that he could only have learned from a person covered by the judge's order. The judge demanded that Farr identify his source despite the California privilege statute: "A publisher, editor, reporter . . . cannot be adjudged in contempt by a court . . . for refusing to disclose the source of any information procured for publication and published in a newspaper . . . ." Farr stated that the information had come from forbidden sources including two of the six attorneys. Each attorney denied having been a source. The judge again asked Farr to identify the individuals. Farr refused and was held in contempt.

The statute was held inapplicable because the legislature had no power to prohibit the court from seeking to preserve the integrity of its own operations. The legislature's efforts to immunize persons from punishment for violation of court orders, violated the separation of powers. To immunize Farr "would severely impair the trial court's discharge of a constitutionally compelled duty to control its own officers. The trial court was enjoined by controlling precedent of the United States Supreme Court to take reasonable action to protect the defendants in the Manson case from the effects of prejudicial publicity." Farr v. Superior Court, 22 Cal.App.3d 60, 99 Cal.Rptr. 342 (1971). The Supreme Court of California denied a hearing and the Supreme Court of the United States denied certiorari 409 U.S. 1011 (1972).

In a later proceeding Farr argued that a contempt citation upon him was essentially a sentence of imprisonment for life because he clearly would not comply. The court noted that an order committing a person until he complies with a court order is "coercive and not penal in nature." The purpose of this sanction is not to punish but to obtain compliance with the order. Where an individual demonstrates conclusively that the coercion will fail, the contempt power becomes penal and comes within a five-day maximum sentence set by California statute. The case was remanded to determine whether coercion could be justified. In re Farr, 36 Cal.App.3d 577, 111 Cal.Rptr. 649 (1974).

Farr was followed by Rosato v. Superior Court, 51 Cal.App. 3d 190, 124 Cal.Rptr. 427 (1975), in which four employees of the Fresno Bee were ordered to testify about how they obtained a copy of a grand jury report that had been ordered sealed. The reporters' privilege did not apply to questions directed at learning whether persons under the court's sealing order had violated it. Hearing was denied and a petition for certiorari was denied 427 U.S. 912 (1976).

Two reporters and two editors served 15 days in jail. The judge then held a hearing and concluded that they would not testify. They were found in criminal contempt, sentenced to five-day terms, given credit for time served, and released.

Separation of powers aside, there remains substantial disagreement about whether a statutory privilege would be desirable, and, if so, the extent and nature of the privilege. As noted earlier, scholars of the law of evidence tend to oppose all privileges as obstacles to the search for truth. The legal profession has accepted some privileges but has refused to endorse a privilege for reporters. At its February 1974 meeting, the House of Delegates of the American Bar Association voted 157–122 to reject the proposition that a reporter's privilege is essential "to protect the public interest . . . in the free dissemination of news and information to the American people on matters of public importance." Editor & Publisher, Feb. 9, 1974, p. 11.

Privilege legislation has also been opposed by a few representatives of the press: in 1974 the Washington Post in an editorial argued that the "best shield is the First Amendment, without the supposed reinforcement of even the purest form of shield law." Editor & Publisher, Mar. 30, 1974, p. 15. The justification for this position is the belief that Congress has no business legislating about the press, whether protectively or otherwise. If Congress is conceded power to help the press now it may later be assumed to have power to enact legislation hostile to the press. This concern was also raised during the debate over the Newspaper Preservation Act. Those holding the so-called Graham-Knight view would prefer to litigate each case in the courts solely in terms of the First Amendment.

This view is likely to produce more litigation than would a statute that provided protection—even if limited to certain types of cases. Some media representatives, particularly those from smaller newspapers and broadcasters, believe a limited statute would help avoid expensive litigation without creating new dangers.

After rejecting the case-by-case approach because of its legal cost and uncertainties, a media lawyer considered objections to legislation in Paul, Why a Shield Law? 29 U.Miami L.Rev. 459 (1975):

> There is, however, the Graham-Knight argument which frets about compromising a basic constitutional right by allowing the legislature to tinker. This problem could be solved by adding two sentences to any shield legislation: "No provision of this act shall be construed to create or imply any limitations upon or otherwise affect any rights secured by the Constitution of the United States. The rights provided by this Act shall be in addition to any rights provided by the Constitution." . . .

The Graham-Knight theorists are also worried about putting reporters in a special class. This ignores what the first amendment is all about. Gatherers and disseminators of information are already in a special class under the first amendment, as are people who insist on religious freedom. The founding fathers put them there. Of course it would be a terrible mistake to draw shield legislation so narrowly that it would apply only to reporters. A broad, one sentence shield law might serve the purpose:

> No person shall be required in any federal or state proceeding to disclose either the source of any published or unpublished information obtained for any medium offering communication to the public, or any unpublished information obtained or prepared in gathering or processing information for any public medium of communication.

A shield law should be short, simple, and absolute because it must be a badge which a reporter can carry and completely understand without having to hire a lawyer or go to court. Some individuals, however, have argued that other factors should be balanced against the first amendment to justify shield law exceptions when: (1) the only way to prove that the defendant is innocent is to have the reporter testify; (2) the reporter is the only source concerning a committed crime; or (3) national security is involved. I do not accept any of these exceptions. They would create loopholes which would destroy the privilege and bring us back to the case-by-case method. While this might result in some miscarriages of justice, so does the privilege against self-incrimination. The fact that a person is the only witness to a crime does not mean he is required to waive his privilege against self-incrimination.

Does the two-sentence addition meet the problem? Is the case for an absolute privilege statute persuasive?

Compare the one-sentence statute suggested by the author with the following Congressional bill.

H.R. 215, INTRODUCED BY REP. KASTENMAIER
94TH CONGRESS, 1ST SESSION (1975).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "News Source and Information Protection Act of 1975".

SEC. 2. As used in this Act—

(1) the term "newsman" means any man or woman who is a reporter, photographer, editor, commentator, journalist, correspondent,

announcer, or other individual (including partnership, corporation, association, or other legal entity existing under or authorized by the laws of the United States or any State) engaged in obtaining, writing, reviewing, editing, or otherwise preparing information in any form for any medium of communication to the public;

(2) the term "State" means any of the several States, territories, or possessions of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

SEC. 3. Except as qualified by sections 4 and 7 of this Act, in any Federal or State proceeding (including a grand jury or pretrial proceeding), no individual called to testify or provide other information (by subpena or otherwise) shall be required to disclose information or the identity of a source of information received or obtained by him in his capacity as a newsman.

SEC. 4. At the trial of any civil or criminal action in any court of the United States . . . or of any State, a newsman may be required to disclose the identity of a source of information or any other information if—

(1) the identity or information was not received or obtained by him in express or implied confidence in his capacity as a newsman, or

(2) the court finds that the party seeking the identity or information has established by clear and convincing evidence—

(A) that disclosure of such identity or information is indispensable to the establishment of the offense charged, the cause of the action pleaded, or the defense interposed in such action;

(B) that such identity or information cannot be obtained by alternative means; and

(C) that there is a compelling and overriding public interest in requiring disclosure of the identity or the information.

SEC. 5. (a) Any order of a court of the United States or of any State granting, modifying, or refusing a claim of privilege on the part of a newsman shall be subject to judicial review and shall be stayed by the issuing court for a reasonable time to permit judicial review.

. . .

SEC. 6. Nothing in this Act shall be construed to impair or preempt the enactment or application of any State law which secures the minimum privileges established by this Act.

SEC. 7. Sections 3 and 4 of this Act shall not be available to a defendant in a defamation suit with respect to the source of any al-

legedly defamatory information when such defendant asserts a defense based on such source. Such defendant need testify only if plaintiff demonstrates that identification of the source will lead to persuasive evidence on the issue of malice [deliberate falsity or recklessness—ed.].

. . .

Notes and Questions

1. Does this bill cover one who writes a speech for delivery from a corner soapbox? Should it?

2. How does § 4 compare with the *Branzburg* opinions?

3. Since the bill covers state proceedings but provides that states may grant greater protection, uniformity will not exist. Is that important here?

4. Three views opposing this type of bill emerged in committee. One preferred an absolute privilege; another argued that there should be no statute of any sort because the First Amendment should control; and the third view was that the bill went too far in exempting reporters from their responsibilities as citizens. See Editor & Publisher, Mar. 15, 1975, p. 23. None of the several bills introduced at each session of Congress has gotten out of Committee. H.R. 215 was thought the most promising of the 1975–76 crop.

5. The Louisville newspapers have announced new guidelines concerning the use of anonymous stories, Editor & Publisher, Feb. 7, 1976, p. 7:

> 1. The reason for the source's anonymity should be explained in the story as fully as possible without revealing the source's identity. (If the reason isn't a good one, then the source shouldn't be quoted.)
>
> 2. Information from an anonymous source should ordinarily be used only if at least one other source substantiates the information.
>
> 3. A supervising editor should be consulted every time an anonymous source is going to be quoted.
>
> 4. We should avoid letting anonymous sources attack someone's character or credibility. If, in a rare instance, it is necessary to do so, we should not print the assertion without first giving the victim a chance to respond.

Other papers and press associations have taken similar positions. What is the motivation?

3. Government Interference with Willing Sources

What are the arguments for permitting willing private sources to convey information to prospective gatherers? Are the justifications to be found in traditional First Amendment analysis? Are other justifications present in this situation? Can the source and the gatherer make different arguments for their positions? Despite the voluntary nature of the proposed interchange, government has often sought to regulate such communication.

Perhaps the earliest case to recognize the nexus between the First Amendment and the right to receive information (although not actively gathering) was Martin v. City of Struthers, 319 U.S. 141 (1943), involving an ordinance making it a crime for itinerants to knock on residents' doors without first receiving permission to do so. Those prosecuted by the city were distributing religious tracts from door to door. The Court reversed the convictions on the ground that the government could not by general regulation prevent communications between the defendants and those who might wish to hear them. Instead the burden was upon residents who did not wish interference, to so indicate on their doors. Although no residents were parties to the case, the Court observed that freedom of speech and press "necessarily protects the right to receive."

Shortly after *Martin*, the Court upheld the right of union labor organizers to solicit members without first obtaining an organizer's card from the Texas Secretary of State. "That there was restriction upon Thomas' right to speak and the rights of the workers to hear what he had to say, there can be no doubt." Thomas v. Collins, 323 U.S. 516 (1945).

It is only in recent years that the passive "right to receive" and its active adjunct, the "right to gather," have been explicitly claimed by the recipient or the gatherer. In Zemel v. Rusk, 381 U.S. 1 (1965), an individual sought a passport valid for travel to Cuba, to become a better-informed citizen. The Court upheld the government's right to deny the passport on two grounds: one was the suggestion that the ban was an "inhibition of action" rather than a restraint on "speech," invoking a distinction between gathering and publishing information. The second point was that the limitation on gathering could be justified by the overriding "foreign policy considerations affecting all citizens" in terms of national security. In response to Zemel's argument that a rejection of his claim would involve a denial of access to information he deemed essential to his decision-making, the majority observed that refusal of entry to the White House would have the same effect. (A lower federal court had previously reached the same result in a case brought by a

reporter who wanted to go to countries barred by his passport. Worthy v. Herter, 270 F.2d 905 (D.C.Cir. 1959)).

That same year, the Court held unconstitutional a statute permitting the government to require that the addressee of unrequested "communist political propaganda" affirmatively request postal delivery thereof in writing. Lamont v. Postmaster General, 381 U.S. 301 (1965). This case involves not active gathering of raw data but the more passive claim of a right to receive a published communication. The majority relied on the deterrent effect of the obligation and did not explore the general right to receive information. Three concurring justices preferred to base their decision on the ground that the addressee's "right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them."

In 1969 the Court again alluded to the right to receive—but in two unusual and very different contexts. In one case, it overturned the conviction of a man for possessing pornographic film in his home. The basis for the decision has been much debated and we will consider this problem more extensively at p. 408, infra. In its opinion, the Court quoted Martin v. City of Struthers, and observed "It is now well established that the Constitution protects the right to receive information and ideas." Stanley v. Georgia, 394 U.S. 557, 564 (1969).

In the second case, dealing with what were seen as the special problems of radio and television, the Court suggested that the dominant rights to airwaves were not those of the licensees of the broadcasting facilities. "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." Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367, 390 (1969). We will return to this problem at great length at p. 495, infra. In both cases, as in *Lamont*, the Court was discussing receipt of communications already available for distribution.

The "right to gather" information from willing private sources began to take shape in 1972 with two decisions rendered on the same day. Kleindienst v. Mandel, 408 U.S. 753 (1972), involved efforts by American scholars to invite Mandel, a Belgian Marxist economist, to attend conferences and to speak at several American universities. Congress had barred visas for aliens who advocated "the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship." Such an alien might be admitted temporarily if the Attorney General approved a recommendation to that effect from the Department of State. A recommendation was made for Mandel but because of his information about Mandel's behavior on a previous trip to the United

States, the Attorney General refused to approve the visa application. Mandel and the scholars sued. After concluding that Mandel, as an alien, had no constitutional right of entry, the Court turned to the rights claimed by the scholars. In light of the foregoing cases, the Court found a First Amendment right to hear Mandel. The Attorney General, in opposition, relied on the distinction between speech and action drawn in Zemel v. Rusk. The Court observed that in light of its previous decisions, "we cannot realistically say that the problem facing us disappears entirely or is nonexistent because the mode of regulation bears directly on physical movement. In *Thomas* the registration requirement on its face concerned only action. In *Lamont*, too, the face of the regulation dealt only with the Government's undisputed power to control physical entry of mail into the country."

A second argument was that "technological developments," such as tapes and telephone hook-ups eliminated any need for a First Amendment right of face-to-face appearance.

> This argument overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning. While alternative means of access to Mandel's ideas might be a relevant factor were we called upon to balance First Amendment rights against governmental regulatory interests . . . we are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access.

Having preserved the scholars' First Amendment argument this far, the Court turned to the contrary interests asserted by the Attorney General:

> In summary, plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established. In the case of an alien excludable under § 212(a)(28), Congress has delegated conditional exercise of this power to the Executive. We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant. What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case.

Three dissenters argued that since *Lamont* prevented the government from encumbering the entry of books and pamphlets, there was no basis for excluding Mandel unless it could be shown that he posed "an actual threat to this country."

The other group of cases decided the same day was the *Branzburg* group, in which the majority recognized that the freedom of the press to publish information necessitated some protection at the gathering stage, but not without exceptions.

The next case concerned censorship of "personal correspondence" to and from prisoners. Procunier v. Martinez, 416 U.S. 396 (1974). The Court recognized the bilateral nature of the relationship:

> Communication by letter is not accomplished by the act of writing words on paper. Rather, it is effected only when the letter is read by the addressee. Both parties to the correspondence have an interest in securing that result, and censorship of the communication between them necessarily impinges on the interest of each. Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech. And this does not depend on whether the nonprisoner correspondent is the author or intended recipient of a particular letter, for the addressee as well as the sender of direct personal correspondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication. . . .
>
> . . .
>
> . . . We therefore turn for guidance, not to cases involving questions of "prisoners' rights," but to decisions of this Court dealing with the general problem of incidental restrictions on First Amendment liberties imposed in furtherance of legitimate governmental activities.

This analysis led the Court to strike down the regulations in question and announce that censorship would be permissible only if the regulation "furthers one or more of the substantial governmental interests of security, order, and rehabilitation" and goes no further than necessary to achieve the interest involved.

Is the Press Entitled to Greater Access?

This set the stage for two companion cases on the right to gather information. Pell v. Procunier, 417 U.S. 817 (1974), involved a ban on press interviews with named inmates in the California prison system. Saxbe v. Washington Post Co., 417 U.S. 843 (1974), involved a similar ban in the federal prisons. In *Pell*, the Court concluded that the security and penological considerations of incarceration were sufficient to justify rejection of the inmates' claim that the interview ban violated their First Amendment rights.

Justice Stewart, writing for the Court in *Pell* and in *Saxbe*, then turned to the claims raised by the press. He noted that "this regulation is not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting of those conditions." Reporters could visit the institutions and "speak about any subject to any inmates whom they might encounter." Interviews with inmates selected at random were also permitted and both the press and the public could take tours through the prisons. "In short, members of the press enjoy access to California prisons that is not available to other members of the public." Indeed, the only apparent restriction was the one being challenged.

The Court retraced the history of the right to receive "such information and ideas as are published." It then turned to the recent reporter's privilege case:

> In Branzburg v. Hayes, 408 U.S. 665 (1972), the Court went further and acknowledged that "newsgathering is not without some First Amendment protection," at 707, for "without some protection for seeking out the news, freedom of the press could be eviscerated," at 681. In *Branzburg* the Court held that the First and Fourteenth Amendments were not abridged by requiring reporters to disclose the identity of their confidential sources to a grand jury when that information was needed in the course of a good-faith criminal investigation. The Court there could "perceive no basis for holding that the public interest in law enforcement and in insuring effective grand jury proceedings [was] insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial," at 690–691.
>
> . . .
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> "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally . . . . Despite the fact that newsgathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded." Branzburg v. Hayes, supra, at 684–685. Similarly, newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.

> The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally. It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, cf. Branzburg v. Hayes, supra, and that government cannot restrain the publication of news emanating from such sources. Cf. N. Y. Times v. United States, supra. It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court. Accordingly, since § 415.071 does not deny the press access to sources of information available to members of the general public, we hold that it does not abridge the protections that the First and Fourteenth Amendments guarantee.

Four Justices dissented on the press question. Justice Powell (writing in dissent in *Saxbe*) asserted:

> Respondents assert a constitutional right to gather news. . . .
>
> The Court rejects this claim on the ground that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." . . .
>
> I agree, of course, that neither any media organization nor reporters as individuals have constitutional rights superior to those enjoyed by ordinary citizens. The guarantees of the First Amendment broadly secure the rights of every citizen; they do not create special privileges for particular groups or individuals. For me, at least, it is clear that persons who become journalists acquire thereby no special immunity from governmental regulation. To this extent I agree with the majority. But I cannot follow the Court in concluding that *any* governmental restriction on press access to information, so long as it is nondiscriminatory, falls outside the purview of First Amendment concern.
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> . . .
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> The specific issue here is whether the Bureau's prohibition of prisoner-press interviews gives rise to a claim of constitutional dimensions. The interview ban is categorical in nature. Its consequence is to preclude accurate and effective reporting on prison conditions and inmate grievances. These subjects are

not privileged or confidential. The Government has no legitimate interest in preventing newsmen from obtaining the information that they may learn through personal interviews or from reporting their findings to the public. Quite to the contrary, federal prisons are public institutions. The administration of these institutions, the effectiveness of their rehabilitative programs, the conditions of confinement that they maintain, and the experiences of the individuals incarcerated therein are all matters of legitimate societal interest and concern. . . .

. . .

. . . An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment. . . .

This constitutionally established role of the news media is directly implicated here. For good reasons, unrestrained public access is not permitted. The people must therefore depend on the press for information concerning public institutions. The Bureau's absolute prohibition of prisoner-press interviews negates the ability of the press to discharge that function and thereby substantially impairs the right of the people to a free flow of information and ideas on the conduct of their Government. The underlying right is the right of the public generally. The press is the necessary representative of the public's interest in this context and the instrumentality which effects the public's right. I therefore conclude that the Bureau's ban against personal interviews must be put to the test of First Amendment review.

There seems to be little question that "big wheels" do exist and that their capacity to influence their fellow inmates may have a negative impact on the correctional environment of penal institutions. . . .

Justice Powell concluded, however, that prison authorities could handle that situation by narrow rules barring interviews with inmates under disciplinary suspension and limiting the number of interviews with any given inmate within a specified time period. The Bureau

of Prisons also argued that a case-by-case assessment of each interview request would be administratively burdensome and correctionally unsound. Justice Powell responded that the Bureau could meet its obligations by promulgating rules setting up reasonable restrictions on the time, place and manner of conducting interviews much as it was already doing in the case of interviews with family, friends, attorneys and clergy. Finally, the Bureau objected that it was difficult to tell "who constitutes the press." Justice Powell responded that although the concept was vague and many might claim to be included, the Bureau could define the term in a rule like the one it was already using for another purpose: "A newspaper entitled to second class mailing privileges; a magazine or periodical of general distribution; a national or international news service; a radio or television network or station." If too many qualified persons wanted interviews, Justice Powell suggested that media representatives might form pools as they do for news events when press access is limited. After discussing these details, he concluded:

> The Court's resolution of this case has the virtue of simplicity. Because the Bureau's interview ban does not restrict speech or prohibit publication or impose on the press any special disability, it is not susceptible to constitutional attack. This analysis delineates the outer boundaries of First Amendment concerns with unambiguous clarity. It obviates any need to enter the thicket of a particular factual context in order to determine the effect on First Amendment values of a nondiscriminatory restraint on press access to information. As attractive as this approach may appear, I cannot join it. I believe that we must look behind bright-line generalities, however sound they may seem in the abstract, and seek the meaning of First Amendment guarantees in light of the underlying realities of a particular environment. Indeed, if we are to preserve First Amendment values amid the complexities of a changing society, we can do no less.

Justices Brennan and Marshall joined Justice Powell's dissent. They also joined a dissent by Justice Douglas that emphasized the absolute nature of the ban and the importance of the information:

> . . .
>
> It is . . . not enough to note that the press—the institution which "[t]he Constitution specifically selected . . . to play an important role in the discussion of public affairs"—is denied no more access to the prisons than is denied the public generally. The prohibition of visits by the public has no practical effect upon their right to know beyond that achieved by the exclusion of the press. The average citizen is most unlikely to inform himself about the operation of the prison system by re-

questing an interview with a particular inmate with whom he has no prior relationship. He is likely instead, in a society which values a free press, to rely upon the media for information.

It is indeed ironic for the Court to justify the exclusion of the press by noting that the government has gone beyond the press and expanded the exclusion to include the public. Could the government deny the press access to all public institutions and prohibit interviews with all governmental employees? Could it find constitutional footing by expanding the ban to deny such access to everyone?

. . .

In considering the merits of this case, first ask whether the case fits within the general rubric of an eager gatherer seeking information from a willing private source. Is that the way Justice Stewart views the case? What is the significance of Justice Stewart's emphasis on the fact that the press is not being barred from something that the public is permitted to do? Is there more reason in this case to distinguish between public and press as gatherer than in the earlier cases in this sequence?

What is the nub of the disagreement between the majority and the dissenters? For an illuminating discussion of the First Amendment implications in newsgathering, see Watkins, Newsgathering and the First Amendment, 53 Journ.Q. 406 (1976). These cases also show the difficulty of making simple statements about which justices "favor media." Compare the positions of Justices Powell and Stewart in *Branzburg* and in the prison interview cases.

B. GOVERNMENT SOURCES

1. Gathering Information From Officials and Records

So far we have been considering legal ramifications of efforts by the media to gather information from private sources. We turn now to the special problems that arise when a government agency or official is believed to hold information being sought. The following excerpt from a discussion of the Pentagon Papers controversy sets out several of the basic issues. Although that case, discussed at length at p. 379, infra, involved the right of the government to prevent publication of information that the press had obtained, our main concern at the moment is to ascertain what obligation, if any, government may have to make information available to the press. The author of the next excerpt is a professor of law at Columbia University.

THE RIGHT TO KNOW AND THE DUTY TO WITHHOLD: THE CASE OF THE PENTAGON PAPERS

Louis Henkin

120 University of Pennsylvania Law Review 271, 273–76 (1971).

Both before the courts and in the Press there was much talk of "the right of the people to know" what government was up to. That phrase might have appealed to the authors of the Declaration of Independence and even to Constitutional Fathers whose political theory and rhetoric asserted that sovereignty was in "the people" and that government governed with the consent of the governed. But the Constitution, of course, expressed no such right, if only because the Eighteenth Century Framers were committed to minimal, "watch dog" government, and saw rights as "retained by the people" to be safeguarded against infringement by government; they did not declare obligations by the government to the people or declare rights of the people that government was obliged affirmatively to effectuate. A "right of the people to know" may indeed have been a principal rationale for the freedom of the Press, but, in the law at least, the people's right to know was derivative, the obverse of the right of the Press to publish, and coextensive with it.

The Press apart, however, any right of the people to know was not considered violated if government maintained secrecy in some matters; it was assumed, no doubt, that the people agreed it should not know what could not be told it without damage to the public interest. From our national beginnings, the Government of the United States has asserted the right to conceal and, therefore, in practical effect not to let the people know. Secrecy governed the deliberations in Philadelphia in 1787. Some need for secrecy was expressly recognized in the Constitution: in providing for publication of a journal of each House of Congress, it excepted "such parts as may in their judgment require secrecy." The occasional need for secrecy underlay some of the dispositions of the Constitution: the power to conduct foreign relations was given to the Executive rather than to Congress, and a part in making treaties to the less numerous Senate rather than to the House. Presidents from Washington to Nixon have asserted "executive privilege" to withhold information from Congress. And Congresses and congressional committees have recognized the "right," the propriety, the need for some executive nondisclosure, even to them: since 1791 Congress, in requesting reports from Executive Departments, has asked the State Department to report only what in the President's judgment was "not incompatible with the public interest." Modern Congresses have recognized the Executive's classification system and provided for its enforcement, to some extent by criminal

penalties. The Supreme Court, too, has repeatedly recognized the need for some secrecy in executive activities. For its own part, Congress has often claimed the need to conceal: the Senate in particular (especially in executive session), and committees and subcommittees of both Houses, have often maintained secrecy. The courts, too, often insist on the confidentiality of deliberations in the jury room or in judicial chambers. The most confidential proceeding in all of the government is probably the conference of the Justices of the Supreme Court.

The reasons for confidentiality in government are various. Military secrecy in time of war is the example usually cited, but that, and defense security in time of peace, do not begin to explain all the information that government has regularly withheld. Diplomatic communications are commonly restricted. Wilson's "open covenants openly arrived at" was a notorious, if innocent joke, a precept he violated as soon as he had pronounced it. No one has questioned the need to prevent premature disclosure of new policy—say, impending economic acts that might affect prices, rates, or values—where "leaks" might bring chaos, or unfair advantage to those who learn early. Confidentiality and privilege are recognized as essential to many working relationships, and many believe that government would become impossible if all communications between officials might readily become public knowledge. And does even an official, perhaps, have a right of "privacy," or a right to have his role fully and accurately, not selectively or erroneously, known?

Government has protected its "right to withhold" by various devices—by selection of trustworthy personnel, by rules, practices, and mores of non-divulging, by avoidance of written communication or other recording, by classifications and restricted distributions, by codes and ciphers, by locks and guards. Such measures to prevent disclosure have also been supplemented by criminal statutes to deter it: laws against espionage have existed longer than the Constitution; some disclosures are expressly forbidden; some publications, involving unauthorized disposition of government documents, might be punishable under general statutes protecting government property. In some circumstances disclosure could bring contempt proceedings by Congress or by the courts. Unauthorized disclosure by officials might bring suspension or removal.

In principle as in practice, then, the "right of the people to know" what Government does has always been reduced by "the right —or duty, or responsibility—of the Government to withhold" in the public interest. But governmental secrecy has usually been seen as at best a necessary evil, and the necessity for that evil has not been accepted by all at all times in all cases. The standards for determining the need to withhold are less than exact, and reasonable men differ

widely as to them and as to their application in particular cases. Without any doubt, moreover, Government frequently withholds more and for longer than it has to. Officials, of course, tend to resolve doubts in favor of non-disclosure. Some concealment is improperly motivated—to cover up mistakes, to promote private or partisan interests, even to deceive another branch or department of government, or the electorate. Congress has tried to deal with such abuse, for example, in the Freedom of Information Act, but such statutes do not begin to reach the problem of "over-concealment" by mammoth, complex government. It may be because "over-concealment" is rampant that Congress seems to have aimed criminal penalties to enforce classification essentially—perhaps exclusively—at purposeful disclosure "with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation."

Still, in the past at least, few have seen constitutional issues in governmental concealment. . . . Rather, it has been assumed, a court would hold that the judgment of the political branches that withholding was required was within their constitutional authority to make and not for the courts to review.

Notes and Questions

1. Compare the following remarks of Justice Stewart in a speech entitled "Or of the Press" reprinted in 26 Hastings L.J. 635–36 (1975):

> Finally, the Pentagon Papers case involved the line between secrecy and openness in the affairs of Government. The question, or at least one question, was whether that line is drawn by the Constitution itself. The Justice Department asked the Court to find in the Constitution a basis for prohibiting the publication of allegedly stolen government documents. The Court could find no such prohibition. So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can.
>
> But this autonomy cuts both ways. 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 government 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. Congress may provide a resolution, at least in some instances, through carefully drawn legislation. For the

> rest, we must rely, as so often in our system we must, on the tug and pull of the political forces in American society.

Justice Stewart appears to be suggesting that although government officials cannot be forced to divulge information through legal actions, neither can they prevent disclosures when their security techniques have failed. Is this a healthy situation? We return to this subject when we consider the Pentagon Papers case, p. 379, infra.

2. The choices for the government are not only whether to withhold or to release information to the public. Some have urged that even if government officials have no obligation to release information, at least they should be forbidden to release misinformation. Section 1001 of Title 18 now provides that "Whoever" knowingly makes false statements in any matter within the jurisdiction of any department or agency faces prison and a fine. H.R. 7846, 94th Cong. 1st Sess., proposed to strike "Whoever" and replace it with "Any person, including any officer or employee of the Federal Government or any elected official thereof, who . . . ." One journalist would make it a felony for an executive branch official to make a "materially false statement" to Congress or one of its committees. Acting on orders of a superior would be no defense. Lewis, Lying in State II, N. Y. Times, July 17, 1975, p. 29. Is the problem of misleading as significant as withholding?

Can official lies ever be justifiable? In an episode reported in The Quill, July-Aug. 1975, p. 14, an informant told police he had been hired to commit arson. In an effort to get more evidence against the contracting party the fire and police departments staged a fire drill at the site but the fire chief reported it as a real fire and provided the press "details" of the nonexistent fire. The idea was to persuade the "employer" that the fire had been set and to catch him paying the informant.

3. Specific types of government information have been made available to the public by legislation. Some statutes involve records; others require that governmental activities be open to the public. We now turn to major legislative efforts in this direction.

FREEDOM OF INFORMATION ACT

5 U.S.C. § 552, as amended, 1974.

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—[descriptions of its organization, rules of procedure, substantive rules of general applicability and changes in these items. Only matter properly published shall take effect unless a person has actual notice of the material.]

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. [Modifications may be made to protect personal privacy, but these must be explained. All material must be indexed and the index made available.]

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

[Section (a)(4) provides that each agency is to adopt reasonable fees for document searches and duplication. United States District Courts are empowered to order agencies to produce documents. If the agency claims that it is exempt under § (b), the agency has the burden of persuasion. The judge may examine the documents in secret to decide whether some or all of them may be withheld. The courts are to expedite consideration of cases under the Act and may award costs against the government when the document-seeker has "substantially prevailed." In cases of improper withholding, the Civil Service Commission is to determine whether disciplinary action

should be brought against the official responsible for the withholding. An official who defies a court order to release documents may be punished for contempt of court.]

. . .

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6) [Agencies are held to short fixed periods of time to reply to a request and to an appeal, with exceptions based on the nature of the information requested.]

. . .

(C) . . . Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confi-

dential 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) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

. . .

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive office of the President), or any independent regulatory agency.

Notes and Questions

1. Notice that nothing in the Act gives any special rights to the press as opposed to the public generally. Is that surprising?

2. What appear to be the critical limitations of the Act?

3. As demands grew for the expansion of the Freedom of Information Act, other forces were also at work. Thus, the Crime Control Act of 1973, 42 U.S.C. § 3701 et seq., requires the Law Enforcement Assistance Administration (LEAA) to ensure that certain criminal records not be disclosed for purposes unrelated to criminal justice. The limitations effectively cover all federal and state criminal justice information systems. In addition, information that may properly be disclosed will be given out only in response to specific requests. In such cases the agency may only confirm or deny specific information contained in the inquiry. Editor & Publisher, June 14, 1975, p. 12.

4. In 1975 the LEAA, in an effort to "discourage general fishing expeditions into a person's private life," sought to bar the press from access to alphabetically filed criminal records. Only information

filed chronologically remained accessible, and information about an individual could generally be obtained only if the reporter knew the date and charge of the arrest. After bitter complaints from the media, the regulations were modified to permit access to alphabetically organized records of public judicial proceedings. The LEAA regulations, to be implemented by the states by December 31, 1977, are applicable to courts and police departments that receive funding from the federal agency. See, Roberson, What are these LEAA Regulations and How Did We Get into this Mess, The Quill 19 (July-Aug. 1976).

5. Another conflict developed as a result of passage of the Privacy Act of 1974, codified in 5 U.S.C. § 552a, immediately after the FOI Act. In Tennessean Newspaper, Inc. v. Levi, 403 F.Supp. 1318 (M.D. Tenn.1975), the United States Attorney for the District interpreted the Privacy Act to preclude his disclosure of certain information concerning persons arrested or indicted in the District. These included, age, address, marital status, employment status, circumstances of arrest, and other background material. He was willing to release only information on the public record, which might include only name and charge. Prior to the effective date of the Privacy Act, the official had routinely made such information available.

Plaintiff newspapers and broadcasters sued under the Freedom of Information Act to obtain the information. The Privacy Act, subject to certain exceptions, forbids federal employees in the executive branch from disclosing a person's records without that individual's consent. One exception permits the disclosure of information required to be made available under the Freedom of Information Act. One exception in that Act provided that investigatory records compiled for law enforcement purposes need not be disclosed where such records would "constitute an unwarranted invasion of personal privacy." The judge ordered disclosure partly because the items reported did not involve a serious invasion and also because he found a "legitimate interest" in public access to such data that would outweigh other claims. In so doing, the judge stressed that he was not deciding that plaintiffs may obtain from the government "any type and amount of information about an arrested or indicted individual which they desire to publish." What limits does that suggest?

6. An indexed list of cases decided under the Freedom of Information Act may be found in 122 Cong.Rec. 13028 (Aug. 2, 1976). Most litigation has involved the exemptions, with the fifth exemption (dealing with inter-agency and intra-agency memoranda) producing the largest number of cases.

7. Apparently the most frequently litigated issues of freedom of information at the state level involve access to arrest records. In an

important decision the California Supreme Court unanimously rejected the constitutional claims of a person who had been arrested but not convicted, to have his arrest record erased or returned. The court, although recognizing the dangers of possible misuse of the record asserted by the individual, concluded that at least in the absence of a legislative determination to the contrary, the preservation of such records could be justified by their value in criminal investigations and in probation and parole decisions. Loder v. Municipal Court, 17 Cal. 3d 859, 553 P.2d 624, 132 Cal.Rptr. 464 (1976). The most extensive collections of reported and unreported state cases involving efforts to obtain government information are found in the Press Censorship Newsletters, of the Reporters' Committee for Freedom of the Press, Washington, D. C.

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2. Access to Government Functions and Meetings

Guidelines for access to meetings of Congress or its committees and access to information about Congressional proceedings are prescribed initially in the Constitution. (Art. I, § 5):

> Each House may determine the Rules of its Proceedings. . . . Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

From the earliest days, sessions of the full House or Senate have usually been open to the public. Senate sessions were occasionally closed for discussion of treaties or nominations, and in the 25 years between 1945 and 1970, the Senate held seven closed sessions: one to consider a committee to oversee the CIA, one to discuss the situation in Laos and Thailand, two to consider the Senate's legislative schedule, and three on missile programs. Guide to the Congress of the United States 63 (1st ed. 1971).

Although most sessions of the full House and Senate have been open, most committee meetings were closed unless hearings were being held. Since 1970, there has been a sharp increase in open committee meetings, extending first to mark-up sessions (in which a pending bill may be approved, amended or rewritten), and later to conference committee meetings in which representatives of the two houses try to reconcile two different versions of proposed legislation. In 1975 the House and Senate voted to require open conferences unless a majority of conferees from either chamber vote in public to

close a session. S.Res. 9 and H.Res. 5, 94th Cong. 1st Sess. Can such negotiations be conducted effectively in open sessions? Should all meetings of all committees and subcommittees be open? When are closed sessions of committees most justifiable?

A different problem arises out of the conduct of Congressional investigations. The power to legislate implies the power to inquire into subjects that may require legislation and allows Congress to conduct investigations and hold hearings. Congress may compel the attendance of witnesses and the production of documents at these hearings under threat of citation for contempt. The arguments against open hearings do not involve national security or the inhibiting effect of publicity on legislative compromise. Rather they reflect a concern for the privacy of witnesses and those whose behavior is under scrutiny. The advent of television coverage of some Congressional hearings has made this concern more significant, leading to a 1955 House resolution requiring a committee to receive evidence in secret session that "may tend to defame, degrade, or incriminate any person" and not to release it. The Senate Rules and Administrative Committee chose instead to issue a report recommending 12 rules to protect witnesses, including a ban on release of testimony received in closed session unless authorized by the committee, and a requirement that witnesses be entitled to demand that television and other cameras not be directed at them.

As we shall see, the public and the press are not excluded from a trial because a party or a witness might be defamed. Why should a witness have such a right in a Congressional investigation?

In 1976, the federal "Government in the Sunshine Act" became law. The Act, located mainly in 5 U.S.C. 552b, provides that meetings of federal agencies must be announced and open to the public unless closed in conformity with the Act. Not surprisingly, the conditions permitting closure very closely track those in the Freedom of Information Act that permit officials to deny access to records. A meeting that assertedly comes within an exception may not be closed unless a majority of the entire membership of the agency votes to take such action. Votes must be recorded and made public within one day after the vote is taken. The chief legal officer of the agency must publicly certify that in his or her opinion the meeting properly comes within a specified provision allowing closure. In closed meetings, complete transcripts, or sometimes minutes, must be kept—and must be made public except for material that comes within the exception.

An action may be brought in the District Court by "any person" to force compliance. The defendant bears the burden of justifying

a closed meeting. In deciding such cases the court may review in chambers transcripts and other evidence. The court is not empowered to void actions taken at improperly closed meetings or to punish officials who act improperly, but it may award costs and reasonable attorney fees to plaintiffs who obtain declaratory judgments, injunctive relief or other relief. It may also award these items against plaintiffs if the court finds the suit was initiated "primarily for frivolous or dilatory purposes."

In light of these obligations on other branches of government, what justifies closed conferences of appellate judges?

Clearly, less governmental business is conducted by the state legislature than by the multitude of agencies created by the legislature or by the executive branch under legislative authorization. In an effort to bring these agencies and their decision-making processes under public scrutiny many state legislatures have adopted "open meeting" or "sunshine" laws. These vary greatly and are summarized in "State Open Meeting Laws: An Overview" by Prof. John B. Adams (Freedom of Information Foundation Series No. 3, July, 1974). Rather than looking at the differences among the existing state statutes, we will consider drafts proposed by Sigma Delta Chi, the professional journalism fraternity, and by Common Cause, the citizens lobbying group, excerpted from pp. 22–29 of the Adams book.

SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI

Be it enacted by the Legislature of the State of ———.

Section 1. All meetings of the governing body of all municipalities located within the State of ———, Boards of County Commissioners of the counties in the State of ———, Boards of Public Instruction of the counties in the State of ———, and all other boards, bureaus, commissions or organizations in the State of ———, excepting grand juries, supported wholly or in part by public funds or expending public funds shall be public meetings.

Section 2. Any person or persons violating any of the provisions of this act shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding ——— Dollars or by imprisonment in the county jail for a period not exceeding ———, or by both such fine and imprisonment.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

Section 4. [Severability provision].

Section 5. [Effective date].

COMMON CAUSE

An Act requiring open meetings of public bodies

Section 1. *Public Policy.* It is essential to the maintenance of a democratic society that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy. Toward this end, this act shall be construed liberally.

Section 2. *Definitions.* As used in this act:

. . .

(b) "Public body" means any administrative, advisory, executive, or legislative body of the state or local political subdivision of the state, or any other entity created by law, that expends or disburses or is supported in whole or in part by tax revenue or that advises or makes recommendations to any entity that expends or disburses or is supported in whole or in part by tax revenue, including but not limited to any board, commission, committee, subcommittee, or other subsidiary thereof.

. . .

Section 3. *Open Meetings.* Every meeting of all public bodies shall be open to the public unless closed pursuant to sections 4 and 5 of this act.

Section 4. *Closed Meetings.* A public body may hold a meeting closed to the public upon an affirmative vote, taken at an open meeting for which notice has been given pursuant to section 6 of this act, of two thirds of its constituent members. A meeting closed to the public shall be limited to matters allowed to be exempted from discussion at open meetings by section 5 of this act. . . .

Section 5. *Exceptions.* (a) A public body may hold a meeting closed to the public pursuant to section 4 of this act for one or more of the following purposes:

(1) discussion of the character, as opposed to the professional competence, or physical or mental health of a single individual provided that such individual may require that such discussion be held at an open meeting; and provided that nothing in this subsection shall

permit a meeting closed to the public for discussion of the appointment of a person to a public body;

(2) strategy sessions with respect to collective bargaining or litigation, when an open meeting would have a detrimental effect on the bargaining or litigating position of the public body;

(3) discussion regarding the deployment of security personnel or devices; and

(4) investigative proceedings regarding allegations of criminal misconduct.

(b) This act shall not apply to any chance meeting, or a social meeting at which matters relating to official business are not discussed.

. . .

. . .

(d) This act shall not prohibit the removal of any person or persons who willfully disrupt a meeting to the extent that orderly conduct of the meeting is seriously compromised.

Section 6. *Notice.* (a) All public bodies shall give written public notice of their regular meetings . . . .

. . .

Section 8. *Voidability.* Any final action taken in violation of sections 3 and 6 of this act shall be voidable by a court of competent jurisdiction. A suit to void any final action must be commenced within 90 days of the action.

. . .

Section 10. *Penalties.* Any person knowingly violating any provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $500 or imprisoned not more than six months, or be both fined and imprisoned.

. . .

Notes and Questions

1. Are the exceptions included in the Common Cause draft wise? Should others be added?

2. What enforcement and remedial devices make the most sense in this type of legislation?

3. Should the press be given any special rights in such legislation?

4. Adams listed 11 provisions that would exist in an "ideal" law. Among these were a statement of public policy favoring openness; requirements that various types of groups, ranging from state legislature to city councils, be open; provision for legal recourse to halt secrecy; a declaration that action taken at illegal meetings was null

and void; and penalties for those who violate the law. He ranked each state's open meeting law against these criteria. The rankings ranged from Tennessee with 11 to Maryland and Rhode Island with one. Editor & Publisher, Aug. 24, 1975, p. 11.

5. As noted earlier, although judges have been reluctant to order public or press admitted to government activities, the person in control of the event may choose to limit access. Thus, in 1974 President Ford began to exclude all reporters from mingling with guests at White House receptions. In 1975, he announced new rules under which a small pool of reporters, carrying only notebooks, might circulate at such events "with the understanding that the pool reporters will respect the privacy of personal conversations between myself or Mrs. Ford and our guests." Editor & Publisher, Sept. 13, 1975, p. 15. Should this be under the President's sole control?

6. *Criminal Liability.* Reporters who attempt to obtain information or documents not legally available risk a variety of civil and criminal sanctions. The latter will be more important than the possible civil action government might bring. Much of the earlier discussion in connection with obtaining information from unwilling private sources, is relevant here, particularly the distinction between actively seeking and knowingly receiving, and the likelihood that statutes barring theft of property may apply as well to government as to private property.

But government has not relied on statutes of general application to protect its secrets. Specific legislation has been enacted by both state and federal governments. For example, the mail clerk in *Kunkin* was charged with, and pleaded guilty to, violation of California Government Code § 6201 providing punishment for government employees who have custody of "any record, map, or book, or of any paper or proceeding of any court," and who steal it. See p. 123, supra. As Henkin noted in the excerpt that introduced this section, although government protects itself by self help the criminal law still plays an important part. The federal government, for example, punishes theft of things of value belonging to the United States, 18 U.S.C. § 641, and concealment and removal of public documents and records, 18 U.S.C. § 2071, as well as conspiracy to commit these acts. See Dennis, Purloined Information as Property: A New First Amendment Challenge, 50 Journ.Q. 456 (1973). Several states define explicit crimes based on unauthorized release of a grand jury transcript, e. g., N.Y.Penal Law § 215.70. These, however, usually apply to court reporters and others who improperly release the transcripts rather than to those who receive them.

The other major area of special government protection involves state secrets relating to national security. These are not aimed solely

at those in custody of documents who improperly release them; some provisions also make it criminal to retain such documents knowing their significance, and still other provisions make it a crime to publish them. These provisions, 18 U.S.C. §§ 791–798, and 952, received relatively little attention until the controversial Pentagon Papers episode. There, numerous volumes of classified documents relating to the Viet Nam war were made public by certain newspapers that had received them from Daniel Ellsberg, who had access to them while a consultant at the Rand Corporation. The applicability of the provisions to Ellsberg was never tested definitively because his trial was aborted due to government misconduct. The possible liability of the newspapers that printed excerpts from the documents was not raised directly because no criminal prosecution was ever brought against the press. These provisions were discussed at length in the case involving the government's efforts to enjoin the press from printing the excerpts, and we will consider them when we consider that case, at p. 379, infra.

7. In addition to criminal sanctions, Congress is empowered to impose conditions of secrecy upon its employees and members, and to enforce them by conducting inquiries and punishing violators. In a famous confrontation in 1976, a House committee studying government intelligence operations voted to make its report public. The full House overruled the committee and voted not to release the report. CBS reporter Daniel Schorr obtained a copy from a Congressional employee and made it public. After extensive efforts to identify the source failed, the House ethics committee called Schorr. He refused to identify his source or to aid the inquiry, relying on a First Amendment privilege of journalists not to reveal confidential sources. He was warned that he might be cited for contempt of Congress. In such a procedure the committee would recommend that the House find Schorr in contempt. The committee in fact was so split that it did not ask the House to act, thus avoiding any court test of Schorr's position. N.Y. Times, Sept. 23, 1976, pp. 1, 15.

A related episode occurred in 1971 when a House committee was investigating a claim that a CBS television documentary had been unfair. It subpoenaed the "outtakes"—film shot but not used in the actual program. When the president of CBS refused to comply with the subpoena on First Amendment grounds, the committee recommended that he be cited for contempt. The full House refused to go along and the matter died.

Should the First Amendment claim be judged differently when made in a legislative, as opposed to a judicial, proceeding?

8. A participant in a media conference asked, "what steps can journalists take to use the devices of the police state? Can we break the

law to get information?" Reporter Earl Caldwell was quoted in Editor & Publisher, Mar. 15, 1975, p. 18, as answering: "There are times when you have to break the law to do things. Reporters have a long standing practice of getting information from telephone records. Most recently the FBI used phone records and reporters called foul. What makes reporters any better to break the law?"

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3. Selective Access to Records and Live Events

In this chapter we are concerned primarily with the efforts of newsgatherers to obtain information that sources will not divulge to anyone. For one reason or another, the possessor does not want the information made public. In this section we deal with an ancillary problem: the willingness of the source to give information to only one or a few of those who seek it. This may sound like the "scoop" that has long been standard journalism practice; the situation may, however, present troublesome legal problems.

Private sources who are free to decline all requests for information, may also respond selectively to such requests. Our concern will be whether the government may likewise decide to release information to some but not all. Clearly a decision to honor one request destroys the argument that the information must not be disclosed. Government officials must then justify their selectivity in terms of the criteria that governed the choice.

BORRECA v. FASI

United States District Court, District of Hawaii, 1974.
369 F.Supp. 906.

[Fasi, Mayor of Honolulu, concluded that Borreca, city hall reporter for the city's largest paper, the Star-Bulletin, was "irresponsible, inaccurate, biased, and malicious in reporting on the mayor and the city administration." As a result, he ordered his administrative assistant, Loomis, to exclude Borreca from his office and refused to talk to Borreca "until Hell freezes over." Loomis announced general news conferences and excluded Borreca from them, and Fasi informed the paper that any other reporter would be welcome. The paper declined to change the assignment. Borreca and the newspaper sought an injunction and damages. The following opinion was issued in response to plaintiffs' motion for a preliminary injunction. For purposes of this motion, the reporter admitted the mayor's charges about his reporting. The judge concluded that the First Amendment provides a limited right of reasonable access to news, including access

to public galleries, press rooms, and press conferences dealing with government.]

SAMUEL P. KING, DISTRICT JUDGE.

. . . The limitations that may be placed by state action on this right of access are determined by a balancing process in which the importance of the news gathering activity and the degree and type of the restraint sought to be imposed are balanced against the state interest to be served. Where First Amendment rights are involved, the asserted state interest must be compelling and the proposed state action must be the least restrictive means available for the asserted governmental end. [ ]

. . .

Mayor Fasi argues that his ostracism of Borreca and ultimatum to the Honolulu Star-Bulletin are not invasions of freedom of the press or do not involve state action.

With respect to the first point, the mayor argues that nothing he has done "subjects, or causes to be subjected . . . [Borreca or the Honolulu Star-Bulletin] . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States, because the Honolulu Star-Bulletin is not prevented from having a representative at a news conference as anyone other than Borreca would be admitted, Borreca is not denied access to news as he may obtain a copy of each news release and of any other written material, and the right of access to news does not include a requirement that Mayor Fasi respond to Borreca's questioning.

One would have to be naive to believe that an individual reporter is solely responsible for the manner in which that reporter's news stories appear in print. Thus Mayor Fasi's objections to Borreca's performance as a reporter can equally be taken as objections to the Honolulu Star-Bulletin's approach to city hall news. Requiring a newspaper's reporter to pass a subjective compatibility-accuracy test as a condition precedent to the right of that reporter to gather news is no different in kind from requiring a newspaper to submit its proposed news stories for editing as a condition precedent to the right of that newspaper to have a reporter cover the news. Each is a form of censorship.

News conferences are not held solely or even primarily for the benefit of the news media. Structured news conferences on limited topics covered by predistributed news releases serve the purpose of the person holding the conference as much if not more than of the news media. Manipulation of the news is a highly developed technique, utilizing staff news specialists, self-serving handouts, pro-

grammed appearances, and positive and negative reinforcement in dealing with reporters and news media. Hand-picking those in attendance intensifies the manipulation. In some respects, therefore, these events are less newsworthy than a freer give and take between interviewers and interviewee. To say, however, that attendance at such a news conference is not a legitimate news gathering activity is absurd.

As a general proposition, the mayor is quite correct in his position that he is not required to respond in any way to any question put to him by any representative of any news media. Whether repeated selective discriminatory unreasonable refusal to respond to all questions by an individual reporter would form the basis of an action for damages under 42 U.S.C. § 1983 is not before the court at this time. Certainly no mandatory injunction requiring the mayor to answer questions would be granted, if for no other reason than its unenforceability.

With respect to the mayor's second point, he argues that his news conferences are private affairs held in his private office at his discretion and his actions in connection with such conferences are not "under color of any statute, ordinance, regulation, custom or usage," of the State of Hawaii.

The mayor is too modest. As the chief executive of the City and County of Honolulu, his statements on municipal and county operations and concerns are embryonic executive directives. They are public communications put forth by him in his official capacity. If he chooses to hold a general news conference in his inner office, for that purpose and to that extent his inner office becomes a public gathering place. When he uses public buildings and public employees to call and hold general news conferences on public matters he is operating in the public and not the private sector of his activities. His oral order to his staff to exclude Borreca from his office is an executive directive by him in the exercise of his authority as mayor which authority he derives from the constitution and laws of the State of Hawaii. The actions of his staff members in excluding Borreca are actions by public employees in their official capacities taken pursuant to the mayor's directive. [ ]

A free press is not necessarily an angelic press. Newspapers take sides, especially in political contests. Newspaper reporters are not always accurate and objective. They are subject to criticism, and the right of a governmental official to criticize is within First Amendment guarantees.

But when criticism transforms into an attempt to use the powers of governmental office to intimidate or to discipline the press or one of its members because of what appears in print, a compelling gov-

ernmental interest that cannot be served by less restrictive means must be shown for such use to meet Constitutional standards. No compelling governmental interest has been shown or even claimed here.

The mayor suggests that there is no requirement that he hold any news conferences, and that he may select individual representatives of the news media with whom to meet in situations other than general news conferences. The mayor is no doubt right again, as a general proposition. On the other hand, it is not necessary to the decision of the pending aspect of the motion for a preliminary injunction to discuss, and I therefore express no opinion on the possible application to these situations of the equal protection clause of the Fourteenth Amendment, or of the possible implications of de facto discrimination against individual news gatherers or against selected segments of the news media.

. . .

Conclusions of Law

Plaintiffs are entitled to a preliminary injunction enjoining Defendant Frank F. Fasi from preventing, or from instructing or advising any person to prevent, Plaintiff Richard Borreca from attending any press conference on the same basis and to the same extent that other news reporters attend press conferences.

Notes and Questions

1. If the mayor's inner office is too small to accommodate all who want to attend is there any obligation to move to a larger room? If not, are there legal constraints on how the mayor may choose those who will attend?

2. Does this case suggest the mayor can avoid Borreca by not calling general press conferences and by substituting "invitation only" sessions? If there are ten reporters who normally cover the mayor, is there a difference between favoring two of those ten by inviting them to a private session and, on the other hand, excluding two and inviting the other eight to a private session?

3. What if the mayor's inner office is large enough for ten, but the mayor says that only three may take part and that this is always to be decided by lot?

4. In Los Angeles Free Press, Inc. v. City of Los Angeles, 9 Cal.App. 3d 448, 88 Cal.Rptr. 605 (1970) a weekly newspaper sued to require the city, its police chief, and the county sheriff to issue press identification cards to its reporters. The paper had a circulation of over 85,000 copies per week and employed eight full-time reporters and

photographers. The card was essential for crossing police lines and entering areas closed to the public at crimes, fires or natural disasters, and also for gaining admission to press conferences called by police authorities. From the evidence, the trial judge concluded that the plaintiff carried no regular "hard core police-beat or fire news as such" and that "the emphasis of the Free Press is not on crime news between individuals and that from its inception the Free Press was designed to report news of civil riots, peace demonstrations, and conflicts between the individual and the state." He dismissed the complaint. On appeal, the dismissal was affirmed:

> If restrictions imposed on the public by the use of police lines do not deprive members of the public of their liberty without due process of law, and if petitioner, despite its press status, has no greater right to cross police lines than other members of the public, has petitioner nevertheless been denied equal protection of the laws by the operation of a policy which grants priority to cross police lines to those members of the press who regularly report police and fire news? We think not. Because of the necessity in terms of public order and safety to restrict access to certain events, respondents could either deny the right to cross police lines to all members of the public, or they could distinguish between members on some reasonable basis. Regular coverage of police and fire news provides a reasonable basis for classification of persons who seek the privilege of crossing police lines. It is true, as petitioner points out, that respondents could have defined the class of persons to be given priority in crossing police lines by some other standard. Indeed, respondents probably could have granted the privilege of crossing police lines on a first-come-first-served basis. However, the issue under the equal protection clause of the Fourteenth Amendment is whether the classification upon which the unequal treatment rests is a reasonable one. . . . Here, the purpose of granting priority to some to cross police lines is to allow the public to gain information about crimes, fires, disasters, and the like, without jeopardizing public order and safety in the process. This purpose is served by a classification of members of the public into those who regularly report such events in the public media and those who do not and by a grant of priority to those who so report. The classification is a reasonable one for constitutional purposes, even though other classifications might have achieved the same result.

The Supreme Court of California denied a hearing and the Supreme Court of the United States denied certiorari, 401 U.S. 982 (1971). Justices Black, Douglas and Brennan dissented from the denial of certiorari.

Compare the approaches taken by the courts in *Borreca* and *Free Press*. What interests were at stake in each of these cases?

Might it be found that the criteria used by the government were improper because papers like the Free Press should each get one card before a major urban paper got its 20th card? Or might it be found that the criteria used were acceptable if used only to limit access to calamities but not to limit admission to press conferences?

5. In Dayton Newspapers, Inc. v. Starick, 345 F.2d 677 (6th Cir. 1965), plaintiff alleged that its reporters were kept by the police from covering a major fire in downtown Dayton although reporters from a competing newspaper were allowed to enter those same areas. The trial judge dismissed the complaint but the court of appeals reversed. Viewing the suit as one by the newspaper "to vindicate its right . . . to gather news for publication without discrimination or uncalled for interference," the court held that the complaint's allegations required the defendant officials to justify their actions. Note the difference in the case if no one had been allowed behind the barriers.

6. Media coverage of Congress is analyzed in Consumers' Union v. Periodical Correspondents' Ass'n, 365 F.Supp. 18 (D.D.C.1973). Under rules promulgated by a Congressional committee and administered by journalists, the publisher of Consumer Reports was denied membership in the defendant association, and thus denied choice gallery space, special media facilities, and admission to daily press conferences held by Congressional leaders. The denial was based on the fact that the publication was not "owned and operated independently of any industry, business, association, or institution" as required by the Rules. The acknowledged goal was to exclude "advocacy groups" from operating "under the guise of journalists." The three other press galleries had no such limitations. While recognizing at most a limited constitutional right to gather government news, the judge thought the First and Fifth Amendment claims much stronger where government has opened a source to some reporters but barred it to others. Barring reporters for all advocacy periodicals from on-the-record press conferences violated the reporters' rights and adversely affected the content and quality of reported news. He concluded that publications could be excluded only under "carefully drawn definite rules developed by Congress and specifically required to protect its absolute right of speech and debate or other compelling legislative interest." The court of appeals reversed on the ground that the actions of the association were under express delegation from Congress and thus were immune from judicial consideration. 515 F.2d 1341 (D.C.Cir. 1975), certiorari denied 423 U.S. 1051 (1976).

7. Rejections of individual applications for press cards have presented different problems. See Watson v. Cronin, 384 F.Supp.

652 (D.Colo.1974) involving a rejection because of the applicant's prior conviction for forgery and pending trial for robbery. The court upheld the city's claim that press cards, which admit persons behind police lines and to sensitive areas, may be limited to trustworthy persons. The court noted that plaintiff had not been harmed in his employment by lack of a card. Although the judge was sympathetic to efforts to rehabilitate former criminals he found no constitutional violation in the city's action.

8. In Forcade v. Knight, 416 F.Supp. 1025 (D.D.C.1976), two reporters sued the Secret Service for refusing to admit them to White House briefings and press conferences. Forcade was a reporter for the Alternative Press Syndicate, a news service representing more than 200 subscribing newspapers. Sherrill was an author. The Secret Service had barred them "for reasons of security" but had not elaborated. After being sued, the Secret Service provided further information including reports that Sherrill had assaulted a governor's press secretary and had "skipped bond" on another assault charge. Forcade was reported to have several aliases, to have been arrested for such things as burglary and possession of explosives and to have thrown glasses of water at a meeting and a pie at a United States Commissioner. He had been a member of the Yippies and the Zippies and had advocated violence at the Democratic National Convention in 1972. The judge thought the most serious charge against Forcade was that he had "allegedly stated that he intends to place a gun within a camera and gain access to the White House with the intention of shooting the President."

The plaintiffs claimed that their access could be restricted in the interest of presidential safety but that any restrictions must be imposed in a nondiscriminatory manner and pursuant to narrowly defined guidelines. The judge first concluded that *Pell* and *Branzburg* gave members of the press a First Amendment right to gather news. He also noted that "denial of White House access to differing viewpoints of the press deprives the public of the uninhibited, robust debate which is at the heart of the First Amendment." The judge concluded that the Service must promulgate standards to ensure that restrictions on access are based on protection of the President's physical safety and not on the political tenets of the reporter. If the Service denies access under the standards it must provide a written decision specifying the grounds for denial and must then afford plaintiffs "an adequate opportunity to rebut or explain any evidence or grounds on which the agency bases its denial."

If the plaintiffs then seek judicial review of a denial of access, should the judge review the Secret Service decision to see if it is reasonable or should the judge make his own decision on what is reason-

able? Do you see the difference? What if the Service argues that the President's safety would be compromised by making certain negative information available to the applicant? Is a separation of powers problem present here? Throughout the case, the only interest asserted to limit access was physical safety. Might the government also assert that reporters with a history of disruptive acts are likely to interfere with press briefings and conferences?

7. *Tape Recorders.* Some states have banned certain reportorial aids for all reporters. Thus, the heads of both houses of the Maryland legislature barred reporters from attending sessions with "tape-recording devices." This was challenged by reporters who claimed that "speed and accuracy are essential attributes of media news services" and that recorders will ensure accuracy. Their claims were rejected in Sigma Delta Chi v. Speaker, Maryland House of Delegates, 270 Md. 1, 310 A.2d 156 (1973). Conceding that newsgathering was entitled to some First Amendment protection, the court unanimously denied that banning tape recorders infringed such a right—plaintiffs were not prevented from carrying out their usual duties and the recorders were usable anywhere in the State House except in the Chambers. Greater accuracy, although desirable, did not merit constitutional protection.

8. *Television in the Courtroom.* With the expansion of television journalism and the popularity of fictitious courtroom dramas, inevitably that medium would seek to enter the courtroom. In the only major case in this field so far, Estes v. Texas, 381 U.S. 532 (1965), defendant had been indicted in the Texas state courts for "swindling" —inducing farmers to buy nonexistent fertilizer tanks and then to deliver to him mortgages on the property. The nature of the charges and the large sums of money involved, attracted nationwide interest. Texas was one of the two states that then permitted televised trials. Over defendant's objection, the trial judge permitted televising of a two-day hearing before trial. For the trial itself, facilities had been prepared for discreet coverage by television and newsreel cameras, but because of defendant's continued objections, only the opening and closing arguments were carried live with sound. Other segments were filmed for possible use on regularly scheduled newscasts. The state courts upheld defendant's conviction and rejected his claim that he had been denied his right to a fair trial because of the televising.

The Supreme Court reversed and upset the conviction. In his majority opinion Justice Clark concluded that the use of television at the trial involved "such a probability that prejudice will result that it is deemed inherently lacking in due process" even without any showing of specific prejudices. His major concerns were empirical. Most

important was the likelihood of an impact on the jurors, both in terms of exaggerating the importance or the newsworthy aspects of the trial, and, even more fundamental, allowing members of the community more readily to pressure the jurors about the outcome. The court was also concerned about what it assumed would be significant pressure on other participants. Some witnesses may become "demoralized and frightened, some cocky and given to overstatement." There was also concern that the trial judge, who is elected in virtually all states, would be tempted to take actions that would please the media and the community. Finally, there was concern about the additional pressure on the defendant. "A defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or in a city or nationwide arena. The heightened public clamor resulting from radio and television coverage will inevitably result in prejudice."

Justice Clark denied that his approach discriminated against broadcast reporters:

> Nor can the courts be said to discriminate where they permit the newspaper reporter access to the courtroom. The television and radio reporter has the same privilege. All are entitled to the same rights as the general public. The news reporter is not permitted to bring his typewriter or printing press. When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case.

Three of the justices who joined Justice Clark also concurred specially. Chief Justice Warren, joined by Justices Douglas and Goldberg, deplored the degrading impact of television on the "hallowed sanctuary" of the courtroom: "The televising of trials would cause the public to equate the trial process with the forms of entertainment regularly seen on television and with the commercial objectives of the television industry." He envisioned trials being televised like football games, with expert commentators and "persons with legal background [hired] to anticipate possible trial strategy, as the football expert anticipates plays for his audience." Further, "the function of a trial is not to provide an educational experience; and there is a serious danger that any attempt to use a trial as an educational tool will both divert it from its proper purpose and lead to suspicions concerning the integrity of the trial process."

Justice Harlan, who provided the crucial fifth vote for reversal, joined the majority opinion only to the extent that it applied to televised coverage of "courtroom proceedings of a criminal trial of widespread public interest," "a criminal trial of great notoriety," and "a heavily publicized and highly sensational affair." In such cases he was worried about the impact on jurors, and he shared Justice Clark's

view that it was not necessary here to show identifiable prejudice. He volunteered that he would reconsider the question when television became so commonplace "as to dissipate all reasonable likelihood that its use in the courtrooms may disparage the judicial process."

Justices Black, Brennan and White joined Justice Stewart in dissent. They condemned the introduction of television into the courtroom as "unwise" but could find nothing in the record to show that in this case petitioner was deprived of any constitutional right. Justice Stewart sensed nuances in the majority opinions that seemed "disturbingly alien to the First and Fourteenth Amendments' guarantees against federal or state interference with the free communication of information and ideas. The suggestion that there are limits on the public's right to know what goes on in the courts causes me deep concern." The fear that nonparticipants might get the "wrong impression" from "unfettered reporting and commentary contains an invitation to censorship which I cannot accept."

Why should participants in a trial be expected to react differently to television than to newspaper reports and radio reports of what has gone on in the courtroom? If a new trial is needed (after a conviction is reversed on appeal) will the fact that the first trial was televised make it more difficult to find jurors for the second trial than if radio and newspapers alone had reported the first trial? If jurors' names are known in a notorious trial, does television add to the pressure on the jurors?

The press has traditionally been allowed to witness and report verbally on executions in state prisons. During the moratorium on executions while the courts were weighing the constitutionality of capital punishment, First Amendment protections for television were expanding. In 1977, after the ban was lifted, television broadcasters in Texas sought permission to film executions for possible showing on television. When state authorities refused, the telecasters sued. A District Judge ruled against the state on the ground that since print media were admitted, there was no basis for denying pool cameras the same access. The state has announced that it will appeal the ruling. N. Y. Times, Jan. 8, 1977, p. 44. Are there differences between the two types of media that might justify excluding television from such events?

9. In 1976 two states began experimenting with televised trials in both criminal and civil cases. The Supreme Courts of Alabama and Florida will evaluate the results in considering the introduction of broadcasting. Guidelines for the experiment are reported in Editor & Publisher, Feb. 21, 1976, p. 16. Canon 3A(7) of the Code of Judicial Conduct of the ABA prohibits judges from allowing broadcasting in the courtroom, with very few exceptions. A proposal from an

ABA task force to study the situation was rejected by the ABA's House of Delegates by voice vote in 1975.

10. *Courtroom Sketching.* Television news directors have resorted to sketching of the courtroom scene to provide a visual dimension to their reports of judicial proceedings. That practice came under attack during the pretrial proceedings involving the trial of the "Gainesville Eight," who were charged with conspiring to disrupt the 1972 Republican National Convention. The trial judge decreed that no sketches be drawn in the courtroom. On appeal, the court refused to accept "a sweeping prohibition of in-court sketching where there has been no showing whatsoever that sketching is in any way obtrusive or disruptive." United States v. Columbia Broadcasting System, Inc., 497 F.2d 102 (5th Cir. 1974). Would any of the views in *Estes* indicate support for a ban on sketching?

11. *The Nixon Tapes.* In United States v. Mitchell (In re National Broadcasting Co.), 386 F.Supp. 639 (D.D.C.1975), the question was whether copies of the tapes that had been made in the White House and that had been played at the criminal trials arising out of Watergate should be made available to members of the press and public who requested them. Judge Gesell first held that the normal rule that the public has a right to inspect and obtain copies of judicial records should apply in this case. Then, however, he expressed concern about the possible uses to which the tapes might be put for commercial purposes and the administrative difficulties of making copies that included only material played in court. He ordered the broadcasters who were seeking the copies to present a plan for court approval that would make the copies available without profit or commercialization and would assure that all who wanted copies could obtain them without special favoritism or priority. He rejected the plans submitted as inadequate.

The case was then returned to Judge Sirica, who decided, in an unreported order, that in no event were the tapes to be made available to the public until after the conclusion of the appeals by those convicted in the criminal trial. He expressed concern that the release of the tapes would prejudice any retrial that might be necessary.

On appeal, Judge Sirica's order was reversed. The majority held that the general rule making evidence and exhibits used in court available to the public took priority over concerns about the possible prejudice at any retrial. The court noted further that all but one of the convictions had been affirmed. The tapes were to be made available as soon as the inevitable problems of reproduction and distribution could be resolved. The dissenter thought Judge Sirica had been wise in attempting to avoid prejudice and the possibility of

tampering with evidence that might be needed for a retrial. "Tapes are especially subject to the possibility of alteration and erasure, as we all know from the incidents involving these tapes, and should not be subjected to any unnecessary handling that might damage them or constitute good cause in a subsequent trial for a court to reject them as unreliable evidence." —— F.2d —— (D.C.Cir.1976). Mr. Nixon is seeking Supreme Court review of the decision. See Schmidt, Why We Haven't Heard the Nixon Tapes, Columbia Journalism Rev., Sept./Oct. 1975, p. 53.

12. Broadcasters and some legislators have been trying to get authorization for live coverage of Congress, but a House ad hoc committee considering the issue has been deadlocked. Broadcasting, June 7, 1976, p. 45. What are the different aspects of this question in these two branches of government?

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4. Newsgathering in the Judicial Process—Including Questions About Prejudicial Publicity

a. Introduction

The judicial branch, unlike the other two, has been the object of considerable litigation as to which of its functions are to be open to public scrutiny. A specific constitutional provision, held to be solely for the benefit of the accused and not addressed to the press, is basic to our discussion. The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." No directive in the constitution affects the conduct of legislative or executive proceedings even to this extent.

The emphasis throughout this section will be on criminal proceedings. The interest of the press in the judicial process, at least at the trial level, has been devoted almost exclusively to dramatic criminal cases involving either sensational crimes or prominent persons. The press has fought hard against exclusion from these cases. Some defendants in criminal cases have therefore sought to bar the press, and necessarily also the public, from various pretrial and trial phases of their cases lest publicity prejudice the judge or, far more likely, the jury that will ultimately hear the case. Thus, the role of the jury in criminal cases and the strong press (and presumably public) interest in particular criminal cases combine to create a potential conflict in criminal cases between defendants and the press. This problem has been called "fair trial-free press" by the bar and "free press-fair trial" by the press. Many commentators suggest that the problem is

monolithic: a broad confrontation between two important segments of society. This book regards the conflict as having several separable aspects and analyzes each one as it arises.

The major, but not the only argument of the press is framed in terms of the public's "right to know" about the functioning of the judiciary. In addition, the press argues that its presence may sometimes directly help the defendant. As well as serving a "watchdog" function just by being present, deterring potential judicial or prosecutorial excesses, a reporter sometimes learns enough about a case to be moved to investigate the charges and eventually find evidence that exonerates the defendant.

Closing civil proceedings has not been a problem, except, as we shall see, when famous people are involved. The cases are either too uninteresting for press coverage, too complicated, or too lengthy to sustain a reader's interest. Even in the few civil cases that do interest the press, the likelihood of prejudice is small. Except for personal injury cases, which are usually uneventful for the observer, most civil cases do not involve juries, and other forms of prejudice are unlikely. The testimony of witnesses rarely involves emotional experiences similar to those in dramatic criminal cases. Thus if the press wanted to attend civil trials there would be little objection.

Prejudicial publicity may arise in two contexts. One involves efforts to influence judicial behavior by writing articles or editorials about pending cases. This problem is discussed at p. 255, infra. The second context centers on the institution of the jury. In the early days jurors were likely to know of the events in question, but for several centuries, the courts have insisted that jurors be impartial. This has not meant that they must be totally ignorant of the events in their community, but, rather, that they be willing and able to reach a verdict solely on the basis of the evidence presented at the trial. Of course jurors' biases might come from many sources other than publicity, such as the defendant's race, religion, occupation, accent, way of walking or dressing, or political affiliation. It is sometimes difficult to determine whether a juror will be impartial. The conventional approach has been to ask jurors questions during the preliminary screening, known as voir dire, that would enable the judge and the lawyers to detect bias. Jurors who convincingly deny bias and assert an ability to be "impartial" will be seated unless extrinsic evidence indicates that the juror either was dishonest or would probably not be psychologically able to disregard some source of bias. If jurors turned out to be unable or unwilling to serve impartially after being selected, the defendant could seek a new trial.

In order to understand some of the problems raised in this area, it is necessary to know that certain types of evidence must be excluded

from criminal trials. The rule of exclusion means that the information is not to be considered in determining the guilt or innocence of the defendant.

Three exclusions are most likely to cause possible problems of prejudicial publicity. One is the rule that an accused's prior record of convictions is not generally admissible in evidence unless the defendant chooses to testify. The fear is that if jurors learn that a defendant has a prior record they may be tempted to convict even though the prosecution may have failed to establish guilt beyond a reasonable doubt in this particular situation.

The second is that confessions made by the defendant before the trial are not admissible in evidence at the trial unless voluntarily made. Even if other evidence shows the confession accurate, to accept a coerced confession would encourage law enforcement authorities to abuse their power.

The third major variety of inadmissible evidence involves items seized in an unlawful search. In these cases, the evidence is almost always trustworthy—and often devastating. Nonetheless, it is excluded if the search was illegal. Again, the point is to discourage the state from engaging in illegal behavior.

In all three situations, since the evidence is inadmissible in the courtroom, the courts seek to keep jurors from gaining access to such information by other means.

In considering pretrial publicity that might introduce bias into trials, an empirical question must be asked about the effect upon jurors of having read or heard certain information about the defendant or a forthcoming trial. The obvious importance of this recurring conflict between the rights of fair trial and free press makes it desirable to look beyond our intuition as to the role of the media in the community before a criminal trial. Many empirical studies have explored the impact on the later decisions of jurors of information disseminated before trial. At the very least, the techniques and the results do not dictate the conclusion that no prejudice results from the publication. Thus the courts may well continue to upset convictions reflecting extensive prejudice—and we may expect lawyers and judges to seek ways to conduct proceedings that will minimize the likelihood that prejudicial publicity will reach the jurors. This may mean either silencing the media or withholding information. Since silencing the media has been thought more difficult to sustain, the latter course is being explored.

Among the empirical studies, see Simon, Murder, Juries and the Press, Trans/Action 40 (May-June 1966), Kline and Jess, Prejudicial Publicity: Its Effect on Law School Mock Juries, 43 Journ.Q. 113 (1966), Tans and Chaffee, Pretrial Publicity and Juror Prejudice: A

Field Study, 43 Journ.Q. 647 (1966); Riley, Pretrial Publicity: A Field Study, 50 Journ.Q. 17 (1973).

Perhaps the most significant recent study is Padawer-Singer and Barton, The Impact of Pretrial Publicity on Jurors' Verdicts, in R.J. Simon, ed. The Jury System in America—A Critical Overview 125 (1975). Juries drawn from actual jury pools listened to a three-hour audiotaped trial. Just before the trial, some jurors read neutral newspaper clippings while others read prejudicial clippings indicating that the defendant had a prior criminal record and had made and then retracted a confession. A second phase of the experiment paralleled the first except that some of the new juries underwent voir dire, while others did not. The authors reported observing "a definite impact of newspaper stories which contain information as to the defendant's previous record and an alleged retracted confession." They also have tentatively concluded that "screening and instructing jurors," may help counteract the effect of the publicity. Do the experiment's conditions reflect reality? See the related article, Padawer-Singer et al, Voir Dire by Two Lawyers: An Essential Safeguard, 57 Judicature 386 (1974).

The current concern arose when the Court denied certiorari in Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950). Justice Frankfurter filed a separate opinion to express his alarm about the torrent of pretrial publicity in the case and to refer to the use of the contempt power in England to prevent virtually all reporting on pending cases. The following year, the Court reversed the convictions in a celebrated rape case because of the improper selection of the grand jury. Shepherd v. Florida, 341 U.S. 50 (1951). Justice Jackson, joined by Justice Frankfurter, concurred on the ground that mob violence and tensions fostered by the press coverage had made a fair trial impossible: "prejudicial influences outside the courtroom, becoming all too typical of a highly publicized trial, were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated."

In 1959, the Court reviewed a federal conviction for illegally dispensing pills, Marshall v. United States, 360 U.S. 310 (1959). During the trial seven jurors were exposed to one or two newspaper articles reporting that defendant had once been convicted of forgery and had practiced medicine without a license. Each of the seven told the judge that "he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles." Even though the trial judge had not permitted the government to introduce evidence about the defendant's prior medical practice he denied a

mistrial. The Court reversed and ordered a new trial. "The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. [ ] It may indeed be greater for it is then not tempered by protective procedures." In the exercise of its "supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts," the Court, while not deciding a constitutional question, ordered a new trial. Justice Black dissented without opinion.

The stage was set for the Court's first confrontation with the problem in constitutional dimension.

IRVIN v. DOWD

Supreme Court of the United States, 1961.
366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751.

[Irvin was convicted of murder in the state courts of Indiana and sentenced to death. Before the trial one change of venue had been granted—to Gibson County. Motions for another change and for continuances, delays in the start of the trial, were denied. The state courts affirmed his conviction. Irvin then sought to upset his conviction in the federal courts by claiming that the state had denied him his constitutional right to an impartial jury because the jury that convicted him had been biased. The court of appeals had rejected his application for habeas corpus, the technical term for a prisoner's claim that he is being restrained illegally.]

MR. JUSTICE CLARK delivered the opinion of the Court.

. . .

England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury. This right has become as much American as it was once the most English. Although this Court has said that the Fourteenth Amendment does not demand the use of jury trials in a State's criminal procedure, [ ], every State has constitutionally provided trial by jury. [ ] In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. . . .

It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected

to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. [ ]

. . .

. . . But as Chief Justice Hughes observed in United States v. Wood, 299 U.S. 123, 145–146 (1936): "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula."

Here the build-up of prejudice is clear and convincing. An examination of the then current community pattern of thought as indicated by the popular news media is singularly revealing. For example, petitioner's first motion for a change of venue from Gibson County alleged that the awaited trial of petitioner had become the *cause célèbre* of this small community—so much so that curbstone opinions, not only as to petitioner's guilt but even as to what punishment he should receive, were solicited and recorded on the public streets by a roving reporter, and later were broadcast over the local stations. A reading of the 46 exhibits which petitioner attached to his motion indicates that a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against him during the six or seven months preceding his trial. The motion further alleged that the newspapers in which the stories appeared were delivered regularly to approximately 95% of the dwellings in Gibson County and that, in addition, the Evansville radio and TV stations, which likewise blanketed that county, also carried extensive newscasts covering the same incidents. These stories revealed the details of his background, including a reference to crimes committed when a juvenile, his convictions for arson almost 20 years previously, for burglary and by a court-martial on AWOL charges during the war. He was accused of being a parole violator. The headlines announced his police line-up identification, that he faced a lie detector test, had been placed at the scene of the crime and that the six murders were solved but petitioner refused to confess. Finally, they announced his confession to the six murders and the fact of his indictment for four of them in Indiana. They reported petitioner's offer to plead guilty if promised a 99-year sentence, but also the determination, on the other hand, of the prosecutor to secure the death penalty, and that petitioner had

confessed to 24 burglaries (the *modus operandi* of these robberies was compared to that of the murders and the similarity noted). One story dramatically relayed the promise of a sheriff to devote his life to securing petitioner's execution by the State of Kentucky, where petitioner is alleged to have committed one of the six murders, if Indiana failed to do so. Another characterized petitioner as remorseless and without conscience but also as having been found sane by a court-appointed panel of doctors. In many of the stories petitioner was described as the "confessed slayer of six," a parole violator and fraudulent-check artist. Petitioner's court-appointed counsel was quoted as having received "much criticism over being Irvin's counsel" and it was pointed out, by way of excusing the attorney, that he would be subject to disbarment should he refuse to represent Irvin. On the day before the trial the newspapers carried the story that Irvin had orally admitted the murder of Kerr (the victim in this case) as well as "the robbery-murder of Mrs. Mary Holland; the murder of Mrs. Wilhelmina Sailer in Posey County, and the slaughter of three members of the Duncan family in Henderson County, Ky."

It cannot be gainsaid that the force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people of Gibson County. In fact, on the second day devoted to the selection of the jury, the newspapers reported that "strong feelings, often bitter and angry, rumbled to the surface," and that "the extent to which the multiple murders—three in one family—have aroused feelings throughout the area was emphasized Friday when 27 of the 35 prospective jurors questioned were excused for holding biased pretrial opinions. . . ." A few days later the feeling was described as "a pattern of deep and bitter prejudice against the former pipe-fitter." Spectator comments, as printed by the newspapers, were "my mind is made up"; "I think he is guilty"; and "he should be hanged."

Finally, and with remarkable understatement, the headlines reported that "impartial jurors are hard to find." The panel consisted of 430 persons. The court itself excused 268 of those on challenges for cause as having fixed opinions as to the guilt of petitioner; 103 were excused because of conscientious objection to the imposition of the death penalty; 20, the maximum allowed, were peremptorily challenged by petitioner and 10 by the State; 12 persons and two alternates were selected as jurors and the rest were excused on personal grounds, e. g., deafness, doctor's orders, etc. An examination of the 2,783-page *voir dire* record shows that 370 prospective jurors or almost 90% of those examined on the point (10 members of the panel were never asked whether or not they had any opinion) entertained some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty. A number admitted that, if they were in the ac-

cused's place in the dock and he in theirs on the jury with their opinions, they would not want him on a jury.

Here the "pattern of deep and bitter prejudice" shown to be present throughout the community, [ ], was clearly reflected in the sum total of the *voir dire* examination of a majority of the jurors finally placed in the jury box. Eight out of the 12 thought petitioner was guilty. With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man. See Delaney v. United States, 199 F.2d 107 (1st Cir. 1952). Where one's life is at stake—and accounting for the frailties of human nature—we can only say that in the light of the circumstances here the finding of impartiality does not meet constitutional standards. Two-thirds of the jurors had an opinion that petitioner was guilty and were familiar with the material facts and circumstances involved, including the fact that other murders were attributed to him, some going so far as to say that it would take evidence to overcome their belief. One said that he "could not . . . give the defendant the benefit of the doubt that he is innocent." Another stated that he had a "somewhat" certain fixed opinion as to petitioner's guilt. No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, "You can't forget what you hear and see." With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt. [ ]

. . . Therefore, on remand, the District Court should enter such orders as are appropriate and consistent with this opinion, [ ], which allow the State a reasonable time in which to retry petitioner. [ ]

Vacated and remanded.

MR. JUSTICE FRANKFURTER, concurring.

Of course I agree with the Court's opinion. But this is, unfortunately, not an isolated case that happened in Evansville, Indiana, nor an atypical miscarriage of justice due to anticipatory trial by newspapers instead of trial in court before a jury.

More than one student of society has expressed the view that not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him. How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception.

. . . This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived. The Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade.

Notes and Questions

1. What warrants the Court's rejection of the jurors' statements that they could be fair to Irvin? What about the oath that jurors take and the admonition of the judge that they must decide the case solely on the evidence before them?

2. The preliminary screening of prospective jurors, whose names have been drawn from the lists of voters, is generally conducted by lawyers for the opposing parties, supervised by a trial judge who may participate in the questioning. Each side has a certain number of peremptory challenges that may be exercised to have prospective jurors barred without giving a reason. Other challenges may be permitted "for cause" by the court. It is at this stage that the trial judge may act to ensure the impartiality of the jury. The change of venue mentioned refers to a removal of the trial from one area to another within the same general jurisdiction. A related device is the change of venire, in which the trial remains at its initial site but panels of jurors, who are also known as veniremen, are brought in from other areas more removed from the event.

Given the publicity described in the Court's opinion, would it have made a difference if the jury had been sequestered—isolated from all media and other persons outside the courtroom—throughout the

trial? Would a delay in the trial help? What about further changes of venue within Indiana? What about a change of venire? Could a well-conducted, albeit lengthy, voir dire produce an unbiased jury? What about waiving a jury?

3. In Murphy v. Florida, 421 U.S. 794 (1975), the jurors in defendant's robbery trial had learned through news stories about some or all of the defendant's earlier convictions for murder, securities theft, and for the 1964 theft of the Star of India sapphire from a New York museum. The majority stated that qualified jurors need not be totally ignorant of the facts surrounding the case. The Court found in the voir dire no showing of hostility to the defendant. Four of the six jurors had volunteered that defendant's past was irrelevant. Moreover, the defendant's attorney during voir dire informed several of the jurors of crimes they had not known about, leading the Court to observe "We will not readily discount the assurances of a juror insofar as his exposure to a defendant's past crimes comes from the defendant or counsel." The indicia of impartiality "might be disregarded in a case where the general atmosphere in the community or courtroom is sufficiently inflammatory, but the circumstances surrounding petitioner's trial are not at all of that variety." Only 20 of the 78 persons examined were excused because of an opinion of guilt. "This may indeed be 20 more than would occur in the trial of a totally obscure person, but it by no means suggests a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no hostile animus of their own." Only Justice Brennan dissented.

4. Soon after *Irvin*, the Court considered a case involving problems in the conduct of the trial itself.

SHEPPARD v. MAXWELL

Supreme Court of the United States, 1966.
384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600.

[In 1954, Sheppard was charged with murdering his wife. The case attracted great public attention and extensive media coverage beginning shortly after the murder, before any arrest had been made. The publicity continued through the pretrial and trial period. Sheppard was convicted of second-degree murder. After serving several years in prison he sought habeas corpus in the federal courts, claiming that the state had denied him his constitutional rights during the prosecution. The district court agreed and granted the writ, but the court of appeals reversed. The Supreme Court in turn reversed, and ordered Sheppard released unless the state gave him a new trial. The Court's lengthy opinion traced the facts in great detail and placed

responsibility on the trial judge for failing to give Sheppard a fair trial:

> The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. . . . Having assigned almost all of the available seats in the courtroom to the news media the judge lost his ability to supervise the environment. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial.

Beyond this concern with the judge's lack of control over the courtroom the Court was troubled by publicity during the trial.]

MR. JUSTICE CLARK delivered the opinion of the Court.

. . .

Much of the material printed or broadcast during the trial was never heard from the witness stand, such as the charges that Sheppard had purposely impeded the murder investigation and must be guilty since he had hired a prominent criminal lawyer; that Sheppard was a perjurer; that he had sexual relations with numerous women; that his slain wife had characterized him as a "Jekyll-Hyde"; that he was "a bare-faced liar" because of his testimony as to police treatment; and, finally, that a woman convict claimed Sheppard to be the father of her illegitimate child. As the trial progressed, the newspapers summarized and interpreted the evidence, devoting particular attention to the material that incriminated Sheppard, and often drew unwarranted inferences from testimony. At one point, a front-page picture of Mrs. Sheppard's blood-stained pillow was published after being "doctored" to show more clearly an alleged imprint of a surgical instrument.

Nor is there doubt that this deluge of publicity reached at least some of the jury. On the only occasion that the jury was queried, two jurors admitted in open court to hearing the highly inflammatory charge that a prison inmate claimed Sheppard as the father of her illegitimate child. Despite the extent and nature of the publicity to which the jury was exposed during trial, the judge refused defense counsel's other requests that the jurors be asked whether they had read or heard specific prejudicial comment about the case, including the incidents we have previously summarized. In these circumstances, we can assume that some of this material reached members of the jury. [ ]

VII.

The court's fundamental error is compounded by the holding that it lacked power to control the publicity about the trial. From the

very inception of the proceedings the judge announced that neither he nor anyone else could restrict prejudicial news accounts. And he reiterated this view on numerous occasions. Since he viewed the news media as his target, the judge never considered other means that are often utilized to reduce the appearance of prejudicial material and to protect the jury from outside influence. We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial and so do not consider what sanctions might be available against a recalcitrant press nor the charges of bias now made against the state trial judge.

The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court. . . .

Secondly, the court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony. A typical example was the publication of numerous statements by Susan Hayes, before her appearance in court, regarding her love affair with Sheppard. Although the witnesses were barred from the courtroom during the trial the full verbatim testimony was available to them in the press. This completely nullified the judge's imposition of the rule. [ ]

Thirdly, the court should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. Much of the information thus disclosed was inaccurate, leading to groundless rumors and confusion. . . . Defense counsel immediately brought to the court's attention the tremendous amount of publicity in the Cleveland press that "misrepresented entirely the testimony" in the case. Under such circumstances, the judge should have at least warned the newspapers to check the accuracy of their accounts. And it is obvious that the judge should have further sought to alleviate this problem by imposing control over the statements made to the news media by counsel, witnesses, and especially the Coroner and police officers. The prosecution repeatedly made evidence available to the news media which was never offered in the trial. Much of the "evidence" disseminated in this fashion was clearly inadmissible. The exclusion of such evidence in court is rendered meaningless when news media make it available to the public. For example, the publicity about Sheppard's refusal to take a lie detector test came directly from police officers and the Coroner. The story that Sheppard had been called a "Jekyll-Hyde" personality by his wife was attributed to a prosecution witness. No such testimony was given. The further report that there was "a 'bombshell witness' on tap" who would testify as to Sheppard's "fiery temper" could only have emanated from the

prosecution. Moreover, the newspapers described in detail clues that had been found by the police, but not put into the record.

The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge's failure to take any action. [ ] Effective control of these sources—concededly within the court's power—might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity, at least after Sheppard's indictment.

More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. . . . Being advised of the great public interest in the case, the mass coverage of the press, and the potential prejudicial impact of publicity, the court could also have requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees. . . . Had the judge, the other officers of the court, and the police placed the interest of justice first, the news media would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom—not pieced together from extrajudicial statements.

From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting the events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes

from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

Since the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom, we must reverse the denial of the habeas petition. The case is remanded to the District Court with instructions to issue the writ and order that Sheppard be released from custody unless the State puts him to its charges again within a reasonable time.

It is so ordered.

MR. JUSTICE BLACK dissents [without opinion].

Notes and Questions

1. Although the judge's failure to maintain proper decorum during the trial was viewed as his major error, the Court devoted extensive consideration to the behavior of the media and suggested techniques by which the judge might have better insulated the trial. In addition, the Court cited the Report of the President's Commission on the Assassination of President John F. Kennedy, in which the Commission, chaired by Chief Justice Earl Warren, expressed grave concern about whether Lee Harvey Oswald could possibly have gotten a fair trial after all the publicity that followed the assassination. See Report, p. 240. The discussion in *Sheppard* plus the observation that "reversals are still but palliatives" led the bar to begin investigating new courses of action in greater detail. The first such effort was made by the American Bar Association, which created a committee that became known as the Reardon Committee after its chairman, Justice Paul Reardon of Massachusetts. We shall have occasion later in this section to consider several of the Committee's recommendations.

2. What judicial techniques would have been most useful in *Sheppard*?

3. We turn now to a consideration of various efforts to control the flow of information in pending judicial cases. Our analysis will focus on the problems in the sequence in which they arise in a criminal case.

b. Information About Pending Cases

Although relatively few crimes are ever reported in newspapers, and even fewer on radio or television, for those few, coverage may

begin shortly after the offense and may increase after an arrest. Some of this information is thought by the bench and bar to present problems of prejudicial publicity. Judges have begun to meet this problem by issuing orders that forbid persons from disclosing particular information about the pending case.

The approach can be traced directly to language in *Sheppard* that the judge "might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case." (384 U.S. at 361). Later, "The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function." (384 U.S. at 363).

The problem usually arises either in relation to a sensational crime or a case with political implications.

YOUNGER v. SMITH

Court of Appeal of California, Second District, 1973.
30 Cal.App.3d 138, 106 Cal.Rptr. 225.

[Younger v. Smith consolidates three separate cases. Younger v. Smith arose out of the prosecution of Siegfried Senff for murder. District Attorney Younger was charged with contempt of court for violating the trial court's order prohibiting all attorneys connected with the Senff case from making "any statement outside of the court as to the nature, substance, or effect of any testimony that ha[d] been given." Younger issued a statement to the news media that generally described the subject matter of various witnesses' testimony given at the preliminary examination, but did not describe the substance of the testimony. Younger was held in contempt even though the trial court specifically found that Younger's statement had in no way prejudiced Senff's right to a fair trial.

The court overturned Younger's contempt conviction, holding that his freedom of speech was violated by a restrictive order that authorized punishment for contempt without a showing that the statement had or might be expected to have any adverse effect on Senff's right to a fair trial. The order, if read to cover such a statement, was fatally overbroad.

Times Mirror v. Superior Court and Busch v. Superior Court both involved the forthcoming prosecution of Donald Antelo and Oscar Hernandez for murdering four-year-old Joyce Huff by shooting her from a passing car. Press reports described the event as a "joy killing" and a "senseless slaying." Others speculated that a gang war was involved and that this was in revenge for an earlier homicide. The trial court issued an order whose pertinent part provided:

> In order to fulfill that Constitutional duty to guarantee that the defendants do receive a fair trial, and because of the obvious public interest in this matter which has produced widespread news media publicity, and it further appearing to the Court that the dissemination by any means of public communication of any out-of-court statements relating to this cause may interfere with the Constitutional right of the defendants to a fair trial and disrupt the proper administration of justice the Court will now issue the following orders, a violation of which will result in swift action to punish for contempt any offender within the jurisdiction of this Court.
>
> 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 a prosecutor, nor any other attorney, nor any judicial officer or employee, nor any public official, including but not limited to any chief of police, nor any sheriff, nor any agent, deputy or employee of any such persons, nor any witness having appeared at the preliminary hearing 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 either of the defendants 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 as to the nature, substance, or effect of any testimony that has been given. Nor shall any such persons issue any statement as to the identity of any prospective witness, or his probable testimony, or the effect thereof. Nor shall any person make any out-of-court statement as to the nature, 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 person or any witness, whether or not under subpoena, make any statement 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.

The order explicitly did not apply to statements concerning the accused's name, age, residence, occupation, the circumstances of the arrest, quotations from public records, and requests for assistance in obtaining evidence. In *Busch*, the District Attorney sought to vacate the restrictive order. We consider the *Times Mirror* part of the case at p. 221, infra.]

KAUS, P. J.

. . .

III.

Busch v. Superior Court

Before we come to grips with Busch's attack on the order in People v. Antelo, several matters should be noted.

1. First and foremost, he does not dispute that the respondent court has the power to attempt to secure a fair trial by making appropriate orders. . . .

2. Prosecutors, of course, do not lose their First Amendment rights when they assume office. . . . They are, however, elected or appointed to prosecute criminal cases, rather than to talk about them. By taking office they necessarily accept certain limitations. Their constituents may properly expect that they cooperate in the courts' efforts to avoid frustration of successful criminal prosecutions, by inhibiting conditions which prevent fair trials and call for mistrials or reversals. . . .

3. Of course, Busch claims no right to make prejudicial pretrial statements. Reducing his legal position to the human level, he seems to resent being ordered not to do something which he would not do anyway. This is understandable.

As will be seen, however, this posture raises false issues. The respondent court's order never mentioned Busch by name. A prejudicial news release by the greenest lawyer on his huge staff may prejudice a criminal trial just as much as a statement by Busch himself.

4. While Busch attacks the order on several procedural and substantive grounds, his objections are to the order as a whole, rather than to specific parts. We therefore have no occasion to decide whether the order may have gone too far in certain particulars.

A.

With this preface we turn to the issues raised by the Busch petition. The first three may conveniently be considered together. Busch claims that the trial court did not adequately articulate the justification for the order, that any justification must be found in a "clear and present danger to the administration of justice" [31] and that, in any event, it appears that whatever evidence was before the respondent court would not have sufficed for a finding of a clear and present danger.

Adverting to the first of these contentions, it certainly appears from the record as a whole that the respondent court more than adequately articulated what it deemed to be the justification for its order. . . . Such orders must be fashioned according to the necessities of the moment. Nobody would contend that a magistrate, on being advised that a person accused of murdering a prominent political figure such as Senator Kennedy was to be arraigned before him, cannot issue a protective order without evidence that the crime is of public interest.

. . .

The question of the correct constitutional standard by which we must judge whether the restrictions on free speech which necessarily inhere in any protective order are justified, is much on the minds of the parties. Their arguments more or less boil down to a choice between a "clear and present danger to the administration of justice" —Busch—versus a "reasonable likelihood of publicity tending to prevent a fair trial"—the respondent court.

We agree that no compelling holding points to either test as the correct one. . . . The question may fairly be said to be open.

. . .

Usually judges are faced with the question whether to issue a protective order at a very early stage in a criminal prosecution. Many of the factors which militate in favor of such an order can only be dimly perceived. The judge may, of course, have a vague idea about the case's potential as a trigger for prejudicial news. He probably knows something about the seriousness of the crime, the character, prominence or notoriety of the principals, and can guess at the newsworthiness of the proceedings from whatever publicity the case has already engendered. That, however, is about it. Even if they

31. At times the suggested test is a "clear and present danger *of a serious and imminent threat* to the administration of justice." It does not appear that Busch feels that the addition of the italicized words makes a difference. . . .

know, none of the parties subject to a proposed protective order will tell him just what information they intend to publicize in the future.

One vital fact which the judge will want to know, no one is likely to answer: where is the case going to be tried? . . . Under the circumstances the judge has little choice but to assume prophylactically that the case will be tried where the alleged crime was committed, which is usually the locality where prejudicial publicity is likely to be heaviest. This is so, although as a realist he may be quite certain that when the chips are down the defendant will have to move for a change of venue and that he will have to grant it.

It would be a waste of space to go on detailing the factors, many lying far in the future, which may affect the fairness of the eventual trial. Every lawyer and judge familiar with these matters can make his own list. We merely wish to make two points: the first is that protective orders must be geared to the apparent needs of the moment and their validity must be judged with that necessity in mind. That is also why, as we have noted, they are subject to review and modification when circumstances change. The second is this: since the assessment of the need for a protective order must take so many uncertain factors into account, pedantic appellate debates over the correct criterion are good clean fun for those who enjoy that sort of thing, but of precious little help to the trial judge who must silence the sources of prejudicial pretrial publicity as soon as possible, or risk spending weeks or months trying a case which is doomed to be reversed, should it result in a conviction.

Nevertheless, since we are asked to hold that the protective order under consideration was not justified by the facts as they appeared on August 11, 1972, we should state by what test we conduct our examination. We have no illusions that applying the facts of People v. Antelo against either test is a mechanical process. Value judgments are necessarily involved. Indeed—depending perhaps on how protective toward the administration of justice one feels—it seems not too fanciful to announce that the two tests are really one: a reasonable likelihood of an unfair trial is, in itself, a clear and present danger to the administration of justice.

The "clear and present danger" test never has been the universal solvent of First Amendment problems which it is popularly thought to be. Although during the last dozen years freedom of expression has, on the whole, enjoyed a very good run in the United States Supreme Court, that court has not expressly applied the clear and present danger test in any context since it decided Wood v. Georgia, 370 U.S. 375, in 1962. . . . Clearly, solving First Amendment problems has always been more complex than just talking about "clear and present danger" or "falsely shouting fire in a theatre."

. . .

We believe that the United States Court of Appeals for the Tenth Circuit was correct when, in United States v. Tijerina, 412 F. 2d 661, 666 (10th Cir. 1969), it rejected the "clear and present danger" test.

"Counsel attack the order on the ground that it is not based on a clear and present danger. The order is based on a 'reasonable likelihood' of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial. *We believe that reasonable likelihood suffices.* The Supreme Court has never said that a clear and present danger to the right of a fair trial must exist before a trial court can forbid extrajudicial statements about the trial." (United States v. Tijerina, 412 F.2d 661, at p. 666. Italics added.)

The "reasonable likelihood" test applied in *Tijerina* is identical with the test which the California Supreme Court enjoins us to apply with respect to motions for change of venue in criminal cases. [ ] While it is fully appreciated that granting a motion for a change of venue does not involve the sacrifice of free speech values,[35] we are persuaded by the holding of the *Tijerina* court, that the First Amendment does not stand in the way of judging the propriety of protective orders by the same test.

We have already pictured the typical situation in which a trial judge must decide whether or not to issue a protective order. To ask him to determine the need for such an order by a finding that the situation presents a clear and present danger to the administration of justice, is simply to require him to palm off guesswork as finding. It would put a premium on hypocritical adherence to an abstract formula.

The virtue of the "reasonable likelihood" test is, therefore, honesty. It recognizes that the court is dealing with contingencies, rather than realities. It does not demand impossible feats of clairvoyant fact finding: for example, a finding that future publicity presents a clear and present danger to the administration of justice, when the court does not even know where the case will be tried! A "reasonable likelihood" test, on the other hand, permits the court to consider openly and frankly the many future variants which collectively may amount to a reasonable likelihood but, by their very contingent nature, can never amount to a clear and present danger—unless, of

35. On the other hand it will not do to shrug off a defendant's plea for a protective order by telling him not to worry about local publicity, however extensive, since he can always move for a change of venue. It is clear that trial in the locality where the crime was allegedly committed has traditionally been felt to be a substantial right, whether of constitutional magnitude or not. [ ]

course the meaning of that term is to be so diluted as to make it indistinguishable from its rival criterion.

We are satisfied that in the hands of a conscientious judge the "reasonable likelihood" test will not lead to abuse.

We have independently reviewed the entire record with the "reasonable likelihood" test in mind. [ ] We are of the opinion that the nature of the publicity given to the Huff homicide provided ample justification for the order when it was made. The extensively publicized shotgun killing of a four-year-old girl in front of or near her home is bad enough. If one adds media speculation of a direct connection between that homicide and a previous one, coupled with allusions to gang warfare, it was certainly "reasonably likely" that prejudicial pretrial publicity would ensue.

We recapitulate: These are not static situations. What may have been reasonably necessary last August, may not seem appropriate today. Protective orders are subject to continuing review based on changed conditions and, in some cases perhaps, on the mere passage of time. Petitioner is free to bring any changed circumstances to the attention of the respondent court.

. . .

Notes and Questions

1. Does the court indicate at what point a trial judge may consider issuing a restrictive order?

2. What criteria must be met before such an order may properly issue? Is there a difference between the two formulations that the court discusses?

3. Is it an argument against this type of order that if the publicity gets too intense and possibly prejudicial, the defendant can move for a continuance? For a change of venue? For a change of venire? Is it possible to sequester the jury in this situation?

4. In Younger v. Smith, the challenge came only from the prosecutor. Until recently, it had been assumed that such an order could be challenged only by someone who was addressed in the order. But it may now be possible for media also to make this challenge. As a result of the episode at Kent State University in which National Guardsmen shot and killed four students, an action for damages was brought against several public officials by the parents of those killed and by several who were wounded. Before the start of that trial the judge issued an order:

For good cause appearing, it is

ORDERED that in addition to all counsel and Court personnel, all parties concerned with this litigation, whether plain-

> tiffs or defendants, their relatives, close friends, and associates are hereby ORDERED to refrain from discussing in any manner whatsoever these cases with members of the news media or the public.

The parties did not object, but CBS did and appealed the order. CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975). The court first held that CBS had "standing" to challenge the order because it was adversely affected by the restraints placed on those covered by the order. It had an arguable right under the First Amendment to gather news, based on the language of *Branzburg*, unless some compelling government interest could be shown to justify the order. The court then turned to the merits of the order itself and concluded that it was too vague in identifying those covered by it; that it was too broad because it barred all speech about the case rather than only possibly prejudicial speech; and that the circumstances prevailing at the time were not so potentially dangerous to fair trial as to warrant any order at all. The trial judge had relied on *Sheppard*, but the appellate court thought this "civil trial" was "a far cry from the circus atmosphere and massive prejudicial publicity" in *Sheppard*.

5. What differences do you see between the orders issued by the trial judges in *Younger* and in *CBS*?

6. On extreme occasions judges may go far beyond the courtroom to constrain activities that may affect a forthcoming trial. After being charged with attempting to assassinate President Ford, Lynette Fromme was identified as a follower of mass-murderer and cult leader Charles Manson. A few weeks before Fromme was scheduled to go to trial in Sacramento, and at her request, the trial judge enjoined the exhibition of a new commercial film, "Manson," in the 26 counties of California from which jurors would be drawn. One segment of the film shows Fromme holding a rifle and saying "You have to make love with it. You have to know every part of it so you can pick it up any second and shoot." The order was challenged as an invasion of the rights of persons living in the 26 counties. The appeal was dismissed as moot because the jury had been selected by the time argument was held. Certiorari was denied. Evans v. Fromme, 425 U.S. 934 (1976).

7. The use of restrictive orders was suggested by the ABA's Reardon Committee's more general suggestion: that the canons of ethics in the various states provide that after arrest and until trial in criminal cases lawyers release no extrajudicial statements relating to (1) prior criminal record of the accused; (2) existence or contents of any confession; (3) performance of any examinations or tests or the defendant's refusal to undergo them; (4) identity, testimony, or credibility of prospective witnesses; (5) possibility of a guilty plea to the

charge or a lesser offense; or (6) any opinion as to the accused's guilt or innocence. The lawyer was permitted to make a factual statement of the accused's name, age, residence, occupation, and family status. Also, if the accused has not been apprehended a lawyer for the prosecution may release information necessary to aid in apprehension or to warn the public of danger. Upon arrest the facts of arrest, including whether there was resistance and what physical evidence was seized may be released. (§ 1.1).

Another section recommended that law enforcement agencies place similar constraints on their officers. (§ 2.1) Court employees were to be ordered not to disclose information "not part of the public records of the court that may tend to interfere with the right of the people or of the defendant to a fair trial." (§ 2.3).

8. After approving the Reardon Report's substantive standards, the ABA created another committee to develop procedures for implementing the standards. That committee has produced Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press, (Revised Draft, Nov. 1975). The committee is concerned with release of prejudicial information and "specifically recommends against the issuance of any orders which would impose direct restraints on the press." The draft proposes adoption of "standing guidelines" and of "special orders." The standing guidelines, which would address the Reardon issues as well as physical arrangements for conducting major cases, would be promulgated after notice to all interested groups including media and an opportunity for comment and appellate review.

Special orders may be entered only in particular cases and only after the judge has relied on "other judicial procedures" for assuring a fair trial "whenever possible." The judge must then draft a proposed order including an explanation of the necessity for the order. It must be preceded by notice and an opportunity for oral argument. Such orders may be entered without notice and hearing if the judge sets forth the "extraordinary circumstances and necessity for entering the order without notice" and allows prompt consideration of objections. "Any party, persons or organizations aggrieved" by the special order would be able to obtain appellate review "forthwith, in the most expeditious manner provided by the particular jurisdiction for review of temporary injunctive orders or any other orders which are subject to expedited review." In early 1976, the ABA voted to defer consideration of the draft until its summer meeting, partly because of press objections and the pendency of the Nebraska Press Association case in the Supreme Court. After the Nebraska decision, p. 234, infra, the ABA adopted the guidelines. "Although there was a sizable block of opposition . . . , the resolution passed by a

voice vote with no need for a roll call." Editor & Publisher, Aug. 14, 1976, p. 9.

ABA actions of this sort have no legal effect whatever since the ABA is a private group. A state may be persuaded that certain ABA recommendations are sound and choose to adopt them as the law of the state. This is no different from a state deciding to enact as part of its law a recommendation proposed by any group or individual.

c. Information About Pretrial Proceedings

In the criminal process two major steps may occur before trial—and may in fact decide whether there will even be a trial. First, at the preliminary hearing the prosecution presents its evidence to a judge who will decide whether the evidence establishes "probable cause" to believe the defendant has committed a crime. If so, the judge orders the defendant to stand trial. If not, the charges will be dropped and the defendant released. More commonly today, a grand jury will consider the charges in secret and if it returns an indictment against the defendant, that will establish probable cause so that no preliminary hearing need be held.

The second important stage is the pretrial hearing. The most common reason for such a hearing is the defendant's effort to suppress illegally obtained evidence. Thus, if the defendant can show that he made a confession under coercion, or that evidence in his apartment was seized illegally, he may make a pretrial motion that the confession or the evidence be suppressed and excluded from the coming trial. If the pretrial proceedings are open to the public, the information becomes available to the press and public and the press may print what it obtains. This has led some defendants to seek to close the proceedings. The remedy of sequestration is not available yet because the trial has not begun and no jury has been selected. The pretrial hearing is usually held several weeks before the trial is scheduled to begin.

STAPLETON v. DISTRICT COURT

Supreme Court of Colorado, 1972.
179 Colo. 187, 499 P.2d 310.

[Defendant Stapleton was charged with first-degree murder and kidnapping. He filed pretrial motions to suppress statements and evidence that had been seized and he sought to have the hearings on these motions closed to the public and the press. The district attor-

ney objected and the trial judge refused to close the hearing. Stapleton petitioned the Supreme Court of Colorado to order the judge to close the hearing.]

MR. JUSTICE LEE delivered the opinion of the Court.

. . .

Petitioner's argument is framed around the *American Bar Association Minimum Standards for Criminal Justice Relating to Fair Trial and Free Press*, § 3.1, [the Reardon Report] which provides:

* * *

"Motion to exclude public from all or part of pretrial hearing.

"In any preliminary hearing, bail hearing, or other pretrial hearing in a criminal case, including a motion to suppress evidence, the defendant may move that all or part of the hearing be held in chambers or otherwise closed to the public, including representatives of the news media, on the ground that dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at the trial and is therefore likely to interfere with his right to a fair trial by an impartial jury. The motion shall be granted unless the presiding officer determines that there is no *substantial likelihood* of such interference. With the consent of the defendant, the presiding officer may take such action on his own motion or at the suggestion of the prosecution. Whenever under this rule all or part of any pretrial hearing is held in chambers or otherwise closed to the public, a complete record of the proceedings shall be kept and shall be made available to the public following the completion of trial or disposition of the case without trial. Nothing in this rule is intended to interfere with the power of the presiding officer in any pretrial hearing to caution those present that dissemination of certain information may jeopardize the right to a fair trial by an impartial jury." (Emphasis added.)

. . .

. . . Petitioner urges that we adopt the foregoing American Bar Association standard as an aid to the trial courts in the resolution of publicity problems inherent in public pretrial hearings. We now do so, believing that reconciliation of what may appear to be inevitable conflicts between the constitutional right of freedom of speech and of the press, vis-a-vis the right to a fair trial before an impartial jury and to due process, may be more readily accomplished.

We recognize that constitutional guarantees are not always absolute and that full exercise thereof is not always entirely possible. [ ] On occasion, one right must necessarily be subordinated to another. The interest of the accused, whose life and liberty are in jeop-

ardy, to a fair trial by an impartial jury is paramount, and may require, depending on the circumstances of the case, limitations upon the exercise of the right of free speech and of the press. The problem is one of balancing of interests so that irreconcilable conflict need not necessarily result from the simultaneous exercise of those constitutional rights. Whether in a particular case there has been an actual accommodation in the simultaneous exercise of the two rights, depends upon the circumstances of the case.

In the context of the factual setting of the present case, the trial court acknowledged the seriousness of the charges against petitioner and the unusual public interest in the trial of the case, as evidenced by the coverage by members of the news media attending previous court hearings. The court concluded, however, that adequate controls could be imposed during the hearing on the suppression motions so as to safeguard against potential prejudice that might flow from the publication of matters revealed at the public suppression hearing. In exercising its discretion, the court in effect ruled there was no *substantial likelihood* that petitioner's right to a fair trial by an impartial jury would be interfered with as a result of a public hearing on petitioner's suppression motions.

Although we might have ruled differently had we been ruling upon this issue as a trial court, we cannot say that the court abused its discretion. Our function is not to preempt the trial court by directing the course of judicial proceedings before it. That is the primary burden of the trial judge who, by the nature of our judicial process, is in the best position to assure that a defendant's right to a fair trial, as well as the public's right to know the course of the trial proceedings, will be substantially protected. In carrying out its function, the trial court has considerable discretion and, as suggested in the court's findings, it is permissible and eminently proper to convene closed pretrial hearings when there is a *substantial likelihood* of prejudicial interference with a defendant's right to a fair trial by an impartial jury. Although the court here denied petitioner's motion, nevertheless, should intervening circumstances have developed, which lend further support to petitioner's position, the matter may always be reconsidered by the trial court.

. . .

MR. JUSTICE HODGES not participating.

MR. JUSTICE GROVES dissenting:

When a defendant asks that a suppression hearing be held *in camera*, I would have it the rule rather than the exception that his request be granted. However, we do not reach that proposition here.

Perhaps I may be privileged on another day to expound my minority views in this respect.

. . .

This is one of those cases in which a substantial segment of the public awaits each item of news with bated breath—the murder-rape of a beautiful 21-year-old University of Colorado coed, whose body was found not too far distant from the Boulder campus.

. . .

As an illustration of how explosive the trial judge considered the publicity potential of this case . . . he ordered that the persons involved in the prosecution and defense make no extrajudicial statements. The court also ordered that affidavits in support of search warrants and the returns and inventories thereon be sequestered.

The deputy public defenders who are representing the defendant had asked that the earlier hearing be *in camera.* A newspaper ran a long editorial criticizing the "secrecy order." . . .

There is less danger of pre-trial prejudice by publicity if the court denies the motion to suppress. However, a ruling granting a motion to suppress is futile if the to-be-suppressed evidence has been the subject of a public suppression hearing. The cat will be out of the bag.

The court has predicated its ruling upon its opinion that during the suppression hearing it will be able to detect in advance any evidence that might be improper and highly prejudicial to the defendant and take prophylactic action. This may be true with respect to the contents of a written confession. However, when inquiry turns to whether exhibits seized in the search should be suppressed, I can easily visualize that some highly prejudicial items or testimony may come into evidence, however alert and attentive the trial judge may be. Irrespective of the fact that the court may suppress a matter, by that time the media has it and, satisfying the desires of the reading and listening public, will disseminate it.

. . . Even assuming that the chance of a slip-up in the suppression hearing is remote, the right of a defendant to be free of prejudicial publicity as to a suppressed item hangs on too thin a thread to have his request for a private suppression hearing denied.

We talk of preventive medicine. Here is a case in which we should practice preventive justice and lessen the possibility that, if this defendant is eventually convicted, reversible error will have been committed at this early stage. I would hold it an abuse of discretion in this particular case to deny the motion for an *in camera* hearing on the motion to suppress.

[JUSTICE ERICKSON also dissented.]

Notes and Questions

1. Compare Allegrezza v. Superior Court, 47 Cal.App.3d 948, 121 Cal.Rptr. 245 (1975). The accused, a 16-year old boy charged with slaying four members of a family, moved that the hearing to suppress his allegedly coerced confession be closed. As in *Stapleton*, the trial judge had already directed that all persons involved in the case make no statements to the media concerning the existence of evidence or the probable testimony of any witness. The trial judge rejected the defendant's motion after it was opposed by the District Attorney. The Court of Appeal ordered that the hearing be closed:

> We are concerned with a purported confession (hereafter, for convenience only, "confession") of one accused and awaiting trial for murder. A question is raised whether the confession was involuntary, or coerced, and therefore inadmissible as evidence at the trial. The superior court hearing might disclose that it was obtained under circumstances establishing its untrustworthiness, something not unknown in the administration of criminal law. Or it might appear to have been secured in disregard of Allegrezza's constitutional rights. In either event it will not be placed in evidence before the jury. By the same token any concern for fairness demands that such a confession, disallowed as evidence, should not reach the eyes or ears of persons who may become jurors of the case. Any reasonable doubt whether it will should be resolved in favor of the accused.
>
> . . . In the context of this case the rights of the press are no greater than the rights of the public generally. And the public generally has no right to pretrial disclosure of questionable evidence, a disclosure which might well deny to the accused the fair and impartial trial which is his due. [ ]
>
> . . .
>
> It is the same right of a fair trial, to one accused of crime, that guarantees all other freedoms, including freedom of speech and of the press. For without the right to a fair trial those freedoms would lack any means of vindication in the face of governmental oppression.
>
> . . .
>
> The Attorney General urges that Allegrezza's proper remedy is not the *in camera* hearing he seeks, but rather a change of venue to another county untouched by the feared prejudicial publicity. The Sixth Amendment guarantees to an accused the right to be tried by an "impartial jury," drawn from the "district wherein the crime shall have been committed." Obviously the courts should not participate in, or encourage, a procedure which obliges the accused to forfeit one constitutional right in order to retain the protection of another.

> Here Allegrezza is charged with several sordid murders. Few things would more likely deny to him a fair trial of those charges, than a pretrial public media announcement and elaboration of a confession which for good reason is later denied acceptance in evidence. Weighing the constitutional value here at stake, *"the most fundamental of all freedoms"* (see Estes v. Texas; italics added), against the lesser and contrasting affront to the public right of informational access, we conclude that the superior court abused its discretion in its denial of an *in camera* hearing on the issue of the voluntariness of Allegrezza's purported confession.

The Supreme Court of California denied a hearing, one justice dissenting.

2. In *Stapleton*, both the majority and the dissent agree that the Reardon Report should be applied but disagree as to the interpretation. What is the goal of § 3.1?

3. *Allegrezza* states that "Any reasonable doubt . . . should be resolved in favor of the accused." Why?

4. The preliminary hearing, which resolves whether the accused should be bound over for trial, is usually public unless the judge decides otherwise. A few states require that the hearing be closed at the defendant's request. The problems of prejudicial publicity that may result in a biased jury if the accused is held for trial are much the same as those of pretrial suppression hearings. Further, rules of evidence are frequently relaxed in preliminary hearings, giving the media access to evidence such as hearsay that may be excluded at trial. Also, often only the prosecutor's side of the case is presented at the hearing and this may lead to one-sided reports of the case. Do these concerns justify closed preliminary hearings?

d. Information About Trials

In this section we consider the possibility that a jury, already chosen and listening to testimony, may be prejudiced by exposure to publicity. If the press were reporting only what the jury has already heard for itself in the courtroom, the problem would be minimal. But even here a reporter's description of certain testimony may modify the juror's own recollection of what he heard, which is one of the reasons why the judge in a criminal case will warn the jurors daily not to discuss the trial or read anything about the trial. We know that failures to comply with these instructions are not infrequent. Jurors must then admit their lapses to the judge, who may react angrily to such admissions. Recall Marshall v. United States, p. 186, supra, in which half the jurors admitted seeing and reading one or more articles about the case during the trial.

A more significant danger arises when, as *Marshall* suggests, the jury is excluded from arguments about admissibility of evidence or about dismissing some of the charges. If the evidence is found inadmissible the jurors are not to know of it, which is why they are excluded from the discussion. Furthermore, the trial may rekindle interest in the case and produce reports of prior offenses, suppressed confessions and other matters that were not reported fully before the trial. But now that the jury has been identified, sequestration is possible.

If a jury were sequestered in every case in which some prejudicial information might be published during the trial, then all information, except from improper juror contacts, would be available. Judges are resorting increasingly to sequestration in such cases but that is an imperfect solution. First, it inconveniences the jurors, particularly in lengthy trials. Judges who are solicitous of jurors are reluctant to ask them to remove themselves from family and friends for weeks or months. And sequestration is expensive. In one reported incident a judge rejected sequestration because of the cost and issued an order limiting coverage of the trial, indicating that if the newspaper would pay the cost of sequestering the jury he would consider rescinding his order. N.Y. Times, Mar. 6, 1976, p. 23. Also, sometimes the need to sequester does not become obvious until after the start of the trial and the judge may not be able to impose it without warning.

A less tangible problem is that the fact of sequestration may of itself prejudice the jury against the defendant, either because of the inconvenience, or because the situation implies that there is derogatory information about the defendant from which the jurors must be shielded. Sequestration may also be prejudicial because it produces an atypical jury. People with family obligations or business pressures are even less likely to be found on a jury that is sequestered than on one that is not. It is not clear whether such a jury will tend to favor the defense or prosecution, but it clearly introduces an unpredictable factor. Although so far there is no legal impediment to sequestration, these drawbacks suggest why judges do not impose it more often.

The Reardon Report in § 3.5(b) provides that the judge shall order sequestration "if it is determined that the case is of such notoriety or the issues are of such a nature that, in the absence of sequestration, highly prejudicial matters are likely to come to the attention of the jurors." The judge is not to tell the jury which party requested the sequestration.

In any event, in the absence of routine sequestration, we must consider the problems that arise when the jury is not sequestered. In

what follows keep in mind the possibility that at times automatic sequestration may be preferable to the specific alternatives being discussed.

(1) Defendant Wants a Public Trial

The main variable at this point becomes the openness of the trial. The Sixth Amendment to the United States Constitution provides that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." A similar provision exists in several state constitutions, but recent constitutional decisions indicate that, in any event, this part of the Sixth Amendment applies to the states. The Supreme Court's first significant venture into this area was In re Oliver, 333 U.S. 257 (1948):

> The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet.* All of these institutions obviously symbolize a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.

By the time of Duncan v. Louisiana, 391 U.S. 145 (1968), the Court was enumerating a public trial as one of the rights included within the Fourteenth Amendment.

This "right," like most, is not absolute. Various state interests have been held to be so compelling as to justify the exclusion of the public and the press regardless of the defendant's wishes. These state interests include the fact that a prosecution witness is young or frightened, or the crime is an embarrassing one; that a witness for the state is an undercover agent whose identity must remain secret; that the discussion will involve information that should be kept secret, such as the components of the skyjacker profile; that the litigation will entail disclosure of a carefully guarded trade secret; or that spectators are threatening witnesses or disrupting the proceedings. In each of these cases, the trial may be closed for as long as is necessary to meet the need that dictates closure. Cases discussing the var-

ious justifications are collected in United States ex rel. Lloyd v. Vincent, 520 F.2d 1272 (2d Cir.) certiorari denied, 423 U.S. 937 (1975).

Courts once closed trials if the subject matter involved sexual misbehavior. Although still barring minors in such cases, the courts no longer automatically close such trials. Many states have statutory exceptions to public trials, again defined in terms of sexually-oriented subject matter. It is no longer clear that these will prevail over a defendant's claim to a public trial.

Perhaps the most common exclusion today occurs in the juvenile proceeding. In most states, hearings in juvenile cases are confidential on the ground that they are primarily to rehabilitate and are clinical rather than punitive. The Supreme Court has said that a state may "continue, if it deems it appropriate, to provide and to improve provision for the confidentiality of records of police contacts and court action relating to juveniles." In re Gault, 387 U.S. 1, 25 (1967).

If the defendant is unable to obtain a public trial, it is of little value to have the press on his side claiming a denial of the public's right to know. The courts that have considered the question indicate that unless the press is singled out for discriminatory treatment, it has no greater right to gain entrance to a closed trial than has the public in general. The courts imply that the public's claim has no constitutional status, and although the defendant's claim has such status he may lose. Finally, notice that the state's reasons for closing trials are not related to the fear of prejudicial publicity.

(2) Defendant Wants a Closed Trial

The Supreme Court has stated that "The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right. For example, although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial. . . ." Singer v. United States, 380 U.S. 24, 34–35 (1965). The normal reason for such a request, assuming that the jury is not sequestered, is to prevent the jury from learning about prejudicial information that may be discussed out of the jury's hearing but not admitted in evidence. This does not apply to information that the press may have learned earlier or from other sources, such as a prior criminal record or what happened at a hearing on motions to suppress, because that can be printed even if the trial is closed. The defendant may also seek closure for reasons having nothing to do with the fear of prejudicial publicity—such as to obtain essential testimony. Thus, in Kirstowsky v. Superior Court, 143 Cal.App.2d 745, 300 P.2d 163 (1956), the defendant in a murder trial wanted the public excluded

because she would be testifying about "revolting" sexual practices the decedent forced her to perform. Her emotional state was such that if forced to testify in public she would be unable to do so effectively. The court held that the trial should have been closed, but only for her testimony. The concern involved an aspect of fair trial unrelated to prejudicial publicity.

Most requests to close the trial, however, do seem to involve publicity. The courts, relying on the Supreme Court's language in *Oliver*, supra, have strongly resisted such requests because of our historic commitment to the public administration of justice, particularly at the trial itself. Some of the decisions that permitted or required closed pretrial proceedings stressed that the dispute was not over the trial itself, implying that the trial was even more deserving of being conducted openly.

Among the concerns that argue against closing trials are the potential dangers of secret justice: the improperly lenient treatment of a defendant who may be a public official or highly placed person, or improperly harsh treatment of an uneducated defendant to satisfy the prosecution's or judge's ulterior motives. Affirmatively, it is desirable for the public to watch its officials and institutions in action and to learn about their roles. Also, the public aspect of the trial may help assure the victim or his family that justice is being done.

The arguments are extensively considered in Oxnard Pub. Co. v. Superior Court, 68 Cal.Rptr. 83 (Cal.App.1968), vacated as moot after a change of venue was granted. The court concluded that the historical and political pressures toward public administration of justice were so great that a closed trial would not be ordered in the absence of "dire necessity." The defense argued that it was not seeking to deny the public information about the trial, but only to delay the release of the transcript until after the unsequestered jury retired for its deliberations. The court was unpersuaded for four reasons: a transcript omits the intonations and gestures that a reporter might observe and think worth reporting; the disclosure of judicial abuses is delayed for the length of the trial; a transcript is less accessible to the public than is an open trial that is reported as it proceeds; and, finally, if the judge issues a controversial ruling that, for example, suppresses an illegally obtained confession and thus frees a possible murderer, the public will be better able to understand such an order if it has been following the progress of the case day-by-day. Are these persuasive reasons for rejecting a closed trial? Recall *Oliver's* statement about the value of "contemporaneous review in the forum of public opinion."

The Reardon Report, in § 3.5(d), provides that if the jury is not sequestered, the public (and press) should be excluded from argu-

ments out of the jury's hearing on a party's request "unless it is determined that there is no substantial likelihood" of prejudice to the defendant's right to a fair trial.

Although we have been emphasizing prejudice to the defendant, it is possible that some cases may involve publicity prejudicial to the government. One obvious difference is that if prejudice enters the case as a result of media statements and leads to an acquittal, the rule against double jeopardy prevents holding a new trial.

In light of this discussion of the trial phase of the litigation process, how should the interests be accommodated? Should all juries be sequestered so that the potential for bias from optional sequestration can be avoided entirely? Should certain phases of trials be closed and reporting delayed until the jury begins deliberating? Should we have no sequestration or limits on information but instead rely on the admonition to jurors, and order new trials freely in cases in which the courts conclude that prejudice has somehow crept in? Are there situations that would suggest waiving a jury altogether?

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e. Other Arguments for Denying Access to Judicial Information.

1. *Jurors' Privacy.* Not all limits on information about the judicial process relate to fears of the prejudicial effect of publicity. A judge may bar release of the names of jurors in notorious cases. If this is limited to the pendency of the trial itself, can it be justified on the ground that it insulates the jurors from possibly prejudicial contacts? If their names are never to be released by court personnel a different justification is needed. This happened in the trial of John Connally in the District of Columbia. The judge wanted to prevent harassment of the jurors after the case, to preserve the confidentiality of jury deliberations, and to guarantee them the opportunity to resume their normal lives after deciding an important case. Would the judge's ban be justified if its purpose were to assure jurors that if they rendered a controversial verdict they would not have to answer to their neighbors for it, or is such responsibility one reason for the jury system? Is a permanent assurance of anonymity too great a price for such independence even if the goal is desirable? In any event, this technique cannot work in small communities where everyone knows jurors' identities from word of mouth. Is that an argument against limiting disclosure in large cities? Efforts to ban the press from naming jurors it knows are discussed at p. 233, infra.

2. *Discipline of Attorneys and Judges.* A more common area of secrecy relates to disciplinary actions brought against attorneys and judges. The secrecy is defended because of the need to obtain cooper-

ation from complainants and witnesses as well as those charged with misbehavior. Also, minor transgressions are thought to require rehabilitation rather than punishment and this is thought best achieved through confidentiality. These precepts have been challenged recently and are being reconsidered. For a good discussion of access to attorney disciplinary records, see McLaughlin v. Philadelphia Newspapers, Inc., 465 Pa. 104, 348 A.2d 376 (1975), denying reporters access to the disciplinary file of an attorney who was being appointed an assistant district attorney.

Discipline of judges is always conducted secretly in the initial stages. In one New York case, a judge was charged with two counts of misbehavior. He was found guilty of the less serious one and innocent of the other. He was not removed from office. A reporter sought to see the file but was told that since the judge was continuing in office and the more serious charge had been rejected, his ability to function would be impaired by release of the whole file. Since the two parts of the file could not be separated, nothing was released. Matter of Nichols v. Gamso, 38 N.Y.2d 907, 346 N.E.2d 556, 382 N.Y.S.2d 755 (1976).

A Virginia newspaper reported a state commission's investigation of various charges of incompetence brought against a particular judge. Under Va.Code § 2.1–37.13, all papers and proceedings, including the judge's name, are confidential "and shall not be divulged by any person to anyone except the Commission." The newspaper was convicted of violating the statute and was fined $500. The judge rejected an argument that the statute applied only to participants in the proceedings. He upheld the statute's validity on the ground that judges accused of wrongdoing are less protected than ordinary citizens because the commission is required to investigate all charges no matter how frivolous. The case is on appeal. See IX Press Censorship Newsletter 84 (1976).

3. *Sealing Criminal Records.* Privacy concerns also loom large in the recent movement toward sealing or expunging criminal records of those who have behaved well for a certain number of years after their convictions. Massachusetts for example provides that if a person committed a felony 15 years ago (or a misdemeanor ten years ago) and has not been found guilty of any criminal offense in the last ten years in any state or federal court, the criminal file shall be sealed. The sealed records shall not operate to disqualify the person from public employment nor be admissible in any court proceedings —except in subsequent criminal proceedings. Applicants for private employment must be told on the application form that a sealed record is equivalent to "no record" and the state commissioner in charge of sealed records "in response to inquiries by authorized persons other

than any law enforcement agency, any court, or any appointing authority, shall in the case of a sealed record report that no record exists." Mass.Laws Ch. 525 (1974). Does the statute interfere with any legitimate public "right" to know? Why should the Commissioner report the file's existence when asked by "any appointing authority?" Does that suggest that the legislature did not believe wholeheartedly in what it was doing? Could this be reconciled with the proposed statute making it a crime for government officials to lie to the public, p. 160, supra? The statute includes no ban on the media reporting what they know from their files or can learn from other sources, raising a matter discussed at p. 342, infra.

Many persons have become concerned that a person acquitted at a trial, or against whom charges are dismissed even before trial, is not usually restored to the condition and reputation he or she enjoyed before becoming involved in the criminal process. Some who deplore this fact have argued that to prevent harm to the innocent, names of arrested persons should remain private unless the person asks its release or is convicted of a crime. What are the merits of such a statute? Legislation to this effect was adopted in New Zealand in 1975 but was repealed by a new government in 1976.

Which legislation places a more justifiable limitation on available information—Massachusetts' or New Zealand's?

4. *Closed Civil Trials.* In addition, the interest in privacy has been asserted in a civil action. In State ex rel. Gore Newspapers Co. v. Tyson, 313 So.2d 777 (Fla.App.1975), entertainer Jackie Gleason sued to dissolve his marriage. Attorneys for both parties moved to close the proceedings. The judge complied and the local press sued for access. The Court, 2–1, granted the access, but conceded to the press no greater right than to the public. The question of closing civil proceedings to the public solely because of a request of the parties was said to be one of first impression. The majority, relying on the absence of statutes that would authorize closing such proceedings, stressed the public's interest in open courts as encouraging witnesses to tell the truth and court officials to be more conscientious. Furthermore an understanding of the system and a sense of confidence in it could never result from secret proceedings. The court found open proceedings desirable in both criminal and civil cases, and observed that respect for the judicial process in marital cases is particularly important because of the fundamental role of marriage and the high incidence of such disputes.

For the majority, the trial could be closed only if that were essential to provide a fair trial for both parties. Here the parties were simply seeking privacy, and the Court asserted that "whenever litigants utilize the judicial processes they place themselves in the posi-

tion where the details of their difficulties will invariably be made public." Furthermore, Jackie Gleason was a "public personage" who "thereby relinquishes at least a part of his right to privacy." Why should this matter? The dissenter argued that the public had no legitimate interest in a family's domestic affairs. In the absence of a constitutional or statutory provision for public trials in civil cases the trial judge should have the power to make this decision.

In another case, a famous singer sued a motel chain for $5,000,000 in damages, asserting that because they negligently failed to provide adequate locks for her room, she was raped. All parties asked the judge to close the courtroom to the press and public. The trial judge concurred but was reversed on appeal. In an oral ruling the court held courtrooms public facilities even in civil cases. If the trial judge had issued a narrower ruling closing specific parts of the trial for compelling reasons, such as the unwillingness or inability of a witness to testify fully in public, that would have presented a different question. N.Y. Times, June 15, 1976, p. 67.

It is important to recognize that in this last group of situations, when the interest invoked against disclosure is privacy, the goal is not simply delayed information but the permanent denial of information. Naturally denials are harder to justify against competing interests than are delays. How might one approach the question of balancing the importance of privacy and other values against the asserted public interest in knowing such things as which jurors are sitting or did sit in certain important trials; which attorneys and judges are being disciplined for what and with what outcome; which children are being judged in juvenile courts; how civil litigants are being treated in particular cases; what crimes individuals have committed in the past?

Chapter IV

RESTRICTIONS ON CONTENT OF COMMUNICATION

In this chapter we will consider the range of legal arguments for prohibiting certain communications because of their substantive content. In each case we will consider, among other points, the justifications offered for restriction and the value of the communication. The justifications are as diverse as the situations to which they are applied. Arguments for limiting speech and press to protect privacy are unlikely to resemble the arguments based on national security.

Even if the speech is determined to be subject to governmental control, there is the further question of what types of sanctions may be imposed. Among the array are criminal prosecutions, civil damage remedies, and bans on speech imposed by administrative techniques or by court injunction. Again, particular sanctions are used for specific kinds of speech. Even when speech is found to be defamatory, for example, it is regulated after the fact and is not enjoined. On the other hand, speech held to invade privacy has been barred from publication. In sum, the sanctions available are as diverse as the justifications offered to protect the speech in the first place.

Much of the material discussed in this chapter, both as to regulation of speech and available remedies, is discussed in a series of remarkable exchanges among reporters, editors, lawyers and judges in The Media and the Law (H. Simons and J. Califano eds. 1976).

A. PROTECTING THE FAIR ADMINISTRATION OF JUSTICE

1. Protecting Jurors from Prejudicial Information

In our discussion of newsgathering we observed several critical points at which government officials sought to deny information to the press and public for fear that dissemination of such information might adversely affect the administration of justice. We saw this in the orders directing district attorneys and others not to discuss certain subjects with press and public, closing pretrial proceedings, and sometimes even trying to close parts of the trial itself.

In this section the interest still involves fair adjudication, but here the media have obtained the controversial material and the question is whether they may be barred from, or punished for, publishing that information. One significant difference is that here the restric-

tive orders run directly against the media and entail exposure to punishment for contempt of court. In the gathering cases, the press usually was not a party, and those who violated court orders by "leaking" information were rarely identified—partly because of the reporter's privilege—and thus escaped punishment for either contempt or violation of a statutory ban on releasing certain information.

YOUNGER v. SMITH

Court of Appeal of California, Second District, 1973.
30 Cal.App.3d 138, 106 Cal.Rptr. 225.

[This is another aspect of the murder case involving the child shot from a moving car, discussed at p. 197, supra. In addition to the extensive order addressed to the prosecutor and others, the judge also issued an order directly against the media:

> It being the further opinion of this Court that Constitutional protections are of little value if the news disseminating agencies seek, investigate, editorialize, and disseminate information of the foregoing proscribed character with respect to this cause, giving anonymity and asserting protection as to their source of information; it is therefore now ORDERED that all agencies of the public media, including written publications, radio, and television, their respective reporters, editors, publishers, and other agents, refrain from the publication of any matters with respect to the present cause except as occur in open court, and particularly as proscribed in the preceding paragraphs of this Order.
>
> . . .
>
> This Order shall be in force until this matter has been disposed of or until further Order of Court.

In *Times Mirror*, a newspaper publishing company sought to have the press portion of the order vacated.]

KAUS, P. J.

. . .

II.

Times Mirror Company v. Superior Court

The legal literature concerning freedom of the press needs no enrichment by yet another panegyric. Those who do not believe that a free press is one of the cornerstones of this republic, will not be swayed by us; those who do, need no refresher.

We do not for one moment suggest that the respondent court was insensitive to free press or free speech values. We do not hesitate, however, to hold that neither Antelo, as the real party in interest here and movant in the respondent court, nor the court itself, have carried the " 'heavy burden of showing justification for the imposition' " of a prior restraint in this case. (New York Times Co. v. United States, 403 U.S. 713, 714 (1971)).

There is no need to belabor the obvious: that the tragic facts of the homicide with which Antelo is charged provoked an immediate public outcry and fairly extensive news coverage. Further, it is clear that, unchecked, continued news coverage of the nature which was before the respondent court carried, to put it mildly, a potential of prejudice.

On the other hand there is no necessary correlation between the depth of a tragedy in human terms and its continued newsworthiness. The homicide of Joyce Huff was not a matter of national or even state-wide concern. Obviously it was of far less interest than the murder of Marilyn Sheppard, yet in Sheppard v. Maxwell, 384 U.S. 333 (1966), the Supreme Court brushed aside any consideration of the question what, if any, sanctions are available against "a recalcitrant press," by concluding that less drastic measures "would have been sufficient to *guarantee* Sheppard a fair trial. . . ." [ ]

Quite apart from the fact that the amount of pretrial publicity in *Sheppard* dwarfed the media coverage in People v. Antelo, there is also the vital difference of tone. Much of the pretrial publicity in *Sheppard,* both before and after Sheppard's arrest, was openly hostile to the defendant. On the other hand, none of the news items brought to our attention in connection with People v. Antelo bears the stamp of a vendetta against the persons accused of the Huff homicide. *Sheppard* makes this an a fortiori case.

In holding, as we must, that the direct restraint against the media was impermissible, we fully recognize that the judge who promulgated it is closer to the situation than we are. Antelo and his codefendant were arraigned in a branch of the Los Angeles County Superior Court which is located near the community where the homicide was committed. Presumably the news value of the alleged crime was more intense in the communities near its commission. Very probably the citizens there will continue to be interested in the Huff tragedy long after people elsewhere will want their appetite for news fed by new horrors.

We also realize it is difficult to put between the covers of the record in a court such as ours all of the many factors, some perhaps subconsciously assimilated, which cause a trial judge familiar with local conditions to make a present determination with respect to future

publicity which may affect the fairness of a trial. This does not, however, relieve us of our constitutional duty, in cases such as this, to make an independent assessment of the facts. [ ] Furthermore, it is perhaps of some advantage not to be too close to the scene. Before it is even appropriate to think about a change of venue to another county—a subject on which we express no view—one must not forget that the homicide occurred in a relatively small community in a county with a population of over seven million people. [ ] This certainly is a fact which we must consider when deciding whether People v. Antelo called for direct restraints, when the Supreme Court did not even think that such restraints were worth discussing in *Sheppard,* a case of nation-wide interest.

. . .

The jurisdiction of courts to make pretrial protective orders rests squarely on their implied and inherent powers. The necessity for such powers is well recognized. We do not deny it. Indeed our decision in the third consolidated matter, the Busch petition, rests on the application of such powers. At the same time, we must recognize that the concept of implied and inherent powers poses great dangers when, of necessity, their definition and application is in the hands of those who wield them. Judicial supremacy must rest on respect, not fear. Materially courts are the most impotent branch of government. If, through lack of restraint and by attempting to increase their powers unnecessarily, they lose the respect which makes them effective, they may soon find that, as a practical matter, even powers that are now conceded to them, are unenforceable.

. . .

UNITED STATES v. DICKINSON

United States Court of Appeals, Fifth Circuit, 1972.
465 F.2d 496.

[Frank Stewart, active in civil rights activities in Baton Rouge, Louisiana, was charged with conspiring to murder the mayor. Asserting that the charge was groundless and brought solely to harass him, Stewart asked the federal district court to enjoin the state proceeding. In accordance with Younger v. Harris, 401 U.S. 37 (1971), the federal court held a hearing limited to the question whether the state's prosecutorial motive was legitimate or contrived. Dickinson and Adams, local newspaper reporters, were covering the hearing when the federal judge ordered that "no report of the testimony taken in this case today shall be made in any newspaper or by radio or

television, or by any other news media." The judge stated his concern about the effect of such reports if the case was ultimately tried in the state court. The judge explicitly said it was permissible to report that the hearing was being held but not "the details of the evidence." The two reporters, aware of the order, nevertheless wrote articles summarizing the day's testimony in detail. The judge found them guilty of criminal contempt for knowingly violating his order and fined each $300. They appealed.]

Before JOHN R. BROWN, CHIEF JUDGE, and BELL and SIMPSON, CIRCUIT JUDGES.

JOHN R. BROWN, CHIEF JUDGE:

. . .

We start, of course, with the proposition repeatedly reaffirmed by the Supreme Court that "a trial is a public event. What transpires in the courtroom is public property. . . . Those who see and hear what transpired may report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." Craig v. Harney, 331 U.S. 367, 374 (1947), [ ]. Moreover, "reporters of all media . . . are plainly free to report whatever occurs in open court through their respective media." *Estes*, 381 U.S. at 541–542.

Particularly is maximum freedom of the press required where the trial is intended to "determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." Wood v. Georgia, 370 U.S. 375, 390 (1962). "The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings." *Estes*, supra, 381 U.S. at 539. Therefore, "particularly in matters of local political corruption and investigations is it important that freedom of communications be kept open . . .." *Wood*, supra, 370 U.S. at 390.

The Younger v. Harris hearing generating the present case, involving as it did allegations of bad faith, harassment, political machinations, and racial motivation on the part of the State prosecutorial officials, was peculiarly one of public concern. In fact, it was precisely the *widespread* interest in the case which led the Court to issue the controversial order. Accordingly, in the circumstances of this case, the prior restraint of the press imposed by the questioned order "comes to this Court bearing a heavy presumption against its constitutional validity." [ ] Any less stringent standard would forsake the unequivocal commands of the First Amendment. [ ]

Of course, the accused has constitutional rights, too, and particularly important among these are rights to a speedy trial before a fair and impartial tribunal in the venue where the alleged offense occurred. Clearly, pervasive and irresponsible news coverage of a pending criminal proceeding can so inflame and prejudice a community that it becomes virtually impossible to select an impartial jury therefrom. And without a doubt it is the Trial Court's responsibility to protect the defendant from such inherently prejudicial influences which threaten the fairness of his trial and an abrogation of his constitutional rights. . . .

. . .

Even if special exigencies might justify curtailment of the right to publish court proceedings in some extraordinary circumstance—and that *if* is a very big one indeed—the present case is peculiarly ill-suited for abandonment of the traditional reluctance of courts to supervise the content of news accounts of public proceedings. In the first place, . . . it is significant that the hearing here in issue was not before a jury, and trial on the merits was by no means immediate. Nor was there any certainty as to the place of the State Court trial. It is the nature of news that it is so readily forgotten—time can erase impressions, even sensational ones. Thus, while prejudicial news coverage may poison the minds of jurors or immediate prospective jurors for the present, the contamination may be only temporary and while allowing the press possibly to generate an inflamed temper in the community is regrettable, this was no indication that change of venue would not likely suffice. Therefore, the District Court's cure was worse than the disease.

Second, the situation which the trial court faced in the present case was in no way the "Roman holiday"—"carnival atmosphere" created by hundreds of reporters at the Sheppard trial, or the "cause celebre"-show-must-go-on environment of the Estes trial. . . .

Third, the public's right to know the facts brought out in this specific hearing was particularly compelling here, since the issue being litigated was a charge that elected state officials had trumped up charges against an individual solely because of his race and political civil rights activities. "Particularly in matters of local political corruption and investigation is it important that freedom of communications be kept open and that the real issues not become obscured . . . ." [ ]

. . .

Finally, there are available alternative cures for prejudicial publicity far less disruptive of constitutional freedoms than an absolute ban on publication. Thus, if as the Judge apprehended, the expected pretrial publicity generated a prejudicial atmosphere which had not

abated by time for the State trial, the traditional remedies of continuance or change of venue would be readily available to insure a fair trial. The inconvenience or expense to State or defendant in such a course was not enough to justify the extreme ban on publication.

. . .

It Doesn't End Here

The conclusion that the District Court's order was constitutionally invalid does not necessarily end the matter of the validity of the contempt convictions. There remains the very formidable question of whether a person may with impunity knowingly violate an order which turns out to be invalid. We hold that in the circumstances of this case he may not.

We begin with the well-established principle in proceedings for criminal contempt that an injunction duly issuing out of a court having subject matter and personal jurisdiction *must be obeyed,* irrespective of the ultimate validity of the order. Invalidity is no defense to criminal contempt. . . .

It is clear that this principle applies even where the invalidity of the order is of constitutional proportions as Walker v. Birmingham, [388 U.S. 307] plainly holds. In *Walker* the contemnors, including Dr. Martin Luther King, had violated an Alabama circuit court ex parte injunction prohibiting participation in street demonstrations planned for the forthcoming Easter weekend. Forsaking numerous appellate routes left open for contesting the circuit court's order, the demonstrators marched anyway in knowing disobedience to the injunction and without having taken any judicial steps to dissolve or overturn it. The Supreme Court affirmed the resulting contempt convictions. Admittedly the injunction in *Walker* was merely a judicial paraphrase of an existing municipal ordinance which prohibited street demonstrations without authority of a permit secured from the Commissioner of Public Safety (Eugene "Bull" Connor), which ordinance was shortly declared unconstitutional by a unanimous court in Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1968).

Nevertheless, the Court, emphasizing that "respect for judicial process is a small price to pay for the civilizing hand of law," 388 U. S. at 321, emphatically rejected the suggestion that an individual may disregard a court order simply because the injunction interfered with —albeit impermissibly—his exercise of First Amendment rights. Absent a showing of "transparent invalidity" or patent frivolity surrounding the order, *it must be obeyed* until reversed by orderly review or disrobed of authority by delay or frustration in the appellate process, regardless of the ultimate determination of constitutionality, or lack thereof.

Uniqueness Of The Judiciary

Admittedly, the inviolability of court orders, typified by the *Walker* rule, is unique among governmental commands. When legislators or executive agencies—State or Federal—have transgressed constitutional or statutory bounds, their mandates need not be obeyed. Violators, of course, risk criminal sanctions if their prediction of illegality should fail, but if the directive is invalid, it may be disregarded with impunity. . . .

. . .

The criminal contempt exception requiring compliance with court orders, while invalid non-judicial directives may be disregarded, is not the product of self-protection or arrogance of Judges. Rather it is born of an experience-proved recognition that this rule is essential for the system to work. Judges, after all, are charged with the final responsibility to adjudicate legal disputes. It is the judiciary which is vested with the duty and the power to interpret and apply statutory and constitutional law. Determinations take the form of orders. The problem is unique to the judiciary because of its particular role. Disobedience to a legislative pronouncement in no way interferes with the legislature's ability to discharge its responsibilities (passing laws). The dispute is simply pursued in the judiciary and the legislature is ordinarily free to continue its function unencumbered by any burdens resulting from the disregard of its directives. Similarly, law enforcement is not prevented by failure to convict those who disregard the unconstitutional commands of a policeman.

On the other hand, the deliberate refusal to obey an order of the court without testing its validity through established processes requires further action by the judiciary, and therefore directly affects the judiciary's ability to discharge its duties and responsibilities. Therefore, "while it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory." Gompers v. Buck's Stove & Range Co., 221 U.S. at 450. [ ]

. . .

Of course, the rule that unconstitutional court orders must nevertheless be obeyed until set aside presupposes the existence of at least three conditions: (i) the court issuing the injunction must enjoy subject matter and personal jurisdiction over the controversy; (ii) adequate and effective remedies must be available for orderly review of the challenged ruling, and (iii) the order must not require an

irretrievable surrender of constitutional guarantees. Regarding (i), there is no problem in this case at all.

Regarding (ii), the Supreme Court made quite clear in *Walker*, supra, that its decision was influenced by the fact that there was a two-day interim between the issuance of the injunction and the planned Good Friday march, during which time some effort to secure judicial relief could and should have been made. However, Mr. Justice Stewart emphasized that "this case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims." 388 U.S. at 318. If there had been no real opportunity to contest the unconstitutional order, as, for example, if it had been issued at the very moment the march was scheduled to commence, then the premise that effective judicial remedies were available would be undermined and the result would likely have been different.

The "News Is Today's News" Argument—Newsmen Are Citizens, Too

Where the thing enjoined is publication and the communication is "news", this condition presents some thorny problems. Timeliness of publication is the hallmark of "news" and the difference between "news" and "history" is merely a matter of hours. Thus, where the publishing of news is sought to be restrained, the incontestable inviolability of the order may depend on the immediate accessibility of orderly review. But in the absence of strong indications that the appellate process was being deliberately stalled—certainly not so in this record—violation with impunity does not occur simply because immediate decision is not forthcoming, even though the communication enjoined is "news". Of course the nature of the expression sought to be exercised is a factor to be considered in determining whether First Amendment rights can be effectively protected by orderly review so as to render disobedience to otherwise unconstitutional mandates nevertheless contemptuous. But newsmen are citizens, too. See Branzburg v. Hayes. 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.

Regarding (iii) it is obvious that if the order requires an *irrevocable* and permanent surrender of a constitutional right, it cannot be enforced by the contempt power. For example, a witness cannot be punished for contempt of court for refusing a court order to testify if the underlying order violates Fifth, Fourth or perhaps First Amendment rights. . . .

But none of these exculpating factors was present in the case before us. As a matter of jurisdiction (i), the District Court certainly has power to formulate Free Press-Fair Trial orders in cases pending before the court and to enforce those orders against all who have actual and admitted knowledge of its prohibitions. Secondly, as the District Court's findings of fact establish, both the District Court and the Court of Appeals were available and could have been contacted that very day, thereby affording speedy and effective but *orderly* review of the injunction in question swiftly enough to protect the right to publish news while it was still "news". Finally, unlike the compelled testimony situations the District Court's order required that information be withheld—not forcibly surrendered—and accordingly, compliance with the Court's order would not require an irrevocable, irretrievable or irreparable abandonment of constitutional privileges.

Under the circumstances, reporters took a chance. As civil disobedients have done before they ran a risk, the risk being magnified in this case by the law's policy which forecloses their right to assert invalidity of the order as a complete defense to a charge of criminal contempt. Having disobeyed the Court's decree, they must, as civil disobeyers, suffer the consequences for having rebelled at what they deem injustice, but in a manner not authorized by law. They may take comfort in the fact that they, as their many forerunners, have thus established an important constitutional principle—which may be all that was really at stake—but they may not now escape the inescapable legal consequence for their flagrant, intentional disregard of the mandates of a Court.

Retrospective Invalidity Taints Guilty Finding

The fact that the District Court in the circumstances of this case could validly have punished the defendants for contempt of court despite the unconstitutionality of the underlying order still does not dispose of the case. There remains the question whether the conviction should stand in view of the fact that the District Court's action rested on the good faith but mistaken belief that the order was perfectly valid.

. . .

In the case before us the conclusion of contempt was bottomed irrevocably on a mistake of law—"It was the opinion of this Court then and it is its opinion now that the order issued was authorized by [paragraph 9 of the Court's Free Press-Fair Trial] Rule." It was not. Since the determination that the conduct of the respondents was contemptuous was premised on this erroneous view, it is appropriate to remand the case to the District Court for a determination of

whether the judgment of contempt or the punishment therefor would still be deemed appropriate in light of the fact that the order disobeyed was constitutionally infirm.

Vacated and remanded.

Notes and Questions

1. On remand the trial judge refused to alter the sentences. He said that they had been based on wilful disobedience rather than on any harm that occurred. 349 F.Supp. 227 (M.D.La.1972). The court of appeals affirmed, 476 F.2d 373 (5th Cir. 1973), and the Supreme Court denied certiorari with Justice Douglas noting that he would have granted the writ. 414 U.S. 979 (1973).

2. Do the courts in *Younger* and *Dickinson* take similar approaches to the standard to be used in reviewing efforts to bar the press from publishing something? In *Younger*, why may the trial judge order the prosecutor not to speak but be unable to do the same to the press?

3. Some agree with *Dickinson* and permit a person to test the constitutionality of an order by disobeying it. Which position is preferable?

4. *Note on Vacating Restrictive Orders.* To understand the pros and cons of the debate about the need to obey a court order, it is important to know the routes by which the press may object to such orders. When the order is addressed to the media directly, rather than barring the parties from talking to the media, the problem of standing discussed in *CBS*, p. 203, supra, does not arise. All courts have mechanisms for expediting cases that require early decision. In the Pentagon Papers proceedings, for example, two cases moved from trial court through courts of appeals to decision by the Supreme Court in 15 days.

After the restrictive order was issued in *Dickinson*, the proper route was first to ask the judge to "stay" (delay the operation of) his own order pending an appeal. In the event that this request was denied, the next step would be to find a single judge of the court of appeals and ask him to stay the order while the reporters file a formal appeal from the order. It should be possible to find the single judge within hours after the challenged ruling is issued. Several of the judges who sit on the Court of Appeals for the Fifth Circuit reside in New Orleans and have chambers there. (Otherwise, the lawyer for the reporters would have to travel to the nearest appellate judge.) If the judge believes that the order is clearly wrong he may grant the stay pending the full appeal. Alternatively, he might refer the application for a stay to the chief judge of the circuit to convene a panel of three judges to decide whether to grant the stay. If the

court of appeals had denied a stay, the reporters could have sought a stay from the Supreme Court Justice who is assigned to handle such matters for the Fifth Circuit. The Justice may grant the stay himself or refer it to the full Court for decision. This procedure is discussed further shortly. Although the duration of the decision-making process will vary with the number of stages required, obviously in some cases the original order might be stayed within a few hours.

5. The prior restraints that do survive must meet strict requirements. The Court has demanded promptness as the price for upholding legislation that requires licensing of motion pictures for public exhibition. The Supreme Court has refused to declare that requirement of a license to be unconstitutional although it operates as a prior restraint, Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961), but it has required that the licensing authority provide a speedy review process. Freedman v. Maryland, 380 U.S. 51 (1965). In Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968), the following procedure was found fatally defective:

> The Chicago Motion Picture Censorship Ordinance prohibits the exhibition in any public place of "any picture . . . without first having secured a permit therefor from the superintendent of police." The Superintendent is required "within three days of receipt" of films to "inspect such . . . films . . . or cause them to be inspected by the Film Review Section . . . and within three days after such inspection" either to grant or deny the permit. If the permit is denied the exhibitor may within seven days seek review by the Motion Picture Appeal Board. The Appeal Board must review the film within 15 days of the request for review and thereafter within 15 days afford the exhibitor, his agent or distributor a hearing. The Board must serve the applicant with written notice of its ruling within five days after close of the hearing. If the Board denies the permit, "the Board, within ten days from the hearing, shall file with the Circuit Court of Cook County an action for an injunction against the showing of the film." A Circuit Court Rule, General Order 3–3, promulgated May 26, 1965, provides that a "complaint for injunction . . . shall be given priority over all other causes. The Court shall set the cause for hearing within five (5) days after the defendant has answered . . . ." However, neither the rule nor any statutory or other provision assures a prompt judicial decision of the question of the alleged obscenity of the film.
>
> The Illinois Supreme Court held "that the administration of the Chicago Motion Picture Ordinance violates no constitutional

rights of the defendants." 38 Ill.2d, at 63, 230 N.E.2d, at 247. We disagree. In Freedman v. Maryland, 380 U.S. 51, 58–59 (1965), we held ". . . that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. . . . To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a *specified brief period*, either issue a license or go to court to restrain showing the film. . . . [T]he procedure must also assure a *prompt final judicial decision*, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." (Emphasis supplied.) The Chicago censorship procedures violate these standards in two respects. (1) The 50 to 57 days provided by the ordinance to complete the administrative process before initiation of the judicial proceeding does not satisfy the standard that the procedure must assure "that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film." (2) The absence of any provision for a prompt judicial decision by the trial court violates the standard that ". . . the procedure must also assure a prompt final judicial decision . . ."

6. The media are also attempting to tighten standards for the issuance of restrictive orders. In one case, Schiavo was on trial in federal court in Philadelphia for perjury before a grand jury investigating a murder. He was also under federal indictment for conspiracy in connection with the murder and under state indictment on charges of first degree murder. On a Friday afternoon at 2:00 p.m. the judge orally ordered the press not to mention the other two indictments and specifically told the offending reporter that she and her editors would face contempt charges if they violated the order. Two hours later counsel for the paper appeared before the district judge and asked that the oral order be vacated. This was denied in writing although the oral order had not yet been transcribed.

Late that afternoon an appeal was filed from the written order refusing to vacate the oral order. The following Wednesday three things happened: the oral order was transcribed, the court of appeals granted a stay of the order, and the jury returned its verdict in Schiavo's case. After a full argument at a later date, the court, *en banc*, denied that the contempt issue had become moot; it was an important dispute "capable of repetition, yet evading review." Such a ruling is crucial to allow decisions on the merits so long as cases like *Dickinson* require that court orders be obeyed until vacated.

The court never reached the substantive issues in the case, asserting that the fact that the order was oral made it hard for the me-

dia to recall accurately and impossible for the court to review on the merits. Seven judges held the issuance of an oral order to be fatally defective. Two dissenting judges would have sustained the order. United States v. Schiavo, 504 F.2d 1 (3d Cir.), certiorari denied 419 U.S. 1096 (1974).

7. After the Sheppard decision in 1966, the Supreme Court did not play a major role in such cases until Times-Picayune Pub. Corp. v. Schulingkamp, 419 U.S. 1301 (1974), when Justice Powell decided an application for a stay pending the filing of a formal appeal. A state trial judge in Louisiana issued a pretrial order in a case in which "a young white nursing student was raped and murdered following her visit to an elderly patient living in one of the city's public housing projects. Shortly thereafter, two Negro suspects were arrested and charged with the crime." The case led to extensive pretrial publicity concerning local safety and several other issues, including the prior record of one of the defendants. The order imposed a total ban on publication of pretrial proceedings until a jury was selected. It also imposed restrictions on what might be published during the trial. The lower court's denial of a stay was appealed to Justice Powell as Circuit Justice for Louisiana. He stated that he would not stay lower court rulings unless there were a reasonable probability that four members of the Court would consider the underlying issue worthy of hearing the case, a significant probability of reversal of the lower court judgment, and a likelihood that irreparable harm would result if the order was not stayed. Using those criteria, Justice Powell stayed the trial court's order. Six weeks elapsed between issuance of the restrictive order and Justice Powell's stay, including litigation in the state courts and the lower federal courts. The Court was in summer recess when Justice Powell acted. Several months later, after the trials had occurred, the Court dismissed the appeal as moot, Justice Douglas dissenting. 420 U.S. 985 (1975).

8. On May 19, 1975 a Texas trial judge presiding over a murder trial ordered the media not to publish the names of jurors who were to try the case until they began deliberations. After the order, the jurors' names were discussed in open court, entered in the official transcript and recorded on juror slips that were available in the court clerk's office. On May 22nd, the Austin American-Statesman asked the Texas Supreme Court to vacate the order. That was denied on May 27th without opinion. On May 29th, Circuit Justice Powell was asked to stay the order. He refused and referred it to the full Court. On June 2, 1975, the Court denied the application for a stay. Justices Brennan and White would have granted the stay; Chief Justice Burger and Justice Douglas took no part. Newspapers, Inc. v. Blackwell, 421 U.S. 997 (1975). Is this type of order an alternative to

sequestration in that it shields jurors from pressure from the community during the trial? Will it work in small towns? Is it necessary in large cities?

9. After these tentative forays, the Supreme Court confronted the issues directly.

NEBRASKA PRESS ASSOCIATION v. STUART

Supreme Court of the United States, 1976.
427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The respondent State District Judge entered an order restraining the petitioners from publishing or broadcasting accounts of confessions or admissions made by the accused or facts "strongly implicative" of the accused in a widely reported murder of six persons. We granted certiorari to decide whether the entry of such an order on the showing made before the state court violated the constitutional guarantee of freedom of the press.

I

On the evening of October 18, 1975, local police found the six members of the Henry Kellie family murdered in their home in Sutherland, Neb., a town of about 850 people. Police released the description of a suspect, Erwin Charles Simants, to the reporters who had hastened to the scene of the crime. Simants was arrested and arraigned in Lincoln County Court the following morning, ending a tense night for this small rural community.

The crime immediately attracted widespread news coverage, by local, regional, and national newspapers, radio and television stations. Three days after the crime, the County Attorney and Simants' attorney joined in asking the County Court to enter a restrictive order relating to "matters that may or may not be publicly reported or disclosed to the public," because of the "mass coverage by news media" and the "reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial." The County Court heard oral argument but took no evidence; no attorney for members of the press appeared at this stage. The County Court granted the prosecutor's motion for a restrictive order and entered it the next day, October 22. The order prohibited everyone in attendance from "releas[ing] or authoriz[ing] for public dissemination in any form or manner what-

soever any testimony given or evidence adduced"; the order also required members of the press to observe the Nebraska Bar-Press Guidelines.[1]

Simants' preliminary hearing was held the same day, open to the public but subject to the order. The County Court bound over the defendant for trial to the State District Court. The charges, as amended to reflect the autopsy findings, were that Simants had committed the murders in the course of a sexual assault.

Petitioners—several press and broadcast associations, publishers, and individual reporters—moved on October 23 for leave to intervene in the District Court, asking that the restrictive order imposed by the County Court be vacated. The District Court conducted a hearing, at which the County Judge testified and newspaper articles about the Simants case were admitted in evidence. The District Judge granted petitioners' motion to intervene and, on October 27, entered his own restrictive order. The judge found "because of the nature of the crimes charged in the complaint that there is a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial." The order applied only until the jury was impaneled and specifically prohibited petitioners from reporting five subjects: (1) the existence or contents of a confession Simants had made to law enforcement officers, which had been introduced in open court at arraignment; (2) the fact or nature of statements Simants had made to other persons; (3) the contents of a note he had written the night of the crime; (4) certain aspects of the medical testimony at the preliminary hearing; (5) the identity of the victims of the alleged sexual assault and the nature of the assault. It also prohibited reporting the exact nature of the restrictive order itself. Like the County Court's order, this order incorporated the Nebraska Bar-Press Guidelines. Finally, the order set out a plan for attendance, seating and courthouse traffic control during the trial.

Four days later, on October 31, petitioners asked the District Court to stay its order. At the same time, they applied to the Nebraska Supreme Court for a writ of mandamus, a stay, and an expe-

1. The Nebraska Guidelines are voluntary standards adopted by members of the state bar and news media to deal with the reporting of crimes and criminal trials. They outline the matters of fact that may appropriately be reported, and also list what items are not generally appropriate for reporting, including: confessions, opinions on guilt or innocence, statements that would influence the outcome of a trial, the results of tests or examinations, comments on the credibility of witnesses, and evidence presented in the jury's absence. The publication of an accused's criminal record should, under the Guidelines, be "considered very carefully." The Guidelines also set out standards for taking and publishing photographs, and set up a joint bar-press committee to foster cooperation in resolving particular problems that emerge. [The Guidelines are reprinted at p. 252, infra. ed.]

dited appeal from the order. The State of Nebraska and the defendant Simants intervened in these actions. The Nebraska Supreme Court heard oral argument on November 25, and issued its *per curiam* opinion December 2. State ex rel. Nebraska Press Assn. v. Stuart, 194 Neb. 783, 236 N.W.2d 794 (1975).[2]

The Nebraska Supreme Court balanced the "heavy presumption against . . . constitutional validity" that an order restraining publications bears, New York Times v. United States, 403 U.S. 713, 714 (1971), against the importance of the defendant's right to trial by an impartial jury. Both society and the individual defendant, the court held, had a vital interest in assuring that Simants be tried by an impartial jury. Because of the publicity surrounding the crime, the court determined that this right was in jeopardy. The court noted that Nebraska statutes required the District Court to try Simants within six months of his arrest, and that a change of venue could move the trial only to adjoining counties, which had been subject to essentially the same publicity as Lincoln County. The Nebraska Supreme Court held, "Unless the absolutist position of the relators was constitutionally correct, it would appear that the District Court acted properly." 194 Neb., at 797.

The Nebraska Supreme Court rejected that "absolutist position," but modified the District Court's order to accommodate the defendant's right to a fair trial and the petitioners' interest in reporting pretrial events. The order as modified prohibited reporting of only three matters: (a) the existence and nature of any confessions or admissions made by the defendant to law enforcement officers, (b) any confessions or admissions made to any third parties, except members of the press, and (c) other facts "strongly implicative" of the accused. The Nebraska Supreme Court did not rely on the Nebraska

2. In the interim, petitioners applied to MR. JUSTICE BLACKMUN as Circuit Justice for a stay of the State District Court's order. He postponed ruling on the application out of deference to the Nebraska Supreme Court, 423 U.S. 1319 (Nov. 13, 1975) (BLACKMUN, J., in Chambers); when he concluded that the delay before that court had "exceed[ed] tolerable limits," he entered an order. 423 U.S. 1327, 1329 (Nov. 20, 1975) (BLACKMUN, J., in Chambers). We need not set out in detail MR. JUSTICE BLACKMUN's careful decision on this difficult issue. In essence he stayed the order insofar as it incorporated the admonitory Bar-Press Guidelines and prohibited reporting of some other matters. But he declined "at least on application for a stay and at this distance, [to] impose a prohibition upon the Nebraska courts from placing any restrictions at all upon what the media may report prior to trial." Id., at 1332. He therefore let stand that portion of the District Court's order that prohibited reporting the existence or nature of a confession, and declined to prohibit that court from restraining publication of facts that were so "highly prejudicial" to the accused or "strongly implicative" of him that they would "irreparably impair the ability of those exposed to them to reach an independent and impartial judgment as to guilt." Id., at 1333. Subsequently, petitioners applied for a more extensive stay; this was denied by the full Court. 423 U.S. 1027 (1975).

Bar-Press Guidelines. After construing Nebraska law to permit closure in certain circumstances, the court remanded the case to the District Judge for reconsideration of the issue whether pretrial hearings should be closed to the press and public.

We granted certiorari to address the important issues raised by the District Court order as modified by the Nebraska Supreme Court, but we denied the motion to expedite review or to stay entirely the order of the State District Court pending Simants' trial. 423 U.S. 1027 (1975). We are informed by the parties that since we granted certiorari, Simants has been convicted of murder and sentenced to death. His appeal is pending in the Nebraska Supreme Court.

II

[The Court concluded that the controversy was not moot because the dispute was "capable of repetition".]

III

The problems presented by this case are almost as old as the Republic. Neither in the Constitution nor in contemporaneous writings do we find that the conflict between these two important rights was anticipated, yet it is inconceivable that the authors of the Constitution were unaware of the potential conflicts between the right to an unbiased jury and the guarantee of freedom of the press. . . .

The trial of Aaron Burr in 1807 presented Chief Justice Marshall, presiding as a trial judge, with acute problems in selecting an unbiased jury. Few people in the area of Virginia from which jurors were drawn had not formed some opinions concerning Mr. Burr or the case, from newspaper accounts and heightened discussion both private and public. The Chief Justice conducted a searching *voir dire* of the two panels eventually called, and rendered a substantial opinion on the purposes of *voir dire* and the standards to be applied. [ ]. Burr was acquitted, so there was no occasion for appellate review to examine the problem of prejudicial pretrial publicity. Chief Justice Marshall's careful *voir dire* inquiry into the matter of possible bias makes clear that the problem is not a new one.

The speed of communication and the pervasiveness of the modern news media have exacerbated these problems, however, as numerous appeals demonstrate. The trial of Bruno Hauptmann in a small New Jersey community, for the abduction and murder of the Charles Lindberghs' infant child, probably was the most widely covered trial up to that time, and the nature of the coverage produced widespread public reaction. Criticism was directed at the "carnival" atmosphere that pervaded the community and the courtroom itself. Responsible leaders of press and the legal profession—including other judges—

pointed out that much of this sorry performance could have been controlled by a vigilant trial judge and by other public officers subject to the control of the court. [ ].

The excesses of press and radio and lack of responsibility of those in authority in the Hauptmann case and others of that era led to efforts to develop voluntary guidelines for courts, lawyers, press and broadcasters. . . .

In practice, of course, even the most ideal guidelines are subjected to powerful strains when a case such as Simants' arises, with reporters from many parts of the country on the scene. Reporters from distant places are unlikely to consider themselves bound by local standards. They report to editors outside the area covered by the guidelines, and their editors are likely to be guided only by their own standards. To contemplate how a state court can control acts of a newspaper or broadcaster outside its jurisdiction, even though the newspapers and broadcasts reach the very community from which jurors are to be selected, suggests something of the practical difficulties of managing such guidelines.

The problems presented in this case have a substantial history outside the reported decisions of courts, in the efforts of many responsible people to accommodate the competing interests. We cannot resolve all of them, for it is not the function of this Court to write a code. We look instead to this particular case and the legal context in which it arises.

IV

[The Court reviewed its cases touching this problem in which it upset convictions, including Irvin v. Dowd, Estes v. Texas and Sheppard v. Maxwell, and quoted the passage from *Sheppard* requiring the trial judge to take "strong measures" to protect the defendants. It then cited another group of cases, including Murphy v. Florida, in which publicity did not lead to reversals of convictions.]

Taken together, these cases demonstrate that pretrial publicity —even pervasive, adverse publicity—does not inevitably lead to an unfair trial. The capacity of the jury eventually impaneled to decide the case fairly is influenced by the tone and extent of the publicity, which is in part and often in large part, shaped by what attorneys, police, and other officials do to precipitate news coverage. The trial judge has a major responsibility. What the judge says about a case, in or out of the courtroom, is likely to appear in newspapers and broadcasts. More important, the measures a judge takes or fails to take to mitigate the effects of pretrial publicity—the measures described in *Sheppard*—may well determine whether the defendant receives a trial consistent with the requirements of due process. That

this responsibility has not always been properly discharged is apparent from the decisions just reviewed.

The costs of failure to afford a fair trial are high. . . .

The state trial judge in the case before us acted responsibly, out of a legitimate concern, in an effort to protect the defendant's right to a fair trial.[4] What we must decide is not simply whether the Nebraska courts erred in seeing the possibility of real danger to the defendant's rights, but whether in the circumstances of this case the means employed were foreclosed by another provision of the Constitution.

V

[The Court here reviewed its cases considering the imposition of a prior restraint against publishing certain material, primarily Near v. Minnesota and New York Times Co. v. United States, both discussed at p. 377, infra. None of these cases dealt with problems of prejudicial publicity.]

The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.

A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.

The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events. Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492–493 (1975); see also, Craig v. Harney, 331 U.S. 367, 374 (1947). For the same reasons the protection against prior restraint should have particular force as applied to reporting of criminal proceedings, whether the crime in question is a single isolated act or a pattern of criminal conduct. . . . The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly—a duty widely acknowledged but not

4. The record also reveals that counsel for both sides acted responsibly in this case, and there is no suggestion that either sought to use pretrial news coverage for partisan advantage. . . .

always observed by editors and publishers. It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors.

Of course, the order at issue . . . does not prohibit but only postpones publication. Some news can be delayed and most commentary can even more readily be delayed without serious injury, and there often is a self-imposed delay when responsible editors call for verification of information. But such delays are normally slight and they are self-imposed. Delays imposed by governmental authority are a different matter. . . . As a practical matter, moreover, the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly.

The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. In this case, the petitioners would have us declare the right of an accused subordinate to their right to publish in all circumstances. But if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined. It is unnecessary, after nearly two centuries, to establish a priority applicable in all circumstances. Yet it is nonetheless clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it. . . .

. . .

VI

We turn now to the record in this case to determine whether, as Learned Hand put it, "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." Dennis v. United States, 183 F.2d 201, 212 (1950), aff'd, 341 U.S. 494 (1951); see also L. Hand, The Bill of Rights 58–61 (1958). To do so, we must examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; (c) how effectively a restraining order would operate to prevent the threatened danger. The precise terms of the restraining order are also important. We must then consider whether the record supports the entry of a prior restraint on publication, one of the most extraordinary remedies known to our jurisprudence.

A

In assessing the probable extent of publicity, the trial judge had before him newspapers demonstrating that the crime had already drawn intensive news coverage, and the testimony of the County Judge, who had entered the initial restraining order based on the local and national attention the case had attracted. The District Judge was required to assess the probable publicity that would be given these shocking crimes prior to the time a jury was selected and sequestered. He then had to examine the probable nature of the publicity and determine how it would affect prospective jurors.

Our review of the pretrial record persuades us that the trial judge was justified in concluding that there would be intense and pervasive pretrial publicity concerning this case. He could also reasonably conclude, based on common human experience, that publicity might impair the defendant's right to a fair trial. He did not purport to say more, for he found only "a clear and present danger that pretrial publicity *could* impinge upon the defendant's right to a fair trial." (Emphasis added.) His conclusion as to the impact of such publicity on prospective jurors was of necessity speculative, dealing as he was with factors unknown and unknowable.

B

We find little in the record that goes to another aspect of our task, determining whether measures short of an order restraining all publication would have insured the defendant a fair trial. Although the entry of the order might be read as a judicial determination that other measures would not suffice, the trial court made no express findings to that effect; the Nebraska Supreme Court referred to the issue only by implication. [ ]

Most of the alternatives to prior restraint of publication in these circumstances were discussed with obvious approval in Sheppard v. Maxwell, 384 U.S., at 357–362: (a) change of trial venue to a place less exposed to the intense publicity that seemed imminent in Lincoln County;[7] (b) postponement of the trial to allow public attention to subside; (c) use of searching questioning of prospective jurors, as Chief Justice Marshall did in the *Burr* case, to screen out those with fixed opinions as to guilt or innocence; (d) the use of emphatic and

7. The respondent and intervenors argue here that a change of venue would not have helped, since Nebraska law permits a change only to adjacent counties, which had been as exposed to pretrial publicity in this case as Lincoln County. We have held that state laws restricting venue must on occasion yield to the constitutional requirement that the State afford a fair trial. Groppi v. Wisconsin, 400 U.S. 505 (1971). We note also that the combined population of Lincoln County and the adjacent counties is over 80,000, providing a substantial pool of prospective jurors.

clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court. Sequestration of jurors is, of course, always available. Although that measure insulates jurors only after they are sworn, it also enhances the likelihood of dissipating the impact of pretrial publicity and emphasizes the elements of the jurors' oaths.

This Court has outlined other measures short of prior restraints on publication tending to blunt the impact of pretrial publicity. See Sheppard v. Maxwell, 384 U.S. at 361–362. Professional studies have filled out these suggestions, recommending that trial courts in appropriate cases limit what the contending lawyers, the police, and witnesses may say to anyone. See American Bar Association, Standards for Criminal Justice, Fair Trial and Free Press 2–15 (Approved Draft, 1968).[8]

We have noted earlier that pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial. . . .

We have therefore examined this record to determine the probable efficacy of the measures short of prior restraint on the press and speech. There is no finding that alternative measures would not have protected Simants' rights, and the Nebraska Supreme Court did no more than imply that such measures might not be adequate. Moreover, the record is lacking in evidence to support such a finding.

C

We must also assess the probable efficacy of prior restraint on publication as a workable method of protecting Simants' right to a fair trial, and we cannot ignore the reality of the problems of managing and enforcing pretrial restraining orders. The territorial jurisdiction of the issuing court is limited by concepts of sovereignty [ ]. The need for *in personam* jurisdiction also presents an obstacle to a restraining order that applies to publication at-large as distinguished from restraining publication within a given jurisdiction. [ ]

The Nebraska Supreme Court narrowed the scope of the restrictive order, and its opinion reflects awareness of the tensions between the need to protect the accused as fully as possible and the need to restrict publication as little as possible. The dilemma posed under-

8. Closing of pretrial proceedings with the consent of the defendant when required is also recommended in guidelines that have emerged from various studies. At oral argument petitioners' counsel asserted that judicially imposed restraints on lawyers and others would be subject to challenge as interfering with press rights to news sources. [ ] We are not now confronted with such issues.

We note that in making its proposals, the American Bar Association recommended strongly against resort to direct restraints on the press to prohibit publication. ABA Standards, at 68–73. Other groups have reached similar conclusions. [ ]

scores how difficult it is for trial judges to predict what information will in fact undermine the impartiality of jurors, and the difficulty of drafting an order that will effectively keep prejudicial information from prospective jurors. When a restrictive order is sought, a court can anticipate only part of what will develop that may injure the accused. But information not so obviously prejudicial may emerge, and what may properly be published in these "gray zone" circumstances may not violate the restrictive order and yet be prejudicial.

Finally, we note that the events disclosed by the record took place in a community of 850 people. It is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it.

Given these practical problems, it is far from clear that prior restraint on publication would have protected Simants' rights.

D

Finally, another feature of this case leads us to conclude that the restrictive order entered here is not supportable. At the outset the County Court entered a very broad restrictive order, the terms of which are not before us; it then held a preliminary hearing open to the public and the press. There was testimony concerning at least two incriminating statements made by Simants to private persons; the statement—evidently a confession—that he gave to law enforcement officials was also introduced. The State District Court's later order was entered after this public hearing and, as modified by the Nebraska Supreme Court, enjoined reporting of (1) "[c]onfessions or admissions against interests made by the accused to law enforcement officials"; (2) "[c]onfessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statements, if any, made by the accused to representatives of the news media"; and (3) all "[o]ther information strongly implicative of the accused as the perpetrator of the slayings."

To the extent that this order prohibited the reporting of evidence adduced at the open preliminary hearing, it plainly violated settled principles: "there is nothing that proscribes the press from reporting events that transpire in the courtroom." Sheppard v. Maxwell, supra, at 362–363. See also Cox Broadcasting Corp. v. Cohn, supra; Craig v. Harney, supra. The County Court could not know that closure of the preliminary hearing was an alternative open to it until the Nebraska Supreme Court so construed state law; but once a pub-

lic hearing had been held, what transpired there could not be subject to prior restraint.

The third prohibition of the order was defective in another respect as well. As part of a final order, entered after plenary review, this prohibition regarding "implicative" information is too vague and too broad to survive the scrutiny we have given to restraints on First Amendment rights. [ ] The third phase of the order entered falls outside permissible limits.

E

The record demonstrates, as the Nebraska courts held, that there was indeed a risk that pretrial news accounts, true or false, would have some adverse impact on the attitudes of those who might be called as jurors. But on the record now before us it is not clear that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court. We cannot say on this record that alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make prior restraint unnecessary. Nor can we conclude that the restraining order actually entered would serve its intended purpose. Reasonable minds can have few doubts about the gravity of the evil pretrial publicity can work, but the probability that it would do so here was not demonstrated with the degree of certainty our cases on prior restraint require.

Of necessity our holding is confined to the record before us. But our conclusion is not simply a result of assessing the adequacy of the showing made in this case; it results in part from the problems inherent in meeting the heavy burden of demonstrating, in advance of trial, that without prior restraint a fair trial will be denied. The practical problems of managing and enforcing restrictive orders will always be present. In this sense, the record now before us is illustrative rather than exceptional. It is significant that when this Court has reversed a state conviction because of prejudicial publicity, it has carefully noted that some course of action short of prior restraint would have made a critical difference. [ ] However difficult it may be, we need not rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint. This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed. [ ]

Our analysis ends as it began, with a confrontation between prior restraint imposed to protect one vital constitutional guarantee

and the explicit command of another that the freedom to speak and publish shall not be abridged. We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact. We hold that, with respect to the order entered in this case prohibiting reporting or commentary on judicial proceedings held in public, the barriers have not been overcome; to the extent that this order restrained publication of such material, it is clearly invalid. To the extent that it prohibited publication based on information gained from other sources, we conclude that the heavy burden imposed as a condition to securing a prior restraint was not met and the judgment of the Nebraska Supreme Court is therefore

Reversed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL concur, concurring in the judgment.

. . . The right to a fair trial by a jury of one's peers is unquestionably one of the most precious and sacred safeguards enshrined in the Bill of Rights. I would hold, however, that resort to prior restraints on the freedom of the press is a constitutionally impermissible method for enforcing that right; judges have at their disposal a broad spectrum of devices for ensuring that fundamental fairness is accorded the accused without necessitating so drastic an incursion on the equally fundamental and salutary constitutional mandate that discussion of public affairs in a free society cannot depend on the preliminary grace of judicial censors.

[After a most extensive review of the facts, Justice Brennan turned to a consideration of the values protected by the Sixth and First Amendments.]

II

A

. . . So basic to our jurisprudence is the right to a fair trial that it has been called "the most fundamental of all freedoms." Estes v. Texas, 381 U.S. 532, 540 (1965). It is a right essential to the preservation and enjoyment of all other rights, providing a necessary means of safeguarding personal liberties against Government oppression. [ ]

The First Amendment to the United States Constitution, however, secures rights equally fundamental in our jurisprudence, and its ringing proclamation that "Congress shall make no law . . . abridging the freedom of speech or of the press . . ." has been

both applied through the Fourteenth Amendment to invalidate restraints on freedom of the press imposed by the States, [ ]; and interpreted to interdict such restraints imposed by the courts [ ]. Indeed, it has been correctly perceived that a "responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." Sheppard v. Maxwell, 384 U.S. 333, 350 (1966). See also, e. g., Cox Broadcasting Corp. v. Cohn, 420 U.S 469, 491–496 (1975). Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of Government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability. [ ]

. . . Settled case law concerning the impropriety and constitutional invalidity of prior restraints on the press compels the conclusion that there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained.[15] This does not imply, however, any subordination of Sixth Amendment rights, for an accused's right to a fair trial may be adequately assured through methods that do not infringe First Amendment values.

B

. . . A commentator has cogently summarized many of the reasons for this deep-seated American hostility to prior restraints:

> "A system of prior restraints is in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than that suppression through criminal process; the procedures do not require attention to the safeguards of the criminal process; the system al-

15. Of course, even if the press cannot be enjoined from reporting certain information, that does not necessarily immunize it from civil liability for libel or invasion of privacy or from criminal liability for transgressions of general criminal laws during the course of obtaining that information.

lows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows." T. Emerson, The System of Freedom of Expression 506 (1970)."

Respondents correctly contend that "the [First Amendment] protection even as to prior restraint is not absolutely unlimited." Near v. Minnesota, supra, at 716. However, the exceptions to the rule have been confined to "exceptional cases." . . .

[Justice Brennan discussed these situations at length, particularly *Near* and *New York Times*.]

I would decline [an invitation to create a new category for the use of prior restraints]. In addition to the almost insuperable presumption against the constitutionality of prior restraints even under a recognized exception, and however laudable the State's motivation for imposing restraints in this case, there are compelling reasons for not carving out a new exception to the rule against prior censorship of publication.

1

Much of the information that the Nebraska courts enjoined petitioners from publishing was already in the public domain, having been revealed in open court proceedings or through public documents. . . .

2

The order of the Nebraska Supreme Court also applied, of course, to "confessions" and other information "strongly implicative" of the accused which was obtained from sources other than official records or open court proceedings. But for the reasons that follow —reasons equally applicable to information obtained by the press from official records of public court proceedings—I believe that the same rule against prior restraints governs *any* information pertaining to the criminal justice system, even if derived from nonpublic sources and regardless of the means employed by the press in its acquisition.

. . .

A judge importuned to issue a prior restraint in the pretrial context will be unable to predict the manner in which the potentially prejudicial information would be published, the frequency with which it would be repeated or the emphasis it would be given, the context in which or purpose for which it would be reported, the scope of the audience that would be exposed to the information,[22] or the impact,

22. It is suggested that prior restraints are really only necessary in "small towns," since media saturation would be more likely and incriminating ma-

evaluated in terms of current standards for assessing juror impartiality, the information would have on that audience. These considerations would render speculative the prospective impact on a fair trial of reporting even an alleged confession or other information "strongly implicative" of the accused. Moreover, we can take judicial notice of the fact that given the prevalence of plea bargaining, few criminal cases proceed to trial, and the judge would thus have to predict what the likelihood was that a jury would even have to be impaneled.[24] Indeed, even in cases that do proceed to trial, the material sought to be suppressed before trial will often be admissible and may be admitted in any event. And, more basically, there are adequate devices for screening from jury duty those individuals who have in fact been exposed to prejudicial pretrial publicity.

Initially, it is important to note that once the jury is impaneled, the techniques of sequestration of jurors and control over the courtroom and conduct of trial should prevent prejudicial publicity from infecting the fairness of judicial proceedings. Similarly, judges may stem much of the flow of prejudicial publicity at its source, before it is obtained by representatives of the press.[27] But even if the press nevertheless obtains potentially prejudicial information and decides to publish that information, the Sixth Amendment rights of the accused may still be adequately protected. In particular, the trial judge should employ the *voir dire* to probe fully into the effect of publicity. The judge should broadly explore such matters as the extent to which prospective jurors had read particular news accounts or whether they had heard about incriminating data such as an alleged confession or statements by purportedly reliable sources concerning the defendant's guilt. . . . Moreover, *voir dire* may indicate the need to grant a brief continuance [28] or to grant a change of venue, [29] techniques that

terials that are published would therefore probably come to the attention of all inhabitants. Of course, the smaller the community, the more likely such information would become available through rumors and gossip, whether or not the press is enjoined from publication. . . .

24. Of course, judges accepting guilty pleas must guard against the danger that pretrial publicity has effectively coerced the defendant into pleading guilty.

27. A significant component of prejudicial pretrial publicity may be traced to public commentary on pending cases by court personnel, law enforcement officials, and the attorneys involved in the case. . . . As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice. It is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases, [ ], and to impose suitable limitations whose transgression could result in disciplinary proceedings. [ ] Similarly, in most cases courts would have ample power to control such actions by law enforcement personnel.

28. Excessive delay, of course, would be impermissible in light of the Sixth

can effectively mitigate any publicity at a particular time or in a particular locale. Finally, if the trial court fails or refuses to utilize these devices effectively, there are the "palliatives" of reversals on appeal and directions for a new trial. . . .

For these reasons alone I would reject the contention that speculative deprivation of an accused's Sixth Amendment right to an impartial jury is comparable to the damage to the Nation or its people that *Near* and *New York Times* would have found sufficient to justify a prior restraint on reporting. Damage to that Sixth Amendment right could never be considered so direct, immediate and irreparable, and based on such proof rather than speculation, that prior restraints on the press could be justified on this basis.

C

There are additional, practical reasons for not starting down the path urged by respondents.[32] . . .

. . .

There is, beyond peradventure, a clear and substantial damage to freedom of the press whenever even a temporary restraint is imposed on reporting of material concerning the operations of the criminal justice system, an institution of such pervasive influence in our constitutional scheme. And the necessary impact of reporting even confessions can never be so direct, immediate and irreparable that I would give credence to any notion that prior restraints may be imposed on that rationale. It may be that such incriminating material would be of such slight news value or so inflammatory in particular cases that responsible organs of the media, in an exercise of self-restraint, would choose not to publicize that material, and not make the

Amendment right to a speedy trial. [ ] However, even short continuances can be effective in attenuating the impact of publicity, especially as other news crowds past events off the front pages. And somewhat substantial delays designed to ensure fair proceedings need not transgress the speedy trial guarantee. See Groppi v. Wisconsin, 400 U.S. 505, 510 (1971); [ ].

29. In Rideau v. Louisiana, 373 U.S. 723 (1963), we held that it was a denial of due process to deny a request for a change of venue that was necessary to preserve the accused's Sixth Amendment rights. And state statutes may not restrict changes of venue if to do so would deny an accused a fair trial. Groppi v. Wisconsin, 400 U.S. 505 (1971).

32. I include these additional considerations, many of which apply generally to any system of prior restraints, only because of the fundamentality of the Sixth Amendment right invoked as the justification for imposition of the restraints in this case; the fact that there are such overwhelming reasons for precluding *any* prior restraints even to facilitate preservation of such a fundamental right reinforces the longstanding constitutional doctrine that there is effectively an absolute prohibition against prior restraints against publication of *any* material otherwise covered within the meaning of the free press guarantee of the First Amendment. [ ]

judicial task of safeguarding precious rights of criminal defendants more difficult. Voluntary codes such as the Nebraska Bar-Press Guidelines are a commendable acknowledgement by the media that constitutional prerogatives bring enormous responsibilities, and I would encourage continuation of such voluntary cooperative efforts between the bar and the media. However, the press may be arrogant, tyrannical, abusive, and sensationalist, just as it may be incisive, probing, and informative. But at least in the context of prior restraints on publication, the decision of what, when, and how to publish is for editors, not judges. [ ] Every restrictive order imposed on the press in this case was accordingly an unconstitutional prior restraint on the freedom of the press, and I would therefore reverse the judgment of the Nebraska Supreme Court and remand for further proceedings not inconsistent with this opinion.

MR. JUSTICE WHITE, concurring.

Technically there is no need to go farther than the Court does to dispose of this case, and I join the Court's opinion. I should add, however, that for the reasons which the Court itself canvasses there is grave doubt in my mind whether orders with respect to the press such as were entered in this case would ever be justifiable. It may be the better part of discretion, however, not to announce such a rule in the first case in which the issue has been squarely presented here. Perhaps we should go no farther than absolutely necessary until the federal courts, and ourselves, have been exposed to a broader spectrum of cases presenting similar issues. If the recurring result, however, in case after case is to be similar to our judgment today, we should at some point announce a more general rule and avoid the interminable litigation that our failure to do so would necessarily entail.

MR. JUSTICE POWELL, concurring.

Although I join the opinion of the Court, in view of the importance of the case I write to emphasize the unique burden that rests upon the party, whether it be the state or a defendant, who undertakes to show the necessity for prior restraint on pretrial publicity.

In my judgment a prior restraint properly may issue only when it is shown to be necessary to prevent the dissemination of prejudicial publicity that otherwise poses a high likelihood of preventing, directly and irreparably, the impaneling of a jury meeting the Sixth Amendment requirement of impartiality. This requires a showing that (i) there is a clear threat to the fairness of trial, (ii) such a threat is posed by the actual publicity to be restrained, and (iii) no less restrictive alternatives are available. Notwithstanding such a showing, a restraint may not issue unless it also is shown that pre-

vious publicity or publicity from unrestrained sources will not render the restraint inefficacious. The threat to the fairness of the trial is to be evaluated in the context of Sixth Amendment law on impartiality, and any restraint must comply with the standards of specificity always required in the First Amendment context.

I believe these factors are sufficiently addressed in the Court's opinion to demonstrate beyond question that the prior restraint here was impermissible.

MR. JUSTICE STEVENS, concurring in the judgment.

For the reasons eloquently stated by MR. JUSTICE BRENNAN, I agree that the judiciary is capable of protecting the defendant's right to a fair trial without enjoining the press from publishing information in the public domain, and that it may not do so. Whether the same absolute protection would apply no matter how shabby or illegal the means by which the information is obtained, no matter how serious an intrusion on privacy might be involved, no matter how demonstrably false the information might be, no matter how prejudicial it might be to the interests of innocent persons, and no matter how perverse the motivation for publishing it, is a question I would not answer without further argument. [ ] I do, however, subscribe to most of what MR. JUSTICE BRENNAN says and, if ever required to face the issue squarely, may well accept his ultimate conclusion.

Notes and Questions

1. What is the essential difference between Chief Justice Burger's approach and Justice Brennan's approach? What is the effect of the other concurring opinions?

2. Is it still permissible to close the courtroom in certain types of proceedings? What about the propriety of issuing restrictive orders preventing lawyers and other court officials from making certain types of statements?

3. The opinions discuss the role of sequestration although this case raised only pretrial problems. How might sequestration aid in this type of case?

4. As the opinions note, the press, bench and bar in Nebraska had collaborated on a set of voluntary guidelines. Such agreements exist in about half of the states, but this case is apparently the first in which a judge attempted to make the guidelines mandatory. In passing on the application for a stay, Justice Blackmun rejected this attempt out of hand, largely on the ground that the guidelines, since they were intended to be voluntary, used terms such as "consider carefully" that did not lend themselves to incorporation into a judicial

order. Some members of the press had warned that guidelines might be thus misused, and noted that guidelines have failed to deter judges from issuing restrictive orders. The Nebraska guidelines, reprinted as an appendix to Justice Brennan's opinion in the principal case, follow.

NEBRASKA BAR–PRESS GUIDELINES FOR DISCLOSURE AND REPORTING OF INFORMATION RELATING TO IMMINENT OR PENDING CRIMINAL LITIGATION

These voluntary guidelines reflect standards which bar and news media representatives believe are a reasonable means of accommodating, on a voluntary basis, the correlative constitutional rights of free speech and free press with the right of an accused to a fair trial. They are not intended to prevent the news media from inquiring into and reporting on the integrity, fairness, efficiency and effectiveness of law enforcement, the administration of justice, or political or governmental questions whenever involved in the judicial process.

As a voluntary code, these guidelines do not necessarily reflect in all respects what the members of the bar or the news media believe would be permitted or required by law.

Information Generally Appropriate for Disclosure, Reporting

Generally, it is appropriate to disclose and report the following information:

1. The arrested person's name, age, residence, employment, marital status and similar biographical information.

2. The charge, its text, any amendments thereto, and, if applicable, the identity of the complainant.

3. The amount or conditions of bail.

4. The identity of and biographical information concerning the complaining party and victim, and, if a death is involved, the apparent cause of death unless it appears that the cause of death may be a contested issue.

5. The identity of the investigating and arresting agencies and the length of the investigation.

6. The circumstances of arrest, including time, place, resistance, pursuit, possession of and all weapons used, and a description of the items seized at the time of arrest. It is appropriate to disclose and report at the time of seizure the description of physical evidence subsequently seized other than a confession, admission or statement. It is appropriate to disclose and report the subsequent finding of

weapons, bodies, contraband, stolen property and similar physical items if, in view of the time and other circumstances, such disclosure and reporting are not likely to interfere with a fair trial.

7. Information disclosed by the public records, including all testimony and other evidence adduced at the trial.

Information Generally Not Appropriate for Disclosure, Reporting

Generally, it is not appropriate to disclose or report the following information because of the risk of prejudice to the right of an accused to a fair trial:

1. The existence or contents of any confession, admission or statement given by the accused, except it may be stated that the accused denies the charges made against him. This paragraph is not intended to apply to statements made by the accused to representatives of the news media or to the public.

2. Opinions concerning the guilt, the innocence or the character of the accused.

3. Statements predicting or influencing the outcome of the trial.

4. Results of any examination or tests or the accused's refusal or failure to submit to an examination or test.

5. Statements or opinions concerning the credibility or anticipated testimony of prospective witnesses.

6. Statements made in the judicial proceedings outside the presence of the jury relating to confessions or other matters which, if reported, would likely interfere with a fair trial.

Prior Criminal Records

Lawyers and law enforcement personnel should not volunteer the prior criminal records of an accused except to aid in his apprehension or to warn the public of any dangers he presents. The news media can obtain prior criminal records from the public records of the courts, police agencies and other governmental agencies and from their own files. The news media acknowledge, however, that publication or broadcast of an individual's criminal record can be prejudicial, and its publication or broadcast should be considered very carefully, particularly after the filing of formal charges and as the time of the trial approaches, and such publication or broadcast should generally be avoided because readers, viewers and listeners are potential jurors and an accused is presumed innocent until proven guilty.

Photographs

1. Generally, it is not appropriate for law enforcement personnel to deliberately pose a person in custody for photographing or televising by representatives of the news media.

2. Unposed photographing and televising of an accused outside the courtroom is generally appropriate, and law enforcement personnel should not interfere with such photographing or televising except in compliance with an order of the court or unless such photographing or televising would interfere with their official duties.

3. It is appropriate for law enforcement personnel to release to representatives of the news media photographs of a suspect or an accused. Before publication of any such photographs, the news media should eliminate any portions of the photographs that would indicate a prior criminal offense or police record.

Continuing Committee for Cooperation

The members of the bar and the news media recognize the desirability of continued joint efforts in attempting to resolve any area of differences that may arise in their mutual objective of assuring to all Americans both the correlative constitutional rights to freedom of speech and press and to a fair trial. The bar and the news media, through their respective associations, have determined to establish a permanent committee to revise these guidelines whenever this appears necessary or appropriate, to issue opinions as to their application to specific situations, to receive, evaluate and make recommendations with respect to complaints and to seek to effect through educational and other voluntary means a proper accommodation of the constitutional correlative rights of free speech, free press and fair trial.

What are the pros and cons of Guidelines generally and the Nebraska version in particular?

5. Soon after the Nebraska decision, the Court had occasion to pass on a related problem. In a juvenile proceeding, an Oklahoma state judge ordered the press not to publish the name or picture of an 11-year old boy who was accused of firing a gun that killed a railroad switchman. His identity had been disclosed earlier during an open hearing. After the Oklahoma Supreme Court upheld the order, the press applied to the Supreme Court to stay the trial judge's order pending the filing and disposition of a petition for certiorari. In an unsigned order, the Supreme Court granted the stay on the ground that the name had already been made public. Citing the Nebraska case and Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), discussed at p. 337, infra, the Court's short opinion noted that the case

did not involve a challenge to the judge's order silencing counsel or public employees, and also did not challenge an Oklahoma statute requiring that juvenile proceedings be held in private unless specifically ordered otherwise by the judge. Oklahoma Pub. Co. v. District Court in and for Oklahoma County, Oklahoma, 429 U.S. —— (1976).

Among the early commentaries on the Nebraska Press case, see Schmidt, The Nebraska Decision, Columbia Journalism Rev., Nov./Dec. 1976, p. 51 and the dozen articles from different vantage points in Symposium, 29 Stanford Law Review 382 (1977).

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2. PROTECTING JUDGES FROM MEDIA PRESSURES

CRAIG v. HARNEY

Supreme Court of the United States, 1947.
331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546.

[Petitioners were the publisher, an editorial writer, and a news reporter of three newspapers under common control—the only papers of general circulation in the Corpus Christi area. A lay judge was conducting a trial in which a landlord, claiming non-payment of rent, sought to regain possession of a building from a tenant who at the time was overseas in the armed forces. The judge directed the jury to find for the landlord. Twice the jury returned a verdict for the tenant and the judge refused to accept it. The third time the jury complied but stated that it was acting against its conscience. Two days later, the tenant's attorney moved for a new trial. During the jury's recalcitrance and the pendency of the motion for new trial, the newspapers published several articles and an editorial. The judge denied the motion for new trial. He then adjudged the petitioners in contempt of court for the publications and sentenced each to jail for three days. The Texas Court of Criminal Appeals affirmed.]

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE REED.

. . .

The court's statement of the issue before it and the reasons it gave for holding that the "clear and present danger" test was satisfied have a striking resemblance to the findings which the Court in Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918), held adequate to sustain an adjudication of contempt by publication. That case held that comment on a pending case in a federal court was pun-

ishable by contempt if it had a "reasonable tendency" to obstruct the administration of justice. We revisited that case in Nye v. United States, 313 U.S. 33, 52 (1941), and disapproved it. And in Bridges v. California, we held that the compulsion of the First Amendment, made applicable to the States by the Fourteenth [ ], forbade the punishment by contempt for comment on pending cases in absence of a showing that the utterances created a "clear and present danger" to the administration of justice. 314 U.S. pp. 260–264. We reaffirmed and reapplied that standard in Pennekamp v. Florida, [328 U.S. 331] which also involved comment on matters pending before the court.

. . .

Neither those cases nor the present one raises questions concerning the full reach of the power of the state to protect the administration of justice by its courts. The problem presented is only a narrow, albeit important, phase of that problem—the power of a court promptly and without a jury trial to punish for comment on cases pending before it and awaiting disposition. The history of the power to punish for contempt [ ] and the unequivocal command of the First Amendment serve as constant reminders that freedom of speech and of the press should not be impaired through the exercise of that power, unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice.

. . .

We start with the news articles. A trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

The articles of May 26, 27, and 28 were partial reports of what transpired at the trial. They did not reflect good reporting, for they failed to reveal the precise issue before the judge. They said that Mayes, the tenant, had tendered a rental check. They did not disclose that the rental check was post-dated and hence, in the opinion of the judge, not a valid tender. In that sense the news articles were by any standard an unfair report of what transpired. But inaccuracies in reporting 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. Conceivably, a plan of reporting on a case could be so designed and executed as to poison the public mind, to cause a march on the court house, or otherwise so disturb the delicate balance in a highly wrought situation as to imperil the fair and orderly functioning of the judicial process. But it takes more imagination than we possess to find in this rather sketchy and one-sided report of a case any imminent or serious threat to a judge of reasonable fortitude. [ ]

The accounts of May 30 and 31 dealt with the news of what certain groups of citizens proposed to do about the judge's ruling in the case. So far as we are advised, it was a fact that they planned to take the proposed action. The episodes were community events of legitimate interest. Whatever might be the responsibility of the group which took the action, those who reported it stand in a different position. Even if the former were guilty of contempt, freedom of the press may not be denied a newspaper which brings their conduct to the public eye.

The only substantial question raised pertains to the editorial. It called the judge's refusal to hear both sides "high handed," a "travesty on justice," and the reason that public opinion was "outraged." It said that his ruling properly "brought down the wrath of public opinion upon his head" since a service man "seems to be getting a raw deal." The fact that there was no appeal from his decision to a "judge who is familiar with proper procedure and able to interpret and weigh motions and arguments by opposing counsel and to make his decisions accordingly" was a "tragedy." It deplored the fact that the judge was a "layman" and not a "competent attorney." It concluded that the "first rule of justice" was to give both sides an opportunity to be heard and when that rule was "repudiated," there was "no way of knowing whether justice was done."

This was strong language, intemperate language, and, we assume, an unfair criticism. But a judge may not hold in contempt one "who ventures to publish anything that tends to make him unpopular or to belittle him . . .." See Craig v. Hecht, 263 U.S. 255, 281 (1923), Mr. Justice Holmes dissenting. The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute 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.

We agree with the court below that the editorial must be appraised in the setting of the news articles which both preceded and followed it. It must also be appraised in light of the community environment which prevailed at that time. The fact that the jury was re-

calcitrant and balked, the fact that it acted under coercion and contrary to its conscience and said so were some index of popular opinion. A judge who is part of such a dramatic episode can hardly help but know that his decision is apt to be unpopular. But the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate. Conceivably a campaign could be so managed and so aimed at the sensibilities of a particular judge and the matter pending before him as to cross the forbidden line. But the episodes we have here do not fall in that category. Nor can we assume that the trial judge was not a man of fortitude.

The editorial's complaint was two-fold. One objection or criticism was that a layman rather than a lawyer sat on the bench. That is legitimate comment; and its relevancy could hardly be denied at least where judges are elected. In the circumstances of the present case, it amounts at the very most to an intimation that come the next election the newspaper in question will not support the incumbent. But it contained no threat to oppose him in the campaign if the decision on the merits was not overruled, nor any implied reward if it was changed. Judges who stand for reelection run on their records. That may be a rugged environment. Criticism is expected. Discussion of their conduct is appropriate, if not necessary. The fact that the discussion at this particular point of time was not in good taste falls far short of meeting the clear and present danger test.

The other complaint of the editorial was directed at the court's procedure—its failure to hear both sides before the case was decided. There was no attempt to pass on the merits of the case. . . . It might well have a tendency to lower the standing of the judge in the public eye. But it is hard to see on these facts how it could obstruct the course of justice in the case before the court. The only demand was for a hearing. There was no demand that the judge reverse his position—or else.

"Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." Bridges v. California, supra, p. 271. But there was here no threat or menace to the integrity of the trial. . . . Giving the editorial all of the vehemence which the court below found in it we fail to see how it could in any realistic sense create an imminent and serious threat to the ability of the court to give fair consideration to the motion for rehearing.

There is a suggestion that the case is different from Bridges v. California, supra, in that we have here only private litigation, while in the *Bridges* case labor controversies were involved, some of them being criminal cases. The thought apparently is that the range of permissible comment is greater where the pending case generates a

public concern. The nature of the case may, of course, be relevant in determining whether the clear and present danger test is satisfied. But, the rule of the *Bridges* and *Pennekamp* cases is fashioned to serve the needs of all litigation, not merely select types of pending cases.

Reversed.

MR. JUSTICE MURPHY, concurring.

. . .

In my view, the Constitution forbids a judge from summarily punishing a newspaper editor for printing an unjust attack upon him or his method of dispensing justice. The only possible exception is in the rare instance where the attack might reasonably cause a real impediment to the administration of justice. Unscrupulous and vindictive criticism of the judiciary is regrettable. But judges must not retaliate by a summary suppression of such criticism for they are bound by the command of the First Amendment. Any summary suppression of unjust criticism carries with it an ominous threat of summary suppression of all criticism. It is to avoid that threat that the First Amendment, as I view it, outlaws the summary contempt method of suppression.

. . .

MR. JUSTICE FRANKFURTER, with whom THE CHIEF JUSTICE [VINSON] concurs, dissenting.

Today's decision, in effect though not in terms, holds unconstitutional a power the possession of which by the States this Court has heretofore deemed axiomatic.

It cannot be repeated too often that the freedom of the press so indispensable to our democratic society presupposes an independent judiciary which will, when occasion demands, protect that freedom. To help achieve such an independent judiciary and to protect its members in their independence, the States of the Union, from the very beginning and throughout our history, have provided for prompt suppression and punishment of interference with the impartial exercise of the judicial process in an active litigation. Interference was punished not by the ordinary criminal process of trial before a jury, but through a distinctive proceeding, summary in character in the sense that a judge without a jury might impose punishment. Such protective measures against publications seriously calculated to agitate the disinterested operation of the judicial process in a litigation awaiting disposition have been deemed part of the constitutional authority of the States to establish courts to do justice as between man and man and between man and society.

. . .

We are not dealing here with criticisms, whether temperate or unbridled, of action in a case after a judge is through with it, or of his judicial qualifications, or of his conduct in general. Comment on what a judge has done—criticism of the judicial process in a particular case after it has exhausted itself—no matter how ill-informed or irresponsible or misrepresentative, is part of the precious right of the free play of opinion. Whatever violence there may be to truth in such utterances must be left to the correction of truth.

The publications now in question did not constitute merely a narrative of a judge's conduct in a particular case nor a general commentary upon his competence or his philosophy. Nor were they a plea for reform of the Texas legal system to the end that county court judges should be learned in the law and that a judgment in a suit of forcible detainer may be appealable. The thrust of the articles was directed to what the judge should do on a matter immediately before him, namely to grant a motion for a new trial. . . .

. . .

If under all the circumstances the Texas Court here was not justified in finding that these publications created "a clear and present danger" of the substantive evil that Texas had a right to prevent, namely the purposeful exertion of extraneous influence in having the motion for a new trial granted, "clear and present danger" becomes merely a phrase for covering up a novel . . . constitutional doctrine. Hereafter the States cannot deal with direct attempts to influence the disposition of a pending controversy by a summary proceeding, except when the misbehavior physically prevents proceedings from going on in court, or occurs in its immediate proximity. Only the pungent pen of Mr. Justice Holmes could adequately comment on such a perversion of the purpose of his phrase.

. . . Even a conscientious judge not a layman, and not merely one serving under a short judicial tenure, may find himself in a dilemma when subjected to a barrage pressing a particular result in a case immediately before him. He may not unnaturally be moved to do what is urged, or he may be impelled to display his independence and not give to the arguments on behalf of the motion for a new trial that serene and undisturbed consideration which often leads judges to grant such a motion. It has not been unknown that judges persist in error to avoid giving the appearance of weakness and vacillation.

. . .

. . .

MR. JUSTICE JACKSON, dissenting.

This is one of those cases in which the reasons we give for our decision are more important to the development of the law than the decision itself.

It seems to me that the Court is assigning two untenable, if not harmful, reasons for its action. The first is that this newspaper publisher has done no wrong. . . .

. . .

But even worse is that this Court appears to sponsor the myth that judges are not as other men are, and that therefore newspaper attacks on them are negligible because they do not penetrate the judicial armor. . . .

From our sheltered position, fortified by life tenure and other defenses to judicial independence, it is easy to say that this local judge ought to have shown more fortitude in the face of criticism. But he had no such protection. He was an elective judge, who held for a short term. I do not take it that an ambition of a judge to remain a judge is either unusual or dishonorable. Moreover, he was not a lawyer, and I regard this as a matter of some consequence. A lawyer may gain courage to render a decision that temporarily is unpopular because he has confidence that his profession over the years will approve it, despite its unpopular reception, as has been the case with many great decisions. But this judge had no anchor in professional opinion. Of course, the blasts of these little papers in this small community do not jolt us, but I am not so confident that we would be indifferent if a news monopoly in our entire jurisdiction should perpetrate this kind of an attack on us.

. . .

Notes and Questions

1. What is the test of "clear and present danger" that emerges from this case? The Supreme Court's reliance on "clear and present danger" in this type of case, beginning with *Bridges*, is perhaps its most consistent attempt to use this doctrine. Is Justice Frankfurter correct in regarding the standard as virtually impossible to satisfy?

2. The majority emphasized that the editorial attacked "the propriety of the court's procedure, not the merits of its ruling." Does that matter?

3. The Court emphasizes that a trial is a public event and that what "transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt." How is that relevant to the case before the court? In *Branzburg*, at p. 127, supra, Justice White said that newsmen "may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal." Does the Nebraska Press case reject Justice White's statement?

4. Is there much difference between saying that if the judge does not rule in a particular way the paper will oppose him in the next election, and saying after the decision that the paper disagrees with it so strongly that it will oppose him in the next election? Does it matter if the paper's position was entirely predictable although not previously articulated? In one part of *Bridges*, an editorial in the Los Angeles Times said that a judge would "make a serious mistake if he grants probation to" two teamsters accused of assaulting non-union truck drivers. The majority observed that the paper's position on labor controversies in the past was such that "it is inconceivable that any judge in Los Angeles would expect anything but adverse criticism from it in the event probation were granted. Yet such criticism after final disposition of the proceedings would clearly have been privileged." The dissenters argued that a powerful paper was bringing pressure on a judge who would have to be reelected in a year. "Clearly, the state court was justified in treating this as a threat to impartial adjudication." There was no "intention to utter idle words. The publication of the editorial was hardly an exercise in futility."

5. No case involving a contempt citation against media for influencing a judicial decision has reached the Supreme Court since *Craig*.

6. In many states judges are elected competitively—and for short terms. A few states have the "Missouri plan" whereby an incumbent judge seeks electoral approval of his record, but runs unopposed. Does the citizens' need to be informed about government justify the behavior of the papers in these cases?

7. Compare Cox v. Louisiana, 379 U.S. 559 (1965), upholding the validity of a statute banning picketing in or near a courthouse. A group of 2,000 persons was protesting the arrest of 23 students the previous day. Justice Goldberg for the Court stated:

> It is, of course, true that most judges will be influenced only by what they see and hear in court. However, judges are human; and the legislature has the right to recognize the danger that some judges, jurors, and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of the trial. A State may also properly protect the judicial process from being misjudged in the minds of the public. Suppose demonstrators paraded and picketed for weeks with signs asking that indictments be dismissed, and that a judge, completely uninfluenced by these demonstrations, dismissed the indictments. A State may protect against the possibility of a conclusion by the public under these circumstances that the judge's action was in part a product of

intimidation and did not flow only from the fair and orderly working of the judicial process. [ ]

Appellant invokes the clear and present danger doctrine in support of his argument that the statute cannot constitutionally be applied to the conduct involved here. . . .

We have already pointed out the important differences between the contempt cases and the present one. [ ]. Here we deal not with the contempt power but with a narrowly drafted statute and not with speech in its pristine form but with conduct of a totally different character. Even assuming the applicability of a general clear and present danger test, it is one thing to conclude that the mere publication of a newspaper editorial or a telegram to a Secretary of Labor, however critical of a court, presents no clear and present danger to the administration of justice and quite another thing to conclude that crowds, such as this, demonstrating before a courthouse may not be prohibited by a legislative determination based on experience that such conduct inherently threatens the judicial process. We therefore reject the clear and present danger argument of appellant.

8. Is there good reason to expose the judge to more pressure than that to which the judges are willing to expose jurors? Are the dangers different from different types of communications?

B. PROTECTING REPUTATION—DEFAMATION

Defamation, perhaps the most pervasive legal nightmare of the media, is a concept that has come down through several centuries of English common law. The conflict with the First Amendment surfaced in this area very recently but the Supreme Court has considered the issue several times in an effort to achieve a balance between freedom of communication and the protection of the interest in reputation.

Its venerable history has greatly influenced the action for defamation. Early in the sixteenth century the common law courts began to recognize a claim for defamation that had previously been within the exclusive jurisdiction of the ecclesiastical courts. Since the common law remedy provided damages rather than ecclesiastical sanctions, the common law action became extremely popular. In another development, during this same period the Star Chamber assumed jurisdiction over all aspects of the press, and printed defamations came to be treated as crimes. Attacks on officials were seditious libels, and libels against private persons contributed to breaches of the peace. After the Restoration both concepts were preserved: the Star

Chamber's view of libel as a crime, and the antecedent common law concept of slander as a tort. Each has exerted influence on the other ever since.

Although it is doubtful that the English law of seditious libel was transplanted in this country, it seems clear that the tort law did cross the Atlantic. Yet the tort law of defamation seems not to have been enforced as vigorously in the United States as it was in England. This was true long before any constitutional questions were raised explicitly. In Government and Mass Communications 106–07 (1947), Professor Chafee speculated that

> [The difference] is probably due to the fact that English jurymen and judges live in a different intellectual climate from the fluid and migratory society of the United States. The Englishman is born into a definite status where he tends to stick for life. What he *is* has at least as much importance as what he *does* in an active career. A slur on his reputation, if not challenged, may cause him to drop several rungs down the social ladder. A man moves within a circle of friends and associates and feels bound to preserve his standing in their eyes. Consequently, *not* to sue for libel is taken as an admission of truth.
>
> An able American has too much else to do to waste time on an expensive libel suit. Most strangers will not read the article, most of his friends will not believe it, and his enemies, who will believe it of course, were against him before. Anyway, it is just one more blow in the rough-and-tumble of politics or business. Even if his reputation is lowered for a while, he can make a fresh start at his home or in a new region and accomplish enough to overwhelm old scandals. A libeled American prefers to vindicate himself by steadily pushing forward his career and not by hiring a lawyer to talk in a courtroom.

Another comment on differences between English and American attitudes toward defamation law is suggested in part of the jury charge in Lewis v. Williams, 105 S.C. 165, 89 S.E. 647 (1916), in which the plaintiff had been called a thief and his wife a whore:

> Now, you see that we had to excuse a juror because he made the statement that he was against this sort of suit anyhow, no matter what the nature of it was, that such cases should not be brought in court. Now, gentlemen, you don't want to undertake a case of this kind and have any such prejudice against such an action, because the law permits one to recover in a case of this kind if a proper case is made out under the rules of law. Now, it is true that we don't have many of this kind of case in South Carolina, because, unfortunately for us and our state, when men use words which are insulting and opprobrious

> and defamatory against each other, the prevalent idea is that such should be remedied by a blow or with a bullet, and that is one of the reasons why it has been said so frequently that human life in South Carolina is cheaper than five-cent cotton. You will find in the old English-speaking countries, gentlemen, that these kinds of actions are very prevalent; that country where law is kept better than in any other country in the world, where people do not go around with deadly weapons with them, the tendency of courts is to encourage cases being brought into court and litigated on the question of defamation of character, seeking their redress in the civil courts for damages, or in a criminal court on an indictment, rather than going out and killing and shooting and beating up.

Are any of these explanations plausible?

Even in the United States, however, certain slurs cannot be ignored, and justify legal recourse. Since the notion of reputation is at the core of the defamation action we will begin our consideration with a look at that concept.

1. THE PLAINTIFF'S CASE

GRANT v. READER'S DIGEST ASS'N, INC.

United States Court of Appeals, Second Circuit, 1945.
151 F.2d 733.

Certiorari denied, 326 U.S. 797, 66 S.Ct. 496, 90 L.Ed. 485 (1946).

Before L. HAND, SWAN, and CLARK, CIRCUIT JUDGES.

L. HAND, CIRCUIT JUDGE.

This is an appeal from a judgment dismissing a complaint in libel for insufficiency in law upon its face. The complaint alleged that the plaintiff was a Massachusetts lawyer, living in that state; that the defendant, a New York corporation, published a periodical of general circulation, read by lawyers, judges and the general public; and that one issue of the periodical contained an article entitled "I Object To My Union in Politics," in which the following passage appeared:

> "And another thing. In my state the Political Action Committee has hired as its legislative agent one, Sidney S. Grant, who but recently was a legislative representative for the Massachusetts Communist Party."

The innuendo then alleged that this passage charged the plaintiff with having represented the Communist Party in Massachusetts as

its legislative agent, which was untrue and malicious. Two questions arise: (1) What meaning the jury might attribute to the words; (2) whether the meaning so attributed was libellous. So far as the wrong consisted of publishing the article in New York, the decisions of the courts of that state are authoritative for us under now familiar principles. As to publication in another state, a question might arise whether we must follow the decisions of that state or any decisions of New York which determined what effect in such cases the courts of New York give to the decisions of another state. No such question comes up upon this motion; and we leave it open. The innuendo added nothing to the meaning of the words, and, indeed, could not. [ ] However, although the words did not say that the plaintiff was a member of the Communist Party, they did say that he had acted on its behalf, and we think that a jury might in addition find that they implied that he was in general sympathy with its objects and methods. The last conclusion does indeed involve the assumption that the Communist Party would not retain as its "legislative representative" a person who was not in general accord with its purposes; but that inference is reasonable and was pretty plainly what the author wished readers to draw from his words. The case therefore turns upon whether it is libellous in New York to write of a lawyer that he has acted as agent of the Communist Party, and is a believer in its aims and methods.

The interest at stake in all defamation is concededly the reputation of the person assailed; and any moral obliquity of the opinions of those in whose minds the words might lessen that reputation, would normally be relevant only in mitigation of damages. A man may value his reputation even among those who do not embrace the prevailing moral standards; and it would seem that the jury should be allowed to appraise how far he should be indemnified for the disesteem of such persons. That is the usual rule. Peck v. Tribune Co., 214 U.S. 185 (1909). Restatement of Torts, § 559. The New York decisions define libel, in accordance with the usual rubric, as consisting of utterances which arouse "hatred, contempt, scorn, obloquy or shame," and the like. [ ] However, the opinions at times seem to make it a condition that to be actionable the words must be such as would so affect "right-thinking" people. . . . The same limitation has apparently been recognized in England [ ]; and it is fairly plain that there must come a point where that is true. As was said in Mawe v. Piggott, Irish Rep. 4 Comm.Law, 54, 62, among those "who were themselves criminal or sympathized with crime," it would expose one "to great odium to represent him as an informer or prosecutor or otherwise aiding in the detection of crime"; yet certainly the words would not be actionable. Be that as it may, in New York if the exception covers more than such a case, it does not go far enough

to excuse the utterance at bar. Katapodis v. Brooklyn Spectator, Inc., (287 N.Y. 17, 38 N.E.2d 112 (1941)), following the old case of Moffatt v. Cauldwell, 3 Hun 26, 5 T. & C. 256 (1874), held that the imputation of extreme poverty might be actionable; although certainly "right-thinking" people ought not shun, or despise, or otherwise condemn one because he is poor. Indeed, the only declaration of the Court of Appeals [ ] leaves it still open whether it is not libellous to say that a man is insane. . . . We do not believe, therefore, that we need say whether "right-thinking" people would harbor similar feelings toward a lawyer, because he had been an agent for the Communist Party, or was a sympathizer with its aims and means. It is enough if there be some, as there certainly are, who would feel so, even though they would be "wrong-thinking" people if they did. . . .

The lower courts in New York have passed on almost the same question in three cases. In Garriga v. Richfield, 174 Misc. 315, 20 N.Y.S.2d 544 (1940), Pecora, J., held that it was not libellous to say that a man was a Communist; in the next year in Levy v. Gelber, 175 Misc. 746, 25 N.Y.S.2d 148 (1941), Hofstadter, J., held otherwise. That perhaps left the answer open; but Boudin v. Tishman, 264 App.Div. 842, 35 N.Y.S.2d 760 (1942), was an unescapable ruling, although no opinion was written. Being the last decision of the state courts, it is conclusive upon us, unless there is a difference between saying that a man is a Communist and saying that he is an agent for the Party or sympathizes with its objects and methods. Any difference is one of degree only: those who would take it ill of a lawyer that he was a member of the Party, might no doubt take it less so if he were only what is called a "fellow-traveler"; but, since the basis for the reproach ordinarily lies in some supposed threat to our institutions, those who fear that threat are not likely to believe that it is limited to party members. Indeed, it is not uncommon for them to feel less concern at avowed propaganda than at what they regard as the insidious spread of the dreaded doctrines by those who only dally and coquette with them, and have not the courage openly to proclaim themselves.

Judgment reversed; cause remanded.

Notes and Questions

1. How does Judge Hand analyze his first question—what meaning the jury might attribute to the words? What is the judge's role in this process? In Cooper v. Greeley, 1 Denio 347 (N.Y.1845), Horace Greeley had written in the New York Tribune that he was not worried about a suit filed against him by James Fenimore Cooper because "Mr. Cooper will have to bring his action to trial somewhere. He will not like to bring it in New York, for we are known here, nor

in Otsego for he is known there." Cooper sued again—for defamation. Greeley contended that the statement meant only "that a prophet has no honor in his own country. The point of the article is the intimation that the plaintiff would prefer a trial where the prejudice and rivalries which assail every man at home could not reach him." Cooper alleged that the statement meant to suggest that he was in bad repute in Otsego. What is the judge's role in interpreting this statement? What is the jury's role?

Notice that this case is in federal court only because of diversity of citizenship. For that reason the court attempts to determine how the state courts of New York would decide the case.

2. Verbal ambiguities aside, the meaning of a statement may be altered by punctuation, paragraphing, and typography. Thus, in Wildstein v. New York Post Corp., 40 Misc.2d 586, 243 N.Y.S.2d 386, affirmed without opinion 24 App.Div.2d 559, 261 N.Y.S.2d 254 (1965), the defendant wrote that the plaintiff was one of "several women described as 'associated' with" a slain executive. The judge observed that if the word "associated" had not been in quotation marks the statement would not have been defamatory; the quotation marks implied a euphemistic use of the word, suggesting an illicit relationship between plaintiff and the deceased. The actual paragraphing of the story may also be crucial in construing the meaning.

3. Another problem arises when part of an article has a defamatory impact but another part of the article negates that impact. The headline may be defamatory although the article is not; the lead paragraph alone may be defamatory but the article as a whole may be harmless; and one sentence may be defamatory but the whole paragraph may be harmless. Gambuzza v. Time, Inc., 18 App.Div.2d 351, 239 N.Y.S.2d 466 (1963), involved a two-page spread of 12 photographs in a magazine article each with a three line legend beneath it. The story involved reports of the activities of a convicted spy. One photograph of plaintiff was captioned "HIS ADMIRER. Frank Gambuzza, a radio dealer who sold Abel some parts for a wireless receiver, praised the Russian for his electronic know-how." Plaintiff alleged that the first two words suggested sympathy for Abel and his cause. The majority noted that sometimes headlines might be read separately from the article and judged by their own words because "a person passing a newsstand . . . may be able to catch a glimpse of a headline without the opportunity or desire to read the accompanying article or may skim through the paper jumping from headline to headline." But this was not such a case because the caption was so close to the text that they had to be read together: "the article must be considered as a whole and its meaning gleaned not from isolated portions thereof but rather from the entire article. . . ."

Two dissenters emphasized that the critical words in the caption were in bold capital type and thus should be considered separately from the rest of the article.

In Kunst v. New York World Telegram Corp., 28 App.Div.2d 662, 280 N.Y.S.2d 798 (1967), the lead paragraph and a photograph caption conveyed a defamatory implication that was negated by a statement that a "persistent and careful reader would discover near the end of the reasonably lengthy article." The majority upheld the complaint stressing that the writing must be "construed, not with the high degree of precision expected of and used by lawyers and judges, but as it would be read and understood by an ordinary member of the public to whom it is directed." A dissenter responded, "It is true this appears near the end of the article, but the article is to be taken as a whole and read in its entirety." He relied on *Gambuzza.*

4. Sometimes the words used do not clearly convey any defamatory thrust, or do not clearly identify their target. If the plaintiff himself is not directly named he must show by "colloquium" that the statement was "of and concerning" him. If it is still not clear how the plaintiff has been defamed, he must plead extrinsic facts that would permit a defamatory meaning to be applied to defendant's words. This allegation of extrinsic facts is called the "inducement." Finally we have the "innuendo" referred to by Judge Hand. Where the statement is not clearly defamatory on its face it is the function of the innuendo to assert the meaning that plaintiff attaches to the passage and any additions by colloquium and inducement. The innuendo is not a fact but is the plaintiff's assertion of how the passage would be understood by those who heard the defendant's words and knew the additional facts.

An example may help clarify the matter. Let us assume defendant says, "The man who lives in the house two doors east of my house was the only person in the Smith home between 7:00 p.m. and 8:00 p. m. last night." If the plaintiff thinks that this statement is defamatory of him and wishes to sue, his pleading must establish how he has been defamed. For colloquium he might allege, "I am the only man who lives in the house two doors east of the speaker's house." This ties the plaintiff to the statement but does not clarify its defamatory nature. The defamation is clarified if the plaintiff alleges as inducement that the Smiths' house was burglarized between 7:00 and 8:00 p.m. last night. The plaintiff will then assert that the innuendo is that he is being charged by defendant with the crime of burglary.

Traditionally, these three terms have been relevant solely to problems of pleading. Courts require that the plaintiff allege the precise words claimed to be defamatory—but when this does not suf-

fice plaintiff must usually make the further allegations we have been discussing.

5. Once the statement is properly understood, what criteria control whether it is, or may be, defamatory? Was *Grant* correctly decided? Consider the following cases:

a. A statement that plaintiff was seduced by Rasputin. Raped by him. Would it be different if the man named had been an American movie idol instead of the infamous "mad monk?"

b. A statement that the plaintiff is of illegitimate birth. Can it ever be defamatory to say that someone is of legitimate birth?

c. A statement that the plaintiffs' child will have to be buried in Potters' Field because his parents are in "dire financial straits" and cannot afford a private burial.

d. A statement that plaintiff endorses the tonic effects of a specific whiskey. Peck v. Tribune Co., 214 U.S. 185 (1909).

e. A statement that the plaintiff, who owns a service station and truck stop, reports to the Interstate Commerce Commission the names of truckers who violate I.C.C. rules limiting the number of consecutive hours they may work. Might it be defamatory to say that he did not report such violators?

f. A statement that a reputable physician illegally terminated life support services on a terminally ill patient who was in great pain and stated that he wished to die. Might it be defamatory to say he refused the patient's request?

g. A statement that a professional gunman who had been hired to assassinate a public official bungled the job.

h. A statement identifying plaintiff, an expert on Egyptian customs, as the author of a particular article on that subject. The article could have impressed the average reader but fellow experts would have found many errors in it.

i. A statement that the plaintiff has died.

j. A statement by a candidate for the Democratic nomination for United States Senator from Florida to his backwoods audiences: "Are you aware that Claude Pepper is known all over Washington as a shameless extrovert? Not only that, but this man is reliably reported to practice nepotism with his sister-in-law, and he has a sister, who was once a thespian in wicked New York. Worst of all, it is an established fact that Mr. Pepper, before his marriage, practiced celibacy." See Sherrill, Gothic Poli-

tics in the Deep South 150 (1968), quoting George Smathers, who defeated Pepper, the incumbent, in that campaign.

6. Even though allowed to bring suit for defamation, a corporation does face impediments not faced by individuals, such as the fact that "since it has no character to be affected by a libel it can only be protected against false and malicious statements affecting its credit or property." See El Meson Espanol v. NYM Corp., 521 F.2d 737 (2d Cir. 1975), involving a charge that the corporate plaintiff's restaurant was a good place "to meet a connection" to buy cocaine.

7. Because the law does not recognize any right to protect the reputation of deceased persons, it is generally held that no suits for defamation may be brought on their behalf. If the statement also hurts a living person's reputation—such as an assertion that a deceased woman was never married—a suit may be brought by her children who are being called illegitimate.

8. The case is established even if the offending statement appeared to be either neutral or positive, but when supplemented by other facts, unknown to defendant, turned out to be defamatory. For example, a newspaper might, based on reliable information, report that a couple had just had a baby. If some readers knew that the couple had been married only three months, the newspaper would be held to have committed defamation because in the eyes of those readers who knew the additional fact the newspaper story suggested unchastity. If a magazine carries what it believes to be fiction but readers reasonably think the words refer to an identifiable plaintiff, a defamation may be found.

9. As suggested in these notes, the plaintiff must show that the statement may be read as "of and concerning" him. The addition of colloquium may help, but the problem has another dimension suggested in the following case.

NEIMAN-MARCUS v. LAIT

United States District Court, Southern District of New York, 1952.
13 Federal Rules Decisions 311.

IRVING R. KAUFMAN, DISTRICT JUDGE. The defendants have moved to dismiss the amended complaint in this action (1) as to those plaintiffs described as salesmen and saleswomen for failure to state a claim upon which relief can be granted, and (2) in its entirety for failure to comply with the Federal Rules of Civil Procedure, 28 U.S. C.A., or in the alternative to require plaintiffs to serve an amended complaint in which the claim of each plaintiff shall be separately stated.

The defendants are authors of a book entitled "U.S.A. Confidential". The plaintiffs are the Neiman-Marcus Company, a Texas corporation operating a department store at Dallas, Texas, and three groups of its employees. They allege that the following matter libelled and defamed them:

"Pages 39–40:

"The telephone had come into its own. Whores are 'call girls,' 'party girls' or 'company girls.' Instead of your visiting them, they come to see you.

"This resulted in a complete change in the economic set-up of the oldest profession. Since houses are not needed, neither are large investments. Without houses immovably located, pay-offs to bluecoats on the beat have become almost extinct and so, for that matter, have raids. Only the lowest streetwalkers are collared. Meanwhile, the price is up; the old 50-cent house girl is insulted with $10 for a quick visit to your hotel room. The younger, fresher and smarter talent asks $100 and frequently gets it.

. . .

"Some people call them call girls and others refer to them as party girls; because you call them when you want a party.

"Page 196:

"He [Stanley Marcus, president of plaintiff Neiman-Marcus Company] may not know that some Neiman models are call girls—the top babes in town. The guy who escorts one feels in the same league with the playboys who took out Ziegfeld's glorified. Price, a hundred bucks a night.

"The salesgirls are good, too—pretty, and often much cheaper—twenty bucks on the average. They're more fun, too, not as snooty as the models. We got this confidential, from a Dallas wolf.

"Neiman-Marcus also contributes to the improvement of the local breed when it imports New York models to make a flash at style shows. These girls are the cream of the crop. Oil millionaires toss around thousand-dollar bills for a chance to take them out.

"Neiman's was a women's specialty shop until the old biddies who patronized it decided their husbands should get class, too. So Neiman's put in a men's store. Well, you should see what happened. You wonder how all the faggots got to the wild and wooly. You thought those with talent ended up in New York and Hollywood and the plodders got government jobs in Washington. Then you learn the nucleus of the Dallas fairy colony is com-

posed of many Neiman dress and millinery designers, imported from New York and Paris, who sent for their boy friends when the men's store expanded. Now most of the sales staff are fairies, too.

"Page 208:

"Houston is faced with a serious homosexual problem. It is not as evident as Dallas', because there are no expensive imported faggots in town like those in the Neiman-Marcus set."

. . .

The individual plaintiffs . . . state that they were employed by the Neiman-Marcus Company at the time the alleged libel was published and that the groups of individual plaintiffs are composed as follows:

(1) Nine individual models who constitute the entire group of models at the time of the publication;

(2) Fifteen salesmen of a total of twenty-five suing on their own behalf and on behalf of the others . . .;

(3) Thirty saleswomen of a total of 382 suing on their own behalf and on behalf of the others. . . .

The first part of defendants' motion is to dismiss the amended complaint as to the salesmen and saleswomen for failure to state a cause of action for libel since, it is alleged, no ascertainable person is identified by the words complained of.

. . .

This Court is of the opinion that the motion to dismiss the salesmen's and saleswomen's causes of action must be denied at this stage of the proceedings, if such plaintiffs have a cause of action in any state of the United States in which it is alleged the defendants' book was distributed to the public.

An examination of the case and text law of libel reveals that the following propositions are rather widely accepted:

(1) Where the group or class libelled is large, none can sue even though the language used is inclusive. [ ]

(2) Where the group or class libelled is small, and each and every member of the group or class is referred to, then any individual member can sue. [ ]

Conflict arises when the publication complained of libels *some* or *less than all* of a designated small group. Some courts say no cause of action exists in any individual of the group. [ ] Other courts in other states would apparently allow such an action. [ ]

While no choice of law is made at this time, it appears from the complaint that Texas or New York law will be of greatest importance

at the trial because of the many contacts with these states; not of small significance is the fact that the individual plaintiffs' community and place of livelihood is in Texas.

The courts of Texas do not seem to have spoken on the "some" allegation of libel. A reading of the New York cases indicates a trend towards submitting to the jury the question as to whether the "charge against several individuals, under some general description or general name . . . has the personal application averred by the plaintiff." Gross v. Cantor, 270 N.Y. 93, 96, 200 N.E. 592, 593 (1936); [ ].

The Court of Appeals for this Circuit has referred to the Restatement of Torts for the "general law". Mattox v. News Syndicate Co., supra, 176 F.2d at page 901. If we do so in this instance, we find that Illustration 2 of § 564, Comment (c) reads as follows:

> "A newspaper publishes the statement that some member of B's household has committed murder. In the absence of any circumstances indicating that some particular member of B's household was referred to, the newspaper has defamed each member of B's household."

Thus the Restatement of Torts would authorize suit by each member of a small group where the defamatory publication refers to but a portion of the group. This result seems to find support in logic and justice, as well as the case law mentioned above. See Riesman, Group Libel, 42 Colum.Law Review 727, 768 (1942). An imputation of gross immorality to *some* of a small group casts suspicion upon all, where no attempt is made to exclude the innocent.

Applying the above principles to the case at bar, it is the opinion of this Court that the plaintiff salesmen, of whom it is alleged that "most . . . are fairies" have a cause of action in New York and most likely other states; where the courts have specifically held to the contrary, a fortiori no cause exists. Defendants' motion to dismiss as to the salesmen for failure to state a claim upon which relief can be granted is denied.

The plaintiff saleswomen are in a different category. The alleged defamatory statement in defendants' book speaks of the saleswomen generally. While it does not use the word "all" or similar terminology, yet it stands unqualified. However, the group of saleswomen is extremely large, consisting of 382 members at the time of publication. No specific individual is named in the alleged libellous statement. I am not cited to a single case which would support a cause of action by an individual member of any group of such magnitude. The courts have allowed suit where the group consisted of four coroners [ ], twelve doctors composing the residential staff of a

hospital [ ], a posse [ ], twelve radio editors [Gross v. Cantor, supra], and in similar cases involving small groups.

But where the group or class disparaged is a large one, absent circumstances pointing to a particular plaintiff as the person defamed, no individual member of the group or class has a cause of action. [ ] Thus actions for libel have failed where the groups libelled consisted of all *officials* of a state-wide union [ ]; all the taxicab drivers in Washington, D. C. . . .; or the members of a clan [ ].

Giving the plaintiff saleswomen the benefit of all legitimate favorable inferences, the defendants' alleged libel cannot reasonably be said to concern more than the saleswomen as a class. There is no language referring to some ascertained or ascertainable person. Nor is the class so small that it follows that defamation of the class infects the individual of the class. This Court so holds as a matter of law since it is of the opinion that no reasonable man would take the writers seriously and conclude from the publication a reference to any individual saleswoman. [ ]

While it is generally recognized that even where the group is large, a member of the group may have a cause of action if some particular circumstances point to the plaintiff as the person defamed, no such circumstances are alleged in the amended complaint. This further exception is designed to apply only where a plaintiff can satisfy a jury that the words referred solely or especially to himself. [ ] The plaintiffs' general allegation that the alleged libellous and defamatory matter was written "of and concerning . . . each of them" is insufficient to satisfy this requirement. [ ]

Accordingly it is the opinion of this Court that as a matter of law the individual saleswomen do not state a claim for libel upon which relief can be granted and the motion to dismiss their cause of action is granted.

. . .

Notes and Questions

1. Is there a difference in reputational harm between asserting that one out of 12 is a murderer, and the claim that 11 out of 12 are murderers?

2. When the charge is against all members of a group the size of the group is decisive. What factors should dictate the maximum size of a group all of whose individual members may sue? Would your answer be different if the charges are against "most" of the group, "some" of the group or "one" of the group?

3. A magazine article about athletes using pep pills and drugs to improve their performance stated, "Speaking of football teams, dur-

ing the 1956 season, while Oklahoma was increasing its sensational victory streak, several physicians observed Oklahoma players being sprayed in the nostrils with an atomizer. And during a televised game, a close-up showed Oklahoma spray jobs to the nation. . . ." The story was read as defaming plaintiff who was second-string fullback on that team and who played in nine of the 11 games of that season. There were at least sixty members on the team but the court did not say whether all could sue. Fawcett Publications, Inc. v. Morris, 377 P.2d 42 (Okla.1962) appeal dismissed and certiorari denied 376 U.S. 513 (1963), Justices Black and Douglas dissenting.

4. Although defamation of large groups—ethnic, religious, professional—has not given rise to civil actions, some states have sought to develop criminal sanctions against defamation of certain large groups. This approach is discussed at p. 323, infra.

5. Obviously a case with interstate aspects presents a cluster of substantive and procedural problems. Most states, either by case law or by adopting the Uniform Single Publication Act, or equivalent, have developed the rule that the entire edition of a printed work is to be treated as a single publication and that all damages for this publication must be recovered in a single action. At first this was limited to one action in each state but it is now recognized that all damages for the nation-wide single publication may, and in some cases, must, be resolved in a single action that takes into account the substantive rules of the relevant states.

Libel and Slander—The Damage Question

As noted, the law of defamation developed from two unrelated sources. It also now has two manifestations: historically, if the words were spoken the plaintiff's action was for slander, and if they were written the action was for libel. The importance of this distinction is that it now dictates whether the plaintiff has to show "special damages"—actual pecuniary loss—as an essential part of his action.

The common law courts have treated libel as substantially more serious than slander. The distinction arose when relatively few people could read and the written word was awesome and thus more credible. A writing may be given more weight because it requires more thought and planning than a spontaneous oral utterance. Furthermore the writing is more lasting and is likely to reach a larger audience than most, if not all, slanders. Thus, libels as a class were more likely to cause harm than slanders and the courts declared that plaintiffs in libel cases were able to recover general damages without any showing of special damages. Therefore a plaintiff proceeding under libel has always been at least as well off, and often better off, than a plaintiff suing for slander for precisely the same words.

If an action is for slander, plaintiff must prove "special damages" unless the defamatory thrust fits into at least one of four categories. These categories are: the imputation of a serious crime involving moral turpitude; imputation of an existing loathsome disease; a charge that attacks the plaintiff's competence or honesty in his business, trade or profession; or a charge of unchastity in a woman. Such a spoken charge is called "slander per se" and gives rise to an action enabling plaintiff to recover general damages to his reputation without proving actual pecuniary harm. Here the jury may conclude that publication of the charge caused substantial harm in the community, and can measure damages according to the number and identity of those who learned of the charge, and their presumed reaction based on the seriousness and credibility of the charge. If a plaintiff could also establish particular items of pecuniary loss such as being discharged from employment, these could be recovered in addition to the general damages presumed.

If the slander is not within the four categories, then an action must be supported by proof of "special" damages. These must be pecuniary in nature such as the loss of employment, the collapse of an advantageous business deal, or some other identifiable economic harm. Once this is established, the plaintiff may also recover his general reputational damages.

Although the categories are of long standing, two developments have blurred the line between them. First, the courts began to distinguish between two types of libel: those clear on their face, called libel *per se*, to which courts applied the traditional general damage rules, and others, called libel *per quod*, in which the reader had to know one or more unstated facts in order to understand the defamatory thrust of the writing. Some courts began to hold that the plaintiff must prove special damages in libel *per quod* cases unless the words used, if spoken, would have fit into one of the four categories of slanders for which special damages were not required. As a result, some plaintiffs now must prove special damages in libel cases. For example, such slanders as calling someone a gambler, a dirty liar, a bedwetter, and the like generally would not fit within one of the four categories of slander *per se* and the plaintiff would have to show special damages before he could win a slander case.

If these words were written, traditional libel rules would allow the plaintiff to recover general damages even if he could show no special damages. But if the libel did not say "X is a gambler" but instead said "X spends his evenings at 123 Hay Road," the situation would be different. Specifying what goes on at that address can show the defamatory nature of the statement, but resorting to facts outside the statement means that the libel is not clear on its face. Some states require the plaintiff to prove special damages for such a

libel since the words, if spoken, would not fit into one of the four categories of slander *per se*. This approach is intended to reduce the number of libel cases because of the great difficulty in proving special damages in many cases.

A second type of blurring of the libel-slander distinction came when courts had to put new communications media into one category or the other or develop new categories. Motion pictures had permanence and the potential for continuing harm, and fit into the libel category whether the defamation occurred visually or on the sound track. Radio was more complex and gave rise to distinctions between extemporaneous speech and words read from an unseen script. Then came television with some courts treating extemporaneous defamations on a live television show as libel because of the capacity for harm despite the lack of permanence. All state statutes concerning new media have preserved the distinction between libel and slander, but they have split over how to classify communications by radio and television.

The resulting libel-slander rules have sometimes permitted a plaintiff to recover enormous amounts in general damages and have at other times barred a plaintiff from recovering anything whatever because special damages could not be proven although serious general harm seemed clear.

In addition to the critical distinction between general and special damages, two other classifications loom large in defamation law: nominal damages and punitive damages. Although nominal damages are unimportant in most tort actions, they may be central in defamation cases. The award of a symbolic amount, such as six cents, may be ambiguous. Clearly, the jury found the attack to be false but awarded six cents. Was this because the statements were not generally believed or because the plaintiff's reputation was such that one more slur couldn't hurt? Most such cases appear to fall in the first group. For an example, see the suit by Quentin Reynolds against the Hearst Corporation and one of its columnists, upholding a jury award of $1 in compensatory damages and $175,000 in punitive damages against the various defendants. Reynolds v. Pegler, 223 F.2d 429 (2d Cir.) certiorari denied 350 U.S. 846 (1955) (Black, J. dissenting).

Most states have permitted the award of punitive damages in cases in which the jury finds that the defendant was acting with "actual malice." This is a very confusing term, as we shall see. For punitive damage purposes it means that the defendant has committed a defamation and has acted with hatred, ill will, or spite toward the plaintiff. In other words, this question of malice is largely determined by the defendant's attitude toward the plaintiff. Even in

states that allow punitive damages, some insist that it may be awarded only if the plaintiff also recovers a substantial compensatory award. But others follow the *Reynolds* approach under which even the slightest compensatory or nominal award of damages will sustain an award of punitive damages if the requisite malice is shown. We shall see that much of the law of damages and malice is being reshaped.

Traditionally, the plaintiff's action for defamation has been easy to establish. The plaintiff had to prove the publication to a third person of a statement of and concerning plaintiff that injured his reputation, and then had to meet whatever damage showing was required under the relevant libel-slander rules. These elements shown, it was up to the defendant to present a defense.

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2. DEFENSES

a. Truth

The most obvious defense, but one rarely used, is to prove the essential truth of the defamatory statement. Most states recognize truth as a complete defense regardless of the speaker's motives. Because the action is intended to compensate those whose reputations are damaged incorrectly, if the defendant has spoken the truth the reputational harm is deemed to provide no basis for an action. A minority of states require the truth to have been spoken with "good motives" or for "justifiable ends" or both.

The defendant need not prove literal truth but must establish the "sting" of his charge. Thus, if the defendant has charged the plaintiff with stealing $25,000 from a bank, truth will be established even if the actual amount was only $12,000. If the defendant cannot prove any theft whatever but can prove that the plaintiff is a bigamist, this information will not support his defense of truth, but it may help mitigate damages to show that the plaintiff's reputation is already in low esteem for other reasons and thus he has suffered less harm than might otherwise have occurred.

Truth is little used as a defense, though it would enable a decisive confrontation, because the defense may be very expensive to establish. A defendant relying on truth almost always bears the legal costs of a full-dress trial as well as the sometimes major expense of investigating the matter and gathering enough evidence to ensure the outcome. Particularly when the charge involved is vague and does not allege specific events, the defense of truth may be very costly—and risky.

b. State Privileges

Not only were there disadvantages to the defense of truth, there were attractive alternatives. Over the centuries the law of defamation has developed several privileges to protect those who utter defamations. Some privileges are "absolute" in the sense that if the occasion gives rise to an absolute privilege, there will be no liability even if the speaker deliberately lied about the plaintiff. The most significant example is the federal and state constitutional privilege afforded legislators who may not be sued for defamation for any statement made during debate. High executive officials, judges and participatants in judicial proceedings also have an absolute privilege to speak freely on matters relevant to their obligations. No matter how such a speaker abuses the privilege by lying, no tort liability will flow. See Barr v. Matteo, 360 U.S. 564 (1959). The only circumstance that gives absolute privilege to the media occurs when broadcasters are required to grant equal opportunity to all candidates for the same office. If a candidate commits defamation the broadcaster is not liable for the defamation. See Farmers Educational & Cooperative Union of America v. WDAY, Inc., 360 U.S. 525 (1959), discussed at p. 620, infra.

The much more common type of privilege is "conditional" or "qualified". The defendant who has such a privilege will prevail in an action for defamation unless the plaintiff can show that the speaker "abused" the privilege. The plaintiff shows abuse by proving that the defendant did not honestly believe what he said or that defendant published more information or published it more widely than was justified by the occasion that provided the privilege.

Most common law privileges serve individuals and do not specifically affect media—with two important exceptions. The first involves the privilege to make fair and accurate reports of governmental proceedings. Under general defamation law, one who repeats another's statement is responsible for the truth of what he repeats. Thus, if X states that "Y told me that Z is a murderer," and Z sues X for defamation, X will be treated as the publisher who is responsible for his own statement. In order to prevail on the defense of truth, X must prove that Z is in fact a murderer—it is not enough for X to prove that in fact Y told him that Z was a murderer. The general reason underlying this view is the reluctance to protect gossip.

It was not long, however, before the courts and the legislatures began to realize that sometimes speakers should be encouraged to repeat others' statements. The federal and state constitutions had already provided that members of the legislative branch could quote others in debate with absolute protection against legal sanctions.

The major example of the value of repetition was found in the reporting of how government was functioning and what government officials were saying. Thus, observers were to be encouraged to report what legislators said on the floor or in committee as well as events in court. It would put reporters in a hopeless situation to be able to safely report only the truthful statements of government officials or of witnesses at a trial. As a result of these considerations, a privilege developed, sometimes called the privilege of "record libel," under which reports of what occurs in governmental proceedings are privileged even if some of those quoted have spoken falsely—so long as the report is accurate or a fair summary of what transpired.

The second major common law privilege of value to the media is the privilege of fair comment upon matters of public interest.

Apparently this privilege entered English law in 1808 in Carr v. Hood, 1 Camp. 355, 170 Eng.Rep. 983. The defendant was charged with ridiculing the plaintiff author's talent so severely that sales of his book were discouraged and his reputation was destroyed. The plaintiff's attorney conceded that his client had exposed himself to literary criticism by making the book public, but insisted that the criticism should be "fair and liberal" and seek to enlighten the public about the book rather than to injure the author. The judge noted that ridicule may be an appropriate tool of criticism, but that criticism unrelated to the author as such would not be privileged. He urged that any "attempt against free and liberal criticism" should be resisted "at the threshold." The result was a rule that criticism, regardless of its merit, was privileged if it was made honestly, with honesty measured by the accuracy of the critic's descriptive observations. If a critic describing a literary, musical or artistic endeavor gave the "facts" accurately and fairly, his honest conclusions would be privileged as "fair comment."

American law recognized this privilege, and while it was applied in cases of literary and artistic criticism it caused little confusion. Problems raised by such comment are discussed in the classic Cherry v. Des Moines Leader, 114 Iowa 298, 86 N.W. 323 (1901) in which a reviewer scathingly described a performance by the Cherry Sisters. But at the turn of the century cases arose in which the privilege of fair comment was claimed with regard to other matters of public interest, including the conduct of politicians. This was not the privilege of reporting what certain public officials were doing in their official capacity. Rather the privilege claimed would permit citizens to criticize and argue about the conduct of their officials, and these cases presented the problem of distinguishing between facts and opinion. In the literary criticism area the application of the privilege could depend upon the accuracy of the "facts" because they were usually readily apparent. When dealing with

politics, however, the "facts" were often elusive. This new problem created a judicial split.

In Post Publishing Co. v. Hallam, 59 F. 530 (6th Cir. 1893), Judge Taft ruled that in order for criticism of officials to be privileged, it must be based upon true underlying facts. The newspaper asserted that it should be judged under the accepted rule that a former master responding to a request for information about a former servant would be privileged if the master stated some "facts" about the servant honestly but mistakenly. Judge Taft refused to apply this rule because in the servant case only the prospective master learned of the defamation, while here the entire public would hear of it. He continued:

> The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed. . . . But, if the privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation, not with a single person or a small class of persons, but with every member of the public, whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charge upon reasonable ground. We think that not only is such a sacrifice not required of every one who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good.
>
> We are aware that public officers and candidates for public office are often corrupt, when it is impossible to make legal proof thereof, and of course it would be well if the public could be given to know, in such a case, what lies hidden by concealment and perjury from judicial investigation. But the danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their characters outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true in fact, but are incapable of legal proof. The freedom of the press is not in danger from the enforcement of the rule we uphold. No one reading the newspaper of the present day can be impressed with the idea that statements of fact concerning public men, and charges against them, are unduly guarded or restricted; and yet the rule complained of is the law in many of the states of the Union and in England.

The privilege became more inaccessible as those courts following the *Hallam* view came to treat questions of motive—why the politician or official acted as he did—as "facts" that had to be true in order for subsequent comment to be privileged.

A contrasting position was taken in Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908), in which the court noted that though Kansas had not been following the *Hallam* approach, "men of unimpeachable character from all political parties continually present themselves as candidates in sufficient numbers to fill the public offices and manage the public institutions." The court ruled that facts relating to matters of public interest are themselves privileged if they are honestly believed to be true; and, if the facts are privileged even if wrong, the comments based upon those facts are also privileged if they are honestly believed. In other words, *Coleman* rejected the *Hallam* distinction between fact and comment or opinion.

c. Constitutional Privilege

In Near v. Minnesota, 283 U.S. 697 (1931), the case that perhaps first reinforced the protection of the press in this country, the majority observed, "But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common-law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our Constitution."

In Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), however, the Supreme Court unanimously upheld the conviction of a Jehovah's Witness who had been prosecuted under a "fighting words" statute after having called a policeman a "God damned racketeer" and a "Damned fascist," and gotten into a fight as a result. In the course of his opinion for the court, Justice Murphy observed:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

This language was often quoted approvingly. Justice Frankfurter, writing for a 5–4 majority in Beauharnais v. Illinois, 343 U.S. 250 (1952), to sustain a state criminal libel law, relied on *Chaplinsky* for the proposition that libelous utterances were not "within the area of constitutionally protected speech."

This sequence set the stage for the following case from Alabama, a state that had long followed the narrow *Hallam* view.

NEW YORK TIMES CO. v. SULLIVAN
(Together with Abernathy v. Sullivan)

Supreme Court of the United States, 1964.
376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686.

[This action was based on a full-page advertisement in The New York Times on behalf of several individuals and groups protesting a "wave of terror" against blacks involved in non-violent demonstrations in the South. Plaintiff, one of three elected commissioners of Montgomery, the capital of Alabama, was in charge of the police department. When he demanded a retraction, as state law required, The Times instead responded that it failed to see how he was defamed. He then filed suit against The Times and four clergymen whose names appeared—although they deny having authorized this —in the ad. Plaintiff alleged that the third and the sixth paragraphs of the advertisement libelled him:

> "In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission."
>
> . . .
>
> "Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times —for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a *felony* under which they could imprison him for *ten years*. . . ."

Plaintiff claimed that he was libelled in the third paragraph by the reference to the police, since his responsibilities included supervision of the Montgomery police. He asserted that the paragraph could be read as charging the police with ringing the campus and seeking to starve the students by padlocking the dining hall. As to the sixth paragraph, he contended that the word "they" referred to his department since arrests are usually made by the police and the paragraph could be read as accusing him of committing the acts charged. Several witnesses testified that they read the statements as referring to plaintiff in his capacity as commissioner.

The defendants admitted several inaccuracies in these two paragraphs: the students sang The Star Spangled Banner, not My Country, 'Tis of Thee; nine students were expelled, not for leading the demonstration, but for demanding service at a lunch counter in the county courthouse; the dining hall was never padlocked; police at no time ringed the campus though they were deployed nearby in large numbers; they were not called to the campus in connection with the demonstration; Dr. King had been arrested only four times; and officers disputed his account of the alleged assault. Plaintiff proved that he had not been commissioner when three of the four arrests occurred and that he had nothing to do with procuring the perjury indictment.

The trial judge charged that the statements were libel per se, that the jury should decide whether they were made "of and concerning" the plaintiff and, if so, general damages were to be presumed. Although noting that punitive damages required more than carelessness, he refused to charge that they required a finding of actual intent to harm or "gross negligence and recklessness." He also refused to order the jury to separate its award of general and punitive damages. The jury returned a verdict for $500,000—the full amount demanded. The Alabama Supreme Court affirmed, holding that malice could be found in several aspects of The Times' conduct.]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

. . .

I.

We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court—that "The Fourteenth Amendment is directed against State action and not private action." That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. [ ] The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised. [ ]

The second contention is that the constitutional guarantees of freedom of speech and of the press are inapplicable here, at least so far as the Times is concerned, because the allegedly libelous statements were published as part of a paid, "commercial" advertisement. The argument [was rejected. See p. 428, infra.]

II.

Under Alabama law as applied in this case, a publication is "libelous per se" if the words "tend to injure a person . . . in his reputation" or to "bring [him] into public contempt"; the trial court stated that the standard was met if the words are such as to "injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust . . ." The jury must find that the words were published "of and concerning" the plaintiff, but where the plaintiff is a public official his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge. Once "libel per se" has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. [ ] His privilege of "fair comment" for expressions of opinion depends on the truth of the facts upon which the comment is based. [ ] Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury. A showing of actual malice is apparently a prerequisite to recovery of punitive damages, and the defendant may in any event forestall a punitive award by a retraction meeting the statutory requirements. Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight. [ ]

The question before us is whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.

Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications. Those statements do not foreclose our inquiry here. None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials. . . . In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law. NAACP v. Button, 371 U.S. 415, 429 (1963). Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. . . . Mr. Justice Brandeis, in his concurring opinion in Whitney v. California, 274 U.S. 357, 375–376 (1927), gave the principle its classic formulation:

> "Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. See Terminiello v. Chicago, 337 U. S. 1, 4 (1949); De Jonge v. Oregon, 299 U.S. 353, 365 (1937). The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker. Cf. Speiser v. Randall, 357 U.S. 513, 525–526 (1958). The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." NAACP v. Button, 371 U.S. 415, 445 (1963). As Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 Elliot's Debates on the Federal Constitution (1876), p. 571. In Cantwell v. Connecticut, 310 U.S. 296, 310 (1940), the Court declared:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and

> abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive," NAACP v. Button, 371 U.S. 415, 433 (1963), was also recognized by the Court of Appeals for the District of Columbia Circuit in Sweeney v. Patterson, 76 U.S.App.D.C. 23, 24, 128 F.2d 457, 458, certiorari denied, 317 U. S. 678 (1942). Judge Edgerton spoke for a unanimous court which affirmed the dismissal of a Congressman's libel suit based upon a newspaper article charging him with anti-Semitism in opposing a judicial appointment. He said:

> "Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. . . . The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable. . . . Whatever is added to the field of libel is taken from the field of free debate."[13]

Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. Bridges v. California, 314 U.S. 252 (1941). This is true even though the utterance contains "half-truths" and "misinformation." Pennekamp v. Florida, 328 U.S. 331, 342, 343, n. 5, 345 (1946). . . . Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the

13. See also Mill, On Liberty (Oxford: Blackwell, 1947), at 47:

> ". . . [T]o argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion . . . all this, even to the most aggravated degree, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct."

combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 596, which first crystallized a national awareness of the central meaning of the First Amendment. . . .

Although the Sedition Act was never tested in this Court,[16] the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. . . . The invalidity of the Act has also been assumed by Justices of this Court. [ ] These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.

There is no force in respondent's argument that the constitutional limitations implicit in the history of the Sedition Act apply only to Congress and not to the States. It is true that the First Amendment was originally addressed only to action by the Federal Government, and that Jefferson, for one, while denying the power of Congress "to controul the freedom of the press," recognized such a power in the States. [ ] But this distinction was eliminated with the adoption of the Fourteenth Amendment and the application to the States of the First Amendment's restrictions. [ ]

What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. [ ] Alabama, for example, has a criminal libel law which subjects to prosecution "any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude," and which allows as punishment upon conviction a fine not exceeding $500 and a prison sentence of six months. [ ] Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. . . . And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication.[18] Whether or not a newspaper

16. The Act expired by its terms in 1801.

18. The Times states that four other libel suits based on the advertisement have been filed against it by others who have served as Montgomery City Commissioners and by the Governor of Alabama; that another $500,000 verdict has been awarded in the only one of these cases that has yet gone to trial; and that the damages sought in the other three total $2,000,000.

can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

The state rule of law is not saved by its allowance of the defense of truth. . . . Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.[19] Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. See, e. g., Post Publishing Co. v. Hallam, 59 F. 530, 540 (C.A. 6th Cir. 1893); see also Noel, Defamation of Public Officers and Candidates, 49 Col.L.Rev. 875, 892 (1949). Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements, which "steer far wider of the unlawful zone." Speiser v. Randall, supra, 357 U.S., at 526. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. An oft-cited statement of a like rule, which has been adopted by a number of state courts, is found in the Kansas case of Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908). . . .

Such a privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when *he* is sued for libel by a private citizen. In Barr v. Matteo, 360 U.S. 564, 575 (1959), this Court held the utterance of a federal official to be absolutely privileged if made "within the outer perimeter" of his duties. The States accord the same immunity to statements of their highest officers, although some differentiate their lesser officials and qualify the privilege they enjoy. But all hold that all offi-

19. Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about "the clearer perception and livelier impression of truth, produced by its collision with error." Mill, On Liberty (Oxford: Blackwell, 1947), at 15; see also Milton, Areopagitica, in Prose Works (Yale, 1959), Vol. II, at 561.

cials are protected unless actual malice can be proved. The reason for the official privilege is said to be that the threat of damage suits would otherwise "inhibit the fearless, vigorous, and effective administration of policies of government" and "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." Barr v. Matteo, supra, 360 U.S., at 571. Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer. . . .

We conclude that such a privilege is required by the First and Fourteenth Amendments.

III.

We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable. While Alabama law apparently requires proof of actual malice for an award of punitive damages, where general damages are concerned malice is "presumed." Such a presumption is inconsistent with the federal rule. . . . Since the trial judge did not instruct the jury to differentiate between general and punitive damages, it may be that the verdict was wholly an award of one or the other. But it is impossible to know, in view of the general verdict returned. Because of this uncertainty, the judgment must be reversed and the case remanded.

Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. . . .

Applying these standards, we consider that the proof presented to show actual malice, lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. The case of the individual petitioners requires little discussion. Even assuming that they could constitutionally be found to have authorized the use of their names on the advertisement, there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard. The judgment against them is thus without constitutional support.

As to the Times, we similarly conclude that the facts do not support a finding of actual malice. . . .

. . .

We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that

the allegedly libelous statements were made "of and concerning" respondent. Respondent relies on the words of the advertisement and the testimony of six witnesses to establish a connection between it and himself. . . . There was no reference to respondent in the advertisement, either by name or official position. A number of the allegedly libelous statements—the charges that the dining hall was padlocked and that Dr. King's home was bombed, his person assaulted, and a perjury prosecution instituted against him—did not even concern the police; despite the ingenuity of the arguments which would attach this significance to the word "They," it is plain that these statements could not reasonably be read as accusing respondent of personal involvement in the acts in question. The statements upon which respondent principally relies as referring to him are the two allegations that did concern the police or police functions: that "truckloads of police . . . ringed the Alabama State College Campus" after the demonstration on the State Capitol steps, and that Dr. King had been "arrested . . . seven times." These statements were false only in that the police had been "deployed near" the campus but had not actually "ringed" it and had not gone there in connection with the State Capitol demonstration, and in that Dr. King had been arrested only four times. The ruling that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems, but we need not consider them here. Although the statements may be taken as referring to the police, they did not on their face make even an oblique reference to respondent as an individual. Support for the asserted reference must, therefore, be sought in the testimony of respondent's witnesses. But none of them suggested any basis for the belief that respondent himself was attacked in the advertisement beyond the bare fact that he was in overall charge of the Police Department and thus bore official responsibility for police conduct; to the extent that some of the witnesses thought respondent to have been charged with ordering or approving the conduct or otherwise being personally involved in it, they based this notion not on any statements in the advertisement, and not on any evidence that he had in fact been so involved, but solely on the unsupported assumption that, because of his official position, he must have been. This reliance on the bare fact of respondent's official position was made explicit by the Supreme Court of Alabama. . . .

This proposition has disquieting implications for criticism of governmental conduct. For good reason, "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." City of Chicago v. Tribune Co., 307 Ill. 595, 601, 139 N. E. 86, 88 (1923). The present proposition would sidestep this obsta-

cle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed. There is no legal alchemy by which a State may thus create the cause of action that would otherwise be denied for a publication which, as respondent himself said of the advertisement, "reflects not only on me but on the other Commissioners and the community." Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression.[30] We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations. Since it was relied on exclusively here, and there was no other evidence to connect the statements with respondent, the evidence was constitutionally insufficient to support a finding that the statements referred to respondent.

The judgment of the Supreme Court of Alabama is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

I concur in reversing this half-million-dollar judgment against the New York Times Company and the four individual defendants. In reversing the Court holds that "the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely "delimit" a State's power to award damages to "public officials against critics of their official conduct" but completely prohibit a State from exercising such a power. The Court goes on to hold that a State can subject such critics to damages if "actual malice" can be proved against them. "Malice," even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent

30. Insofar as the proposition means only that the statements about police conduct libeled respondent by implicitly criticizing his ability to run the Police Department, recovery is also precluded in this case by the doctrine of fair comment. See American Law Institute, Restatement of Torts (1938), § 607. Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact. Both defenses are of course defeasible if the public official proves actual malice, as was not done here.

protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment. Unlike the Court, therefore, I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute unconditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery agencies and officials. . . .

The half-million-dollar verdict does give dramatic proof, however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials. . . . In fact, briefs before us show that in Alabama there are now pending eleven libel suits by local and state officials against the Times seeking $5,600,000 and five such suits against the Columbia Broadcasting System seeking $1,700,000. Moreover, this technique for harassing and punishing a free press—now that it has been shown to be possible—is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers.

In my opinion the Federal Constitution has dealt with this deadly danger to the press in the only way possible without leaving the free press open to destruction—by granting the press an absolute immunity for criticism of the way public officials do their public duty. Compare Barr v. Matteo, 360 U.S. 564 (1959). Stopgap measures like those the Court adopts are in my judgment not enough. This record certainly does not indicate that any different verdict would have been rendered here whatever the Court had charged the jury about "malice," "truth," "good motives," "justifiable ends," or any other legal formulas which in theory would protect the press. Nor does the record indicate that any of these legalistic words would have caused the courts below to set aside or to reduce the half-million-dollar verdict in any amount.

. . .

We would, I think, more faithfully interpret the First Amendment by holding that at the very least it leaves the people and the press free to criticize officials and discuss public affairs with impunity. . . . An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.[6]

I regret that the Court has stopped short of this holding indispensable to preserve our free press from destruction.

6. Cf. Meiklejohn, Free Speech and Its Relation to Self-Government (1948).

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE DOUGLAS joins, concurring in the result.

. . .

In my view, the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses. . . .

. . .

. . . It may be urged that deliberately and maliciously false statements have no conceivable value as free speech. That argument, however, is not responsive to the real issue presented by this case, which is whether that freedom of speech which all agree is constitutionally protected can be effectively safeguarded by a rule allowing the imposition of liability upon a jury's evaluation of the speaker's state of mind. If individual citizens may be held liable in damages for strong words, which a jury finds false and maliciously motivated, there can be little doubt that public debate and advocacy will be constrained. And if newspapers, publishing advertisements dealing with public issues, thereby risk liability, there can also be little doubt that the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished. . . .

. . .

This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen. Freedom of press and of speech insures that government will respond to the will of the people and that changes may be obtained by peaceful means. Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment.[4] . . .

. . .

If the government official should be immune from libel actions so that his ardor to serve the public will not be dampened and "fearless, vigorous, and effective administration of policies of government" not be inhibited, Barr v. Matteo, supra, at 571, then the citizen and the press should likewise be immune from libel actions for their criticism of official conduct. . . .

4. In most cases, as in the case at bar, there will be little difficulty in distinguishing defamatory speech relating to private conduct from that relating to official conduct. I recognize, of course, that there will be a gray area. The difficulties of applying a public-private standard are, however, certainly of a different genre from those attending the differentiation between a malicious and nonmalicious state of mind. . . .

The conclusion that the Constitution affords the citizen and the press an absolute privilege for criticism of official conduct does not leave the public official without defenses against unsubstantiated opinions or deliberate misstatements. "Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgment . . . of free speech. . . ." Wood v. Georgia, 370 U.S. 375, 389 (1962). The public official certainly has equal if not greater access than most private citizens to media of communication. . . .

. . .

Notes and Questions

1. What is the justification for the majority position? Is the test for abuse of this privilege different from that applied in the usual qualified privilege case?

2. The majority twice observes that deliberate falsity is used in argument. Why is such behavior not protected here?

3. Do you consider either of the concurring opinions preferable to the majority approach? Would it be desirable to enable a public official to have a jury assess the truth of charges against him—without seeking damages?

4. Commenting after the *Times* case, Professor Kalven speculated on the case's future:

> The closing question, of course, is whether the treatment of seditious libel as the key concept for development of appropriate constitutional doctrine will prove germinal. It is not easy to predict what the Court will see in the *Times* opinion as the years roll by. It may regard the opinion as covering simply one pocket of cases, those dealing with libel of public officials, and not destructive of the earlier notions that are inconsistent only with the larger reading of the Court's action. But the invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, seems to me to be overwhelming. If the Court accepts the invitation, it will slowly work out for itself the theory of free speech that Alexander Meiklejohn has been offering us for some fifteen years now.

Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 Sup.Ct.Rev. 191, 221. Does his prediction seem sound? Keep it in mind as we consider the cases decided since *Times*.

5. The majority in the New York Times case did not explicitly condemn the concurring approaches. A few months later, in Garrison v.

Louisiana, 379 U.S. 64 (1964), the Court, in an opinion by Justice Brennan, extended the *Times* rule to cases of criminal libel and also held that truth must be a defense in cases brought by public officials. The majority explained its refusal to protect deliberate falsity:

> Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. [ ] That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

6. The next case was Rosenblatt v. Baer, 383 U.S. 75 (1966). Plaintiff Baer had been hired by the three elected county commissioners to be Supervisor of a public recreation facility owned by Belknap County, New Hampshire. Defendant, in his weekly newspaper column, noted that a year after plaintiff's discharge the facility was doing much better financially. The column could be understood as charging either inefficiency or dishonesty. In reversing plaintiff's state court judgment, the Supreme Court said that the vague language could be read as an attack on government—and that Baer could not sue unless he showed that he had been singled out for attack. Justice Brennan's majority opinion then held that Baer was a "public official" under the *Times* rule and that the trial judge's charge did not give the jury the correct "malice" standard.

7. The Supreme Court next considered two cases together, Curtis Publishing Co. v. Butts, and Associated Press v. Walker, 388 U.S. 130 (1967). In *Butts* the defendant magazine had accused the plaintiff athletic director of disclosing his game plan to an opposing coach before their game. Although he was on the staff of a state university Butts was paid by a private alumni organization. In *Walker,* the defendant news service reported that the plaintiff, a former United

States Army general who resigned to engage in political activity, had personally led students in an attack on federal marshals who were enforcing a desegregation order at the University of Mississippi.

In both cases, lower courts had affirmed substantial jury awards against the defendants and had refused to apply the *Times* doctrine on the ground that public officials were not involved. The Supreme Court divided several ways on several issues, affirming *Butts*, 5–4, and reversing *Walker*, 9–0. Chief Justice Warren wrote the pivotal opinion in which he concluded that both men were "public figures" and that the standard developed in *New York Times* should apply to "public figures" as well:

> To me, differentiation between "public figures" and "public officials" and adoption of separate standards of proof for each has no basis in law, logic, or First Amendment policy. Increasingly in this country, the distinctions between governmental and private sectors are blurred. Since the depression of the 1930's and World War II there has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental, and business worlds. Depression, war, international tensions, national and international markets, and the surging growth of science and technology have precipitated national and international problems that demand national and international solutions. While these trends and events have occasioned a consolidation of governmental power, power has also become much more organized in what we have commonly considered to be the private sector. In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.
>
> Viewed in this context then, it is plain that although they are not subject to the restraints of the political process, "public figures," like "public officials," often play an influential role in ordering society. And surely as a class these "public figures" have as ready access as "public officials" to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involve-

> ment in public issues and events is as crucial as it is in the case of "public officials." The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct.

He found that on the merits the standard had not been met in *Walker*. In *Butts* he found that defendant's counsel had deliberately waived the *Times* doctrine and he also found evidence establishing reckless behavior. He thus voted to reverse *Walker* and affirm *Butts*.

Justice Harlan, joined by Justices Clark, Stewart and Fortas, argued that the *Times* standard should not apply to public figures because criticism of government was not involved:

> We consider and would hold that a "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. . . .

Applying that standard Justice Harlan concluded that Walker had failed to establish a case, but that Butts had shown that the Saturday Evening Post ignored elementary precautions in preparing a potentially damaging story. Together with the Chief Justice's vote, there were five votes to affirm *Butts*.

Justices Brennan and White agreed with the Chief Justice in *Walker* but found no waiver in *Butts* and would have reversed both cases. They agreed with the Chief Justice that *Butts* had presented enough evidence to come within the *Times* standard but thought that errors in the charge required a new trial.

Justices Black and Douglas adhered to their position, urged that the *Times* rule be abandoned, and voted to reverse both cases.

8. In St. Amant v. Thompson, 390 U.S. 727 (1968), the defendant, a candidate for public office, read on television a series of statements he had received from Mr. Albin, a member of a Teamsters' Union local. The statements, made under oath, falsely implied that the plaintiff, a deputy sheriff, had taken bribes. The defendant had not checked the facts stated by Albin, nor had he investigated Albin's reputation for veracity. The state court ruled that these failures to inquire further sufficed to meet the required standard of reckless disregard for the truth. The Supreme Court reversed and concluded that the standard of "reckless disregard" had not been met. It recognized that the

term could receive no single "infallible definition" and that its outer limits would have to be developed in "case-to-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes or case law." There "must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication" in order for recklessness to be found. Anticipating the charge that this position would encourage publishers not to verify their assertions, the Court stated:

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is a product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

Justices Black and Douglas adhered to their position in *Times* and concurred in the result. Justice Fortas dissented on the ground that the failure to make "a good-faith check" of the statement was sufficient to establish "reckless disregard." How would the Court's test apply to an extreme partisan who would readily believe anything derogatory about his opponent?

9. In Greenbelt Coop. Pub. Ass'n v. Bresler, 398 U.S. 6 (1970), the plaintiff, who represented a neighboring county in the state legislature, was a local real estate developer engaged in controversial negotiations with the Greenbelt City Council. During two tumultuous council meetings, members of the audience characterized the plaintiff's bargaining position as "blackmail." Defendants, who published the local newspaper, accurately reported the two meetings, including the blackmail charges—sometimes without quotation marks. The state court upheld a plaintiff's judgment for compensatory and punitive damages, but the Supreme Court reversed.

Justice Stewart's opinion concluded that the trial judge's malice charge had been inadequate because he had spoken in terms of "spite, hostility or deliberate intention to harm." Although observing that this would adequately dispose of the matter, the Court added that the case "involves newspaper reports of public meetings of the citizens of a community concerned with matters of local governmental interest

and importance. The very subject of the news reports, therefore, is one of particular First Amendment concern." It further stressed that the articles were "accurate and truthful reports of what had been said" at the public hearings. The Court characterized the plaintiff's argument as being that the persons at the meeting and the defendant, by using the word blackmail, were charging him with a crime, and that since the defendants knew he had committed no crime they were liable for "knowing use of falsehood." The Court met the argument by ruling "that as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported" in the newspaper.

10. Next the Court decided three cases as a group. Two of them involved false charges made about a candidate for office. The Court unanimously extended the *Times* rationale to candidates because "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) and Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971). In *Roy*, the charge related to criminal activity that allegedly took place many years earlier. The Court decided that the *Times* rule should include "anything which might touch on an official's fitness for office" when a candidate's behavior is being discussed. "The principal activity of a candidate in our political system . . . consists in putting before the voters every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him. A candidate who, for example, seeks to further his cause through the prominent display of his wife and children can hardly argue that his qualities as a husband or father remain of 'purely private' concern." The Court concluded that a "charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office" for purposes of applying the *Times* rule.

In *Damron*, the candidate was said to have been charged with a crime, when in fact his brother was the one charged. Again, the *Times* rule applied.

In the third case, Time, Inc. v. Pape, 401 U.S. 279 (1971), a report by the Civil Rights Commission included some unverified complaints of police brutality as examples of the types of complaints being received. Time reported the release of the volume and quoted one of the complaints without indicating that it had not been verified. The police named in that complaint sued Time. The *Times* rule admittedly applied and the question was whether the facts would permit a jury to find the requisite malice. The Court chose a very narrow ground that stressed the difficulties of reporting what someone has

said as opposed to what someone has done. Here the Commission's own words might have been read to suggest that the complaints were probably valid and thus Time may have accurately captured the sense of the Commission's report, even though it excluded the word "alleged." Even if the story was inaccurate, the Court held as a matter of law that there was no basis for finding deliberate or reckless falsity.

11. A plurality of the Court took the next step in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), involving a broadcaster's charge that a magazine distributor sold obscene material and was arrested in a police raid. Justice Brennan, joined by Chief Justice Burger and Justice Blackmun, held that the *Times* standard should be extended to "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." The arrest and the distributor's subsequent claims against the police were thought to fit this category and the *Times* standard was applied. In reaching that position Justice Brennan concluded that the focus on the plaintiff's status begun in the *Times* case bore "little relationship either to the values protected by the First Amendment or to the nature of our society. . . . Thus, the idea that certain 'public' figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction." Discussion of a matter of public concern must be protected even when it involves an unknown person. If the states fear that private citizens will be unable to respond to adverse publicity, "the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern," a reference to possible use of the right of reply. 403 U.S. at 47.

Is this a rejection of the philosophy of the *Times* case? Is it persuasive?

Justice White concurred on the narrow ground that the press is privileged to report "upon the official actions of public servants in full detail." Justice Black provided the fifth vote against liability for the reasons stated in his earlier opinions. Justices Harlan, Stewart and Marshall dissented on various grounds but they agreed that the private plaintiff should be required to prove no more than negligence in this case. Justice Douglas did not participate.

12. *Butts* was not the only media case won by plaintiffs in that period. For example, see Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969), involving articles during the 1964 campaign that discussed whether Senator Goldwater was psychologically fit to be President. The court upheld an award of one dollar in compensatory damages,

$25,000 in punitive damages against Ginzburg, and $50,000 in punitive damages against Fact Magazine, Inc. The Supreme Court denied certiorari 396 U.S. 1049 (1970) over a dissent by Justice Black joined by Justice Douglas. The dissent recognized that the jury was justified in finding that the articles "were prepared with a reckless disregard of the truth." On the other hand, it contended that "The public has an unqualified right to have the character and fitness of anyone who aspires to the Presidency held up for the closest scrutiny. Extravagant, reckless statements and even claims that may not be true seem to me an inevitable and perhaps essential part of the process by which the voting public informs itself of the qualities of a man who would be President."

GERTZ v. ROBERT WELCH, INC.

Supreme Court of the United States, 1974.
418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789.

[Plaintiff, an attorney, was retained to represent the family of a youth killed by Nuccio, a Chicago policeman. In that capacity, plaintiff attended the coroner's inquest and filed an action for damages but played no part in a criminal proceeding in which Nuccio was convicted of second degree murder. Respondent publishes American Opinion, a monthly outlet for the views of the John Birch Society. As part of its efforts to alert the public to an alleged nationwide conspiracy to discredit local police, the magazine's editor engaged a regular contributor to write about the Nuccio episode. The article that appeared charged a frame-up against Nuccio and portrayed plaintiff as a "major architect" of the plot. It also falsely asserted that he had a long police record, was an official of the Marxist League for Industrial Democracy, and was a "Leninist" and a "Communist-fronter." The editor had no reason to doubt the charges and made no effort to verify them.

Gertz filed an action for libel in District Court because of diversity of citizenship. The trial judge first ruled that Gertz was not a public official or public figure and that under Illinois law there was no defense. The jury awarded $50,000. On further reflection, the judge decided that since a matter of public concern was being discussed, the *Times* rule should apply and he granted the defendant judgment notwithstanding the jury's verdict. He thus anticipated the plurality's approach in Rosenbloom v. Metromedia, Inc. The court of appeals, relying on the intervening decision in *Rosenbloom,* affirmed because of the absence of "clear and convincing" evidence of

"actual malice." According to St. Amant v. Thompson, failure to investigate, without more, could not establish reckless disregard for truth. Gertz appealed.]

MR. JUSTICE POWELL delivered the opinion of the Court.

. . .

II

The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements. The Court considered this question on the rather different set of facts presented in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). Rosenbloom, a distributor of nudist magazines, was arrested for selling allegedly obscene material while making a delivery to a retail dealer. The police obtained a warrant and seized his entire inventory of 3,000 books and magazines. He sought and obtained an injunction prohibiting further police interference with his business. He then sued a local radio station for failing to note in two of its newscasts that the 3,000 items seized were only "reportedly" or "allegedly" obscene and for broadcasting references to "the smut literature racket" and to "girliebook peddlers" in its coverage of the court proceeding for injunctive relief. He obtained a judgment against the radio station, but the Court of Appeals for the Third Circuit held the *New York Times* privilege applicable to the broadcast and reversed. 415 F.2d 892 (1969).

This Court affirmed the decision below, but no majority could agree on a controlling rationale. The eight Justices who participated in *Rosenbloom* announced their views in five separate opinions, none of which commanded more than three votes. The several statements not only reveal disagreement about the appropriate result in that case; they also reflect divergent traditions of thought about the general problem of reconciling the law of defamation with the First Amendment. One approach has been to extend the *New York Times* test to an expanding variety of situations. Another has been to vary the level of constitutional privilege for defamatory falsehood with the status of the person defamed. And a third view would grant to the press and broadcast media absolute immunity from liability for defamation. To place our holding in the proper context, we preface our discussion of this case with a review of the several *Rosenbloom* opinions and their antecedents.

. . .

In his opinion for the plurality in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), MR. JUSTICE BRENNAN took the *New*

York Times privilege one step further. He concluded that its protection should extend to defamatory falsehoods relating to private persons if the statements concerned matters of general or public interest. . . .

. . .

In *Rosenbloom* Mr. Justice Harlan . . . acquiesced in the application of the privilege to defamation of public figures but argued that a different rule should obtain where defamatory falsehood harmed a private individual. He noted that a private person has less likelihood "of securing access to channels of communication sufficient to rebut falsehoods concerning him" than do public officials and public figures, 403 U.S., at 70, and has not voluntarily placed himself in the public spotlight. Mr. Justice Harlan concluded that the States could constitutionally allow private individuals to recover damages for defamation on the basis of any standard of care except liability without fault.

. . . The principal point of disagreement among the three dissenters concerned punitive damages. Whereas Mr. Justice Harlan thought that the States could allow punitive damages in amounts bearing "a reasonable and purposeful relationship to the actual harm done . . . ," id., at 75, MR. JUSTICE MARSHALL concluded that the size and unpredictability of jury awards of exemplary damages unnecessarily exacerbated the problems of media self-censorship and that such damages should therefore be forbidden.

III

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. . . .

Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. . . . And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties. . . . The First Amendment re-

quires that we protect some falsehood in order to protect speech that matters.

The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. . . .

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name

> "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system." Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (concurring opinion).

Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. . . .

The *New York Times* standard defines the level of constitutional protection appropriate to the context of defamation of a public person. Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. This standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test. Despite this substantial abridgment of the state law right to compensation for wrongful hurt to one's reputation, the Court has concluded that the protection of the *New York Times* privilege should be available to publishers and broadcasters of defamatory falsehood concerning public officials and public figures. [ ] We think that these decisions are correct, but we do not find their holdings justified solely by reference to the interest of the press and broadcast media in immunity from liability.

Rather, we believe that the *New York Times* rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons. For the reasons stated below, we conclude that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.

Theoretically, of course, the balance between the needs of the press and the individual's claim to compensation for wrongful injury might be struck on a case-by-case basis. As Mr. Justice Harlan hypothesized, "it might seem, purely as an abstract matter, that the most utilitarian approach would be to scrutinize carefully every jury verdict in every libel case, in order to ascertain whether the final judgment leaves fully protected whatever First Amendment values transcend the legitimate state interest in protecting the particular plaintiff who prevailed." Rosenbloom v. Metromedia, Inc., 403 U.S., at 63 (footnote omitted). But this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.

With that caveat we have no difficulty in distinguishing among defamation plaintiffs. The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.[9] Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scru-

9. Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie. But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry.

tiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties. As the Court pointed out in Garrison v. Louisiana, 379 U.S., at 77, the public's interest extends to "anything which might touch on an official's fitness for office . . . . Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character."

Those classed as public figures stand in a similar position. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an "influential role in ordering society." Curtis Publishing Co. v. Butts, supra, at 164 (Warren, C. J., concurring in result). He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual. The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not—to determine, in the words of MR. JUSTICE MARSHALL, "what information is relevant to self-government." Rosenbloom v. Metromedia, Inc., 403 U.S., at 79. We doubt the wisdom of committing this task to the conscience of judges. Nor does

the Constitution require us to draw so thin a line between the drastic alternatives of the *New York Times* privilege and the common law of strict liability for defamatory error. The "public or general interest" test for determining the applicability of the *New York Times* standard to private defamation actions inadequately serves both of the competing values at stake. On the one hand, a private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of *New York Times*. This is true despite the factors that distinguish the state interest in compensating private individuals from the analogous interest involved in the context of public persons. On the other hand, a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions. And liability may far exceed compensation for any actual injury to the plaintiff, for the jury may be permitted to presume damages without proof of loss and even to award punitive damages.

We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation. At least this conclusion obtains where, as here, the substance of the defamatory statement "makes substantial danger to reputation apparent." [11] This phrase places in perspective the conclusion we announce today. Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. Cf. Time, Inc. v. Hill, 385 U.S. 374 (1967). Such a case is not now before us, and we intimate no view as to its proper resolution.

IV

Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*. This conclusion is not based on a belief that the considerations which prompt-

11. Curtis Publishing Co. v. Butts, supra, at 155.

ed the adoption of the *New York Times* privilege for defamation of public officials and its extension to public figures are wholly inapplicable to the context of private individuals. Rather, we endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation. But this countervailing state interest extends no further than compensation for actual injury. For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-

defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

V

Notwithstanding our refusal to extend the *New York Times* privilege to defamation of private individuals, respondent contends that we should affirm the judgment below on the ground that petitioner is either a public official or a public figure. There is little basis for the former assertion. Several years prior to the present incident, petitioner had served briefly on housing committees appointed by the mayor of Chicago, but at the time of publication he had never held any remunerative governmental position. Respondent admits this but argues that petitioner's appearance at the coroner's inquest rendered him a "de facto public official." Our cases recognize no such concept. Respondent's suggestion would sweep all lawyers under the *New York Times* rule as officers of the court and distort the plain meaning of the "public official" category beyond all recognition. We decline to follow it.

Respondent's characterization of petitioner as a public figure raises a different question. That designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

Petitioner has long been active in community and professional affairs. He has served as an officer of local civic groups and of various professional organizations, and he has published several books and

articles on legal subjects. Although petitioner was consequently well known in some circles, he had achieved no general fame or notoriety in the community. None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was atypical of the local population. We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

In this context it is plain that petitioner was not a public figure. He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. We are persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purpose of this litigation.

We therefore conclude that the *New York Times* standard is inapplicable to this case and that the trial court erred in entering judgment for respondent. Because the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury, a new trial is necessary. We reverse and remand for further proceedings in accord with this opinion.

It is so ordered.

MR. JUSTICE BLACKMUN, concurring.

[Although I joined the *Rosenbloom* plurality opinion,] I am willing to join, and do join, the Court's opinion and its judgment for two reasons:

1. By removing the specters of presumed and punitive damages in the absence of *New York Times* malice, the Court eliminates significant and powerful motives for self-censorship that otherwise are present in the traditional libel action. By so doing, the Court leaves what should prove to be sufficient and adequate breathing space for a vigorous press. What the Court has done, I believe, will have little, if any, practical effect on the functioning of responsible journalism.

2. The Court was sadly fractionated in *Rosenbloom.* A result of that kind inevitably leads to uncertainty. I feel that it is of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority position that eliminates the unsureness engendered by *Rosenbloom's* diversity. If my vote were not needed to create a majority, I would adhere to my prior view. A definitive ruling, however, is paramount. [ ]

For these reasons, I join the opinion and the judgment of the Court.

MR. CHIEF JUSTICE BURGER, dissenting.

The doctrines of the law of defamation have had a gradual evolution primarily in the state courts. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and its progeny this Court entered this field.

Agreement or disagreement with the law as it has evolved to this time does not alter the fact that it has been orderly development with a consistent basic rationale. In today's opinion the Court abandons the traditional thread so far as the ordinary private citizen is concerned and introduces the concept that the media will be liable for negligence in publishing defamatory statements with respect to such persons. Although I agree with much of what MR. JUSTICE WHITE states, I do not read the Court's new doctrinal approach in quite the way he does. I am frank to say I do not know the parameters of a "negligence" doctrine as applied to the news media. Conceivably this new doctrine could inhibit some editors, as the dissents of MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN suggest. But I would prefer to allow this area of law to continue to evolve as it has up to now with respect to private citizens rather than embark on a new doctrinal theory which has no jurisprudential ancestry.

The petitioner here was performing a professional representative role as an advocate in the highest tradition of the law, and under that tradition the advocate is not to be invidiously identified with his client. The important public policy which underlies this tradition—the right to counsel—would be gravely jeopardized if every lawyer who takes an "unpopular" case, civil or criminal, would automatically become fair game for irresponsible reporters and editors who might, for example, describe the lawyer as a "mob mouthpiece" for representing a client with a serious prior criminal record, or as an "ambulance chaser" for representing a claimant in a personal injury action.

I would reverse the judgment of the Court of Appeals and remand for reinstatement of the verdict of the jury and the entry of an appropriate judgment on that verdict.

MR. JUSTICE DOUGLAS, dissenting.

. . .

. . . The standard announced today leaves the States free to "define for themselves the appropriate standard of liability for a publisher or broadcaster" in the circumstances of this case. This of course leaves the simple negligence standard as an option with the jury free to impose damages upon a finding that the publisher failed to act as "a reasonable man." With such continued erosion of First Amendment protection, I fear that it may well be the reasonable man who refrains from speaking.

Since in my view the First and Fourteenth Amendments prohibit the imposition of damages upon respondent for this discussion of public affairs, I would affirm the judgment below.

MR. JUSTICE BRENNAN, dissenting.

I agree with the conclusion, expressed in Part V of the Court's opinion, that, at the time of publication of respondent's article, petitioner could not properly have been viewed as either a "public official" or "public figure"; instead, respondent's article, dealing with an alleged conspiracy to discredit local police forces, concerned petitioner's purported involvement in "an event of public or general interest."

. . .

. . .

Although acknowledging that First Amendment values are of no less significance when media reports concern private persons' involvement in matters of public concern, the Court refuses to provide, in such cases, the same level of constitutional protection that has been afforded the media in the context of defamation of public persons. The accommodation that this Court has established between free speech and libel laws in cases involving public officials and public figures—that defamatory falsehood be shown by clear and convincing evidence to have been published with knowledge of falsity or with reckless disregard of truth—is not apt, the Court holds, because the private individual does not have the same degree of access to the media to rebut defamatory comments as does the public person and he has not voluntarily exposed himself to public scrutiny.

While these arguments are forcefully and eloquently presented, I cannot accept them, for the reasons I stated in *Rosenbloom:*

> "The *New York Times* standard was applied to libel of a public official or public figure to give effect to the [First] Amendment's function to encourage ventilation of public issues, not because the public official has any less interest in protecting his reputation than an individual in private life. While the argument that public figures need less protection because they can command media attention to counter criticism may be true for some

very prominent people, even then it is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story. When the public official or public figure is a minor functionary, or has left the position that put him in the public eye . . . , the argument loses all of its force. In the vast majority of libels involving public officials or public figures, the ability to respond through the media will depend on the same complex factor on which the ability of a private individual depends: the unpredictable event of the media's continuing interest in the story. Thus the unproved, and highly improbable, generalization that an as yet [not fully defined] class of 'public figures' involved in matters of public concern will be better able to respond through the media than private individuals also involved in such matters seems too insubstantial a reed on which to rest a constitutional distinction." [ ]

. . .

. . . Under a reasonable-care regime, publishers and broadcasters will have to make pre-publication judgments about juror assessment of such diverse considerations as the size, operating procedures, and financial condition of the newsgathering system, as well as the relative costs and benefits of instituting less frequent and more costly reporting at a higher level of accuracy. [ ] Moreover, in contrast to proof by clear and convincing evidence required under the *Times* test, the burden of proof for reasonable care will doubtless be the preponderance of the evidence. . . .

The Court does not discount altogether the danger that jurors will punish for the expression of unpopular opinions. This probability accounts for the Court's limitation that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." [ ] But plainly a jury's latitude to impose liability for want of due care poses a far greater threat of suppressing unpopular views than does a possible recovery of presumed or punitive damages. Moreover, the Court's broad-ranging examples of "actual injury," including impairment of reputation and standing in the community, as well as personal humiliation, and mental anguish and suffering, inevitably allow a jury bent on punishing expression of unpopular views a formidable weapon for doing so. Finally, even a limitation of recovery to "actual injury"—however much it reduces the size or frequency of recoveries—will not provide the necessary elbowroom for First Amendment expression. . . .

On the other hand, the uncertainties which the media face under today's decision are largely avoided by the *Times* standard. I reject

the argument that my *Rosenbloom* view improperly commits to judges the task of determining what is and what is not an issue of "general or public interest." [3] I noted in *Rosenbloom* that performance of this task would not always be easy. Id., at 49 n. 17. But surely the courts, the ultimate arbiters of all disputes concerning clashes of constitutional values, would only be performing one of their traditional functions in undertaking this duty. . . .

. . .

MR. JUSTICE WHITE, dissenting.

. . .

The impact of today's decision on the traditional law of libel is immediately obvious and indisputable. No longer will the plaintiff be able to rest his case with proof of a libel defamatory on its face or proof of a slander historically actionable *per se*. In addition, he must prove some further degree of culpable conduct on the part of the publisher, such as intentional or reckless falsehood or negligence. And if he succeeds in this respect, he faces still another obstacle: recovery for loss of reputation will be conditioned upon "competent" proof of actual injury to his standing in the community. This will be true regardless of the nature of the defamation and even though it is one of those particularly reprehensible statements that have traditionally made slanderous words actionable without proof of fault by the publisher or of the damaging impact of his publication. The Court rejects the judgment of experience that some publications are so inher-

3. The Court, taking a novel step, would not limit application of First Amendment protection to private libels involving issues of general or public interest, but would forbid the States from imposing liability without fault in any case where the substance of the defamatory statement made substantial danger to reputation apparent. As in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 n. 12, 48–49, n. 17 (1971), I would leave open the question of what constitutional standard, if any, applies when defamatory falsehoods are published or broadcast concerning either a private or public person's activities not within the scope of the general or public interest.

Parenthetically, my Brother WHITE argues that the Court's view and mine will prevent a plaintiff—unable to demonstrate some degree of fault—from vindicating his reputation by securing a judgment that the publication was false. This argument overlooks the possible enactment of statutes, not requiring proof of fault, which provide for an action for retraction or for publication of a court's determination of falsity if the plaintiff is able to demonstrate that false statements have been published concerning his activities. Cf. Note, Vindication of the Reputation of a Public Official, 80 Harv.L.Rev. 1730, 1739–1747 (1967). Although it may be that questions could be raised concerning the constitutionality of such statutes, certainly nothing I have said today (and, as I read the Court's opinion, nothing said there) should be read to imply that a private plaintiff, unable to prove fault, must inevitably be denied the opportunity to secure a judgment upon the truth or falsity of statements published about him. [ ]

ently capable of injury, and actual injury so difficult to prove, that the risk of falsehood should be borne by the publisher, not the victim.

. . .

So too, the requirement of proving special injury to reputation before general damages may be awarded will clearly eliminate the prevailing rule, worked out over a very long period of time, that, in the case of defamations not actionable *per se*, the recovery of general damages for injury to reputation may also be had if some form of material or pecuniary loss is proved. Finally, an inflexible federal standard is imposed for the award of punitive damages. No longer will it be enough to prove ill will and an attempt to injure.

These are radical changes in the law and severe invasions of the prerogatives of the States. . . .

. . .

The central meaning of *New York Times*, and for me the First Amendment as it relates to libel laws, is that seditious libel—criticism of government and public officials—falls beyond the police power of the State. . . .

. . .

The Court evinces a deep-seated antipathy to "liability without fault." But this catch-phrase has no talismanic significance and is almost meaningless in this context where the Court appears to be addressing those libels and slanders that are defamatory on their face and where the publisher is no doubt aware from the nature of the material that it would be inherently damaging to reputation. He publishes notwithstanding, knowing that he will inflict injury. With this knowledge, he must intend to inflict that injury, his excuse being that he is privileged to do so—that he has published the truth. But as it turns out, what he has circulated to the public is a very damaging falsehood. Is he nevertheless "faultless?" Perhaps it can be said that the mistake about his defense was made in good faith, but the fact remains that it is he who launched the publication knowing that it could ruin a reputation.

In these circumstances, the law has heretofore put the risk of falsehood on the publisher where the victim is a private citizen and no grounds of special privilege are invoked. The Court would now shift this risk to the victim, even though he has done nothing to invite the calumny, is wholly innocent of fault, and is helpless to avoid his injury. I doubt that jurisprudential resistance to liability without fault is sufficient ground for employing the First Amendment to revolutionize the law of libel, and in my view, that body of legal rules poses no realistic threat to the press and its service to the public. The press today is vigorous and robust. To me, it is quite incredible to suggest that threats of libel suits from private citizens are causing

the press to refrain from publishing the truth. I know of no hard facts to support that proposition, and the Court furnishes none.

The communications industry has increasingly become concentrated in a few powerful hands operating very lucrative businesses reaching across the Nation and into almost every home. Neither the industry as a whole nor its individual components are easily intimidated, and we are fortunate that they are not. Requiring them to pay for the occasional damage they do to private reputation will play no substantial part in their future performance or their existence.

In any event, if the Court's principal concern is to protect the communications industry from large libel judgments, it would appear that its new requirements with respect to general and punitive damages would be ample protection. . . .

It is difficult for me to understand why the ordinary citizen should himself carry the risk of damage and suffer the injury in order to vindicate First Amendment values by protecting the press and others from liability for circulating false information. This is particularly true because such statements serve no purpose whatsoever in furthering the public interest or the search for truth but, on the contrary, may frustrate that search and at the same time inflict great injury on the defenseless individual. The owners of the press and the stockholders of the communications enterprises can much better bear the burden. And if they cannot, the public at large should somehow pay for what is essentially a public benefit derived at private expense.

. . .

. . . Whether or not the course followed by the majority is wise, and I have indicated my doubts that it is, our constitutional scheme compels a proper respect for the role of the States in acquitting their duty to obey the Constitution. Finding no evidence that they have shirked this responsibility, particularly when the law of defamation is even now in transition, I would await some demonstration of the diminution of freedom of expression before acting.

For the foregoing reasons, I would reverse the judgment of the Court of Appeals and reinstate the jury's verdict.

Notes and Questions

1. Why did the majority adhere to the *Times* rule for public officials? Public figures? Some have argued that Gertz was a public figure and that the case should have been analyzed along the lines of *Butts* and *Walker*. See Pember and Teeter, Privacy and the Press Since Time, Inc. v. Hill, 50 Wash.L.Rev. 57, 75 (1974): "Gertz was a member of numerous boards and commissions in Illinois, had published several books on civil rights matters, had frequently been honored by civil rights groups and had represented some rather famous

clients. . . . His publishing record belies the notion that he was a poor, helpless, private individual who could not gain access to the press." Would that suffice to meet the standard?

2. Why does the majority in *Gertz* prefer its approach to the plurality's approach in *Rosenbloom*?

3. What criteria might be relevant in deciding whether a newspaper has been at fault in publishing a false statement?

4. If a private citizen proves fault, why can he not recover traditional damages for defamation?

5. The Supreme Court has not decided finally whether public figures and private citizens may recover punitive damages.

6. Justice White is particularly concerned about having private citizens bear the burden of defamation. If the media cannot bear the expense of the harm they do, the public should "somehow pay for what is essentially a public benefit derived at private expense." How might this work?

7. The first significant application of *Gertz* occurred in Time, Inc. v. Firestone, 424 U.S. 448 (1976), in which a magazine reported, perhaps incorrectly, that a member of "one of America's wealthier industrial families" had received a divorce because of his wife's adultery. The divorce decree was probably based on either "extreme cruelty" or "lack of domestication," but the judge was not explicit. The state court upheld the wife's defamation award of $100,000. Time argued that the "actual malice" standard should apply for two reasons. First, it asserted that the plaintiff was a public figure, but the majority disagreed: "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." The Court rejected the argument that because the case was of great public interest, the respondent must have been a public figure: "Dissolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public." Moreover, plaintiff was compelled to go to court to seek relief in a marital dispute and her involvement was not voluntary. The fact that she held "a few" press conferences during the case did not change her otherwise private status. She did not attempt to use them to influence the outcome of the trial or to thrust herself into an unrelated dispute.

The second claim was that reporting of judicial proceedings should never lead to liability for negligence. Justice Rehnquist's opinion for the Court rejected the contention:

> It may be that all reports of judicial proceedings contain some informational value implicating the First Amendment, but recognizing this is little different from labeling all judicial proceedings matters of "public or general interest," as that phrase was used by the plurality in *Rosenbloom*. Whatever their general validity, use of such subject matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area. It was our recognition and rejection of this weakness in the *Rosenbloom* test which led us in *Gertz* to eschew a subject matter test for one focusing upon the character of the defamation plaintiff. [ ] By confining inquiry to whether a plaintiff is a public officer or a public figure who might be assumed to "have voluntarily exposed themselves to increased risk of injury from defamatory falsehood," we sought a more appropriate accommodation between the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances. Cf. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
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> . . .
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> It may be argued that there is still room for application of the *New York Times* protections to more narrowly focused reports of what actually transpires in the courtroom. But even so narrowed, the suggested privilege is simply too broad. Imposing upon the law of private defamation the rather drastic limitations worked by *New York Times* cannot be justified by generalized references to the public interest in reports of judicial proceedings. The details of many, if not most, courtroom battles would add almost nothing towards advancing the uninhibited debate on public issues thought to provide principal support for the decision in *New York Times*. [ ] And 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, 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. There appears little reason why these individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into a courtroom. The public interest in accurate reports of judicial proceedings is substantially protected by *Cox Broadcasting Co.*, supra. As to inaccurate and

> defamatory reports of facts, matters deserving no First Amendment protection, [ ], we think *Gertz* provides an adequate safeguard for the constitutionally protected interests of the press and affords it a tolerable margin for error by requiring some type of fault.

Plaintiff had withdrawn her claim for damages to reputation before trial but the Court held that the award could be sustained on proof of anxiety and concern over the impact of the adultery charge on her young son. The Court vacated the judgment for lack of consideration of fault by either the jury or any of the state courts. Justices Powell and Stewart, though joining the majority, asserted that the grounds of divorce were so unclear in this "bizarre case" that there was "substantial evidence" that Time was not negligent. Justice White, believing that the state courts had found negligence, would have affirmed the award. In addition, since the article had been written before *Rosenbloom* and *Gertz*, he saw no reason to require any showing of fault. Justice Brennan dissented on the ground that reports of judicial proceedings should not lead to liability unless the errors are deliberate or reckless. He observed that even those who would confine the central meaning of the First Amendment to "explicitly political speech" would extend protection to speech concerned with governmental behavior. He also thought the damage limits of *Gertz* had been "subverted" by the recovery allowed here with no showing of reputational harm. Justice Marshall, dissenting, thought that plaintiff was a public figure; he also doubted the existence of negligence. Justice Stevens took no part.

The Florida Supreme Court has ordered a new trial. Recall that under the common law "record libel" privilege, reports of governmental proceedings were privileged if they were fair and accurate reports of what had happened—even if the speaker being quoted had committed a defamation. Under the common law privilege, Time's report, if incorrectly reporting the basis of the divorce decree, would not have been protected. For this reason Time had to assert a constitutional privilege.

8. It is important to remember that Justice Powell's opinion in *Gertz* provided that states might use whatever standard they wanted to use so long as they met the minimum requirements of fault and the damage rules of *Gertz*. Thus, at the extreme, nothing in the Court's opinion would prevent a state from completely abolishing all suits for defamation. Some states have responded to *Gertz* by adopting the *Rosenbloom* approach. A few are developing their own rules, but most appear to be choosing the *Gertz* minimum standards as their own.

9. A claim of absolute privilege for slanders uttered during a reportorial investigation has been rejected. Davis v. Schuchat, 510 F.2d 731 (D.C.Cir. 1975). An investigative reporter was trying to develop information about someone who, years earlier, had been acquitted on perjury charges. While interviewing sources the reporter asserted that the man once had been "convicted of a felony." The reporter stated that his interview technique involved "throwing a lot of thoughts out in an interview just to get a response." The court assumed that private persons and the press were equally privileged but failed to see "why a comment on a matter of public interest should be any more protected in the private sphere than it is in the public arena." Can you distinguish the situations?

10. *Gertz* has already provoked a thoughtful debate: Anderson, Libel and Press Self-Censorship, 53 Texas L.Rev. 422 (1975); Robertson, Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc., 54 Texas L.Rev. 199 (1976); Anderson, A Response to Professor Robertson: The Issue is Control of Press Power, 54 Texas L.Rev. 271 (1976).

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3. Remedies for Defamation

Injunctions. Injunctions are generally unavailable for reasons discussed in Chafee's Government and Mass Communication 91–92 (1947): "One man's judgment is not to be trusted to determine what people can read. . . . So our law thinks it better to let the defamed plaintiff take his damages for what they are worth than to intrust a single judge (or even a jury) with the power to put a sharp check on the spread of possible truth." Furthermore, there are gradations of partial truth that are too subtle for a blanket injunction.

Reply. If the plaintiff completes the obstacle course we have described, damages are the only available remedy of any importance. The right of reply mentioned by Justice Brennan in *Rosenbloom* and *Gertz* would allow the victim of the defamation to respond in his own words in the offending publication, but states rarely require this, and it now appears to have serious constitutional problems. See Miami Herald Pub. Co. v. Tornillo, p. 359, infra. As to the role of reply in broadcasting, see p. 617, infra.

Retraction. The common law itself had some rules that tended to reduce the amount of damages recoverable in defamation. They were called "partial" defenses since they did not defeat liability but only reduced the size of the award. At common law if the defendant voluntarily retracted the statement, that fact was admissible to show that the plaintiff had not been damaged as badly as he claimed. It

might also show that the defendant had not acted maliciously in the first place. Some states have enacted retraction statutes that grant further protection to mass media defendants. These apply to media only because of the requirement that the retraction be published promptly and with the same prominence as the defamation. It would be meaningless to make the retraction privilege available to media such as books and motion pictures, and the effectiveness of retraction varies even among those media that are covered in most states. It is generally thought, for example, that a retraction in the same space in a newspaper or magazine is more likely to reach the audience that read the original defamation than would most retractions over radio or television of a broadcast defamation.

The statutes vary in covering those who defame innocently, carelessly, or maliciously. What they have in common is a requirement that the prospective plaintiff demand a retraction shortly after the defamation. If the publisher complies within a similar period of time, then the plaintiff may recover only his special damages, and no general damages. If the retraction is not published within the time limit, the plaintiff may recover whatever damages the common law allowed—subject now to the damage limitations of *Gertz*.

Criminal Libel. Criminal libel is not generally available although it is part of the law in most states. California's version, which was typical, declared a libel to be "a malicious defamation" that tended to blacken the memory of the dead or of one who is alive. Malice was presumed "if no justifiable motive" was shown. Truth could be put in evidence and if the matter was "true, and was published with good motives and for justifiable ends, the party shall be acquitted." Such actions have been defended as deterring breaches of the peace—particularly when the defamed person is dead and no civil action will lie.

Criminal libel had already fallen into disuse before *Garrison*, p. 296, supra. The strictures placed on the action in that case diminished still further its usefulness. The role of the action is even more doubtful when it is used by prosecutors in behalf of famous or powerful persons who do not wish to bring a civil action themselves. This was the situation in 1976 when a state court declared the California criminal libel law unconstitutional because of its limitations on the defense of truth and its presumption of malice. Since other states have taken the same path, criminal libel no longer appears to be a serious risk to publishers.

Group Libel Statutes. The main concern in the debate over group libel has been the hazards of unrestricted hate propaganda. Curbs on group defamation have been advocated to reduce friction among racial, religious, and ethnic groups. As early as 1917 some states

enacted criminal group libel laws for that purpose. The Nazi defamation of minority groups, and conspicuous racial tensions in the United States, brought renewed attention to group libel laws in the 1940's and 50's. David Riesman's Democracy and Defamation: the Control of Group Libel, 42 Columbia L.Rev. 727 (1942), revived the debate as to the efficacy of group libel laws as a means of reducing group hatred and preventing the spread of socially disruptive attitudes.

The most common method of confronting group libel has been the enactment of criminal laws directed specifically at the problem. Such laws typically prohibit communications that are abusive or offensive toward a group or that tend to arouse hatred, contempt, or ridicule of the group. Penalties have ranged from a fine of $50 or 30 days imprisonment, to $10,000 or two years in prison.

Beauharnais v. Illinois, 343 U.S. 250 (1952), is the only Supreme Court decision to review the constitutionality of group libel legislation. The Court, 5–4, affirmed a conviction under Illinois' 1917 group libel statute. The law prohibited publications portraying "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed, or religion" that subjected those described to "contempt, derision, or obloquy or which is productive of breach of the peace or riots." Beauharnais, the president of an organization called the "White Circle League," had distributed leaflets calling on the Mayor and City Council to halt the "further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro." The flyer also included an application for membership in the League and a call for a million white people to unite, adding that: "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will."

Justice Frankfurter's opinion for the Court treated the statute as "a form of criminal libel law" and accepted the dictum of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), that libel was one of those "well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem." He traced the history of violent and destructive racial tension in Illinois and concluded that it would "deny experience" to say that the statute was without reason. He disposed of the First Amendment in a single paragraph near the end of his opinion:

> Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issue behind the phrase "clear and present danger." Certainly no one would contend that obscene speech,

for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class.

Of the four dissenters, only Justices Black and Douglas addressed the First Amendment problems that the majority had cast aside by excluding the whole area of libel from First Amendment protection. Justice Black analyzed the decision as extending the scope of the law of criminal libel from "the narrowest of areas" involving "purely private feuds" to "discussions of matters of public concern." This was an invasion of the First Amendment's absolute prohibition of laws infringing the freedom of public discussion. Justice Douglas concurred in Justice Black's opinion and wrote separately to emphasize that he would have required a demonstration that the "peril of speech" was "clear and present." He agreed with Justice Black that allowing a legislature to regulate "within reasonable limits" the right of free speech was "an ominous and alarming trend."

Beauharnais suggested the constitutionality of group libel laws that were sufficiently specific, at least as long as they were directed against breaches of the peace, but subsequent defamation cases have undermined its validity. Perhaps Justice Brennan interred it in Garrison v. Louisiana, when he noted that the "virtual disappearance of criminal libel prosecutions" reflected the modern consensus that such laws were no longer justified by any danger of breach of the peace. Only a half-dozen states retain group defamation statutes.

Group libel statutes also raise practical objections. Group libel prosecutions normally involve issues on which the community is sharply divided. The incidence as well as the outcome of prosecutions may thus depend on which segments of the community are represented in the office of the prosecuting attorney and on the jury. Moreover, defendant could use the trial to promote his views and might well benefit regardless of the result: an acquittal would validate his viewpoint, while a conviction would make him a martyr whose civil liberties had been violated. These difficulties have led most commentators and many representatives of minority groups to oppose group libel legislation.

C. PROTECTING PRIVACY

1. State Developments

"Privacy" is a relatively new legal concept with many facets. We have already considered the "intrusion" aspect in connection with how far reporters may go to obtain information from unwilling sources, p. 111, supra. Here we focus on disclosure by the press of facts about an individual that he would rather not have publicly disseminated.

The idea that this interest should be legally protected can be traced to a law review article by Louis D. Brandeis and his law partner, Samuel D. Warren, The Right to Privacy, 4 Harv.L.Rev. 193 (1890), often considered the most influential law review article ever published. The authors, reacting to the editorial practices of Boston newspapers, made clear their concerns:

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. 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. . . . When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feelings. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.

Working with a variety of rather remote precedents from other areas of law, the authors developed an argument that courts should recognize an action for invasion of privacy by media publication.

The theory was rejected in the first major case to consider it. In Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902), the defendants, a flour company and a box company, obtained a good likeness of the plaintiff, a very pretty girl, and reproduced it on their advertising posters. Plaintiff said she was humiliated and suffered great distress. The court, 4–3, rejected a common law privacy action on grounds that suggested concern about innovating after

so many centuries; an inability to see how the doctrine, once accepted, could be judicially limited to appropriate situations; and skepticism about finding liability for an action that might actually please some potential "victims." The Warren and Brandeis article was discussed at length but the court concluded that the precedents relied upon were too remote to sustain the proposed rights.

The outcry was immediate. At its next session, the New York legislature created a statutory right of privacy (New York Civil Rights Law, §§ 50 and 51). The basic provision was that "a person, firm or corporation that uses for advertising purposes, or the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor." The other section provided for an injunction and created an action for compensatory and punitive damages. The meaning of "advertising purposes" was clear but the phrase "purposes of trade" was not self-explanatory. Eventually it came to mean that an accurate story carried as editorial (non-advertising) content was not actionable.

Other states, perhaps learning from the New York experience, slowly began to develop a common law right to privacy that was not influenced by statutory language and not limited to advertising invasions. In addition to an action for commercial use of one's name, the courts also developed actions for truthful uses of plaintiff's name that were thought to be outside the areas of legitimate public concern. The action for invasion of privacy by publication of true editorial material began to take hold during the 1920's and early 1930's.

Courts in the late 1930's became more attentive to the Supreme Court's expanding protection of expression. Operating on a common law level, they tended to expand protection for the media by taking a narrow view of what were legitimately private areas.

The newsworthiness defense expanded because courts were reluctant to impose normative standards of what should be newsworthy. Instead, they leaned toward a descriptive definition of newsworthiness that protected whatever an editor had decided would interest his readers. By the 1960's some doubted whether the action for invasion of privacy had any remaining vitality. See, Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 Law and Contemporary Problems 326 (1966); Bloustein, Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional As Well?, 46 Texas L.Rev. 611 (1968).

It was precisely during the last part of the 1960's and the beginning of the 1970's, however, that privacy as a general social value

was perceived to be threatened in different ways by the encroachment of computers, data banks, and electronic devices, as well as the media. The concept of privacy also expanded as the Supreme Court dealt with birth control, abortion, and other problems in the context of a right of privacy. This was bound to have an impact on the media aspects of privacy as well.

One result of the new thinking was to broaden the area of privacy protection and to reduce the area once covered by common law notions of newsworthiness. At the same time, however, the defamation cases, beginning with New York Times v. Sullivan, were signalling a counter trend of press protection.

The first two cases to reach the Supreme Court that raised the issue of invasion of privacy by the media were atypical: Time, Inc. v. Hill and *Cantrell* dealt with invasions that involved false statements, rather than the more traditional issue raised by true statements. This led to a digression we consider at p. 347, infra. We first consider two common law decisions, and then the Supreme Court's first case involving the First Amendment's impact in true-privacy cases.

SIDIS v. F–R PUBLISHING CORP.

United States Court of Appeals, Second Circuit, 1940.
113 F.2d 806.
Certiorari denied, 311 U.S. 711, 61 S.Ct. 393, 85 L.Ed.2d 462 (1940).

Before SWAN, CLARK, and PATTERSON, CIRCUIT JUDGES.

CLARK, CIRCUIT JUDGE. William James Sidis was the unwilling subject of a brief biographical sketch and cartoon printed in The New Yorker weekly magazine for August 14, 1937. Further references were made to him in the issue of December 25, 1937, and in a newspaper advertisement announcing the August 14 issue. He brought an action in the district court against the publisher, F-R Publishing Corporation. His complaint stated three "causes of action": The first alleged violation of his right of privacy as that right is recognized in California, Georgia, Kansas, Kentucky, and Missouri; the second charged infringement of the rights afforded him under §§ 50 and 51 of the N.Y. Civil Rights Law. . . . Defendant's motion to dismiss the first two "causes of action" was granted, and plaintiff has filed an appeal from the order of dismissal. . . .

William James Sidis was a famous child prodigy in 1910. His name and prowess were well known to newspaper readers of the period. At the age of eleven, he lectured to distinguished mathematicians on the subject of Four-Dimensional Bodies. When he was sixteen, he was graduated from Harvard College, amid considerable public atten-

tion. Since then his name has appeared in the press only sporadically, and he has sought to live as unobtrusively as possible. Until the articles objected to appeared in The New Yorker, he had apparently succeeded in his endeavor to avoid the public gaze.

Among The New Yorker's features are brief biographical sketches of current and past personalities. In the latter department, which appears haphazardly under the title of "Where Are They Now?" the article on Sidis was printed with a subtitle "April Fool." The author describes his subject's early accomplishments in mathematics and the wide-spread attention he received, then recounts his general breakdown and the revulsion which Sidis thereafter felt for his former life of fame and study. The unfortunate prodigy is traced over the years that followed, through his attempts to conceal his identity, through his chosen career as an insignificant clerk who would not need to employ unusual mathematical talents, and through the bizarre ways in which his genius flowered, as in his enthusiasm for collecting streetcar transfers and in his proficiency with an adding machine. The article closes with an account of an interview with Sidis at his present lodgings, "a hall bedroom of Boston's shabby south end." The untidiness of his room, his curious laugh, his manner of speech, and other personal habits are commented upon at length, as is his present interest in the lore of the Okamakammessett Indians. The subtitle is explained by the closing sentence, quoting Sidis as saying "with a grin" that it was strange, "but you know, I was born on April Fool's Day." Accompanying the biography is a small cartoon showing the genius of eleven years lecturing to a group of astounded professors.

It is not contended that any of the matter printed is untrue. Nor is the manner of the author unfriendly; Sidis today is described as having "a certain childlike charm." But the article is merciless in its dissection of intimate details of its subject's personal life, and this in company with elaborate accounts of Sidis' passion for privacy and the pitiable lengths to which he has gone in order to avoid public scrutiny. The work possesses great reader interest, for it is both amusing and instructive; but it may be fairly described as a ruthless exposure of a once public character, who has since sought and has now been deprived of the seclusion of private life.

. . .

All comment upon the right of privacy must stem from the famous article by Warren and Brandeis on The Right of Privacy in 4 Harv.L.Rev. 193.

. . .

Warren and Brandeis realized that the interest of the individual in privacy must inevitably conflict with the interest of the public in

news. Certain public figures, they conceded, such as holders of public office, must sacrifice their privacy and expose at least part of their lives to public scrutiny as the price of the powers they attain. But even public figures were not to be stripped bare. "In general, then, the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office. * * * Some things all men alike are entitled to keep from popular curiosity, whether in public life or not, while others are only private because the persons concerned have not assumed a position which makes their doings legitimate matters of public investigation." Warren and Brandeis, supra at page 216.

It must be conceded that under the strict standards suggested by these authors plaintiff's right of privacy has been invaded. Sidis today is neither politician, public administrator, nor statesman. Even if he were, some of the personal details revealed were of the sort that Warren and Brandeis believed "all men alike are entitled to keep from popular curiosity."

But despite eminent opinion to the contrary, we are not yet disposed to afford to all of the intimate details of private life an absolute immunity from the prying of the press. Everyone will agree that at some point the public interest in obtaining information becomes dominant over the individual's desire for privacy. Warren and Brandeis were willing to lift the veil somewhat in the case of public officers. We would go further, though we are not yet prepared to say how far. At least we would permit limited scrutiny of the "private" life of any person who has achieved, or has had thrust upon him, the questionable and indefinable status of a "public figure." [ ]

William James Sidis was once a public figure. As a child prodigy, he excited both admiration and curiosity. Of him great deeds were expected. In 1910, he was a person about whom the newspapers might display a legitimate intellectual interest, in the sense meant by Warren and Brandeis, as distinguished from a trivial and unseemly curiosity. But the precise motives of the press we regard as unimportant. And even if Sidis had loathed public attention at that time, we think his uncommon achievements and personality would have made the attention permissible. Since then Sidis has cloaked himself in obscurity, but his subsequent history, containing as it did the answer to the question of whether or not he had fulfilled his early promise, was still a matter of public concern. The article in The New Yorker sketched the life of an unusual personality, and it possessed considerable popular news interest.

We express no comment on whether or not the news worthiness of the matter printed will always constitute a complete defense. Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency. But when focused upon public characters, truthful comments upon dress, speech, habits, and the ordinary aspects of personality will usually not transgress this line. Regrettably or not, the misfortunes and frailties of neighbors and "public figures" are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day.

Plaintiff in his first "cause of action" charged actual malice in the publication, and now claims that an order of dismissal was improper in the face of such an allegation. We cannot agree. If plaintiff's right of privacy was not invaded by the article, the existence of actual malice in its publication would not change that result. Unless made so by statute, a truthful and therefore non-libelous statement will not become libelous when uttered maliciously. [ ] A similar rule should prevail on invasions of the right of privacy. "Personal ill-will is not an ingredient of the offence, any more than in an ordinary case of trespass to person or to property." Warren and Brandeis, supra, at page 218. Nor does the malice give rise to an independent wrong based on an intentional invasion of the plaintiff's interest in mental and emotional tranquillity. This interest, however real, is one not yet protected by the law. Restatement, Torts, § 46, comment c.

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2. The second "cause of action" charged invasion of the rights conferred on plaintiff by §§ 50 and 51 of the N.Y. Civil Rights Law.

. . .

Before passage of this statute, it had been held that no common law right of privacy existed in New York. [ ] Any liability imposed upon defendant must therefore be derived solely from the statute, and not from general considerations as to the right of the individual to prevent publication of the intimate details of his private life. The statute forbids the use of a name or picture only when employed "for advertising purposes, or for the purposes of trade." In this context, it is clear that "for the purposes of trade" does not contemplate the publication of a newspaper, magazine, or book which imparts truthful news or other factual information to the public. Though a publisher sells a commodity, and expects to profit from the sale of his product, he is immune from the interdict of §§ 50 and 51

so long as he confines himself to the unembroidered dissemination of facts. Publishers and motion picture producers have occasionally been held to transgress the statute in New York, but in each case the factual presentation was embellished by some degree of fictionalization. . . .

. . .

Affirmed.

BARBER v. TIME, INC.

Supreme Court of Missouri, 1942.
348 Mo. 1199, 159 S.W.2d 291.

[Plaintiff suffered from a condition that caused her to lose weight even though she ate frequently. An article in Time magazine's "Medicine" section reported the unusual condition, naming the plaintiff and carrying a photograph that showed "her face, head and arms, with the bedclothes over her chest." The article was titled "Starving Glutton." The captions under the photograph were "Insatiable-Eater Barber" and "She eats for ten." The story was originated by United Press and the photograph taken by "International," a syndicate dealing in news pictures. Further facts are given in the opinion. In plaintiff's suit for invasion of privacy against Time, Inc., the jury awarded compensatory damages of $1,500 and punitive damages in the same amount. Time appealed, relying on the common law, and the United States and Missouri constitutions.]

HYDE, Commissioner.

. . .

. . . In order to preserve rights for himself one must aid in preserving them for all. This requires cooperation with others. No one is entitled to or can have complete isolation. Individual rights must be construed in the light of duties incumbent upon individuals as citizens of a free country. In Sidis v. F-R Publishing Corp. [ ] the court said: "Everyone will agree that at some point the public interest in obtaining information becomes dominant over the individual's desire for privacy." Conduct, either good or bad, or even misfortune, may properly bring persons to public attention and then (as said in Restatement of Torts comment under Section 867): "They are subject to the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains and victims." Likewise, however, freedom of the press was not created merely for

the benefit of the press, but because it is essential to the preservation of free government, and progress of civilization. "In the ultimate, an informed and enlightened public opinion was the thing at stake," and "the predominant purpose of the grant of immunity . . . was to preserve an untrammeled press as a vital source of public information." Grosjean v. American Press Co., [ ]. Therefore, the press, like individual citizens, must not abuse its constitutional rights or overlook its obligations to others.

. . .

Considering the article herein involved, we think plaintiff made a jury case. It was shown that plaintiff not only did not consent to the publication of any article or picture in connection with her illness, but protested against any publicity to the reporters, who interviewed her, and that her picture was taken by one while the other was trying to persuade her to consent to such publicity. Certainly if there is any right of privacy at all, it should include the right to obtain medical treatment at home or in a hospital for an individual personal condition (at least if it is not contagious or dangerous to others) without personal publicity. [ ] "To enable a physician to treat his patient to advantage it is often necessary that the patient communicate information which it would be both embarrassing and harmful to have circulated generally throughout the community." [21 R.C.L. 378, sec. 24.] The public generally understands that the ethics of the medical profession require such matters to be kept confidential. Our Legislature has furnished protection by statutes (Sec. 1895, R.S.1939) which gives the patient a privilege to prevent its disclosure even in court without his consent or waiver. It was not necessary to state plaintiff's name in order to give medical information to the public as to the symptoms, nature, causes or results of her ailment. The representative of defendant's medical department testified she knew that "in medical books, case histories of people do not even mention the names or addresses but simply refer to them by letters or symbols;" that "so that as far as interest from a medical standpoint is concerned it wasn't necessary to have her picture or her name and address at all;" but that "an attractive picture . . . of a young lady . . . will attract reader's interest." The same thing was true of the title "Starving Glutton" which defendant originated. Certainly plaintiff's picture conveyed no medical information. While plaintiff's ailment may have been a matter of some public interest because unusual, certainly the identity of the person who suffered this ailment was not. Whatever the limits of the right of privacy may be, it seems clear that it must include the right to have information given to or gained by a physician in the treatment of an individual's personal ailment kept from publication which would state his name in

connection therewith without such person's consent. Likewise, whatever may be the right of the press, tabloids or news reel companies to take and use pictures of persons in public places, certainly any right of privacy ought to protect a person from publication of a picture taken without consent while ill or in bed for treatment and recuperation. We, therefore, hold that the court properly overruled defendant's demurrer to the evidence.

Defendant also assigns error in giving plaintiff's instruction authorizing punitive damages. . . . Certainly the acts of the reporters shown in this case would be sufficient to prove express malice, against them and their employer, as a wanton intentional invasion of plaintiff's rights. (Coming back with a photographer after being refused her consent to publish an article about her ailment and taking her picture surreptitiously while she was voicing her protests against any publicity in a conversation with one of them, by means of which he attracted her attention away from the photographer.) However, it was not shown that these persons had any connection with defendant or that defendant knew what they had done and no such contention is even made.

. . .

PER CURIAM:—The foregoing opinion by HYDE, C., is adopted as the opinion of the court. All the judges concur.

Notes and Questions

1. In *Barber*, does the court appear to be relying on the "intrusion" by the reporter and the photographer? How important is the photograph in the court's analysis? The use of the name?

2. Why was the revelation in *Barber* thought to justify a damage award? How did it differ from that in *Sidis?* Was the newsworthiness privilege consistently applied in the two cases?

3. Consent is a defense to invasion of privacy. Would Sidis necessarily have lost on that basis if he hadn't lost on other grounds?

4. What might the *Sidis* court have had in mind when it referred to revelations "so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency?"

5. Was it possible to handle the story in *Sidis* without identifying him or causing him harm? Were the same considerations present in *Barber?* Whatever happened to the idea that "names are news?"

6. Jenkins v. Dell Pub. Co., 251 F.2d 447 (3d Cir.) certiorari denied 357 U.S. 921 (1958), involved an article in defendant's "Front Page Detective" about a man who had been kicked to death by the leader of a teen-age gang. The article appeared while the trial was pending,

four months after the event. Entitled "Heartbreak House," the brief story ran a single page and was illustrated with photographs including one of the victim's family, who are the plaintiffs. The photograph had been taken by a newspaper reporter shortly after the homicide, with the family's consent, and sold to another firm which sold it to the defendant. The trial judge's grant of summary judgment to the defendant was affirmed 4–3. The majority rejected the plaintiff's contention that material published for "entertainment" was not newsworthy:

> For present purposes news need be defined as comprehending no more than relatively current events such as in common experience are likely to be of public interest. In the verbal and graphic publication of news, it is clear that information and entertainment are not mutually exclusive categories. A large part of the matter which appears in newspapers and news magazines today is not published or read for the value or importance of the information it conveys. Some readers are attracted by shocking news. Others are titillated by sex in the news. Still others are entertained by news which has an incongruous or ironic aspect. Much news is in various ways amusing and for that reason of special interest to many people. Few newspapers or news magazines would long survive if they did not publish a substantial amount of news on the basis of entertainment value of one kind or another. This may be a disturbing commentary upon our civilization, but it is nonetheless a realistic picture of society which courts shaping new juristic concepts must take into account. In brief, once the character of an item as news is established, it is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment in determining the extent to which publication is privileged.

Is this sound?

7. Not all newspapers go as far as the law may permit. The St. Louis Post-Dispatch has announced that although it will continue to identify burglary victims and losses, the stories will not indicate whether any valuables were overlooked and addresses will be given in block numbers rather than specific numbers. The paper will not identify victims of sex crimes if the report would tend to degrade the victim. Editor & Publisher, Feb. 8, 1975, p. 17. What about the accused? Are these sound lines to draw?

8. The press itself has been notably timid in this area, perhaps uncertain about the degree to which it is protected because the courts have been generous, but vague. In an article in the April, 1975, issue

of [MORE], Washington columnist Brit Hume condemned the reluctance of editors to publish stories about Congressmen who seem senile at Committee hearings, extramarital activities of Presidents and Congressmen, public drunkenness of Congressmen and similar matters. Are these equally deserving of disclosure? Would you distinguish between reporting actions or behavior apparent to any observer, and reporting information acquired surreptitiously? He quotes an editor as saying that prying into the lives of public officials "smells of Hollywood gossip." Could you draw a line between the two? One approach was to print such information only when the circumstance "affects their public performance." Hume argues that this is a poor standard because it is often very difficult to tell why a Congressman is not being effective. He cites one case in which it was thought that a Senator objected to the sexual behavior of a Congressman from his state and that the tension between them probably hurt the Congressman's effectiveness. Hume notes other problems relating to relatives of those in public office: an official's son who gets into a minor traffic accident, or the mental health of the wife or child of a possible presidential candidate.

9. During the 1976 political campaign, the Detroit News reported that the Democratic candidate for United States Senator from Michigan had had an extra-marital sexual relationship seven years earlier with a member of his Congressional staff. This was not a case in which the woman on the Congressional payroll was performing only sexual favors. Mike Royko, a newspaper columnist, argued that the newspaper should not have carried the story since there was no claim that the behavior cost the taxpayers money, that it affected his performance as a Congressman, or that the woman was intrinsically newsworthy, such as a spy. He suggested that the motive lay in the fact that the paper was supporting the Republican opponent. Do you think the paper should have printed the story? Should the candidate be able to sue successfully for invasion of privacy? Should the candidate have any action against the newspaper because of the timing of the story and its apparent motive in carrying it? (The Democrat won the election.)

10. The Supreme Court finally considered an accurate invasion of privacy case in 1975.

2. Constitutional Privilege

COX BROADCASTING CORP. v. COHN

Supreme Court of the United States, 1975.
420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328.

[Mr. Cohn's 17-year-old daughter was raped in Georgia and did not survive the occurrence. In Georgia it is a misdemeanor for "any news media or any other person to print and publish, broadcast, televise or disseminate through any other medium of public dissemination . . . the name or identity of any female who may have been raped. . . ." Ga.Code Ann. § 26–9901. Similar statutes exist in a few other states. The girl was not identified at the time. Eight months later, appellant's reporter, Wassell, also an appellant, attended a hearing for the six youths charged with the rape and murder and learned the girl's name by inspecting the indictment in the courtroom. His report naming the girl was telecast.

The Georgia Supreme Court held that the complaint stated a common law action for damages for invasion of the father's own privacy. Defendant's First Amendment argument was rejected on the ground that the statute was an authoritative declaration that Georgia considered a rape victim's name not to be a matter of public concern. The court could discern "no public interest or general concern about the identity of the victim of such a crime as will make the right to disclose the identity of the victim rise to the level of First Amendment protection."

On appeal, the Supreme Court first decided that the decision below was a "final" judgment so as to give the court jurisdiction. The Court then turned to the First Amendment issue.]

Mr. Justice White delivered the opinion of the Court.

. . .

Georgia stoutly defends both § 26–9901 and the State's common-law privacy action challenged here. Her claims are not without force, for powerful arguments can be made and have been made, that however it may be ultimately defined, there *is* a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity. Indeed, the central thesis of the root article by Warren and Brandeis, The Right to Privacy, 4 Harv.L.Rev. 193, 196 (1890), was that the press was overstepping its prerogatives by publishing essentially private information and that there should be a remedy for the alleged abuses.

More compellingly, the century has experienced a strong tide running in favor of the so-called right of privacy. . . .

. . . Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press. The face-off is apparent, and the appellants urge upon us the broad holding that the press may not be made criminally or civilly liable for publishing information that is neither false nor misleading but absolutely accurate, however damaging it may be to reputation or individual sensibilities.

. . .

. . . Rather than address the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, or to put it another way, whether the State may ever define and protect an area of privacy free from unwanted publicity in the press, it is appropriate to focus on the narrower interface between press and privacy that this case presents, namely, whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection. We are convinced that the State may not do so.

In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice. See Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

Appellee has claimed in this litigation that the efforts of the press have infringed his right to privacy by broadcasting to the world the fact that his daughter was a rape victim. The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events

of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government.

The special protected nature of accurate reports of judicial proceedings has repeatedly been recognized. This Court, in an opinion written by MR. JUSTICE DOUGLAS, has said:

> "A trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. *Those who see and hear what transpired can report it with impunity.* There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." Craig v. Harney, 331 U.S. 367, 374 (1947) (emphasis added).

. . .

The developing law surrounding the tort of invasion of privacy recognizes a privilege in the press to report the events of judicial proceedings. The Warren and Brandeis article, supra, noted that the proposed new right would be limited in the same manner as actions for libel and slander where such a publication was a privileged communication: "the right to privacy is not invaded by any publication made in a court of justice . . . and (at least in many jurisdictions) reports of any such proceedings would in some measure be accorded a like privilege."

. . .

Thus even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record. The conclusion is compelling when viewed in terms of the First and Fourteenth Amendments and in light of the public interest in a vigorous press. The Georgia cause of action for invasion of privacy through public disclosure of the name of a rape victim imposes sanctions on pure expression—the content of a publication—and not conduct or a combination of speech and nonspeech elements that might otherwise be open to regulation or prohibition. See United States v. O'Brien, 391 U.S. 367, 376–377 (1968). The publication of truthful information available on the public record contains none of the indicia of those limited categories of expression, such as "fighting" words, which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morali-

ty." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (footnote omitted).

By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.

We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public. At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish.[26] Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast. See Miami Herald Pub. Co. v. Tornillo, 418 U.S., at 258.

Appellant Wassell based his televised report upon notes taken during the court proceedings and obtained the name of the victim from the indictments handed to him at his request during a recess in the hearing. Appellee has not contended that the name was ob-

26. We mean to imply nothing about any constitutional questions which might arise from a state policy not allowing access by the public and press to various kinds of official records, such as records of juvenile court proceedings.

tained in an improper fashion or that it was not on an official court document open to public inspection. Under these circumstances, the protection of freedom of the press provided by the First and Fourteenth Amendments bars the State of Georgia from making appellants' broadcast the basis of civil liability.[27]

Reversed.

MR. CHIEF JUSTICE BURGER concurs in the judgment.

MR. JUSTICE POWELL, concurring.

. . .

I am in entire accord with the Court's determination that the First Amendment proscribes imposition of civil liability in a privacy action predicated on the truthful publication of matters contained in open judicial records. But my impression of the role of truth in defamation actions brought by private citizens differs from the Court's.

. . .

MR. JUSTICE DOUGLAS, concurring in the judgment.

I agree that the state judgment is "final," and I also agree in the reversal of the Georgia court.* On the merits, the case for me is on all fours with New Jersey State Lottery Comm'n v. United States, 491 F.2d 219 (CA3d 1974), vacated and remanded. [420 U.S. 371]. For the reasons I stated in my dissent from our disposition of that case, there is no power on the part of government to suppress or penalize the publication of "news of the day."

MR. JUSTICE REHNQUIST, dissenting.

Because I am of the opinion that the decision which is the subject of this appeal is not a "final" judgment or decree, as that term is

27. Appellants have contended that whether they derived the information in question from public records or instead through their own investigation, the First and Fourteenth Amendments bar any sanctions from being imposed by the State because of the publication. Because appellants have prevailed on more limited grounds, we need not address this broader challenge to the validity of § 26-9901 and of Georgia's right of action for public disclosure.

* While I join in the narrow result reached by the Court, I write separately to emphasize that I would ground that result upon a far broader proposition, namely, that the First Amendment, made applicable to the States through the Fourteenth, prohibits the use of state law "to impose damages for merely discussing public affairs . . . ." [ ] In this context, of course, "public affairs" must be broadly construed—indeed, the term may be said to embrace "any matter of sufficient general interest to prompt media coverage . . . ." Gertz v. Robert Welch, Inc., [ ] (DOUGLAS, J. dissenting). By its now-familiar process of balancing and accommodating First Amendment freedoms with state or individual interests, the Court raises a specter of liability which must inevitably induce self-censorship by the media, thereby inhibiting the rough-and-tumble discourse which the First Amendment so clearly protects.

used in 28 U.S.C. § 1257, I would dismiss this appeal for want of jurisdiction.

. . .

Notes and Questions

1. What issues does Justice White avoid by his narrow statement of the question in the case?

2. Consider three resolutions: a statute (a) making the rape victim's name private information and barring its release by government officials; (b) making the name available to the public but forbidding its publication in mass media; (c) making the name available to the public with no ban on publication. What problems are presented by each approach?

3. One of the questions still open after *Cox* is the effect of the passage of time on the plaintiff's right to recover if public records are not involved. At common law it was generally thought that if an event created a continuing interest in the person or subject, subsequent reports were permissible. Is *Sidis* helpful on this issue? Compare *Sidis* with a New York Times column, "Follow-Ups On The News," recalling a dramatic rescue at sea of a 14-year-old girl 18 years earlier. It reported her current name and that she was the "wife of a San Antonio, Tex., lawyer and mother of a year-old girl, and she is studying for a degree in library science." N.Y. Times, Mar. 31, 1974, § 1, p. 33. What differences do you see? What similarities?

4. *Cox* makes clear the difference between trying to prevent the press from gathering the information in the first place, and trying to prevent the publication of something that has been learned—especially from a public record. This distinction brings into sharper focus the problems that emerge from efforts to expunge and seal what were previously open public records. As noted earlier, p. 217, supra, several states may expunge criminal records when certain criteria are met. Is it possible after *Cox* for the state to claim that what has been expunged has never been public or may no longer be printed? Newspapers keep extensive files that include convictions of many persons. If the record is subsequently expunged is it possible for the person to sue any paper that publishes the past record? Would it matter if the disclosure is thought relevant to some issue of public concern, such as that person's candidacy for public office?

5. Another phase of the privacy problem developed as a Congressional committee moved toward publishing a report about secret activities of the CIA. A person who figured prominently in the report sued to keep his name from being printed in the report. He claimed

that to name him would expose him to a clear and present danger of physical violence. The district judge agreed that great physical risk would accompany his identification but nonetheless decided he could not order Congress to delete a name from a report. The press reported this event—and named the person who was seeking the relief. When a wire service reported the decision, relying on "informed sources," it named the man. S.F. Chronicle, Nov. 18, 1975, p. 8. The New York Times reported the suit and the attorneys' refusal to name their client, but the story then continued, "However, the two lawyers represent ———" and named the man. N.Y. Times, Nov. 18, 1975, p. 12. The man filed an appeal with the court of appeals and at this point the Congressional committee agreed to delete his name. The appeal was withdrawn. In reporting that event, the media did not name the man. Might they have been liable for invasion of privacy?

6. In Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), Sports Illustrated planned an article about a California beach area reputed to be the world's most dangerous site for body surfing. Plaintiff, known as the most daring surfer at the site, was interviewed and photographed at the beach. To verify the accuracy of the article, a checker for the magazine called plaintiff's home. Plaintiff claims that he then learned for the first time that the article would deal not only with his prominence as a surfer but also with "some rather bizarre incidents in his life that were not directly related to surfing." These included diving headfirst down a flight of stairs and eating "spiders and other insects." The events, and the facts that he had never learned to read and that other surfers thought him "abnormal," were thought to have some bearing on plaintiff's "reckless disregard for his own safety" in body surfing. When plaintiff learned of the scope of the proposed article, he "revoked his consent" to any mention of his name or use of his photograph in the article. When the article appeared with the information about plaintiff and photographs of him, he sued for invasion of privacy.

The trial court's refusal to dismiss the case was affirmed. The court first ruled that plaintiff's participation in the interviews did not make the information public. Selective discussion with others was not the same as broadcasting information to the public. When one speaks with a member of the press, however, he should anticipate that the material may become public at a later time and his speaking will be taken as consent—unless, as alleged here, the consent is withdrawn before the publication.

Citing *Cox*, the publisher argued that the First Amendment protected all true statements from liability:

> A press which must depend upon a governmental determination as to what facts are of 'public interest' in order to avoid liability

> for their truthful publication is not free at all. . . . A constitutional rule can be fashioned which protects all the interests involved. This goal is achieved by providing a privilege for truthful publications which is defeasible only when the court concludes as a matter of law that the truthful publication complained of constitutes a clear abuse of the editor's constitutional discretion to publish and discuss subjects and facts which in his judgment are matters of public interest."

The court rejected the argument and adopted the view of the Restatement (Second) of Torts, that liability may be imposed if the matter published is "not of legitimate concern to the public." Then the court quoted § 652D comment *f* (Tent.Draft No. 13, 1967):

> 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 the community mores. The line 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, with which a reasonable member of the public, with decent standards, would say that he had no concern. . . .

In libel and obscenity cases juries utilize community standards and the court thought they should do so here, too, "subject to close judicial scrutiny to ensure that the jury resolutions comport with First Amendment principles." What is the difference between Time's position and that adopted by the court? Is the court's view consistent with *Cox?* Over the dissents of Justices Brennan and Stewart, the Supreme Court denied certiorari in *Virgil.* 425 U.S. 998 (1976).

On remand, the trial judge held that under the standards enunciated by the court of appeals, no reasonable juror could conclude that the published facts were highly offensive to a reasonable person or that they were published for any "morbid, sensational, or curiosity appeal they might have." As a result, he dismissed the suit before trial. Editor & Publisher, Jan. 8, 1977, p. 10.

7. The case that comes closest to raising the "indecency" question is probably Taylor v. K.T.V.B., Inc., 96 Idaho 202, 525 P.2d 984 (1976). Plaintiff had threatened his housekeeper's sister with a shotgun and the police had been called. Defendant's television crew arrived at the scene and began filming as the plaintiff was led from the house—stark naked. The following evening the film was shown on the regular newscast and "Taylor's buttocks and genitals were visible to television viewers for a time period of approximately eight- to nine-tenths of one second." In plaintiff's privacy action the trial

judge charged that the reporting of newsworthy events "would not justify a lurid or indecent treatment of the facts such as would outrage the community's sense of decency." The jury awarded plaintiff $15,000. How would you have handled such an episode?

On appeal, the court, 4–1, reversed and remanded for a new trial, relying on both the common law and the First Amendment. The defendant argued that it had "an absolute privilege to report truthfully all details of an event of current public interest without incurring liability for invasion of privacy." The court rejected that position and held that "news media are immune from liability for reporting the details of an arrest without regard to the fact that this may result in the disclosure of embarrassing private facts about the arrestee unless it can be shown that the disclosure was made with 'malice,' i. e., for the purpose of embarrassing or humiliating the arrestee, or with reckless disregard as to whether that disclosure will result in such embarrassment or humiliation."

See also Neff v. Time, Inc., 406 F.Supp. 858 (W.D.Pa.1976) (refusing to find liability for a photograph of a Steeler football fan with his fly open used in an article on Pittsburgh Steeler fans.)

8. In Deaton v. Delta Democrat Pub. Co., 326 So.2d 471 (Miss. 1976), the defendant paper ran a feature about a public school class for mentally retarded children. A caption identified the four Deaton children in an accompanying photograph as members of the class. Plaintiffs claimed that the defendant's acts were "done by intentional design" without regard to the children's rights of privacy and their "right to the pursuit of happiness." A demurrer granted by the trial judge was unanimously reversed. The existence of the school and its program were of legitimate public interest but the naming of the children was unprotected: "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 relied on *Virgil* for the proposition that reasonable limitations on the press to protect privacy "do not infringe on the right of the people to be informed on matters properly in the public domain." Is this case like *Barber?*

9. In Jordan v. Pensacola News-Journal, Inc., 314 So.2d 222 (Fla. App.1975), plaintiffs as adoptive parents, for themselves and their child, sued defendant for publishing a story about their adoption with complete details. A statute declared that adoption cases and documents were "confidential" and it had been implemented by such steps as not indexing cases by the name of the minor. Plaintiff claimed that the statute created a "right of privacy to save and protect them from embarrassment, humiliation, and offensive publicity." The

trial judge's dismissal of the complaint was affirmed. There was no allegation that the newspaper obtained its information from closed files and the statute contained no proscription on publishing such data.

10. Ethical questions abound in privacy cases. In addition to those already raised, recent episodes suggest two more. In one, the newspaper had reason to know that naming CIA agents might lead to harm or death to those named. In the second, a former double agent told a newspaper that if it named him in a forthcoming story he would commit suicide. The paper ran the name and the agent committed suicide that day. Are invasion of privacy actions a possibility in either case? The press has considered its behavior in these cases at some length. See [MORE] Feb. 1976, p. 12; The Quill, May 1976, p. 11.

11. *Right of Publicity.* Another offshoot of the notion of privacy might more aptly be considered protection of the right to publicize one's own name and likeness. Thus, when an advertiser places plaintiff in an ad without his consent, the courts have allowed recovery. Occasionally the plaintiff is a totally private person whose damages would be measured by the embarrassment and humiliation of the invasion, but more often the plaintiff is a famous person whose name or likeness would add to the appeal of the advertisement. In such cases the loss affects the plaintiff's future ability to sell his name and likeness to other advertisers.

Occasionally journalists are on the other side of privacy-publicity cases. In Reilly v. Rapperswill Corp., 50 App.Div.2d 342, 377 N.Y.S.2d 488 (1975), plaintiff television reporters presented a feature on insulation materials that included defendant's product. Defendant manufacturer used a promotional film that included an excerpt from the filmed report. Plaintiffs sued under the New York statute to enjoin defendant from using their names and images without their consent. The court granted a temporary injunction and rejected the argument that plaintiffs "had already forfeited their right to privacy by becoming public figures." The court thought the case particularly strong because of the plaintiffs' employment: "To be effective, a news reporter must maintain an image of absolute integrity and impartiality. The commercial exploitation of an impartial report by use of a video tape . . . for advertising or trade purposes, will not only tarnish the reporter's reputation for objectivity, but will have a chilling effect on reporters now involved in a field of expanding concern—consumer protection."

3. False-Light Privacy

The conventional idea of invasion of privacy as conceived by Warren and Brandeis involved true statements about aspects of plaintiff's life that others had no business knowing. But along the way, a few cases involved false charges that placed the plaintiff in a false light but did not harm his "reputation" so as to permit an action for defamation. If one uses a very broad idea of reputational harm, many false statements about persons would be within the defamation rubric. But most states put limits on the notion of reputational harm and thus a group of cases emerged in which courts resorted to privacy ideas to protect the plaintiff. In one example, a group used the plaintiff's name without authorization on a petition to the governor to veto a bill. Although falsely stating that plaintiff had signed the petition would not be defamatory, the court found the situation actionable because it cast plaintiff in a false light.

The line between defamation and privacy was obviously being tested by this type of case. But the line between this and the "true" privacy case also became blurred after Time, Inc. v. Hill, 385 U.S. 374 (1967). In September, 1952, James Hill and his family were held hostage in their home for 19 hours by three escaped convicts who apparently treated them decently. The incident received extensive nationwide coverage. Thereafter the Hills moved to another state, sought seclusion and refused to make public appearances. A novel modeled in general on the event was published the following year. In 1955, Life magazine in a very short article announced that a play and a motion picture were being made from the novel, which they said was "inspired" by the Hill episode. The play, "a heartstopping account of how a family rose to heroism in a crisis," would enable the public to see the Hill story "re-enacted." Photographs in the magazine showed actors performing scenes from the play at the house at which the original events had occurred. The Hills claimed that the story was inaccurate because the novel and the play showed the convicts committing violence on the father and uttering a "verbal sexual insult" at the daughter.

Suit was brought under the New York statute that required plaintiff to show that the article was being used for advertising purposes or for purposes of trade. A truthful article, no matter how unpleasant for the Hills, would not have been actionable. The state courts had previously indicated that falsity would show that the article was really for purposes of trade and not for public enlightenment. The state courts allowed recovery after lengthy litigation.

The Supreme Court by a very fragile majority decided that the privilege to comment on matters of public interest had constitutional protection and could not be lost by the introduction of falsity unless the falsity was either deliberate or recklessly introduced. The Court used the defamation analogy that was then being developed in the wake of the Times case and applied it to this privacy case that involved falsity, ignoring the fact that the falsity was relatively trivial. Was the false report any more harmful than an absolutely true one would have been? If not, why does the falsity matter? The Court had not yet considered defamation actions by private citizens.

The next false-light privacy case was Cantrell v. Forest City Pub. Co., 419 U.S. 245 (1974), in which a reporter had previously written a prize-winning story about the collapse of a bridge that killed 44 people, including Melvin Cantrell. A few months later he returned to the Cantrell home for a follow-up on how the family coped with disaster. His story contained several false statements. Although Mrs. Cantrell had not been present, the story stated that she "will talk neither about what happened nor about how they are doing. She wears the same mask of non-expression she wore at the funeral. She is a proud woman. Her world has changed. She says that after it happened, the people in town offered to help them out with money and they refused to take it." Other misrepresentations included his descriptions of the family's poverty. The family sought damages on a false-light privacy theory. Are any of the misstatements defamatory?

The Court, in an opinion by Justice Stewart, held that the First Amendment did not protect deliberate or reckless falsity. He also observed that this was not an appropriate occasion to "consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher . . . of false statements injurious to a private individual under a false-light theory of invasion of privacy, or whether the constitutional standard announced in Time, Inc. v. Hill applies to all false-light cases." This has been taken as a hint that the Court thinks *Hill* set too tough a standard for plaintiffs in this type of case.

Justice Douglas was the sole dissenter: "Those who write the current news seldom have the objective, dispassionate point of view—or the time—of scientific analysts. They deal in fast-moving events and the need for 'spot' reporting. . . . [I]n such matters of public import such as the present news reporting, there must be freedom from damages lest the press be frightened into playing a more ignoble role than the Framers visualized."

4. Enjoining Violations of Privacy

Many commentators have observed that damages in defamation are a more adequate remedy than in truthful invasion of privacy cases. In defamation the award of damages, especially special damages, may compensate the plaintiff for a loss of reputation that has in fact injured him financially. Even a judgment for nominal damages may have a vital symbolic function. In privacy, however, once the invasion has occurred the embarrassing truth is out and a judgment or an award of money does not resurrect a sullied reputation or undo other harm caused by the publication. Counterattack and counterspeech are not useful here.

Thus, courts have looked more seriously at alternatives in privacy suits, and have been somewhat more responsive to a plea for an injunction to prevent the utterance of the invasion in the first place. Often the plaintiff learns about the invasion only after actual publication, but in some situations prevention is feasible. Because the privacy action is so recent in origin, it lacks a long history like that of defamation during which the injunction came to be totally rejected in actions for private defamations.

The Supreme Court has had a curious record with regard to injunctions barring invasions of privacy by the media. Although three significant cases have presented the issue, the Court has yet to come to grips with it. In the first, a famous baseball player persuaded the New York courts to enjoin the publication of an unauthorized biography that contained false dialogue. Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967). The defendants compromised and settled their dispute while it was being appealed to the Supreme Court.

The second chance came in a case involving a motion picture about conditions inside a Massachusetts institution for the criminally insane. The state court barred showing of the picture except to professional groups because of the producer's invasion of the privacy of the inmates, assertedly in violation of an agreement he signed in order to get permission to make the film. Commonwealth v. Wiseman, 356 Mass. 251, 249 N.E.2d 610 (1969). The Supreme Court denied certiorari to Wiseman, the producer, 398 U.S. 960 (1969), over the lengthy dissent of Justice Harlan, joined by Justices Douglas and Brennan:

> Petitioners seek review in this Court of a decision of the Massachusetts Supreme Judicial Court enjoining the commercial distribution to general audiences of the film "Titticut Follies." Petitioners' film is a "documentary" of life in Bridgewater State Hospital for the criminally insane. Its stark portrayal of pa-

tient-routine and treatment of the inmates is at once a scathing indictment of the inhumane conditions that prevailed at the time of the film and an undeniable infringement of the privacy of the inmates filmed, who are shown nude and engaged in acts that would unquestionably embarrass an individual of normal sensitivity. . . .

The balance between these two interests, that of the individual's privacy and the public's right to know about conditions in public institutions, is not one that is easily struck, particularly in a case like that before us where the importance of the issue is matched by the extent of the invasion of privacy. . . . A further consideration is the fact that these inmates are not only the wards of the Commonwealth of Massachusetts but are also the charges of society as a whole. It is important that conditions in public institutions should not be cloaked in secrecy, lest citizens may disclaim responsibility for the treatment that their representative government affords those in its care. At the same time it must be recognized that the individual's concern with privacy is the key to the dignity which is the promise of civilized society. [ ]

. . .

I am at a loss to understand how questions of such importance can be deemed not "certworthy." To the extent that the Commonwealth suggests that certiorari be denied because petitioners failed to comply with reasonable contract conditions imposed by the Commonwealth, that question in itself is one of significant constitutional dimension, for it is an open question as to how far a government may go in cutting off access of the media to its institutions when such access will not hinder them in performing their functions. Cf. Estes v. Texas, 381 U.S. 532 (1965); [ ]. In the case before us, however, the only asserted interest is the State's concern for the privacy of the inmates in its care, and the basis for the decision below was the predominance of that interest over that of the general public in seeing the film.

Wiseman's petition for rehearing was denied. Justices Harlan, Brennan and Blackmun dissented. "Mr. Justice Douglas took no part in the consideration or decision of this motion and petition." 400 U.S. 860, 954 (1970).

Obviously this did not solve the matter. The issue central to *Wiseman* reappeared in a state court case in New York in 1976, when a television crew entered an institution for care of neglected children and filmed some of the children. Questions "which could fairly be

described as leading or suggestive were directed to the children with respect to drugs, assaults, etc. to which the children responded." The institution's director sought to enjoin the televising of the film. The trial judge denied a preliminary injunction and vacated his temporary restraining order, but granted a stay pending appeal. The Appellate Division, 4–1, concluded after viewing the film that they were "not persuaded that its sole or even its chief object is to provide information which could lead to a correction of the conditions it claims exists." Nonetheless, nothing in the film warranted a ban on its showing. If appropriate, the defendants could be "called to account" after the fact. Three judges voted to grant a stay pending further appeal, one voted to vacate the stay immediately, and one thought the injunction proper because the privacy of the children had been invaded and their identities should not be presented on television. Quinn v. Johnson, 51 App.Div.2d 391, 381 N.Y.S.2d 875 (1976). At this point, the case was resolved when the broadcaster decided that it could blur the faces of the children to make them unrecognizable. One newspaper noted "Here was a case where the large principle against prior restraint or censorship was upheld; and, yet, where a humane judgment could be made at the same time. Nothing in the First Amendment prevents the exercise of good taste and compassion." N.Y. Times, May 10, 1976, p. 26.

The third Supreme Court case involved a different claim of privacy raised by a former patient trying to enjoin her analyst from publishing a book the analyst had written about her treatment. Although names and other facts were changed in the book, the plaintiff alleged that she and her family were easily identifiable. The trial court granted a preliminary injunction only as to such distributions "as were not reasonably calculated to reach the scientific reader." The Appellate Division modified by enjoining all distribution until the litigation concluded. Doe v. Roe, 42 App.Div.2d 559, 345 N.Y.S.2d 560 (1973) affirmed mem. 33 N.Y.2d 902, 307 N.E.2d 823, 352 N.Y.S.2d 626 (1973). Defendants, including the book's publisher, sought certiorari, objecting to the restraint on concededly true statements that concerned matters of medical and scientific importance. The Court granted certiorari, 417 U.S. 907 (1974), heard arguments, and then dismissed the writ as having been "improvidently granted." 420 U.S. 307 (1975). The fact that this case had a murky record and the complication of the confidential relationship might have dissuaded the Court from deciding the case.

How might one analyze the competing interests in these invasion of privacy cases when the issue becomes one of a remedy for a true statement that is adjudged an invasion? How do these cases square with concern about prior restraint?

D. PROTECTING THE POLITICAL PROCESS— THE ACCESS THEORY

The Supreme Court and many state courts have long recognized that the state has a legitimate and often compelling interest in safeguarding the integrity of the electoral process and the ability of individual citizens to participate in it. Justice Frankfurter described these issues as "not less than basic to a democratic society," and this importance has been affirmed in a long line of cases involving efforts to regulate the conduct of elections.

Many statutes intended to ensure the integrity of this democratic process, regulate the mechanisms of political discussion. Since, as has been suggested, the importance of freedom of expression rests at least in part on its role in effective self-government, the First Amendment and election statutes may conflict in the name of serving the democratic process. One view is that full and free discussion is so fundamental to the electoral process that attempts to limit expresssion in order to purify the process will ultimately undermine it instead. But others argue that some cleansing measures may be necessary to keep the process open despite their implications for the exercise of the citizen's First Amendment rights. In this view, some limitations on free expression that would be unconstitutional in other contexts should be upheld if they contribute to the integrity of elections. This tension will be considered in a variety of contexts below.

We will consider the effect of election laws on media primarily. At this point we limit our concern to print media because of the unique problems broadcasting is thought to present. As a justification for the imposition of restraints on print media, the broad interest in "fair elections" so often cited by the courts may be subdivided into three major interests: prevention of dishonesty; opportunity to reach the electorate; and the electorate's ability to evaluate the respective arguments.

1. PREVENTING DISHONESTY

WILSON v. SUPERIOR COURT

Supreme Court of California, 1975.
13 Cal.3d 652, 532 P.2d 116, 119 Cal.Rptr. 468.

[Petitioner Wilson's newsletter attacking his opponent Watson, the incumbent assessor, reproduced newspaper articles stating that Watson was indicted for bribery and "Watson Bribery Case Slated for Trial Today," without showing that these events took place seven years earlier or that Watson had been acquitted. Watson sued for libel and slander and sought to enjoin further publication of the leaflet. The judge issued a temporary restraining order banning further distribution of the newsletter "or written or oral statements substantially similar" to those made therein. The judge told petitioner's attorney that petitioner had "every right to state the truth, but not a portion of the truth, or . . . a narrow view of the truth, which may well be a falsehood." Petitioner then changed his material several times by adding dates and an indication that the trial ended in an acquittal. At the hearing on a preliminary injunction, the judge declared that petitioner could bring Watson's history before the public but only "in such a manner that the average voter, looking at that will understand that they are not current articles." The judge suggested such things as spelling out the dates rather than using "3/30/67," which might be thought a file number, and putting the acquittal in the same size type as the reference to the bribery charge.

A preliminary injunction was issued in substantially the same terms as the restraining order except that it required the articles about Watson to be presented in a "fair and balanced manner with a full presentation of the facts" with citations to source and full date of each article without abbreviation. Petitioner sought a writ of prohibition to prevent the trial court from enforcing its orders.]

MOSK, J.—In Gertz v. Robert Welch, Inc., 418 U.S. 323, 325 (1974), Justice Powell began by observing that "This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." Growing public awareness of the need for integrity in the election process has added to the judicial task: in this case we are called upon to determine whether a court may constitutionally enjoin the publication of allegedly misleading and libelous statements made by a candidate for political office about his opponent.

. . .

The principles applicable to this case are well settled. More than four decades ago, the United States Supreme Court in Near v. Minnesota (1931) declared that prior restraint upon publications which refer to the malfeasance of public officers would violate the guarantees of the First Amendment to the United States Constitution.

. . .

These principles have retained their vigor from 1931 to date. From Near to Times-Picayune Pub. Corp. v. Schulingkamp (1974) [p. 233, supra], it has been consistently held that any prior restraint on expression bears a heavy presumption against its constitutional validity. A recent case declined to restrain publication of the so-called "Pentagon Papers" despite the urging of the government that the publication would result in a serious breach of national security (New York Times Co. v. United States, 403 U.S. 713 (1971)),[2] and an attempt to restrain distribution of a pamphlet criticizing a real estate broker for his selling practices has likewise been held improper (Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) [ ]).

The overriding significance of these precepts was emphasized in New York Times Co. v. Sullivan [ ], in which it was held that a public official may not recover damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice. In its opinion, the court characterized as a "profound national commitment" the principle that debate on public issues must be "uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on the government and public officials." (376 U.S. at p. 270). These authorities leave no doubt that the truth or falsity of a statement on a public issue is irrelevant to the question whether it should be repressed in advance of publication.

. . .

There can be no doubt that the preliminary injunction here constituted a prior restraint on publication. Not only was petitioner prohibited from publishing and distributing any of the four versions of the Newsletter but he was forbidden to publish statements "substantially similar" to those made in the circular. The preliminary injunction went even further in prohibiting the publication of any articles about Watson unless they were presented in a "fair and balanced manner with a full presentation of the facts," and the court went so

2. Watson attempts to distinguish New York Times Co. v. United States on the ground that it involved the publication of "current news" whereas petitioner published seven-year-old excerpts from newspaper articles misrepresented as current news. Obviously, the question whether the published material relates to contemporary or historical events cannot be decisive.

far as to prescribe in some detail its theory of what constitutes a fair and balanced presentation.

Watson attempts to justify the orders on various grounds. He claims that there was no prior restraint here because the court did not prohibit discussion of his background but only enjoined deceptive use of the articles. This amounts to an assertion that no unconstitutional prior restraint occurred because petitioner was permitted to publish true statements, fairly presented, and was only enjoined from a purportedly deceptive presentation. The concept that a statement on a public issue may be suppressed because it is believed by a court to be untrue is entirely inconsistent with constitutional guarantees and raises the spectre of censorship in a most pernicious form.

. . .

Watson next asserts that the *Near* rationale is inapplicable because the reprinting of newspaper articles does not constitute political discussion. But the mere fact that petitioner chose this type of format, rather than the typical narrative method, to bring his concept of Watson's background to the attention of the voters can have no significant effect upon the status of the articles as a form of political presentation. Indeed, as Chief Justice Hughes wrote in Lovell v. Griffin, 303 U.S. 444, 452 (1938), "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."

Even if the Newsletter constitutes protected speech, argues Watson, the injunction was justified because its publication presents a clear and present danger of a substantive evil since the circulation of misleading charges against a candidate interferes with the democratic voting process. The cases establish that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." (Bridges v. California, 314 U.S. 252, 263 (1941)). We think it evident that if publication of the Pentagon Papers did not constitute a sufficiently serious threat to justify creation of an exception to the established principles set forth above, the circulation of election campaign charges even if deemed extravagant or misleading, does not present a danger of sufficient magnitude to warrant a prior restraint.

Another argument of Watson is that the speech elements of the Newsletter are merely incidental to conduct, i. e., the activity of "deceptive campaign practices," and that, therefore, petitioner does not enjoy "unlimited First Amendment protection." Petitioner, like the defendant in *Near*, did no more than publish and distribute a circular relating to the conduct of a public official. It would be anomalous if the mere fact of publication and distribution were somehow deemed to constitute "conduct" which in turn destroyed the right to freely

publish. There is, of course, similar "conduct" involved in the circulation of every daily newspaper and its treatment of political affairs. As Justice Black wrote for the court in Mills v. Alabama, 384 U.S. 214, 218–219 (1966): "Whatever differences may exist about interpretations of the First Amendment there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes."

The circumstances of this paradigmatic case, inspired by the emotions of a political campaign, demonstrate the wisdom of, and the need for, the rule prohibiting prior restraints. In the hearings which led to the injunction, the trial court informed petitioner that he had the right to state the "truth" but not "a narrow view of the truth, which may well be falsehood," and suggested changes in the Newsletter in the "interest of fairness," such as the size of type which would be suitable.

After the restraining order was issued, Watson sought a contempt citation against petitioner on the ground that the later versions of the circular did not comply with the order. . . .

Thus, petitioner was placed in the untenable position of speculating on whether his attempts to comply with the court orders were satisfactory or whether additional versions of the Newsletter would also be repressed. The result was not merely a theoretical chilling of his right to publish, but actual acquiescence by him, under threat of contempt, in refraining from future publication of any of the four versions of the circular. [ ] By the restraining order the court also devised for itself an intolerable role: it was called upon to determine whether various versions of the Newsletter presented "too narrow a view of the truth" and whether successive publications were "substantially similar" to the original circular. It even went so far as to specify such details of publication as the size of type which would give a "fair" presentation. The court thus aggressively assumed the role of governmental censor, approving its version of a "fair" presentation, and disapproving a "too narrow view of the truth."

We do not intend to imply approval of the dubious tactics employed by petitioner in the Newsletter or to suggest that prior restraint upon publication can never be justified. . . . However, we have not discovered any case upholding the power of a court to restrain publication of a statement regarding the official conduct of a public officer on the ground that the statement was not wholly true or was presented in a deceptive manner. The judiciary has been ever

mindful of Thomas Jefferson's aphorism that "error of opinion may be tolerated when reason is free to combat it".

We hold, therefore, that the preliminary injunction violated petitioner's rights of freedom of expression under the United States Constitution, and for an independent ground, under the broader terms of the California Constitution. The orders must be annulled.

. . .

WRIGHT, C. J., MCCOMB, J., TOBRINER, J., SULLIVAN, J., CLARK, J., and RICHARDSON, J., concurred.

Notes and Questions

1. If the judge had limited himself to enjoining the distribution of the documents that he had actually before him, would the result have been the same? Are new problems raised when the judge in addition orders Wilson not to issue statements "substantially similar" to those made in the newsletter?

2. Is the result based in part on the doubt about whether Wilson's statements were "false," "unfair," or a "narrower view of truth, which may well be falsehood?" Might it matter to the court whether the statement reported a bribery charge against an opponent (a) with no date, (b) with the accurate date in tiny print, or (c) with a falsified date? Similarly, is there a significant difference between (a) not reporting the acquittal, (b) reporting it on another page, (c) reporting it in tiny print, (d) falsely reporting that he was convicted?

3. Why does the court suggest that prior restraints on political discussion are unjustifiable during election campaigns?

4. Jefferson is quoted as saying that "error of opinion may be tolerated when reason is free to combat it." Does that passage apply to this case?

5. It is a crime in several states to make certain false statements affecting an election campaign. For example, consider New York's Election Law § 472(a) adopted in 1974:

> In addition to the powers and duties elsewhere enumerated in this article, the state board of elections, after public hearings, shall adopt a "fair campaign code" setting forth ethical standards of conduct for persons, political parties and committees engaged in election campaigns including, but not limited to, specific prohibitions against practices of political espionage and other political practices involving subversion of the political parties and process, attacks based on racial, religious or ethnic background and deliberate misrepresentation of a candidate's qualifi-

cations, position on a political issue, party affiliation or party endorsement.

The New York provision is limited to persons engaged in election campaigns, and § 484(a) specifically excludes "any person, association, or corporation engaged in the publication or distribution of any newspaper or other publication issued at regular intervals." Why exclude an editorial or article that deliberately misstates facts about a candidate?

6. A three-judge court invalidated the Code adopted in conformity with New York Election Law § 472(a). At the outset, the court agreed with the state board's argument based on *Garrison*, p. 296, supra, "that calculated falsehoods are of such slight social value that no matter what the context in which they are made, they are not constitutionally protected." This was true even though freedom of speech "has its fullest and most urgent applications" in political campaigns. Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971). This approach, however, did not save the provisions of the code that barred "misrepresentations" of a candidate's position, party affiliation, or qualifications. The statute and code "have not been so carefully drawn or authoritatively construed as to regulate only unprotected expression." The problem was overbroad statement of what was forbidden as well as a failure of the regulations to require that the misrepresentations be "deliberately" or "recklessly" false.

The court also rejected the "blanket prohibition" on attacks on a candidate's race, sex, religion or ethnic background. The state had defended these prohibitions on the ground that such statements were "completely unrelated to any candidate's 'fitness for office.'" Calling this an "exercise in self-delusion," the court stated that it "would be a retreat from reality to hold that voters do not consider race, religion, sex or ethnic background when choosing political candidates." The court relied on the Supreme Court's libel decision in Monitor Patriot Co. v. Roy, in which the Court held "as a matter of constitutional law that a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office" for purposes of applying the "knowing falsehood or reckless disregard" rule of *New York Times*. The Court also noted that given the "realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks." The statute and the regulations were declared unconstitutional on their face. Vanasco v. Schwartz, 401 F.Supp. 87 (E.D.N.Y.1975). The Supreme Court affirmed without opinion 423 U.S. 1041 (1976).

7. In the Mills case cited in *Wilson* the Supreme Court unanimously reversed the conviction of a newspaper editor for writing an editorial

in violation of a statute prohibiting "electioneering" or solicitation of votes on election day:

> Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free. The Alabama Corrupt Practices Act by providing criminal penalties for publishing editorials such as the one here silences the press at a time when it can be most effective. It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press. (218–19)

The state claimed to be protecting the public from confusing "last minute charges" that could not be answered, but the court noted that such charges could still be made on the day before the election. Is there a stronger justification for such a law?

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2. Access to the Public

MIAMI HERALD PUBLISHING CO. v. TORNILLO

Supreme Court of the United States, 1974.
418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The issue in this case is whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper, violates the guarantees of a free press.

I

In the fall of 1972, appellee, Executive Director of the Classroom Teachers Association, apparently a teachers' collective-bargaining agent, was a candidate for the Florida House of Representatives. On September 20, 1972, and again on September 29, 1972, appellant printed editorials critical of appellee's candidacy.* In response to these editorials appellee demanded that appellant print verbatim his replies, defending the role of the Classroom Teachers Association and the organization's accomplishments for the citizens of Dade County. Appellant declined to print the appellee's replies, and appellee brought suit in Circuit Court, Dade County, seeking declaratory and

* [The editorials are reprinted in the opinion. The proposed replies are printed in Lange, The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment, 52 N.C.L.Rev. 1, 60 n. 272 (1973)—ed.]

injunctive relief and actual and punitive damages in excess of $5,000. The action was premised on Florida Statute § 104.38 (1973), a "right of reply" statute which provides that if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges. The reply must appear in as conspicuous a place and in the same kind of type as the charges which prompted the reply, provided it does not take up more space than the charges. Failure to comply with the statute constitutes a first-degree misdemeanor.[2]

Appellant sought a declaration that § 104.38 was unconstitutional. After an emergency hearing requested by appellee, the Circuit Court denied injunctive relief because, absent special circumstances, no injunction could properly issue against the commission of a crime, and held that § 104.38 was unconstitutional as an infringement on the freedom of the press under the First and Fourteenth Amendments to the Constitution. 38 Fla.Supp. 80 (1972). The Circuit Court concluded that dictating what a newspaper must print was no different from dictating what it must not print. The Circuit Judge viewed the statute's vagueness as serving "to restrict and stifle protected expression." Id., at 83. Appellee's cause was dismissed with prejudice.

On direct appeal, the Florida Supreme Court reversed, holding that § 104.38 did not violate constitutional guarantees. 287 So.2d 78 (1973). It held that free speech was enhanced and not abridged by the Florida right-of-reply statute, which in that court's view, furthered the "broad societal interest in the free flow of information to the public." Id., at 82. It also held that the statute is not impermissibly vague; the statute informs "those who are subject to it as to what conduct on their part will render them liable to its penalties." Id., at 85.[4] Civil remedies, including damages, were held to be availa-

2. "104.38 *Newspaper assailing candidate in an election; space for reply*— If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083."

4. The Supreme Court placed the following limiting construction on the statute:

"[W]e hold that the mandate of the statute refers to 'any reply' which is wholly responsive to the charge made

ble under this statute; the case was remanded to the trial court for further proceedings not inconsistent with the Florida Supreme Court's opinion.

. . .

III

A

The challenged statute creates a right to reply to press criticism of a candidate for nomination or election. The statute was enacted in 1913 and this is only the second recorded case decided under its provisions.

Appellant contends the statute is void on its face because it purports to regulate the content of a newspaper in violation of the First Amendment. Alternatively it is urged that the statute is void for vagueness since no editor could know exactly what words would call the statute into operation. It is also contended that the statute fails to distinguish between critical comment which is and which is not defamatory.

B

The appellee and supporting advocates of an enforceable right of access to the press vigorously argue that government has an obligation to ensure that a wide variety of views reach the public.[8] The contentions of access proponents will be set out in some detail.[9] It is urged that at the time the First Amendment to the Constitution was enacted in 1791 as part of our Bill of Rights the press was broadly representative of the people it was serving. While many of the newspapers were intensely partisan and narrow in their views, the press collectively presented a broad range of opinions to readers. Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers. A true marketplace of ideas existed in which there was relatively easy access to the channels of communication.

in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane." Id., at 86.

8. See generally Barron, Access to the Press—A New First Amendment Right, 80 Harv.L.Rev. 1641 (1967).

9. For a good overview of the position of access advocates see Lange, The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment, 52 N.C.L.Rev. 1, 8–9 (1973) (hereinafter Lange).

Access advocates submit that although newspapers of the present are superficially similar to those of 1791 the press of today is in reality very different from that known in the early years of our national existence. In the past half century a communications revolution has seen the introduction of radio and television into our lives, the promise of a global community through the use of communications satellites, and the specter of a "wired" nation by means of an expanding cable television network with two-way capabilities. The printed press, it is said, has not escaped the effects of this revolution. Newspapers have become big business and there are far fewer of them to serve a larger literate population. Chains of newspapers, national newspapers, national wire and news services, and one-newspaper towns,[13] are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events. Major metropolitan newspapers have collaborated to establish news services national in scope. Such national news organizations provide syndicated "interpretive reporting" as well as syndicated features and commentary, all of which can serve as part of the new school of "advocacy journalism."

The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper's being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion.[15] Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretive analysis. The abuses of bias and manipulative reportage are, likewise, said to be the

13. "Nearly half of U.S. daily newspapers, representing some three-fifths of daily and Sunday circulation, are owned by newspaper groups and chains, including diversified business conglomerates. One-newspaper towns have become the rule with effective competition operating in only 4 percent of our large cities." Background Paper by Alfred Balk in Twentieth Century Fund Task Force Report for a National News Council, A Free and Responsive Press 18 (1973).

15. "Local monopoly in printed news raises serious questions of diversity of information and opinion. What a local newspaper does not print about local affairs does not see general print at all. And, having the power to take initiative in reporting and enunciation of opinions, it has extraordinary power to set the atmosphere and determine the terms of local consideration of public issues." B. Bagdikian, The Information Machines 127 (1971).

result of the vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues. The monopoly of the means of communication allows for little or no critical analysis of the media except in professional journals of very limited readership. . . .

The obvious solution, which was available to dissidents at an earlier time when entry into publishing was relatively inexpensive, today would be to have additional newspapers. But the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers,[16] have made entry into the marketplace of ideas served by the print media almost impossible. It is urged that the claim of newspapers to be "surrogates for the public" carries with it a concomitant fiduciary obligation to account for that stewardship. From this premise it is reasoned that the only effective way to insure fairness and accuracy and to provide for some accountability is for government to take affirmative action. The First Amendment interest of the public in being informed is said to be in peril because the "marketplace of ideas" is today a monopoly controlled by the owners of the market.

Proponents of enforced access to the press take comfort from language in several of this Court's decisions which suggests that the First Amendment acts as a sword as well as a shield, that it imposes obligations on the owners of the press in addition to protecting the press from government regulation. In Associated Press v. United States, [ ], the Court, in rejecting the argument that the press is immune from the antitrust laws by virtue of the First Amendment, stated:

> "The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First

16. The newspapers have persuaded Congress to grant them immunity from the antitrust laws in the case of "failing" newspapers for joint operations. 84 Stat. 466, 15 U.S.C. § 1801 et seq.

Amendment does not sanction repression of that freedom by private interests." (Footnote omitted.)

In New York Times Co. v. Sullivan, [ ], the Court spoke of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." It is argued that the "uninhibited, robust" debate is not "wide-open" but open only to a monopoly in control of the press. Appellee cites the plurality opinion in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 47, and n. 15 (1971), which he suggests seemed to invite experimentation by the States in right-to-access regulation of the press.[18]

Access advocates note that MR. JUSTICE DOUGLAS a decade ago expressed his deep concern regarding the effects of newspaper monopolies:

> "Where one paper has a monopoly in an area, it seldom presents two sides of an issue. It too often hammers away on one ideological or political line using its monopoly position not to educate people, not to promote debate, but to inculcate in its readers one philosophy, one attitude—and to make money." "The newspapers that give a variety of views and news that is not slanted or contrived are few indeed. And the problem promises to get worse . . . ." The Great Rights 124–125, 127 (E. Cahn ed. 1963).

They also claim the qualified support of Professor Thomas I. Emerson, who has written that "[a] limited right of access to the press can be safely enforced," although he believes that "[g]overnment measures to encourage a multiplicity of outlets, rather than compelling a few outlets to represent everybody, seems a preferable course of action." T. Emerson, The System of Freedom of Expression 671 (1970).

18. "If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern.*

> "[*] Some states have adopted retraction statutes or right-of-reply statutes . . . .
>
> "One writer, in arguing that the First Amendment itself should be read to guarantee a right of access to the media not limited to a right to respond to defamatory falsehoods, has suggested several ways the law might encourage public discussion. Barron, Access to the Press—A New First Amendment Right, 80 Harv. L.Rev. 1641, 1666–1678 (1967). It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. Constitutional adjudication must take into account the individual's interest in access to the press as well as the individual's interest in preserving his reputation, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesired press attention. A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly."

IV

However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years.[20]

The Court foresaw the problems relating to government-enforced access as early as its decision in Associated Press v. United States, supra. There it carefully contrasted the private "compulsion to print" called for by the Association's bylaws with the provisions of the District Court decree against appellants which "does not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published." 326 U.S., at 20 n. 18. In Branzburg v. Hayes, [ ], we emphasized that the cases then before us "involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold." In Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 117 (1973), the plurality opinion as to Part III noted:

> "The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers."

An attitude strongly adverse to any attempt to extend a right of access to newspapers was echoed by several Members of this Court in their separate opinions in that case. Id., at 145 (STEWART, J., concurring); id., at 182 n. 12 (BRENNAN, J., dissenting). Recently, while approving a bar against employment advertising specifying "male" or "female" preference, the Court's opinion in Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 391 (1973), took pains to limit its holding within narrow bounds:

> "Nor, *a fortiori*, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the pro-

20. Because we hold that § 104.38 violates the First Amendment's guarantee of a free press we have no occasion to consider appellant's further argument that the statute is unconstitutionally vague.

tection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial."

Dissenting in *Pittsburgh Press*, MR. JUSTICE STEWART, joined by MR. JUSTICE DOUGLAS, expressed the view that no "government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot." [ ]

We see that beginning with *Associated Press*, supra, the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such a compulsion to publish that which " 'reason' tells them should not be published" is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.

Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak because "the statute in question here has not prevented the *Miami Herald* from saying anything it wished" begs the core question. Compelling editors or publishers to publish that which " 'reason' tells them should not be published" is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. Grosjean v. American Press Co., [ ]. The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.[22]

22. "However since the amount of space a newspaper can devote to 'live news' is finite,* if a newspaper is forced to publish a particular item, it must as a practical matter, omit something else.

"[*] The number of column inches available for news is predetermined by a number of financial and physical factors, including circulation, the amount of advertising, and increasingly, the availability of newsprint. . . ." Note, 48 Tulane L.Rev. 433, 438 (1974) (one footnote omitted).

Another factor operating against the "solution" of adding more pages to ac-

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate," New York Times Co. v. Sullivan, [ ]. The Court, in Mills v. Alabama, 384 U.S. 214, 218 (1966), stated that

> "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates . . . ."

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forego publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. Accordingly, the judgment of the Supreme Court of Florida is reversed.

It is so ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE REHNQUIST joins, concurring.

I join the Court's opinion which, as I understand it, addresses only "right of reply" statutes and implies no view upon the constitutionality of "retraction" statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction. See generally Note, Vindication of the Reputation of a Public Official, 80 Harv.L.Rev. 1730, 1739–1747 (1967).

MR. JUSTICE WHITE, concurring.

The Court today holds that the First Amendment bars a State from requiring a newspaper to print the reply of a candidate for pub-

commodate the access matter is that "increasingly subscribers complain of bulky, unwieldly papers." Bagdikian, Fat Newspapers and Slim Coverage, Columbia Journalism Review 19 (Sept./Oct. 1973).

lic office whose personal character has been criticized by that newspaper's editorials. According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned. New York Times Co. v. United States, 403 U.S. 713 (1971). A newspaper or magazine is not a public utility subject to "reasonable" governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed. Cf. Mills v. Alabama, 384 U.S. 214, 220 (1966). We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer "the power of reason as applied through public discussion" and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press. . . .

. . .

To justify this statute, Florida advances a concededly important interest of ensuring free and fair elections by means of an electorate informed about the issues. But prior compulsion by government in matters going to the very nerve center of a newspaper—the decision as to what copy will or will not be included in any given edition—collides with the First Amendment. Woven into the fabric of the First Amendment is the unexceptionable, but nonetheless timeless, sentiment that "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper." 2 Z. Chafee, Government and Mass Communications 633 (1947).

The constitutionally obnoxious feature of § 104.38 is not that the Florida Legislature may also have placed a high premium on the protection of individual reputational interests; for government certainly has "a pervasive and strong interest in preventing and redressing attacks upon reputation." Rosenblatt v. Baer, 383 U.S. 75, 86 (1966). Quite the contrary, this law runs afoul of the elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor. . . .

. . .

Reaffirming the rule that the press cannot be forced to print an answer to a personal attack made by it, however, throws into stark relief the consequences of the new balance forged by the Court in the companion case also announced today. Gertz v. Robert Welch, Inc., [ ], goes far toward eviscerating the effectiveness of the ordinary libel action, which has long been the only potent response available to the private citizen libeled by the press. Under *Gertz*, the burden of

proving liability is immeasurably increased, proving damages is made exceedingly more difficult, and vindicating reputation by merely proving falsehood and winning a judgment to that effect are wholly foreclosed. Needlessly, in my view, the Court trivializes and denigrates the interest in reputation by removing virtually all the protection the law has always afforded.

Of course, these two decisions do not mean that because government may not dictate what the press is to print, neither can it afford a remedy for libel in any form. *Gertz* itself leaves a putative remedy for libel intact, albeit in severely emaciated form; and the press certainly remains liable for knowing or reckless falsehoods under New York Times Co. v. Sullivan, [ ], and its progeny, however improper an injunction against publication might be.

One need not think less of the First Amendment to sustain reasonable methods for allowing the average citizen to redeem a falsely tarnished reputation. . . . To me it is a near absurdity to so deprecate individual dignity, as the Court does in *Gertz*, and to leave the people at the complete mercy of the press, at least in this stage of our history when the press, as the majority in this case so well documents, is steadily becoming more powerful and much less likely to be deterred by threats of libel suits.

Notes and Questions

1. Although the statute was limited to attacks on candidates in election campaigns the majority treats the case as involving a general right of access to the press. Should it have mattered that the law was designed to assure the free flow of information to the public only in the political area and only at a specific point in the political process? The Florida Supreme Court had emphasized this aspect of the state's objective in upholding the statute (287 So.2d 78, 80–81, 86):

> The election of leaders of our government by a majority of the qualified electors is the fundamental precept upon which our system of government is based, and is an integral part of our nation's history. Recognizing that there is a right to publish without prior governmental restraint, we also emphasize that there is a correlative responsibility that the public be fully informed.
>
> The entire concept of freedom of expression as seen by our founding fathers rests upon the necessity for a fully informed electorate. James Madison wrote that, "A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy; or, perhaps both. Knowledge will forever govern ignorance; and a people who mean to be

their own governors, must arm themselves with the power which knowledge gives" (to W. T. Barry, August 4, 1822).

The public *"need to know"* is most critical during an election campaign. By enactment of the first comprehensive corrupt practices act relating to primary elections in 1909 our legislature responded to the need for insuring free and fair elections. . . . The statutory provision . . . was enacted not to punish, coerce or censor the press but rather as a part of a centuries old legislative task of *maintaining conditions conducive to free and fair elections.* The Legislature in 1913 decided that owners of the printing press had already achieved such political clout that when they engaged in character assailings, the victim's electoral chances were unduly and improperly diminished. To assure fairness in campaigns, the assailed candidate had to be provided an equivalent opportunity to respond; otherwise not only the candidate would be hurt *but also* the people would be deprived of both sides of the controversy.

What some segments of the press seem to lose sight of is that the First Amendment guarantee is "not for the benefit of the press so much as for the benefit of us all." [10] Speech concerning public affairs is more than self expression. It is the essence of self government.[11]

. . .

In conclusion, we do not find that the operation of the statute would interfere with freedom of the press as guaranteed by the Florida Constitution and the Constitution of the United States. Indeed it strengthens the concept in that it presents both views leaving the reader the freedom to reach his own conclusion. This decision will encourage rather than impede the wide open and robust dissemination of ideas and counterthought which the concept of free press both fosters and protects and which is essential to intelligent self government.

Is the justification for an access statute strongest—or weakest—when limited to election campaigns rather than being categorical? For the legislative history of the statute, including the odd fact that it was sponsored by an editor and that seven of the eight newspapermen in the legislature supported it, see Hoffer and Butterfield, The Right to Reply: A Florida First Amendment Aberration, 53 Journ.Q. 111 (1976).

Access in Electoral Campaigns. Can a special case be made for requiring access to the media in election campaigns? The emphasis

10. Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

11. Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964).

on access to the mass media during election campaigns assumes that advertisements in or endorsements by the media are of great importance to candidates. Yet so far empirical studies have revealed that the media have very little effect. One reviewer summarized the behavioral science literature on the point, Weiss, Effects of the Mass Media of Communication, in 5 Handbook of Social Psychology 77 (E. Aronson & G. Lindzey 2d ed. 1969): "When the effects of the media on the outcomes of political campaigns in an open society are limited to conversions of vote intentions from one party to another, the media seem relatively ineffective. Few people appear to be converted merely through exposure to formal political communications. The available evidence suggests that the preponderance of total media effects is contributed by the reinforcement or substantiation of vote decisions brought about by other factors, such as habitual patterns of voting or social and personal influences."

On the other hand, it is also clear that the impotence of the media in moving voters generally from one political party to another does not extend to local elections. There the importance of editorial endorsement is well established. See e.g., McCombs, Editorial Endorsement; A Study of Influence, 44 Journ.Q. 545 (1967). Why might newspaper endorsements be more effective in local campaigns? A review of recent presidential campaigns suggests the importance of the local newspaper's endorsement in its community. Robinson, The Press as King-Maker: What Surveys from the Last Five Campaigns Show, 51 Journ.Q. 587 (1974). See also, Patterson & McClure, Political Advertising: Voter Reaction, 37 Public Opinion 447 (1973).

Although, with the exception of newspaper endorsements, the effects of the media appear to be minimal during election campaigns, studies suggest that the impact between campaigns is of far greater significance. Again Weiss summarizes:

> As has been pointed out by Lang and Lang [The Mass Media and Voting, in Reader in Public Opinion and Communication 455 (B. Berelson & M. Janowitz 2d ed. 1966)], the media do not merely transmit messages, but structure "reality" by selecting, emphasizing, and interpreting events. This pervasive influence of the media may lead to small cumulative changes between campaigns, at a time when political identifications and partisanship may not be salient; the net result may be to affect the dispositions themselves . . . or to set the perceptual frame in which the campaign is interpreted and responded to. . . .

Does this support the desirability of legislating or judicially recognizing a right of access to the press? Should the right of reply be established only where endorsements have been shown to be effective?

On balance, is the right of reply likely to expand or contract the breadth of political debate?

2. Jerome A. Barron, whose 1967 Harvard Law Review article is cited in *Tornillo*, was the first modern exponent of access to the press as a First Amendment right in many situations. Barron also represented the appellee in the Supreme Court. His view, further developed in his Freedom of the Press for Whom? (1973), places great weight on changes in the media between 1791 and today. Which of these changes might bolster Barron's position? In 1975 the advertising content of newspapers averaged 63.7 percent, news content 34.7 percent, and house linage 1.6%. Editor & Publisher, Mar. 20, 1976, p. 36. Is this relevant to the Court's concern about the increasing bulk of newspapers?

3. How do the Florida court and the Supreme Court analyze the issue of "compulsion" to print in terms of the traditional First Amendment framework of prior restraints and subsequent punishment? Is an affirmative obligation to print something any more or less onerous than a negative ban on certain kinds of publication? From a philosophical standpoint, can *Tornillo* be seen as a conflict between "freedom from" and "freedom to?" Or a conflict between "press" and "speech?"

4. Might the statute in *Tornillo* have withstood attack if it had required a demonstration of "falsity"—or deliberate falsity—in the newspaper coverage before making access available?

5. Is there a basis for Justice Brennan's assertion that the Court's opinion does not bring into question a statute that would give defamation plaintiffs who prove falsity the right to a mandatory retraction? Consider the differences among statutes that required the paper to say "We were wrong" or "A court has ordered us to state that it has found that we were in error" or "A court has ordered us to retract our statement. . . ."

What about a statute that gave the publisher a choice between paying damages and issuing a retraction?

6. In a book devoted almost exclusively to the access question, it is claimed that the *Tornillo* ruling is "almost devoid of reasoned support, its use of precedent is disingenuous, and the constitutional principle announced is not consistent with other rules grounded in the First Amendment." B. Schmidt, Jr., Freedom of the Press vs. Public Access 13 (1976). Since unreasoned opinions are fragile, "the sweeping and conclusive fashion in which the Court rejected the constitutionality of access statutes may prove less durable than less categorical arguments against broad access requirements." Later, at p.

234, the author suggests that the Court may have written sweepingly to counter the broad claims of the Florida opinions and the academic supporters of access. Although the case does recognize "autonomy of the press" as a "guarantee of constitutional dimension," later cases may impose some limit on the broad proposition, as in other First Amendment areas. For a similar suggestion that the case may be less sweeping than its language, see The Supreme Court, 1973 Term, 88 Harv.L.Rev. 43, 177–78 (1974).

The significance of *Tornillo* in developing distinctions between control of print media and broadcasting is discussed in detail at p. 511, infra. One response to the *Tornillo* problem has been more discussion of unofficial "press councils" to pass upon complaints brought against media by members of the public. The subject is explored in Ritter and Leibowitz, Press Councils: The Answer to Our First Amendment Dilemma, 1974 Duke L.J. 845. The results of the efforts of the National News Council may be found in "In the Public Interest," a report of 1973–75 activities and in supplementary reports of the Council.

7. *Paid Advertisements.* The statute in question in *Tornillo* applied to newspaper "columns" generally. Would a different question of access be raised if Tornillo wanted to purchase space for political advertising?

a. With the exception of one lower court case in Ohio, courts have uniformly held that a private newspaper may reject advertising for any reason, or no reason, so long as its motive or effect is not anti-competitive, and most state action claims have been denied. When a litigant relied on the "access argument" to contend that a private paper that has established itself as a forum for advertising has an obligation to accept advertisements expressing opinions on matters of public concern, the court rejected it in a single paragraph: "We do not understand this to be the concept of freedom of the press recognized in the First Amendment." Chicago Joint Board, Amalgamated Clothing Workers of America v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970), certiorari denied 402 U.S. 973 (1971). Would the same analysis apply if the newspaper had been party to a joint operating agreement under the Newspaper Preservation Act?

b. A separate but related problem is presented when the government itself wishes to place official notices in local newspapers—often required by statute to do so. Though there are few cases it appears that the courts uniformly hold that newspapers may reject such advertising if they desire.

c. The rates that a newspaper may charge (if it does accept editorial advertising) are frequently regulated. A number of states as

well as the federal government (Federal Election Campaign Act Amendments of 1974, § 205(a), 2 U.S.C. § 435) require that a periodical charge political advertisers no more than it charges others who make "comparable use" of the same space for other purposes. Constitutional attacks on these statutes have been rejected in both Massachusetts, Opinion of the Justices to the Senate, 363 Mass. 909, 298 N. E.2d 829, 835 (1973), and New Hampshire, Chronicle & Gazette Pub. Co., Inc. v. Attorney Gen., 94 N.H. 148, 48 A.2d 478 (1946), certiorari denied 329 U.S. 690 (1947), on the ground that the regulation dealt exclusively with commercial aspects of the operation of the periodical. Compare Gore Newspapers Co. v. Shevin, 397 F.Supp. 1253 (S.D. Fla.1975), invalidating Florida's statute requiring newspapers when they sold space to candidates to charge a rate that did not exceed "the lowest local rate available to advertisers otherwise qualifying for maximum frequency discounts, bulk discounts, and advertising packages. . . ." The court assumed that the "cheapest rate is not an unprofitable rate." Nonetheless it declared the statute unconstitutional because it restrained the content of the publication. The judge relied on the *Tornillo* rationale that the access statute imposed a penalty on the press for printing certain types of material. Here the restraint was aimed at revenue rather than content but the judge thought the same principle applicable.

8. The impact of media reports of election returns during election day has raised different and possibly even more complex problems. The concern has been that early returns from the East coast might influence voters in Western time zones. There is as yet no proof of this, although long-range and indirect effects have not been ruled out. See, e. g., K. Lang & G. E. Lang, Voting and Nonvoting (1968). The Federal Election Campaign Act Amendments of 1974 passed by the Senate would have imposed a penalty on anyone who "makes public any information" on the number of votes cast for President and Vice President before midnight, Eastern Standard Time on election day. Would that have been constitutional? What about a provision requiring that all polls throughout the country close simultaneously in Presidential election years?

9. *Student Publications.* The claim that a particular forum is public, so that all must have equal access, has also been applied to student newspapers at public schools and universities. The question arises when an advertisement or an announcement is submitted for publication. Some courts have held that a newspaper run by a student organization at a public institution may not select or reject material on the basis of its content. Other courts, in language that echoes *Tornillo,* have held that the First Amendment prohibits state control of editorial judgment in such cases and protects editorial discretion.

In Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976), the majority upheld the power of the student newspaper to reject an announcement submitted by an off-campus group of students. The majority and dissenting opinions discuss the problem extensively.

Much of the apparent disagreement is due to the uncertainty about how much influence a particular campus administration may have over the policies and decisions of the student editors. Some cases have assumed that the students were really little more than agents of the administration and thus government officials were in control and the paper could not discriminate on the grounds of content. Other cases have proceeded on an understanding that university officials had no control over the newspaper's decisions, thus leaving the publication without the obligations of a public institution.

An internal problem in student newspaper cases involves efforts by school administrators to punish student editors who have carried material the administrators deemed offensive. In Papish v. Board of Curators, 410 U.S. 667 (1973), a student was expelled from the University of Missouri for distributing on campus a newspaper that contained a cartoon with an offensive caption. The Court recognized that the university officials were empowered to regulate disruptive conduct, but held that they could not prohibit the dissemination of ideas by offensive language solely for the sake of "conventions of decency." The state university was bound to the same First Amendment standards as were other agencies of the state. The power to regulate offensive speech is discussed at p. 425, infra. Courts have rejected other techniques for controlling student speech such as the requirement of prior submission of material to school officials for approval, and the cutting off of funds after material displeased officials. Finally, it appears that student editors at public institutions who are improperly fired or suspended by university officials may be able to recover damages from the officials under the federal Civil Rights Act.

The Student Press Law Center in Washington, D. C., has begun publishing a quarterly report on the First Amendment problems that confront college and high school newspapers in the United States. In addition, the Center has published a Manual for Student Expression: The First Amendment Rights of the High School Press (1976). See also, G. Stevens and J. Webster, Law and the Student Press (1973).

10. For the very different way in which political campaigns affect broadcast media, see p. 619, infra.

3. Evaluation of Arguments—The Question of Anonymity

Preventing false statements during campaigns and attempting to get the views of the candidates to the electorate, may still not provide the electorate with a basis for judging all the arguments. Some campaign literature may be anonymous so that voters do not know how much credence to give it—except that the fact of anonymity may itself be considered by the reader. A related problem of misattributed literature could be handled under a carefully drafted provision against false statements. The problem of anonymity has received special treatment. In Talley v. California, 362 U.S. 60 (1960), the Court overturned an ordinance barring distribution of "any hand-bill in any place under any circumstances, which does not have printed on the cover, or the face thereof, the name and address" of the person who "printed, wrote, compiled or manufactured" it and the person "who caused the same to be distributed." The state sought to defend it on the ground that the ordinance helped identify those responsible for fraud, false advertising, and libel. But the majority responded that the ordinance swept much more broadly than that in covering all handbills under all circumstances. The Court noted the great importance of anonymous pamphlets through history: "Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England . . . was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government." After discussing the role of anonymous literature in England, the opinion recalls that "Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes."

For the three dissenters, Justice Clark argued that Talley failed to present "any claim, much less proof, that he will suffer any injury whatever by identifying the handbill with his name," and thus failed to show how the ordinance was restraining his speech. Justice Clark stated he stood "second to none in supporting Talley's right of free speech—but not his freedom of anonymity. The Constitution says nothing about freedom of anonymous speech." An additional concern was that 36 states had such statutes relating to election campaign literature whose justification was the same as that offered in this case. The majority did not discuss these statutes but the dissent feared that those were being undermined along with the much broader statute in this case.

A less difficult question is presented by statutes that would require authors to sign newspaper editorials. The Supreme Judicial Court of Maine invalidated such a statute in a short opinion citing *Talley*. Opinion of the Justices, 306 A.2d 18 (Me.1973). Is the newspaper case distinguishable from that of handbills? According to the Delaware Supreme Court, the signed editorial statute presents a stronger case for invalidation since a newspaper publisher, unlike a pamphleteer, is not anonymous, and "adopts the unsigned editorial as its own, regardless of the identity of the penman." In re Opinion of the Justices, 324 A.2d 211 (Del.1974). The Delaware court also found the statute to be an impermissible interference with editorial judgment and control under *Tornillo*. Is there any justification for a requirement that only editorials seeking to influence an election be signed? Why might editorials be treated differently from advertisements with respect to anonymity?

E. PROTECTING STATE SECRETS

In this section we consider situations in which the government claims that disclosure of information will compromise or has already compromised an important state interest that requires secrecy. Although these matters are often gathered under the heading of "national security," that term is too narrow because secrecy may be claimed for matters remote from national security or international relations. For example, the concern may be that identification of an undercover narcotics agent or of an informer will seriously impede or prematurely terminate an investigation into potential criminal offenses. In a different context, a government agency may assert that disclosure of projected freeway routings or land being considered for condemnation will jeopardize the implementation. It seems more appropriate, then, to gather these cases under the broader rubric of "state secrets." Of course, not all state secret claims that impinge on speech are equally powerful. Claims of serious danger to national security may receive greater consideration than the claim that an investigation of a misdemeanor has been thwarted by the identification of one government agent. To the extent that cases involving government secrets also involve thefts of government documents or improper release of information, recall the discussion of criminal liability at p. 170, supra.

Disclosure of state secrets may occur apart from a property interest. Public disclosure by the press of a document from the foreign affairs ministry of another country might have implications for this country's national security or might seriously interfere with the conduct of foreign relations. Although the case would not involve government property, it would deal with an allegedly substantial harm to

the national interest. Is such a concern beyond the reach of government sanction?

The state secret issue may arise in a variety of contexts. The clearest case would be a carefully drawn criminal statute barring unauthorized disclosure of certain information by government officials to others. This affects newsgathering, discussed at p. 197, supra. Another might involve a carefully drawn criminal statute banning publication of certain information by the press. In a third situation, with or without a properly drawn criminal statute, the government seeks to enjoin an official from making a disclosure that the government believes would violate its interest. Fourth, the government may rely on a contract relationship to enjoin an employee from disclosing unauthorized information. If the disclosure has already occurred, the government may seek damages for breach of contract. A fifth situation, central to the "Pentagon Papers" case, is a government effort to enjoin media from publishing information already obtained.

Several Justices discussed possible criminal sanctions against the media, in considering the steps taken by two newspapers to publish excerpts from a classified 47-volume Pentagon study. After the first excerpts appeared, the government sought to enjoin the publication of the rest. The problem had been alluded to in Near v. Minnesota, 283 U.S. 697 (1931), when the Court suggested several situations in which "prior restraint" might be permissible. It quoted *Schenck*, 249 U.S. 47 (1919): "When a nation is at war, many things that might be said in time of peace are such a hindrance to its efforts that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." The Court in *Near* stated: "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing date of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications." Again, quoting *Schenck*, the Court observed that the constitutional guarantee of free speech does not "protect a man from an injunction against uttering words that may have all the effect of force."

NEW YORK TIMES CO. v. UNITED STATES

Supreme Court of the United States, 1971.
403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822.

[On June 13, 1971, the New York Times began publishing portions of a secret Defense Department compilation of the history of the Vietnam involvement, known as the Pentagon Papers. The government sought an injunction in federal court in New York to stop the publication. On June 18, the Washington Post also began publishing portions of the documents, and a separate government action to restrain publication was brought in the District of Columbia. Between June 15 and June 23, district courts in New York and the District of Columbia considered the cases and courts of appeals decided appeals in both cases. On June 25, the Supreme Court granted certiorari in the Times and Post cases. Restraining orders were continued in effect, barring publication in both cases pending the Supreme Court's disposition of the cases. Four Justices—Black, Douglas, Brennan and Marshall—dissented from the grants of certiorari, urged summary action, and stated that they "would not continue the restraint" on the newspapers. Oral argument was heard on June 26, and the Supreme Court rendered the decision four days later, on June 30, 1971.]

PER CURIAM.

We granted certiorari in these cases in which the United States seeks to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled "History of U. S. Decision-Making Process on Viet Nam Policy." [ ]

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); see also Near v. Minnesota, 283 U.S. 697 (1931). The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). The District Court for the Southern District of New York in the *New York Times* case and the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit in the *Washington Post* case held that the Government had not met that burden. We agree.

The judgment of the Court of Appeals for the District of Columbia Circuit is therefore affirmed. The order of the Court of Appeals for the Second Circuit is reversed and the case is remanded with directions to enter a judgment affirming the judgment of the District Court for the Southern District of New York. The stays entered

June 25, 1971, by the Court are vacated. The judgments shall issue forthwith.

So ordered.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

I adhere to the view that the Government's case against the Washington Post should have been dismissed and that the injunction against the New York Times should have been vacated without oral argument when the cases were first presented to this Court. I believe that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment. Furthermore, after oral argument, I agree completely that we must affirm the judgment of the Court of Appeals for the District of Columbia Circuit and reverse the judgment of the Court of Appeals for the Second Circuit for the reasons stated by my Brothers DOUGLAS and BRENNAN. In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment.

. . .

In other words, we are asked to hold that despite the First Amendment's emphatic command, the Executive Branch, the Congress, and the Judiciary can make laws enjoining publication of current news and abridging freedom of the press in the name of "national security." The Government does not even attempt to rely on any act of Congress. Instead it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to "make" a law abridging freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law. . . . To find that the President has "inherent power" to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make "secure." No one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that Madison and his collaborators intended to outlaw in this Nation for all time.

The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides

no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged. . . .

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK joins, concurring.

While I join the opinion of the Court I believe it necessary to express my views more fully.

It should be noted at the outset that the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." That leaves, in my view, no room for governmental restraint on the press.

There is, moreover, no statute barring the publication by the press of the material which the Times and the Post seek to use. Title 18 U.S.C. § 793(e) provides that "[w]hoever having unauthorized possession of, access to, or control over any document, writing . . . or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates . . . the same to any person not entitled to receive it . . . [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both."

The Government suggests that the word "communicates" is broad enough to encompass publication.

There are eight sections in the chapter on espionage and censorship, §§ 792–799. In three of those eight "publish" is specifically mentioned: § 794 (b) applies to "Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, *publishes*, or communicates . . . [the disposition of armed forces]."

Section 797 applies to whoever "reproduces, *publishes*, sells, or gives away" photographs of defense installations.

Section 798 relating to cryptography applies to whoever: "communicates, furnishes, transmits, or otherwise makes available . . . *or publishes*" the described material. (Emphasis added.)

Thus it is apparent that Congress was capable of and did distinguish between publishing and communication in the various sections of the Espionage Act.

. . .

So any power that the Government possesses must come from its "inherent power."

The power to wage war is "the power to wage war successfully." See Hirabayashi v. United States, 320 U.S. 81, 93 (1943). But the war power stems from a declaration of war. The Constitution by Art. I, § 8, gives Congress, not the President, power "[t]o declare War." Nowhere are presidential wars authorized. We need not decide therefore what leveling effect the war power of Congress might have.

These disclosures [3] may have a serious impact. But that is no basis for sanctioning a previous restraint on the press. . . .

. . .

The Government says that it has inherent powers to go into court and obtain an injunction to protect the national interest, which in this case is alleged to be national security.

Near v. Minnesota, 283 U.S. 697 (1931), repudiated that expansive doctrine in no uncertain terms.

The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be. [ ] The present cases will, I think, go down in history as the most dramatic illustration of that principle. A debate of large proportions goes on in the Nation over our posture in Vietnam. That debate antedated the disclosure of the contents of the present documents. The latter are highly relevant to the debate in progress.

Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be "uninhibited, robust, and wide-open" debate. [ ]

. . .

MR. JUSTICE BRENNAN, concurring.

. . .

The error that has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise. The entire thrust of the Government's claim throughout these cases

3. There are numerous sets of this material in existence and they apparently are not under any controlled custody. Moreover, the President has sent a set to the Congress. We start then with a case where there already is rather wide distribution of the material that is destined for publicity, not secrecy. I have gone over the material listed in the *in camera* brief of the United States. It is all history, not future events. None of it is more recent than 1968.

has been that publication of the material sought to be enjoined "could," or "might," or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.* Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation "is at war," Schenck v. United States, 249 U.S. 47, 52 (1919), during which times "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." Near v. Minnesota, 283 U.S. 697, 716 (1931). Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature. . . .

MR. JUSTICE STEWART, with whom MR. JUSTICE WHITE joins, concurring.

. . .

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.

Yet it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. . . .

* Freedman v. Maryland, 380 U.S. 51 (1965), and similar cases regarding temporary restraints of allegedly obscene materials are not in point. For those cases rest upon the proposition that "obscenity is not protected by the freedoms of speech and press." Roth v. United States, 354 U.S. 476, 481 (1957). Here there is no question but that the material sought to be suppressed is within the protection of the First Amendment; the only question is whether, notwithstanding that fact, its publication may be enjoined for a time because of the presence of an overwhelming national interest. . . .

I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. . . .

This is not to say that Congress and the courts have no role to play. Undoubtedly Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. Congress has passed such laws, and several of them are of very colorable relevance to the apparent circumstances of these cases. And if a criminal prosecution is instituted, it will be the responsibility of the courts to decide the applicability of the criminal law under which the charge is brought. Moreover, if Congress should pass a specific law authorizing civil proceedings in this field, the courts would likewise have the duty to decide the constitutionality of such a law as well as its applicability to the facts proved.

But in the cases before us we are asked neither to construe specific regulations nor to apply specific laws. We are asked, instead, to perform a function that the Constitution gave to the Executive, not the Judiciary. We are asked, quite simply, to prevent the publication by two newspapers of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us. I join the judgments of the Court.

MR. JUSTICE WHITE, with whom MR. JUSTICE STEWART joins, concurring.

I concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system. I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations.[1] Nor,

1. The Congress has authorized a strain of prior restraints against private parties in certain instances. The National Labor Relations Board routinely issues cease-and-desist orders against employers who it finds have threatened or coerced employees in the exercise of protected rights. See 29 U.S.C. § 160(c). Similarly, the Federal Trade Commission is empowered to impose cease-and-desist orders against unfair methods of competition. 15 U.S.C. § 45(b). Such orders can, and quite often do, restrict what may be spoken or written under certain circumstances. See, e.g., NLRB v. Gis-

after examining the materials the Government characterizes as the most sensitive and destructive, can I deny that revelation of these documents will do substantial damage to public interests. Indeed, I am confident that their disclosure will have that result. But I nevertheless agree that the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases, at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these.

. . .

At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press. Much of the difficulty inheres in the "grave and irreparable danger" standard suggested by the United States. If the United States were to have judgment under such a standard in these cases, our decision would be of little guidance to other courts in other cases, for the material at issue here would not be available from the Court's opinion or from public records, nor would it be published by the press. . . .

It is not easy to reject the proposition urged by the United States and to deny relief on its good-faith claims in these cases that publication will work serious damage to the country. But that discomfiture is considerably dispelled by the infrequency of prior-restraint cases. Normally, publication will occur and the damage be done before the Government has either opportunity or grounds for suppression. So here, publication has already begun and a substantial part of the threatened damage has already occurred. The fact of a massive breakdown in security is known, access to the documents by many unauthorized people is undeniable, and the efficacy of equitable relief against these or other newspapers to avert anticipated damage is doubtful at best.

. . .

sel Packing Co., 395 U.S. 575, 616–620 (1969). Article I, § 8, of the Constitution authorizes Congress to secure the "exclusive right" of authors to their writings, and no one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another. See Westermann Co. v. Dispatch Printing Co., 249 U.S. 100 (1919). Newspapers do themselves rely from time to time on the copyright as a means of protecting their accounts of important events. However, those enjoined under the statutes relating to the National Labor Relations Board and the Federal Trade Commission are private parties, not the press; and when the press is enjoined under the copyright laws the complainant is a private copyright holder enforcing a private right. These situations are quite distinct from the Government's request for an injunction against publishing information about the affairs of government, a request admittedly not based on any statute.

The Criminal Code contains numerous provisions potentially relevant to these cases. Section 797 makes it a crime to publish certain photographs or drawings of military installations. Section 798, also in precise language, proscribes knowing and willful publication of any classified information concerning the cryptographic systems or communication intelligence activities of the United States as well as any information obtained from communication intelligence operations. If any of the material here at issue is of this nature, the newspapers are presumably now in full notice of the position of the United States and must face the consequences if they publish. I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint.

The same would be true under those sections of the Criminal Code casting a wider net to protect the national defense. Section 793 (e) makes it a criminal act for any unauthorized possessor of a document "relating to the national defense" either (1) willfully to communicate or cause to be communicated that document to any person not entitled to receive it or (2) willfully to retain the document and fail to deliver it to an officer of the United States entitled to receive it. The subsection was added in 1950 because pre-existing law provided no penalty for the unauthorized possessor unless demand for the documents was made. "The dangers surrounding the unauthorized possession of such items are self-evident, and it is deemed advisable to require their surrender in such a case, regardless of demand, especially since their unauthorized possession may be unknown to the authorities who would otherwise make the demand." S.Rep.No.2369, pt. 1, 81st Cong., 2d Sess., 9 (1950). . . .

It is thus clear that Congress has addressed itself to the problems of protecting the security of the country and the national defense from unauthorized disclosure of potentially damaging information. [ ] It has not, however, authorized the injunctive remedy against threatened publication. It has apparently been satisfied to rely on criminal sanctions and their deterrent effect on the responsible as well as the irresponsible press. I am not, of course, saying that either of these newspapers has yet committed a crime or that either would commit a crime if it published all the material now in its possession. That matter must await resolution in the context of a criminal proceeding if one is instituted by the United States. In that event, the issue of guilt or innocence would be determined by procedures and standards quite different from those that have purported to govern these injunctive proceedings.

MR. JUSTICE MARSHALL, concurring.

. . .

In these cases there is no problem concerning the President's power to classify information as "secret" or "top secret." Congress has specifically recognized Presidential authority, which has been formally exercised in Exec. Order 10501 (1953), to classify documents and information. See, e. g., 18 U.S.C. § 798; 50 U.S.C. § 783. Nor is there any issue here regarding the President's power as Chief Executive and Commander in Chief to protect national security by disciplining employees who disclose information and by taking precautions to prevent leaks.

. . .

It would, however, be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit. There would be a similar damage to the basic concept of these coequal branches of Government if when the Executive Branch has adequate authority granted by Congress to protect "national security" it can choose instead to invoke the contempt power of a court to enjoin the threatened conduct. The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret laws. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). It did not provide for government by injunction in which the courts and the Executive Branch can "make law" without regard to the action of Congress. It may be more convenient for the Executive Branch if it need only convince a judge to prohibit conduct rather than ask the Congress to pass a law, and it may be more convenient to enforce a contempt order than to seek a criminal conviction in a jury trial. Moreover, it may be considered politically wise to get a court to share the responsibility for arresting those who the Executive Branch has probable cause to believe are violating the law. But convenience and political considerations of the moment do not justify a basic departure from the principles of our system of government.

. . .

MR. CHIEF JUSTICE BURGER, dissenting.

So clear are the constitutional limitations on prior restraint against expression, that from the time of Near v. Minnesota, 283 U.S. 697 (1931), until recently in Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), we have had little occasion to be concerned with cases involving prior restraints against news reporting on matters of public interest. There is, therefore, little variation among the members of the Court in terms of resistance to prior re-

straints against publication. Adherence to this basic constitutional principle however, does not make these cases simple. In these cases, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government and specifically the effective exercise of certain constitutional powers of the Executive. Only those who view the First Amendment as an absolute in all circumstances—a view I respect, but reject—can find such cases as these to be simple or easy.

These cases are not simple for another and more immediate reason. We do not know the facts of the cases. No District Judge knew all the facts. No Court of Appeals judge knew all the facts. No member of this Court knows all the facts.

Why are we in this posture, in which only those judges to whom the First Amendment is absolute and permits of no restraint in any circumstances or for any reason, are really in a position to act?

I suggest we are in this posture because these cases have been conducted in unseemly haste. . . .

. . .

It is not disputed that the Times has had unauthorized possession of the documents for three to four months, during which it has had its expert analysts studying them, presumably digesting them and preparing the material for publication. During all of this time, the Times, presumably in its capacity as trustee of the public's "right to know," has held up publication for purposes it considered proper and thus public knowledge was delayed. No doubt this was for a good reason; the analysis of 7,000 pages of complex material drawn from a vastly greater volume of material would inevitably take time and the writing of good news stories takes time. But why should the United States Government, from whom this information was illegally acquired by someone, along with all the counsel, trial judges, and appellate judges be placed under needless pressure? After these months of deferral, the alleged "right to know" has somehow and suddenly become a right that must be vindicated instanter.

. . .

The consequence of all this melancholy series of events is that we literally do not know what we are acting on. As I see it, we have been forced to deal with litigation concerning rights of great magnitude without an adequate record, and surely without time for adequate treatment either in the prior proceedings or in this Court. It is interesting to note that counsel on both sides, in oral argument before this Court, were frequently unable to respond to questions on factual points. Not surprisingly they pointed out that they had been working literally "around the clock" and simply were unable to review the documents that give rise to these cases and were not famil-

iar with them. This Court is in no better posture. I agree generally with MR. JUSTICE HARLAN and MR. JUSTICE BLACKMUN but I am not prepared to reach the merits.[3]

I would affirm the Court of Appeals for the Second Circuit and allow the District Court to complete the trial aborted by our grant of certiorari, meanwhile preserving the status quo in the *Post* case. I would direct that the District Court on remand give priority to the *Times* case to the exclusion of all other business of that court but I would not set arbitrary deadlines.

I should add that I am in general agreement with much of what MR. JUSTICE WHITE has expressed with respect to penal sanctions concerning communication or retention of documents or information relating to the national defense.

We all crave speedier judicial processes but when judges are pressured as in these cases the result is a parody of the judicial function.

MR. JUSTICE HARLAN, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

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

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

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

Both the Court of Appeals for the Second Circuit and the Court of Appeals for the District of Columbia Circuit rendered judgment on June 23. The New York Times' petition for certiorari, its motion for accelerated consideration thereof, and its application for interim relief were filed in this Court on June 24 at about 11 a. m. The appli-

3. With respect to the question of inherent power of the Executive to classify papers, records, and documents as secret, or otherwise unavailable for public exposure, and to secure aid of the courts for enforcement, there may be an analogy with respect to this Court. No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required.

cation of the United States for interim relief in the *Post* case was also filed here on June 24 at about 7:15 p. m. This Court's order setting a hearing before us on June 26 at 11 a. m., a course which I joined only to avoid the possibility of even more peremptory action by the Court, was issued less than 24 hours before. The record in the *Post* case was filed with the Clerk shortly before 1 p. m. on June 25; the record in the *Times* case did not arrive until 7 or 8 o'clock that same night. The briefs of the parties were received less than two hours before argument on June 26.

This frenzied train of events took place in the name of the presumption against prior restraints created by the First Amendment. Due regard for the extraordinarily important and difficult questions involved in these litigations should have led the Court to shun such a precipitate timetable. In order to decide the merits of these cases properly, some or all of the following questions should have been faced:

1. Whether the Attorney General is authorized to bring these suits in the name of the United States. . . .

2. Whether the First Amendment permits the federal courts to enjoin publication of stories which would present a serious threat to national security. See Near v. Minnesota, 283 U.S. 697, 716 (1931) (dictum).

3. Whether the threat to publish highly secret documents is of itself a sufficient implication of national security to justify an injunction on the theory that regardless of the contents of the documents harm enough results simply from the demonstration of such a breach of secrecy.

4. Whether the unauthorized disclosure of any of these particular documents would seriously impair the national security.

5. What weight should be given to the opinion of high officers in the Executive Branch of the Government with respect to questions 3 and 4.

6. Whether the newspapers are entitled to retain and use the documents notwithstanding the seemingly uncontested facts that the documents, or the originals of which they are duplicates, were purloined from the Government's possession and that the newspapers received them with knowledge that they had been feloniously acquired. Cf. Liberty Lobby, Inc. v. Pearson, 129 U.S.App.D.C. 74, 390 F.2d 489 (1967, amended 1968).

7. Whether the threatened harm to the national security or the Government's possessory interest in the documents justifies the issuance of an injunction against publication in light of—

a. The strong First Amendment policy against prior restraints on publication;

b. The doctrine against enjoining conduct in violation of criminal statutes; and

c. The extent to which the materials at issue have apparently already been otherwise disseminated.

These are difficult questions of fact, of law, and of judgment; the potential consequences of erroneous decision are enormous. The time which has been available to us, to the lower courts, and to the parties has been wholly inadequate for giving these cases the kind of consideration they deserve. It is a reflection on the stability of the judicial process that these great issues—as important as any that have arisen during my time on the Court—should have been decided under the pressures engendered by the torrent of publicity that has attended these litigations from their inception.

Forced as I am to reach the merits of these cases, I dissent from the opinion and judgments of the Court. Within the severe limitations imposed by the time constraints under which I have been required to operate, I can only state my reasons in telescoped form, even though in different circumstances I would have felt constrained to deal with the cases in the fuller sweep indicated above.

. . .

. . . It is plain to me that the scope of the judicial function in passing upon the activities of the Executive Branch of the Government in the field of foreign affairs is very narrowly restricted. This view is, I think, dictated by the concept of separation of powers upon which our constitutional system rests.

. . .

The power to evaluate the "pernicious influence" of premature disclosure is not, however, lodged in the Executive alone. I agree that, in performance of its duty to protect the values of the First Amendment against political pressures, the judiciary must review the initial Executive determination to the point of satisfying itself that the subject matter of the dispute does lie within the proper compass of the President's foreign relations power. Constitutional considerations forbid "a complete abandonment of judicial control." Cf. United States v. Reynolds, 345 U.S. 1, 8 (1953). Moreover, the judiciary may properly insist that the determination that disclosure of the subject matter would irreparably impair the national security be made by the head of the Executive Department concerned—here the Secretary

of State or the Secretary of Defense—after actual personal consideration by that officer. This safeguard is required in the analogous area of executive claims of privilege for secrets of state. [ ]

But in my judgment the judiciary may not properly go beyond these two inquiries and redetermine for itself the probable impact of disclosure on the national security. . . .

Even if there is some room for the judiciary to override the executive determination, it is plain that the scope of review must be exceedingly narrow. I can see no indication in the opinions of either the District Court or the Court of Appeals in the *Post* litigation that the conclusions of the Executive were given even the deference owing to an administrative agency, much less that owing to a co-equal branch of the Government operating within the field of its constitutional prerogative.

. . .

MR. JUSTICE BLACKMUN, dissenting.

I join MR. JUSTICE HARLAN in his dissent. I also am in substantial accord with much that MR. JUSTICE WHITE says, by way of admonition, in the latter part of his opinion.

. . .

With such respect as may be due to the contrary view, this, in my opinion, is not the way to try a lawsuit of this magnitude and asserted importance. . . .

The First Amendment, after all, is only one part of an entire Constitution. Article II of the great document vests in the Executive Branch primary power over the conduct of foreign affairs and places in that branch the responsibility for the Nation's safety. Each provision of the Constitution is important, and I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions. First Amendment absolutism has never commanded a majority of this Court. See for example, Near v. Minnesota, 283 U.S. 697, 708 (1931), and Schenck v. United States, 249 U.S. 47, 52 (1919). What is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent. Such standards are not yet developed. The parties here are in disagreement as to what those standards should be. But even the newspapers concede that there are situations where restraint is in order and is constitutional. . . .

. . .

I strongly urge, and sincerely hope that these two newspapers will be fully aware of their ultimate responsibilities to the United States of America. Judge Wilkey, dissenting in the District of Col-

umbia case, after a review of only the affidavits before his court (the basic papers had not then been made available by either party), concluded that there were a number of examples of documents that, if in the possession of the Post, and if published, "could clearly result in great harm to the nation," and he defined "harm" to mean "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate. . . ." I, for one, have now been able to give at least some cursory study not only to the affidavits, but to the material itself. I regret to say that from this examination I fear that Judge Wilkey's statements have possible foundation. I therefore share his concern. I hope that damage has not already been done. If, however, damage has been done, and if, with the Court's action today, these newspapers proceed to publish the critical documents and there results therefrom "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate," to which list I might add the factors of prolongation of the war and of further delay in the freeing of United States prisoners, then the Nation's people will know where the responsibility for these sad consequences rests.

Notes and Questions

1. How many votes might have shifted had there been a statute explicitly authorizing the government to seek an injunction to bar release of information once the Attorney General determined that release of the information would pose a "grave and immediate danger" to national security?

2. Louis Henkin, in The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers, 120 U.Pa.L.Rev. 271 (1971), criticized the emphasis on the distinction between enjoining speech and punishing it after the fact because "while a criminal penalty more readily permits 'civil disobedience,' or reliance on the jury to acquit, stiff penalties will deter—and deny the right to know—almost as effectively as any injunction." In this case what are the differences between enjoining and punishing afterward?

3. Henkin had another criticism of the decision (278–80):

> More important, the upshot of the Court's apparent constitutional doctrine is unsatisfying. For, as regards governmental documents and information, the Constitution is apparently interpreted as ordaining that a branch of government can properly conceal even from other branches, surely from the public; but the Press is free to try to uncover, and if it succeeds it is free to publish. That kind of trial by battle and cleverness between the

three estates and the fourth hardly seems the way best to further the various aims of a democratic society. It does not ensure that what should be concealed will not be uncovered. And, on the other hand, the rare, haphazard, fortuitous, journalistic uncovering will hardly achieve effective public knowledge of all that should be known, for almost all that is concealed (needfully or not) will continue to be effectively withheld. (That some bits of it are sometimes selectively revealed by official "leaks" to chosen journalists only underscores the haphazard quality of what is disclosed.)

Nor does the implication that the courts will be available to adjust the competing interests promise an effective accommodation. The difficulty is not with judicial balancing in principle: that, we have accepted (*pace* Mr. Justice Black), is what the Constitution orders even as regards the "preferred freedoms" of the first amendment. But, one may ask, can courts meaningfully weigh the Government's "need" to conceal, the Press's "need" to publish, the people's "need" to know? If, on the one hand, the need for military secrecy in time of war seems obvious and paramount; if, on the other hand, as in the *Pentagon Papers* Case, many could not see why the Government should conceal documents several years old relating to an issue that had become of great national moment; who can meaningfully weigh the less obvious, less dramatic consequences of disclosure of any one of millions of documents that are the stuff of governing and of international relations? How does a court weigh the effect on relations with country X, or on international relations generally, of publication of a diplomatic communication to or from another country which the latter does not wish to see public? How does the court weigh the people's "need" to know in any particular case? . . .

. . .

There is no happy solution, only the eternal cry and quest for better government. But surely Congress and the President could do more than they have done. The *Pentagon Papers* Case has dramatized issues, admonished bureaucrats, and created an atmosphere receptive to a major effort to increase public and scholarly knowledge even while reinforcing secrecy where it is necessary. There is need for measures to rebuild confidence in government, including confidence in its policies of disclosure and concealment. At least there ought to be provision for automatic declassification of many categories of documents, putting the burden on the bureaucracy to determine and maintain the need for reclassifying. Until Congress and Presidents turn a hard face to unnecessary classification, bureaucrats will not learn the

> habit of disclosure. The unhappy game of trial by cleverness between Executive and Press with an infrequent journalistic success will do little to support the people's right to know when Government abuses its responsibility to withhold.

Henkin expects that the courts will have a limited effect in this area. Do you agree?

4. At the outset of the quoted passage Henkin deplores the claim that the press is free to try to uncover information that the government is trying to conceal "and if it succeeds, it is free to publish." He argues that this "kind of trial by battle and cleverness between the three estates and the fourth hardly seems the way best to further the various aims of a democratic society." Compare the comments of Mr. Justice Stewart in a speech delivered in 1974 and printed in 26 Hastings L.J. 631 (1975). After observing that the constitutional result was that "the autonomous press may publish what it knows, and may seek to learn what it can," he continued:

> But this autonomy cuts both ways. 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 government 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. Congress may provide a resolution, at least in some instances, through carefully drawn legislation. For the rest, we must rely, as so often in our system we must, on the tug and pull of the political forces in American society.

Is this consistent with Henkin's analysis?

5. Many who had hoped for a definitive ruling on the legitimacy of "prior restraint" were disappointed with the strategy of Alexander Bickel, who argued the case for the Times. Their attitude is reflected in Pember, The "Pentagon Papers" Decision: More Questions Than Answers, 48 Journ.Q. 403, 406, 411 (1971):

> But the newspapers, unfortunately, did not take the position that all prior restraint was unconstitutional. Bickel even suggested a standard which might be applied in restraining the press: whether the publication of a document would have a direct link to a grave event which was immediate and visible. The

admission that in some circumstances prior restraint was acceptable, prompted Justice Douglas to remark, "This is a strange argument for the *Times* to be making."

. . .

. . . [T]he great issue in the case—whether the First Amendment prohibits prior restraint even when the national security is placed in jeopardy—was never joined. Attorneys for both newspapers wanted to win this case, not make constitutional law. Consequently, they made the tactically sound decision to concede that in certain instances prior restraint was permissible even under the First Amendment.

The case then degenerated into an argument over whether this was such an instance. Great law cases are not built of "such stuff."

A lawyer who represented the Washington Post, explained the litigation strategy in Godofsky, Protection of the Press From Prior Restraint and Harassment Under Libel Laws, 29 U.Miami L.Rev. 462, 471–72 (1975):

I am aware of the fact that members of academia and others have criticized those who briefed and argued this case in the Supreme Court because none of us urged adoption of a rule which would prohibit prior restraints, even in circumstances such as those suggested by Chief Justice Hughes in Near v. Minnesota. I don't think I should attempt to explain the position of the *New York Times*, but I would like to tell you something of what went into our own thinking.

In the first place we did not need an absolute ban on prior restraints to win the case. The district court had found, after an evidentiary hearing, that the only danger involved in publication was the embarrassment which the United States would suffer in attempting to explain to foreign governments why the United States government could not censor its press. We did not think that any court in this country would be prepared to support a prior restraint on this basis.

Second, the court of appeals had also found, by a lopsided majority, that the government had failed to meet the *Near* test.

. . .

Third, we knew from the Supreme Court memorandum setting the case for argument that four of the nine justices (Black, Douglas, Brennan and Marshall), would almost certainly hold

that there was no basis for continuing the restraint which had been in effect during the pendency of the litigation, and we did not wish to take a position which might conceivably alienate the critical fifth vote we needed to win. After all, unless you accept the position of Justices Black and Douglas, its pretty hard to argue that papers can publish the sailing dates of troopships and the number and location of troop positions.

Finally, we knew that Justices Black and Douglas had long been advocates of the absolute position with respect to the first amendment. We also knew that these two eminent Justices had never convinced any of their brethren of the correctness of their views. We believed that Justices Black and Douglas would almost certainly continue to urge that view on their brethren in this case. We were of the view that if Justices Black and Douglas were unable, over a period of several decades, to convince their brethren that the first amendment was absolute, we certainly would not be able to devise a series of arguments which would do so between 3:30 P.M. Friday and 5 A.M. Saturday morning.

Professor Bickel discussed the significance of the case he argued successfully in A. Bickel, The Morality of Consent 79–88 (1976).

6. Although the government never sought to invoke criminal sanctions against the media in the Pentagon Papers episode, it did file charges against Daniel Ellsberg and Anthony Russo. Ellsberg, a consultant to the Rand Corporation, had been authorized to possess the papers, provided he kept them on the premises of Rand and in his safe when not in use. He was not to reproduce them, but he removed them from Rand and had them reproduced with Russo's help. The government relied primarily on 18 U.S.C. § 641, charging that Ellsberg did "embezzle, steal and knowingly convert to his own use and the use of another" the documents known as the Pentagon Papers, and on 18 U.S.C. § 793(d) and (e). Subsection (e) is discussed in Justice White's opinion. Subsection (d) involves communication and transmission of "any document, writing . . . or note relating to the national defense . . . which . . . the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation. . . ." The charges against Ellsberg and Russo were dismissed because of government misconduct.

7. In national security cases the government has been more successful when seeking to enjoin disclosures by its employees. United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972), involved an injunction obtained by the government against publication of Marchetti's book about the Central Intelligence Agency, his former employer.

At the time he joined, he promised not to divulge any classified information unless specifically authorized in writing by the Director. When he resigned from the CIA he signed a secrecy oath. Although recognizing that prior restraints were rarely justifiable, the court upheld this because of the government's right to secrecy in foreign affairs. A confidential relationship inhered in the employment and "the law would probably imply a secrecy agreement had there been no formal expressed agreement." The government need not resort to ordinary criminal sanctions because of the great risk of harm from disclosure. The court recognized that by joining the CIA, Marchetti did not relinquish his rights to free speech. He might write about CIA operations and criticize the agency as any citizen might, but he could not disclose classified information obtained during his employment unless the material was already in the public domain. The court concluded that judicial review of agency objections to the text was available, but that the court could determine only whether the material was classified and if so whether it had previously been made public. The Supreme Court denied certiorari, 409 U.S. 1063 (1972), Justices Douglas, Brennan and Stewart dissenting.

On remand, the judge permitted publication of all but 26 of the 168 items still in question. The director of the CIA and the Secretary of State appealed and the judgment was reversed. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.) certiorari denied 421 U.S. 992 (1975), Justice Douglas dissenting. Apparently the trial judge could find little to explain why particular documents or parts of documents had been classified, and often the classification officer could not be identified or was unavailable. The court of appeals observed that in its earlier decision in *Marchetti* it had assumed that all information in a classified document should be held to be classified and not subject to disclosure. On this appeal the court decided that the trial judge had imposed an excessive burden on the government because he refused to recognize that there "is a presumption of regularity in the performance by a public official of his public duty. . . . That presumption leaves no room for speculation that information which the district court can recognize as proper for top secret classification was not classified at all by the official who placed the 'Top Secret' legend on the document."

F. PROTECTING THE PUBLIC WELFARE—MORALS, SAFETY AND HEALTH

1. Obscenity and Pornography

Recall that in 1942 in the famous quotation from *Chaplinsky*, p. 283, supra, Justice Murphy stated that "lewd and obscene" words were among those "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." That may explain why, even though laws against obscenity had been in effect in this country since Colonial times, it was not until 1957 that the Supreme Court confronted the question of the impact of the First Amendment on the law of obscenity. In Roth v. United States, 354 U.S. 476 (1957), the Court held that even though it was "expression," obscenity was outside the protection of the First and Fourteenth Amendments. Yet, "sex and obscenity are not synonymous." Sex, "a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." Basically, the majority decided that obscenity could be determined by asking "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

Shortly thereafter, the majority consensus began to collapse as justices began groping for the line between the protected and the unprotected. For example, Justice Stewart, concurring in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964), asserted that "hardcore pornography" was the only type of material that could be prohibited. He continued, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."

Two years later, Justice Stewart tried to define the term in a dissenting opinion in Ginzburg v. United States, 383 U.S. 463, 499 (1966). He adopted a position put forward by the government that "Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character." He also extended the class to drawings in comic-book format,

and to some verbal descriptions of "such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value."

By 1967, the Court had been reduced to reversing convictions for obscenity without hearing oral argument or rendering written opinions whenever five members of the Court, using their own tests, concluded that the material in the case was not obscene. See Redrup v. New York, 386 U.S. 767 (1967).

The opinions in the two cases that follow provide a view of the recent developments in obscenity litigation.

MILLER v. CALIFORNIA

Supreme Court of the United States, 1973.
413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This is one of a group of "obscenity-pornography" cases being reviewed by the Court in a re-examination of standards enunciated in earlier cases involving what Mr. Justice Harlan called "the intractable obscenity problem." Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968) (concurring and dissenting).

Appellant conducted a mass mailing campaign to advertise the sale of illustrated books, euphemistically called "adult" material. After a jury trial, he was convicted of violating California Penal Code § 311.2(a), a misdemeanor, by knowingly distributing obscene matter,[1] and the Appellate Department, Superior Court of California, County of Orange, summarily affirmed the judgment without opinion. Appellant's conviction was specifically based on his conduct in

1. At the time of the commission of the alleged offense, which was prior to June 25, 1969, § 311.2(a) and § 311 of the California Penal Code read in relevant part:

"§ 311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state

"(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor. . . ."

"§ 311. Definitions

"As used in this chapter:

"(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

. . .

"(e) 'Knowingly' means having knowledge that the matter is obscene."

causing five unsolicited advertising brochures to be sent through the mail in an envelope addressed to a restaurant in Newport Beach, California. The envelope was opened by the manager of the restaurant and his mother. They had not requested the brochures; they complained to the police.

The brochures advertise four books entitled "Intercourse," "Man-Woman," "Sex Orgies Illustrated," and "An Illustrated History of Pornography," and a film entitled "Marital Intercourse." While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed.

I

This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material [2] when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. [ ] It is in this context that we are called on to define the standards which must be used to identify obscene material that a State may

2. This Court has defined "obscene material" as "material which deals with sex in a manner appealing to prurient interest," Roth v. United States, supra, at 487, but the *Roth* definition does not reflect the precise meaning of "obscene" as traditionally used in the English language. Derived from the Latin *obscaenus*, *ob*, to, plus *caenum*, filth, "obscene" is defined in the Webster's Third New International Dictionary (Unabridged 1969) as "1a: disgusting to the senses . . . b: grossly repugnant to the generally accepted notions of what is appropriate . . . 2: offensive or revolting as countering or violating some ideal or principle." The Oxford English Dictionary (1933 ed.) gives a similar definition, "[o]ffensive to the senses, or to taste or refinement; disgusting, repulsive, filthy, foul, abominable, loathsome."

The material we are discussing in this case is more accurately defined as "pornography" or "pornographic material." "Pornography" derives from the Greek (*pornè*, harlot, and *graphos*, writing). The word now means "1: a description of prostitutes or prostitution 2: a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement." Webster's Third New International Dictionary, supra. Pornographic material which is obscene forms a sub-group of all "obscene" expression, but not the whole, at least as the word "obscene" is now used in our language. We note, therefore, that the words "obscene material" as used in this case, have a specific judicial meaning which derives from the *Roth* case, i.e., obscene material "which deals with sex." *Roth*, supra, at 487. See also ALI Model Penal Code § 251.4(*l*) "Obscene Defined." (Official Draft 1962.)

regulate without infringing on the First Amendment as applicable to the States through the Fourteenth Amendment.

The dissent of MR. JUSTICE BRENNAN reviews the background of the obscenity problem, but since the Court now undertakes to formulate standards more concrete than those in the past, it is useful for us to focus on two of the landmark cases in the somewhat tortured history of the Court's obscenity decisions. In Roth v. United States, 354 U.S. 476 (1957), the Court sustained a conviction under a federal statute punishing the mailing of "obscene, lewd, lascivious or filthy . . ." materials. The key to that holding was the Court's rejection of the claim that obscene materials were protected by the First Amendment. Five Justices joined in the opinion stating:

> "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment] guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . "We hold that obscenity is not within the area of constitutionally protected speech or press." 354 U.S., at 484–485 (footnotes omitted).

Nine years later, in Memoirs v. Massachusetts, 383 U.S. 413 (1966), the Court veered sharply away from the *Roth* concept and, with only three Justices in the plurality opinion, articulated a new test of obscenity. The plurality held that under the *Roth* definition

> "as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." Id., at 418.

. . .

While *Roth* presumed "obscenity" to be "utterly without redeeming social importance," *Memoirs* required that to prove obscenity it must be affirmatively established that the material is "*utterly* without redeeming social value." Thus, even as they repeated the words of *Roth*, the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative, i. e., that the material was "*utterly* without redeeming social value"—a burden virtually impossible to discharge under our criminal standards of proof. Such considerations caused Mr. Justice Harlan to wonder if the "*utterly* without redeeming social value" test had any meaning at all. [ ]

Apart from the initial formulation in the Roth case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. [ ] We have seen "a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." Interstate Circuit, Inc. v. Dallas, 390 U.S., at 704–705 (Harlan, J., concurring and dissenting) (footnote omitted).[3] This is not remarkable, for in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression. This is an area in which there are few eternal verities.

The case we now review was tried on the theory that the California Penal Code § 311 approximately incorporates the three-stage *Memoirs* test, supra. But now the *Memoirs* test has been abandoned as unworkable by its author,[4] and no Member of the Court today supports the *Memoirs* formulation.

II

. . .

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, [ ] ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the "*utterly* without redeeming social value" test of Memoirs v. Massachusetts, 383 U.S., at 419; that concept has never commanded the adherence of more than three Justices at one time. . . .

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what

3. In the absence of a majority view, this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. Redrup v. New York, 386 U.S. 767 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup* "policy." [ ] The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us.

4. See the dissenting opinion of MR. JUSTICE BRENNAN in Paris Adult Theatre I v. Slaton, [ ].

a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. [ ] For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy. In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members.

MR. JUSTICE BRENNAN, [ ] [abandoning his former position], now maintains that no formulation of this Court, the Congress, or the States can adequately distinguish obscene material unprotected by the First Amendment from protected expression, [ ]. Paradoxically, MR. JUSTICE BRENNAN indicates that suppression of unprotected obscene material is permissible to avoid exposure to unconsenting adults, as in this case, and to juveniles, although he gives no indication of how the division between protected and nonprotected materials may be drawn with greater precision for these purposes than for regulation of commercial exposure to consenting adults only. Nor does he indicate where in the Constitution he finds the authority to distinguish between a willing "adult" one month past the state law age of majority and a willing "juvenile" one month younger.

Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. . . .

. . .

III

Under a national Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially questions of fact, and our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether "the average person, applying contemporary community standards" would consider certain materials "prurient," it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a *national* "community standard" would be an exercise in futility.

. . .

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. [ ] People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. As the Court made clear in Mishkin v. New York, 383 U.S., at 508–509, the primary concern with requiring a jury to apply the standard of "the average person, applying contemporary community standards" is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one. [ ] We hold that the requirement that the jury evaluate the materials with reference to "contemporary standards of the State of California" serves this protective purpose and is constitutionally adequate.

IV

The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a "misuse of the great guarantees of free speech and free press. . . ." Breard v. Al-

exandria, 341 U.S., at 645. The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. "The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people," Roth v. United States, supra, at 484 (emphasis added). [ ] But the public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.

There is no evidence, empirical or historical, that the stern 19th century American censorship of public distribution and display of material relating to sex, [ ] in any way limited or affected expression of serious literary, artistic, political, or scientific ideas. . . .

MR. JUSTICE BRENNAN finds "it is hard to see how state-ordered regimentation of our minds can ever be forestalled." Paris Adult Theatre I v. Slaton (BRENNAN, J., dissenting). These doleful anticipations assume that courts cannot distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material. Moreover, state regulation of hard core pornography so as to make it unavailable to nonadults, a regulation which MR. JUSTICE BRENNAN finds constitutionally permissible, has all the elements of "censorship" for adults; indeed even more rigid enforcement techniques may be called for with such dichotomy of regulation. . . .

In sum, we (a) reaffirm the *Roth* holding that obscene material is not protected by the First Amendment; (b) hold that such material can be regulated by the States, subject to the specific safeguards enunciated above, without a showing that the material is "*utterly* without redeeming social value"; and (c) hold that obscenity is to be determined by applying "contemporary community standards," [ ] not "national standards." The judgment of the Appellate Department of the Superior Court, Orange County, California, is vacated and the case remanded to that court for further proceedings not inconsistent with the First Amendment standards established by this opinion. [ ]

MR. JUSTICE DOUGLAS, dissenting.

. . .

Today the Court retreats from the earlier formulations of the constitutional test and undertakes to make new definitions. This effort, like the earlier ones, is earnest and well intentioned. The difficulty is that we do not deal with constitutional terms, since "obscenity" is not mentioned in the Constitution or Bill of Rights. And the First Amendment makes no such exception from "the press" which it undertakes to protect nor, as I have said on other occasions, is an ex-

ception necessarily implied, for there was no recognized exception to the free press at the time the Bill of Rights was adopted which treated "obscene" publications differently from other types of papers, magazines, and books. So there are no constitutional guidelines for deciding what is and what is not "obscene." The Court is at large because we deal with tastes and standards of literature. What shocks me may be sustenance for my neighbor. What causes one person to boil up in rage over one pamphlet or movie may reflect only his neurosis, not shared by others. We deal here with a regime of censorship which, if adopted, should be done by constitutional amendment after full debate by the people.

. . .

My contention is that until a civil proceeding has placed a tract beyond the pale, no criminal prosecution should be sustained. For no more vivid illustration of vague and uncertain laws could be designed than those we have fashioned. . . .

While the right to know is the corollary of the right to speak or publish, no one can be forced by government to listen to disclosure that he finds offensive. That was the basis of my dissent in Public Utilities Comm'n v. Pollak, 343 U.S. 451, 467 (1952), where I protested against making a streetcar audience a "captive" audience. There is no "captive audience" problem in these obscenity cases. No one is being compelled to look or to listen. Those who enter news stands or bookstalls may be offended by what they see. But they are not compelled by the State to frequent those places; and it is only state or governmental action against which the First Amendment, applicable to the States by virtue of the Fourteenth, raises a ban.

. . .

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

In my dissent in Paris Adult Theatre I v. Slaton, decided this date, I noted that I had no occasion to consider the extent of state power to regulate the distribution of sexually oriented material to juveniles or the offensive exposure of such material to unconsenting adults. In the case before us, appellant was convicted of distributing obscene matter in violation of California Penal Code § 311.2, on the basis of evidence that he had caused to be mailed unsolicited brochures advertising various books and a movie. I need not now decide whether a statute might be drawn to impose, within the requirements of the First Amendment, criminal penalties for the precise conduct at issue here. For it is clear that under my dissent in *Paris Adult Theatre I*, the statute under which the prosecution was brought is unconstitutionally overbroad, and therefore invalid on its face. "[T]he transcendent value to all society of constitutionally protected expres-

sion is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' " . . .

PARIS ADULT THEATRE I v. SLATON

Supreme Court of the United States, 1973.
413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446.

[Respondents, a district attorney and a local court solicitor, filed civil complaints seeking injunctions against petitioners, two Atlanta movie theatres, on the ground they were exhibiting obscene motion pictures. Signs outside the theatres identified them as showing "mature feature films" and stated that entrants must be "21 and able to prove it. If viewing the nude body offends you, Please Do Not Enter." Nothing outside indicated the full nature of what was being shown. "In particular, nothing indicated that the films depicted as they did—scenes of simulated fellatio, cunnilingus, and group sex intercourse. There was no evidence that minors had ever entered the theatres." The trial court denied the injunction on the ground that the exclusion of minors and the general notice of content made the showing constitutionally permissible. The Georgia Supreme Court unanimously reversed on the grounds that the movies were "hard core pornography" and their exhibition was not protected by the First Amendment.]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

. . .

II

We categorically disapprove the theory, apparently adopted by the trial judge, that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only. This holding was properly rejected by the Georgia Supreme Court. Although we have often pointedly recognized the high importance of the state interest in regulating the exposure of obscene materials to juveniles and unconsenting adults, [ ] this Court has never declared these to be the only legitimate state interests permitting regulation of obscene material. The States have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation, as long as these regulations do not run afoul of specific constitutional prohibitions. . . .

In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assum-

ing it is feasible to enforce effective safeguards against exposure to juveniles and to passersby.[7] Rights and interests "other than those of the advocates are involved." Breard v. Alexandria, 341 U.S. 622, 642 (1951). These include 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. The Hill-Link Minority Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable correlation between obscene material and crime. Quite apart from sex crimes, however, there remains one problem of large proportions aptly described by Professor Bickel:

> "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." 22 The Public Interest 25–26 (Winter 1971). (Emphasis added.)
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> . . .

But, it is argued, there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society. It is urged on behalf of the petitioners that, absent such a demonstration, any kind of state regulation is "impermissible." We reject this argument. It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself. . . . Although there is no

7. It is conceivable that an "adult" theater can—if it really insists—prevent the exposure of its obscene wares to juveniles. An "adult" bookstore, dealing in obscene books, magazines, and pictures, cannot realistically make this claim. The Hill-Link Minority Report of the Commission on Obscenity and Pornography emphasizes evidence (the Abelson National Survey of Youth and Adults) that, although most pornography may be bought by elders, "the heavy users and most highly exposed people to pornography are adolescent females (among women) and adolescent and young adult males (among men)." The Report of the Commission on Obscenity and Pornography 401 (1970). The legitimate interest in preventing exposure of juveniles to obscene material cannot be fully served by simply barring juveniles from the immediate physical premises of "adult" bookstores, when there is a flourishing "outside business" in these materials.

conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist. . . .

From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs. [ ] The same is true of the federal securities and antitrust laws and a host of federal regulations. [ ] On the basis of these assumptions both Congress and state legislatures have, for example, drastically restricted associational rights by adopting antitrust laws, and have strictly regulated public expression by issuers of and dealers in securities, profit sharing "coupons," and "trading stamps," commanding what they must and must not publish and announce. [ ] Understandably those who entertain an absolutist view of the First Amendment find it uncomfortable to explain why rights of association, speech, and press should be severely restrained in the marketplace of goods and money, but not in the marketplace of pornography.

Likewise, when legislatures and administrators act to protect the physical environment from pollution and to preserve our resources of forests, streams, and parks, they must act on such imponderables as the impact of a new highway near or through an existing park or wilderness area. . . . The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional.

If we accept the unprovable assumption that a complete education requires certain books, see Board of Education v. Allen, 392 U.S. 236, 245 (1968) [ ], and the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior? . . . The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.

It is argued that individual "free will" must govern, even in activities beyond the protection of the First Amendment and other con-

stitutional guarantees of privacy, and that government cannot legitimately impede an individual's desire to see or acquire obscene plays, movies, and books. We do indeed base our society on certain assumptions that people have the capacity for free choice. Most exercises of individual free choice—those in politics, religion, and expression of ideas—are explicitly protected by the Constitution. Totally unlimited play for free will, however, is not allowed in our or any other society. We have just noted, for example, that neither the First Amendment nor "free will" precludes States from having "blue sky" laws to regulate what sellers of securities may write or publish about their wares. [ ] Such laws are to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition. Nor do modern societies leave disposal of garbage and sewage up to the individual "free will," but impose regulation to protect both public health and the appearance of public places. States are told by some that they must await a "laissez faire" market solution to the obscenity-pornography problem, paradoxically "by people who have never otherwise had a kind word to say for laissez faire," particularly in solving urban, commercial, and environmental pollution problems. [ ]

The States, of course, may follow such a "laissez faire" policy and drop all controls on commercialized obscenity, if that is what they prefer, just as they can ignore consumer protection in the marketplace, but nothing in the Constitution *compels* the States to do so with regard to matters falling within state jurisdiction. . . .

It is asserted, however, that standards for evaluating state commercial regulations are inapposite in the present context, as state regulation of access by consenting adults to obscene material violates the constitutionally protected right to privacy enjoyed by petitioners' customers. Even assuming that petitioners have vicarious standing to assert potential customers' rights, it is unavailing to compare a theater open to the public for a fee, with the private home of Stanley v. Georgia, 394 U.S., at 568, and the marital bedroom of Griswold v. Connecticut, [381 U.S.] at 485–486. This Court, has, on numerous occasions, refused to hold that commercial ventures such as a motion-picture house are "private" for the purpose of civil rights litigation and civil rights statutes. [ ] The Civil Rights Act of 1964 specifically defines motion-picture houses and theaters as places of "public accommodation" covered by the Act as operations affecting commerce. [ ]

Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' [ ]." [ ] This privacy right encompasses and protects the person-

al intimacies of the home, the family, marriage, motherhood, procreation, and child rearing. [ ] Nothing, however, in this Court's decisions intimates that there is any "fundamental" privacy right "implicit in the concept of ordered liberty" to watch obscene movies in places of public accommodation.

If obscene material unprotected by the First Amendment in itself carried with it a "penumbra" of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the "privacy of the home," which was hardly more than a reaffirmation that "a man's home is his castle." Cf. Stanley v. Georgia, supra, at 564.[13] Moreover, we have declined to equate the privacy of the home relied on in *Stanley* with a "zone" of "privacy" that follows a distributor or a consumer of obscene materials wherever he goes. [ ] The idea of a "privacy" right and a place of public accommodation are, in this context, mutually exclusive. Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a "live" theater stage, any more than a "live" performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue.

. . .

Finally, petitioners argue that conduct which directly involves "consenting adults" only has for that sole reason, a special claim to constitutional protection. Our Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, is a step we are unable to take.[15] Commercial exploitation of depictions, descriptions, or exhibitions of obscene conduct on commercial prem-

13. The protection afforded by Stanley v. Georgia, 394 U.S. 557 (1969), is restricted to a place, the home. In contrast, the constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved. [ ] Obviously, there is no necessary or legitimate expectation of privacy which would extend to marital intercourse on a street corner or a theater stage.

15. The state statute books are replete with constitutionally unchallenged laws against prostitution, suicide, voluntary self-mutilation, brutalizing "bare fist" prize fights, and duels, although these crimes may only directly involve "consenting adults." . . . As Professor Irving Kristol has observed: "Bearbaiting and cockfighting are prohibited only in part out of compassion for the suffering animals; the main reason they were abolished was because it was felt that they debased and brutalized the citizenry who flocked to witness such spectacles." On the Democratic Idea in America 33 (1972).

ises open to the adult public falls within a State's broad power to regulate commerce and protect the public environment. The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as "wrong" or "sinful." The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's words, the States' "right . . . to maintain a decent society." Jacobellis v. Ohio, 378 U.S., at 199 (dissenting opinion).

To summarize, we have today reaffirmed the basic holding of Roth v. United States, supra, that obscene material has no protection under the First Amendment. See Miller v. California. . . . In this case we hold that the States have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accommodation, including so-called "adult" theaters from which minors are excluded. In light of these holdings, nothing precludes the State of Georgia from the regulation of the allegedly obscene material exhibited in Paris Adult Theatre I or II, provided that the applicable Georgia law, as written or authoritatively interpreted by the Georgia courts, meets the First Amendment standards set forth in Miller v. California, [ ]. The judgment is vacated and the case remanded to the Georgia Supreme Court for further proceedings not inconsistent with this opinion and Miller v. California, supra. [ ].

Vacated and remanded.

MR. JUSTICE DOUGLAS, dissenting.

My Brother BRENNAN is to be commended for seeking a new path through the thicket which the Court entered when it undertook to sustain the constitutionality of obscenity laws and to place limits on their application. I have expressed on numerous occasions my disagreement with the basic decision that held that "obscenity" was not protected by the First Amendment. I disagreed also with the definitions that evolved. Art and literature reflect tastes; and tastes, like musical appreciation, are hardly reducible to precise definitions. That is one reason I have always felt that "obscenity" was not an exception to the First Amendment. . . .

. . .

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

This case requires the Court to confront once again the vexing problem of reconciling state efforts to suppress sexually oriented ex-

pression with the protections of the First Amendment, as applied to the States through the Fourteenth Amendment. No other aspect of the First Amendment has, in recent years, demanded so substantial a commitment of our time, generated such disharmony of views, and remained so resistant to the formulation of stable and manageable standards. I am convinced that the approach initiated 16 years ago in Roth v. United States, 354 U.S. 476 (1957), and culminating in the Court's decision today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the time has come to make a significant departure from that approach.

. . .

. . . The essence of our problem in the obscenity area is that we have been unable to provide "sensitive tools" to separate obscenity from other sexually oriented but constitutionally protected speech, so that efforts to suppress the former do not spill over into the suppression of the latter. . . .

. . .

Of course, the vagueness problem would be largely of our own creation if it stemmed primarily from our failure to reach a consensus on any one standard. But after 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials. Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as "prurient interest," "patent offensiveness," "serious literary value," and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them. Although we have assumed that obscenity does exist and that we "know it when [we] see it," Jacobellis v. Ohio, supra, at 197 (STEWART, J., concurring), we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.

. . . These considerations suggest that no one definition, no matter how precisely or narrowly drawn, can possibly suffice for all situations, or carve out fully suppressible expression from all media without also creating a substantial risk of encroachment upon the guarantees of the Due Process Clause and the First Amendment.[9]

9. Although I did not join the opinion of the Court in Stanley v. Georgia, 394 U.S. 557 (1969), I am now inclined to agree that "the Constitution protects the right to receive information and ideas," and that "[t]his right to

The vagueness of the standards in the obscenity area produces a number of separate problems, and any improvement must rest on an understanding that the problems are to some extent distinct. First, a vague statute fails to provide adequate notice to persons who are engaged in the type of conduct that the statute could be thought to proscribe. . . .

In addition to problems that arise when any criminal statute fails to afford fair notice of what it forbids, a vague statute in the areas of speech and press creates a second level of difficulty. We have indicated that "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." Smith v. California, 361 U.S. 147, 151 (1959). . . .

. . .

The problems of fair notice and chilling protected speech are very grave standing alone. But it does not detract from their importance to recognize that a vague statute in this area creates a third, although admittedly more subtle, set of problems. These problems concern the institutional stress that inevitably results where the line separating protected from unprotected speech is excessively vague. In *Roth* we conceded that "there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls. . . ." 354 U.S., at 491–492. Our subsequent experience demonstrates that almost every case is "marginal." And since the "margin" marks the point of separation between protected and unprotected speech, we are left with a system in which almost every obscenity case presents a constitutional question of exceptional difficulty. . . .

. . .

. . . In addition, the uncertainty of the standards creates a continuing source of tension between state and federal courts, since the need for an independent determination by this Court seems to render superfluous even the most conscientious analysis by state tribunals. And our inability to justify our decisions with a persuasive rationale—or indeed, any rationale at all—necessarily creates the impression that we are merely second-guessing state court judges.

The severe problems arising from the lack of fair notice, from the chill on protected expression, and from the stress imposed on the

receive information and ideas, regardless of their social worth . . . is fundamental to our free society." . . . Whether or not a class of "obscene" and thus entirely unprotected speech does exist, I am forced to conclude that the class is incapable of definition with sufficient clarity to withstand attack on vagueness grounds. Accordingly, it is on principles of the void-for-vagueness doctrine that this opinion exclusively relies.

state and federal judicial machinery persuade me that a significant change in direction is urgently required. I turn, therefore, to the alternatives that are now open.

IV

1. The approach requiring the smallest deviation from our present course would be to draw a new line between protected and unprotected speech, still permitting the States to suppress all material on the unprotected side of the line. In my view, clarity cannot be obtained pursuant to this approach except by drawing a line that resolves all doubt in favor of state power and against the guarantees of the First Amendment. We could hold, for example, that any depiction or description of human sexual organs, irrespective of the manner or purpose of the portrayal, is outside the protection of the First Amendment and therefore open to suppression by the States. That formula would, no doubt, offer much fairer notice of the reach of any state statute drawn at the boundary of the State's constitutional power. And it would also, in all likelihood, give rise to a substantial probability of regularity in most judicial determinations under the standard. But such a standard would be appallingly overbroad, permitting the suppression of a vast range of literary, scientific, and artistic masterpieces. Neither the First Amendment nor any free community could possibly tolerate such a standard. Yet short of that extreme it is hard to see how any choice of words could reduce the vagueness problem to tolerable proportions, so long as we remain committed to the view that some class of materials is subject to outright suppression by the State.

2. The alternative adopted by the Court today recognizes that a prohibition against any depiction or description of human sexual organs could not be reconciled with the guarantees of the First Amendment. But the Court does retain the view that certain sexually oriented material can be considered obscene and therefore unprotected by the First and Fourteenth Amendments. To describe that unprotected class of expression, the Court adopts a restatement of the *Roth-Memoirs* definition of obscenity. . . .

. . .

Although the Court's restatement substantially tracks the three-part test announced in Memoirs v. Massachusetts, supra, it does purport to modify the "social value" component of the test. Instead of requiring, as did *Roth* and *Memoirs*, that state suppression be limited to materials utterly lacking in social value, the Court today permits suppression if the government can prove that the materials lack "*serious* literary, artistic, political or scientific value." But the definition of "obscenity" as expression utterly lacking in social importance is the key to the conceptual basis of *Roth* and our subsequent opin-

ions. In *Roth* we held that certain expression is obscene, and thus outside the protection of the First Amendment, precisely *because* it lacks even the slightest redeeming social value. [ ] The Court's approach necessarily assumes that some works will be deemed obscene—even though they clearly have *some* social value—because the State was able to prove that the value, measured by some unspecified standard, was not sufficiently "serious" to warrant constitutional protection. That result is not merely inconsistent with our holding in *Roth*; it is nothing less than a rejection of the fundamental First Amendment premises and rationale of the *Roth* opinion and an invitation to widespread suppression of sexually oriented speech. Before today, the protections of the First Amendment have never been thought limited to expressions of *serious* literary or political value. [ ]

. . .

4. Finally, I have considered the view, urged so forcefully since 1957 by our Brothers BLACK and DOUGLAS, that the First Amendment bars the suppression of any sexually oriented expression. That position would effect a sharp reduction, although perhaps not a total elimination, of the uncertainty that surrounds our current approach. Nevertheless, I am convinced that it would achieve that desirable goal only by stripping the States of power to an extent that cannot be justified by the commands of the Constitution, at least so long as there is available an alternative approach that strikes a better balance between the guarantee of free expression and the States' legitimate interests.

V

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 byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms. Given these inevitable side effects of state efforts to suppress what is assumed to be *unprotected* speech, we must scrutinize with care the state interest that is asserted to justify the suppression. For in the absence of some very substantial interest in suppressing such speech, we can

hardly condone the ill effects that seem to flow inevitably from the effort.

Obscenity laws have a long history in this country. . . .

This history caused us to conclude in *Roth* "that the unconditional phrasing of the First Amendment [that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."] was not intended to protect every utterance." . . .

Because we assumed—incorrectly, as experience has proved—that obscenity could be separated from other sexually oriented expression without significant costs either to the First Amendment or to the judicial machinery charged with the task of safeguarding First Amendment freedoms, we had no occasion in *Roth* to probe the asserted state interest in curtailing unprotected, sexually oriented speech. Yet, as we have increasingly come to appreciate the vagueness of the concept of obscenity, we have begun to recognize and articulate the state interests at stake. . . .

The opinions in *Redrup* and Stanley v. Georgia reflected our emerging view that the state interest in protecting children and in protecting unconsenting adults may stand on a different footing from the other asserted state interests. . . . Similarly, if children are "not possessed of that full capacity for individual choice which is the presupposition of the First Amendment guarantees," Ginsberg v. New York, 390 U.S., at 649–650 (STEWART, J., concurring), then the State may have a substantial interest in precluding the flow of obscene materials even to consenting juveniles. [ ]

But, whatever the strength of the state interests in protecting juveniles and unconsenting adults from exposure to sexually oriented materials, those interests cannot be asserted in defense of the holding of the Georgia Supreme Court in this case. . . .

At the outset it should be noted that virtually all of the interests that might be asserted in defense of suppression, laying aside the special interests associated with distribution to juveniles and unconsenting adults, were also posited in Stanley v. Georgia, supra, where we held that the State could not make the "mere private possession of obscene material a crime." Id., at 568. That decision presages the conclusions I reach here today.

In *Stanley* we pointed out that "[t]here appears to be little empirical basis for" the assertion that "exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence." Id., at 566 and n. 9.[26] In any event, we added that "if the State is

26. Indeed, since *Stanley* was decided, the President's Commission on Obscenity and Pornography has concluded:

"In sum, empirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual materials plays a significant

only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that '[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law. . . .' Whitney v. California, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring)." Id., at 566–567.

Moreover, in *Stanley* we rejected as "wholly inconsistent with the philosophy of the First Amendment," id., at 566, the notion that there is a legitimate state concern in the "control [of] the moral content of a person's thoughts," id., at 565, and we held that a State "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." Id., at 566. That is not to say, of course, that a State must remain utterly indifferent to—and take no action bearing on—the morality of the community. . . .

. . .

If, as the Court today assumes, "a state legislature may . . . act on the . . . assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior," then it is hard to see how state-ordered regimentation of our minds can ever be forestalled. For if a State may, in an effort to maintain or create a particular moral tone, prescribe what its citizens cannot read or cannot see, then it would seem to follow that in pursuit of that same objective a State could decree that its citizens must read certain books or must view certain films. . . .

Recognizing these principles, we have held that so-called thematic obscenity—obscenity which might persuade the viewer or reader to engage in "obscene" conduct—is not outside the protection of the First Amendment:

> "It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a

role in the causation of delinquent or criminal behavior among youth or adults. The Commission cannot conclude that exposure to erotic materials is a factor in the causation of sex crime or sex delinquency." Report of the Commission on Obscenity and Pornography 27 (1970) (footnote omitted). To the contrary, the Commission found that "[o]n the positive side, explicit sexual materials are sought as a source of entertainment and information by substantial numbers of American adults. At times, these materials also appear to serve to increase and facilitate constructive communication about sexual matters within marriage." Id., at 53.

majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing." Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 688–689 (1959).

Even a legitimate, sharply focused state concern for the morality of the community cannot, in other words, justify an assault on the protections of the First Amendment. [ ] Where the state interest in regulation of morality is vague and ill defined, interference with the guarantees of the First Amendment is even more difficult to justify.

In short, while I cannot say that the interests of the State—apart from the question of juveniles and unconsenting adults—are trivial or nonexistent, I am compelled to conclude that these interests cannot justify the substantial damage to constitutional rights and to this Nation's judicial machinery that inevitably results from state efforts to bar the distribution even of unprotected material to consenting adults. [ ] I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly "obscene" contents. Nothing in this approach precludes those governments from taking action to serve what may be strong and legitimate interests through regulation of the manner of distribution of sexually oriented material.

. . . Difficult questions must still be faced, notably in the areas of distribution to juveniles and offensive exposure to unconsenting adults. Whatever the extent of state power to regulate in those areas,[29] it should be clear that the view I espouse today would introduce a large measure of clarity to this troubled area, would reduce the institutional pressure on this Court and the rest of the State and Federal Judiciary, and would guarantee fuller freedom of expression while leaving room for the protection of legitimate governmental interests. . . .

Notes and Questions

1. What changes are wrought by *Miller*? How are they justified?

2. What different question is raised in *Paris*? What motivates the majority's answer to that question?

29. The Court erroneously states, Miller v. California, ante, [ ], that the author of this opinion "indicates that suppression of unprotected obscene material is permissible to avoid exposure to unconsenting adults . . . and to juveniles. . . ." I defer expression of my views as to the scope of state power in these areas until cases squarely presenting these questions are before the Court. See n. 9, supra; Miller v. California, supra (dissenting opinion).

3. What underlies Justice Douglas' argument that no prosecution for obscenity should be possible until after a particular tract has been declared "beyond the pale" in a civil proceeding?

4. Is the use of injunctions necessarily more restrictive of speech than prosecuting for an offense after publication? The Court, 5–4, has upheld a state procedure under which an ex parte injunction could be obtained against allegedly obscene material with trial to follow within a day after issue was joined, and decision within two days after the end of the trial. Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957). The trial judge in that case found the books obscene and ordered their destruction. The majority stressed that it "would be bold to assert that the *in terrorem* effect" of criminal statutes "less restrains booksellers in the period before the law strikes" than does this civil procedure. The majority also stressed that the statute did not operate on matter until after it had been published. The dissenters were concerned that the original injunction operated before there had been a finding that the material was unprotected speech.

5. In Jenkins v. Georgia, 418 U.S. 153 (1974), Jenkins had been convicted for showing the film "Carnal Knowledge." The state courts had relied on the jury's finding, but the Court reversed on the ground that the standards set in *Miller* did not justify the jury's verdict. Although "ultimate sexual acts" took place "the camera does not focus on the bodies of the actors at such times. There is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene" under *Miller*. Was the Supreme Court back in the business of reviewing individual books and movies?

6. In *Miller*, California had chosen to use a statewide community standard and the Court had observed that a national standard was "hypothetical and unascertainable." In *Jenkins*, the majority had said that a state was not required to define the phrase "contemporary community standards" in more precise geographical terms. In Hamling v. United States, 418 U.S. 87 (1974), the Court interpreted a federal statute barring the mailing of obscene materials to make the relevant community the one from which the jury was drawn.

7. Perhaps because motion picture censorship was permissible, states attempted to regulate more than obscenity when reviewing films. Some attempts were struck down because the grounds other than obscenity were found too vague. In Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), New York had banned a film on the grounds that it was "sacrilegious," which the state defined as treating religion with "contempt, mockery, scorn, and ridicule." The

Court thought this gave the censor too much leeway, although it noted that the First Amendment did not allow freedom to exhibit "every motion picture of every kind at all times and all places."

Efforts to reach non-obscene materials were rejected directly in Kingsley International Pictures Corp. v. Regents, 360 U.S. 684 (1959), in which New York had banned the film of Lady Chatterley's Lover because the theme was "immoral" in that it presented acts of adultery as "desirable, acceptable, or proper patterns of behavior." The Court held the state had exceeded the reach of obscenity or pornography. The Constitutional guarantee "is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax."

8. The result is that although motion pictures may still be subject to administrative screening before public presentation, Times Film Corp. v. Chicago, 365 U.S. 43 (1961), they may be rejected only for those reasons that permit penalizing distributors of books and magazines after the fact: obscenity and pornography. The characteristics of different media of course, may still lead to different results. In addition, when preliminary obligations are imposed, speedy review of adverse decisions must be assured.

9. *The Captive Audience.* The majority in *Paris* held that the voluntary and discreet actions of adults did not immunize their behavior from regulation. The other side of the coin is the so-called "captive audience" situation in which language that might otherwise be appropriate becomes impermissible because of the imposition on an involuntary audience. This problem may arise from the inability of the speaker to find a means of communication that will reach only willing listeners or viewers or from a speaker's deliberate effort to reach those who would not voluntarily expose themselves to his speech. The Supreme Court has addressed this privacy problem in a number of contexts, a few of which involve material that some might consider sexually offensive. In a case upholding the right of a city transit company to play radio news, music and advertising over loudspeakers in buses and streetcars, Justice Douglas dissented: "One who tunes in on an offensive program at home can turn it off or tune in another station as he wishes. One who hears disquieting or unpleasant programs in public places, such as restaurants, can get up and leave. But the man on the streetcar has no choice but to sit and listen, or perhaps to sit and try *not* to listen." Public Utilities Comm'n v. Pollak, 343 U.S. 451, 469 (1952).

In Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), the Court upheld a municipal ordinance banning noncommercial (in this case political) display placards in city transit vehicles. The plurality

opinion relied at least in part on captive audience concerns and Justice Douglas' crucial fifth vote rested wholly on the captive audience justification: "There is no difference when the message is visual not auricular [as was the case in *Pollak*]. In each the viewer or listener is captive."

On the same day it decided *Lehman*, the Court curtly rejected a claim that passersby were held captive by an altered American flag hung from a second story window as a political protest. "Anyone who might have been offended could easily have avoided the display." Spence v. Washington, 418 U.S. 405, 412 (1974). The Court relied on Cohen v. California, 403 U.S. 15 (1971), in which the Court had held protected the wearing in a courthouse of a jacket inscribed with the message "Fuck the Draft." *Cohen* is discussed in detail in Note 12.

In Erznoznik v. Jacksonville, 422 U.S. 205 (1975), the Court struck down an ordinance forbidding the showing of nudity on drive-in theatre screens visible from public streets. After a lengthy review of privacy-captive audience precedents, the Court once again relied on *Cohen*: "This [ordinance] cannot be justified as a means of preventing significant intrusions on privacy. The ordinance seeks only to keep these films from being seen from public streets and places where the offended viewer readily can avert his eyes. In short, the screen of a drive-in threatre is not 'so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.' " In a vigorous dissent, Chief Justice Burger objected that "the screen of a drive-in movie theatre is a unique type of eye-catching display that can be highly distracting."

Captive audience arguments have been more acceptable with regard to dissemination aimed at the home. See e. g., Breard v. Alexandria, 341 U.S. 622, 641–45 (1951) (barring door-to-door distribution or solicitation for "commercial" purposes); Kovacs v. Cooper, 336 U.S. 77 (1949) (prohibiting "loud and raucous" sound trucks). In Martin v. Struthers, 319 U.S. 141 (1943), the Court struck down a statute forbidding door-to-door distribution of any kind, but in dictum acknowledged that there remained "with the homeowner himself" the power to decide "whether distributors of literature may lawfully call at a home." The Court suggested that the city could still make it an offense "to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed."

This language was later stressed in Rowan v. Post Office, 397 U.S. 728, 736 (1970). There the Court upheld a statute allowing homeowners who had received advertisements for "erotically arousing or sexually provocative" material to instruct the Post Office to forbid that mailer to send any more materials to the addressees, in ef-

fect allowing homeowners to impose their own prior restraint. The Court had previously rejected a captive audience justification for a statute requiring the Postmaster General to detain all communist political propaganda mailed from abroad unless the addressee, after receiving notice, specifically requested its delivery. Lamont v. Postmaster General, 381 U.S. 301 (1965).

In *Rowan*, Chief Justice Burger relied heavily on "[t]he ancient concept that 'a man's home is his castle' . . ." and asserted that to require homeowners to receive and then discard offensive mail would be to "license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home." 397 U.S. at 737. Would it be more appropriate to compare the television viewer who switches channels *after* seeing that a program is or will be offensive with the recipient who throws away a piece of mail *after* seeing that it is or will be offensive?

10. In Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), in addition to the "captive audience" argument, the city also asserted that the ordinance was justified as a protection of children. This also failed because the restriction was "broader than permissible. The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of films containing any uncovered buttocks or breasts, irrespective of contexts or pervasiveness. Thus, it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigeneous . . . Clearly all nudity cannot be deemed obscene even as to minors." In appropriately drafted statutes, it is possible to protect minors from obscenity even though such a statute could not apply to the general public. See Ginsberg v. New York, 390 U.S. 629 (1968) for a discussion of the states' power to regulate minors' access to obscene material.

The most significant attempt to regulate material in newsracks on the basis of content was invalidated largely because of *Erznoznik*. Carl v. City of Los Angeles, 61 Cal.App.3d 265, 132 Cal.Rptr. 365 (1976). The city had banned from newsracks any publication whose exposed front page carried "any photograph, cartoon or drawing" of genital or anal regions or parts of the female breast of persons over the age of puberty. The court found the quoted passages from *Erznoznik* to be applicable except for the reference to a baby's buttocks. If distinctions were to be drawn, this case was clearer than *Erznoznik* because of the greater obtrusiveness of the giant movie screen as compared to a paper in a newsrack and also because by contemporary standards the "average person . . . would be more easily of-

fended by nudity photographically reproduced in a motion picture, than by nudity captured in cartoons or drawings."

11. Unique problems of "captive audience" in broadcasting obscenity are discussed at p. 640, infra.

12. *Offensive Words.* The relationship between obscenity and offensive speech is developed in Cohen v. California, 403 U.S. 15 (1971), in which the defendant wore a jacket on which the words "Fuck the Draft" were plainly visible. The state courts had upheld his conviction for disturbing the peace for his wearing the jacket in a courthouse corridor in which women and children were present. The Supreme Court reversed, 5–4. For the majority, Justice Harlan observed:

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

The state argued that even if the words were not obscene they could not be thrust upon unwilling or unsuspecting viewers. Justice Harlan responded:

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silent dissidents simply as a matter of personal predilections.
>
> In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in

> being free from unwanted expression in the confines of one's own home. . . .

Justice Harlan concluded that the controlling question was whether "the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary." He began consideration of that question by reemphasizing the values of free expression "in a society as diverse and populous as ours," citing Justice Brandeis' concurrence in *Whitney*, p. 76, supra. He then turned to the specific facts of the case:

> Against this perception of the constitutional policies involved, we discern certain more particularized considerations that peculiarly call for reversal of this conviction. First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.
>
> Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. . . .

Justice Blackmun's dissent, joined by Justice Black among others, argued mainly that "Cohen's absurd and immature antic . . . was mainly conduct and little speech. [ ] Further, the case appears to me to be well within the sphere of Chaplinsky v. New Hampshire. . . . As a consequence, this Court's agonizing over First Amendment values seems misplaced and unnecessary."

In subsequent cases, the Supreme Court has extended protection to use of offensive language in other contexts.

2. Safety and Health

The justifications for limiting communication have tended so far to relate either to matters of individual concern such as defamation and privacy, or to matters of public concern such as fair elections or state secrets. When we look at limits imposed in the name of public welfare this line becomes blurred. The states are acting on behalf of an aggregate of individuals in order to protect health and safety; to prevent consumers from being cheated; to provide equality of opportunity for members of minority groups in housing and employment; and to keep the streets clean and unlittered. These have all been recognized as matters of traditional state concern and are no longer challenged—at least when it is action rather than communication that is restrained. Thus it is much clearer that the state may punish those who drop a leaflet on the streets than that it may bar the distribution of such literature. A constitutional issue arises when the question is whether, in order to prevent litter, the state may ban the distribution of leaflets to willing recipients who may eventually drop them on the sidewalk.

In each of the cases in this section, like those throughout this chapter, the state collides with the First Amendment, but here something new and different has been added. Here, the state has tried to elude the First Amendment by arguing that the proscribed communication is "commercial speech" and is thus either unprotected or just slightly protected by the First Amendment. Although that does not usually justify the state action in the first instance, it did prevent the First Amendment from having the opposing force it usually has. Since most efforts to regulate communication in the name of public health and welfare do indeed involve what has been loosely called "commercial speech," we begin with a consideration of that question.

a. Commercial Speech

Our story begins with the cases involving bans on the distribution of leaflets without prior consent of a city official. In Lovell v. Griffin, 303 U.S. 444 (1938), such a ban on distributing "literature of any kind" was held invalid on its face as an example of the type of general licensing requirement that had precipitated the "struggle for the freedom of the press." In Schneider v. State, 308 U.S. 147 (1939), the municipalities, to circumvent *Griffin*, argued that their restraints on distribution were aimed at preventing fraud, disorder, or littering. The Court concluded that the proper response was to punish the acts of fraud and littering themselves. Concern for littering could not justify prohibiting "a person rightfully on a public street from handing literature to one willing to receive it."

1. Valentine v. Chrestensen, 316 U.S. 52 (1942). In this first "commercial speech" case, Chrestensen wanted to advertise his submarine tours. New York City's Police Department advised him that it would be illegal to distribute handbills about commercial and business matters. Chrestensen therefore added to the other side of the leaflet an attack on the city's dock department for refusing to let him use a particular pier for his submarine. The Police Department thought this still violated the ordinance and he sought to enjoin their interference with his distribution. The Supreme Court, reversing the lower courts, upheld the regulation:

> 1. This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment.

This attitude toward commercial speech may partially explain Breard v. City of Alexandria, 341 U.S. 622 (1951), in which the Court upheld an ordinance banning door-to-door solicitation for purposes of sales —as applied to solicitors of magazine subscriptions. This case followed shortly after Martin v. City of Struthers, 319 U.S. 141 (1943), in which the Court had struck down application of an ordinance against uninvited solicitors to members of a religious group.

2. New York Times v. Sullivan. The issue did not arise again until the Times case, p. 284, supra, in which the state court held that the First Amendment did not apply because the case arose out of an advertisement. The Supreme Court disagreed. The publication "was not a 'commercial' advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."

3. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973). An ordinance barred employers from discriminating in employment and also barred others from aiding in such discrimination. The Pittsburgh Press carried Help Wanted advertisements in columns captioned "Jobs—Male Interest," "Jobs—Female

Interest," and "Male—Female," according to the wishes of the advertiser. The Commissioner ordered the Press to stop using such captions except where the ordinance provided that "the employer or advertiser is free to make hiring or employment referral decisions on the basis of sex." The Supreme Court upheld the order, 5–4. The majority agreed that the "commercial speech" doctrine permitted the ban:

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

The newspaper argued that the case involved an editorial judgment concerning the placement of such advertisements. Although the newspapers always acceded to the advertisers' requests, Justice Powell, for the majority, acknowledged that some editorial judgment was involved. He concluded, however, that in this case the newspaper was entitled to no greater protection than the advertiser itself:

> Discrimination in employment is not only commercial activity, it is *illegal* commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes. Nor would the result be different if the nature of the transaction were indicated by placement under columns captioned "Narcotics for Sale" and "Prostitutes Wanted" rather than stated within the four corners of the advertisement.
>
> The illegality in this case may be less overt, but we see no difference in principle here. . . .
>
> . . . 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.

The Court emphasized that nothing in the holding allowed government to forbid the newspaper to "publish and distribute advertisements commenting on the Ordinance, the enforcement practices of the Commission, or the propriety of sex preferences in employment."

Chief Justice Burger dissented on the ground that the order functioned as a prior restraint on publication. Justice Stewart dissented on the ground that the government had no power to tell a newspaper in advance "what it can print and what it cannot." He thought this the first case "in this or any other American court that permits a government agency to enter a composing room of a newspaper and dictate to the publisher the layout and makeup of the newspaper's pages." If government can do this with classified advertising "what is there to prevent it from dictating the layout of the news pages tomorrow?" Justice Douglas joined Justice Stewart's dissent and added one of his own. Justice Blackmun joined Justice Stewart's dissent except for one paragraph.

4. Bigelow v. Virginia, 421 U.S. 809 (1975). The fourth case involved the publication in a Virginia newspaper of a New York group's advertisement stating that abortions were legal in New York with no residency requirement and offering to provide information and to arrange abortions in accredited hospitals at low cost. An address and telephone numbers were listed. Bigelow, the manager of the newspaper, was prosecuted under a statute making it a misdemeanor for "any person, by publication . . . or by the sale or circulation of any publication . . . [to] encourage or prompt the procuring of" an abortion. The state courts upheld the conviction and relied on the state's interest that women come to decisions about abortions "without the commercial advertising pressure usually incidental to the sale of a box of soap powder."

The Supreme Court reversed, 7–2. In his opinion for the Court, Justice Blackmun placed the advertisement closer to that in the New York Times case than to those of the other cases because it conveyed "information of potential interest and value to a diverse audience." The opinion also stressed that the activities advertised were legal in New York and that, although Virginia might be concerned about the health and welfare of its citizens, it could not keep from them information about legal activities in other states. Virginia had erred in assuming that "advertising, as such, was entitled to no First Amendment protection. . . ." At the same time advertising, "like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. [ ] To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged." In performing that balancing, the Court concluded that the advertisement was protected by the First Amendment. Justice Rehnquist, joined by Justice White, dissented on the grounds that the speech should be treated as unprotected commercial speech and that, even if

given some First Amendment protection, the speech interest was outweighed by the state's interest in "preventing commercial exploitation of the health needs of its citizens."

VIRGINIA STATE BOARD OF PHARMACY v. VIRGINIA CITIZENS CONSUMER COUNCIL, INC.

Supreme Court of the United States, 1976.
425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346.

[A Virginia statute declared any pharmacist who "advertises . . . any . . . price . . . for any drugs which may be dispensed only by prescription" guilty of "unprofessional conduct" punishable by penalties ranging from fines to revocation of license. The parties stipulated that "about 95% of all prescriptions are now filled with dosage forms prepared by the pharmaceutical manufacturer." They also stipulated that prices for the same drug in the same city varied greatly. The statute was challenged by consumer groups and an individual on the ground that the First Amendment entitled them to receive information that pharmacists wished to communicate to them. A three-judge district court agreed and invalidated the statute.

The first question was whether the claim could be raised by consumers "and not solely, if at all, by the advertisers." Relying on Lamont v. Postmaster General, Kleindienst v. Mandel, and Procunier v. Martinez, all discussed at p. 149, supra, Justice Blackmun concluded that freedom of speech "presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both. . . . If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees." The Court then turned to the main issue.]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

. . .

IV

The appellants contend that the advertisement of prescription drug prices is outside the protection of the First Amendment because it is "commercial speech." There can be no question that in past decisions the Court has given some indication that commercial speech is unprotected. In Valentine v. Chrestensen, [ ] the Court upheld a New York statute that prohibited the distribution of any "handbill, circular . . . or other advertising matter whatsoever in or upon

any street." The Court concluded that, although the First Amendment would forbid the banning of all communication by handbill in the public thoroughfares, it imposed "no such restraint on government as respects purely commercial advertising." 316 U.S., at 54. Further support for a "commercial speech" exception to the First Amendment may perhaps be found in Breard v. Alexandria, 341 U.S. 622 (1951), where the Court upheld a conviction for violation of an ordinance prohibiting door-to-door solicitation of magazine subscriptions. The Court reasoned: "The selling . . . brings into the transaction a commercial feature," and it distinguished Martin v. Struthers, supra, where it had reversed a conviction for door-to-door distribution of leaflets publicizing a religious meeting, as a case involving "no element of the commercial." 341 U.S., at 642–643. Moreover, the Court several times has stressed that communications to which First Amendment protection was given were *not* "purely commercial." [ ]

Since the decision in *Breard*, however, the Court has never *denied* protection on the ground that the speech in issue was "commercial speech." That simplistic approach, which by then had come under criticism or was regarded as of doubtful validity by members of the Court, was avoided in Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973). There the Court upheld an ordinance prohibiting newspapers from listing employment advertisements in columns according to whether male or female employees were sought to be hired. The Court, to be sure, characterized the advertisements as "classic examples of commercial speech," id., at 385, and a newspaper's printing of the advertisements as of the same character. The Court, however, upheld the ordinance on the ground that the restriction it imposed was permissible because the discriminatory hirings proposed by the advertisements, and by their newspaper layout, were themselves illegal.

Last Term, in Bigelow v. Virginia, 421 U.S. 809 (1975), the notion of unprotected "commercial speech" all but passed from the scene. We reversed a conviction for violation of a Virginia statute that made the circulation of any publication to encourage or promote the processing of an abortion in Virginia a misdemeanor. The defendant had published in his newspaper the availability of abortions in New York. The advertisement in question, in addition to announcing that abortions were legal in New York, offered the services of a referral agency in that State. We rejected the contention that the publication was unprotected because it was commercial. *Chrestensen's* continued validity was questioned, and its holding was described as "distinctly a limited one" that merely upheld "a reasonable regulation of the manner in which commercial advertising could be distributed." 421 U.S. at 819. We concluded that "the Virginia courts

erred in their assumptions that advertising, as such, was entitled to no First Amendment protection," and we observed that the "relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas." Id., at 825–826.

Some fragment of hope for the continuing validity of a "commercial speech" exception arguably might have persisted because of the subject matter of the advertisement in *Bigelow*. We noted that in announcing the availability of legal abortions in New York, the advertisement "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.' " Id., at 822. And, of course, the advertisement related to activity with which, at least in some respects, the State could not interfere. See Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973). Indeed, we observed: "We need not decide in this case 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." Id., at 825.

Here, in contrast, the question whether there is a First Amendment exception for "commercial speech" is squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment.

V

We begin with several propositions that already are settled or beyond serious dispute. It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. Buckley v. Valeo, 424 U.S. 1 (1976); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S., at 384; New York Times Co. v. Sullivan, 376 U.S., at 266. Speech likewise is protected even though it is carried in a form that is "sold" for profit, [ ] and even though it may involve a solicitation to purchase or otherwise pay or contribute money.

If there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content. Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject. No one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical prices should be regulat-

ed, or their advertisement forbidden. Nor can it be dispositive that a commercial advertisement is uneditorial, and merely reports a fact. Purely factual matter of public interest may claim protection. Bigelow v. Virginia, 412 U.S., at 822 [ ].

Our question is whether speech which does "no more than propose a commercial transaction," Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S., at 385, is so removed from any "exposition of ideas," Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942), and from " 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,' " Roth v. United States, 354 U.S. 476, 484 (1957), that it lacks all protection. Our answer is that it is not.

Focusing first on the individual parties to the transaction that is proposed in the commercial advertisement, we may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him for protection under the First Amendment. The interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome. . . .

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. Appellees' case in this respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.

Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest. . . . Obviously, not all commercial messages contain the same or even a very great public interest element. There are few to which such an element, however, could not be added. Our pharmacist, for example, could cast himself as a commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof. We see little point in requiring him to do so, and little difference if he does not.

Moreover, there is another consideration that suggests that no line between publicly "interesting" or "important" commercial adver-

tising and the opposite kind could ever be drawn. Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

Arrayed against these substantial individual and societal interests are a number of justifications for the advertising ban. These have to do principally with maintaining a high degree of professionalism on the part of licensed pharmacists. . . .

Price advertising, it is argued, will place in jeopardy the pharmacist's expertise and, with it, the customer's health. It is claimed that the aggressive price competition that will result from unlimited advertising will make it impossible for the pharmacist to supply professional services in the compounding, handling, and dispensing of prescription drugs. Such services are time-consuming and expensive; if competitors who economize by eliminating them are permitted to advertise their resulting lower prices, the more painstaking and conscientious pharmacist will be forced either to follow suit or to go out of business. It is also claimed that prices might not necessarily fall as a result of advertising. If one pharmacist advertises, others must, and the resulting expense will inflate the cost of drugs. It is further claimed that advertising will lead people to shop for their prescription drugs among the various pharmacists who offer the lowest prices, and the loss of stable pharmacist-customer relationships will make individual attention—and certainly the practice of monitoring —impossible. Finally, it is argued that damage will be done to the professional image of the pharmacist. This image, that of a skilled and specialized craftsman, attracts talent to the profession and reinforces the better habits of those who are in it. Price advertising, it is said, will reduce the pharmacist's status to that of a mere retailer.

The strength of these proffered justifications is greatly undermined by the fact that high professional standards, to a substantial extent, are guaranteed by the close regulation to which pharmacists

in Virginia are subject. And this case concerns the retail sale by the pharmacist more than it does his professional standards. Surely, any pharmacist guilty of professional dereliction that actually endangers his customer will promptly lose his license. At the same time, we cannot discount the Board's justifications entirely. The Court regarded justifications of this type sufficient to sustain the advertising bans challenged on due process and equal protection grounds [ ].

The challenge now made, however, is based on the First Amendment. This casts the Board's justifications in a different light, for on close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. . . .

. . .

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the "professional" pharmacist from marketing his own assertedly superior product and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. [ ] But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have re-enforced our view that it is. We so hold.

VI

In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible. We mention a few only to make clear that they are not before us and therefore are not foreclosed by this case.

There is no claim, for example, that the prohibition on prescription drug price advertising is a mere time, place, and manner restric-

tion. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information. [ ] Whatever may be the proper bounds of time, place, and manner restrictions on commercial speech, they are plainly exceeded by this Virginia statute, which singles out speech of a particular content and seeks to prevent its dissemination completely.

Nor is there any claim that prescription drug price advertisements are forbidden because they are false or misleading in any way. Untruthful speech, commercial or otherwise, has never been protected for its own sake. [ ] Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem.[24] The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely. [ ]

Also, there is no claim that the transactions proposed in the forbidden advertisements are themselves illegal in any way. Cf. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, supra; United States v. Hunter, 459 F.2d 205 (CA4th), certiorari denied, 409 U.S. 934 (1972). Finally, the special problems of the electronic broadcast media are likewise not in this case. Cf. Capital Broadcasting Co. v. Mitchell, 333 F.Supp. 582 (D.C.1971), affirmed sub nom. Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972).

24. In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does "no more than propose a commercial transaction" Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S., at 385, and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits there is little likelihood of its being chilled by proper regulation and foregone entirely.

Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. [ ] They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive. [ ] They may also make inapplicable the prohibition against prior restraints. [ ]

What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions[25] we conclude that the answer to this one is in the negative.

The judgment of the District Court is affirmed.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

[Chief Justice Burger concurred separately to emphasize that "the Court wisely leaves" the question of medical and legal services "to another day." Because 95 percent of prescriptions are already in dosage units, he thought the pharmacist "no more renders a true professional service than does a clerk who sells lawbooks." He suggested that advertising of price by professionals might be inherently misleading since "what the professional must do will vary greatly in individual cases." Justice Stewart concurred separately to explain why the decision did not destroy the "constitutional legitimacy of every state and federal law regulating false or deceptive advertising." He emphasized that such laws generally are aimed at commercial advertisers who know the product they are advertising and can more easily verify the accuracy of representations made, than can "the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines. . . ." There was little likelihood of chilling accurate advertising by proscribing false advertising. "Indeed, the elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection—its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking."

Justice Rehnquist dissented. He disagreed on the standing issue because those interested could get the information by other means. On the merits, the Constitution did not require "the Virginia Legislature to hew to the teachings of Adam Smith." Recognizing the difficulty of drawing the line between protected speech and commercial speech in previous cases, he nevertheless thought the majority had

25. We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.

been unwise in drawing a new line between truthful commercial speech and false and misleading commercial speech. He understood the Court's view that the First Amendment was "primarily an instrument to enlighten public decisionmaking in a democracy" to refer to "political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo. It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment." He was also concerned that pharmacists might use this opportunity to promote the use of drugs by such advertisements as "Don't spend another sleepless night. Ask your doctor to prescribe Seconal without delay."]

Notes and Questions

1. Justice Blackmun responded to the dissent's standing question in a footnote observing that there was "no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is." To Justice Rehnquist's claim that if plaintiffs needed the information so badly they might have called the pharmacy or set up canvassing groups, Justice Blackmun responded that if "the great need for the information . . . distinguishes our prior cases at all, it makes the appellees' First Amendment claim a stronger rather than a weaker one."

2. Does the majority opinion imply some constraints other than those relating to truthful as opposed to false and misleading advertisements? In what ways might the right to engage in commercial speech be less broad than the right to engage in other types of speech?

3. If the government could bar an activity such as the sale of cigarettes, would it follow that it could bar advertising of that activity? Assuming that the government could prohibit the manufacture and sale of cigarettes, may it instead permit their continued sale but bar manufacturers from advertising (and the press from carrying the advertisements)?

4. The regulation of commercial speech has generally been developed in cases involving attacks by the prospective advertisers or, occasionally, the medium that would otherwise have carried the banned advertisements. See e. g. Capital Broadcasting Co. v. Mitchell, p. 656, infra, involving the ban on broadcast cigarette commercials.

5. In some areas, false advertisements are directly regulated. Thus, § 13(a) of the Federal Trade Commission Act, 15 U.S.C. § 53(a),

may be invoked when the Trade Commission has reason to believe that a corporation is engaged in disseminating "materially misleading advertising intended to induce the purchase of items of food. . . ." In one case, a non-profit trade association published advertisements stating that there was no scientific evidence linking egg consumption to heart disease. The court thought the record clearly showed the existence of such evidence and upheld an order banning such ads because "There is no constitutional right to disseminate false or misleading advertisements." The group was allowed to state its own position "provided that it also states that there is substantial contrary evidence." Federal Trade Comm'n v. National Comm'n on Egg Nutrition, 517 F.2d 485 (7th Cir. 1975) certiorari denied 426 U.S. 919 (1976). Is there likewise an obligation on university medical researchers or the Surgeon General to announce that although they have concluded that the evidence links egg consumption and heart disease there is also contrary evidence, or vice-versa? Do First Amendment considerations suggest that all parties should have similar obligations in this situation? Is there a valid distinction between the duties of university and government health experts and those of parties who use advertising to sell eggs?

6. The Federal Trade Commission Act provides that "No publisher, radio-broadcast licensee, or agency or medium for the dissemination of advertising . . . shall be liable under this section by reason of the dissemination by him of any false advertisement, unless he has refused" to identify the person who placed the advertisement. 15 U.S.C. § 54. Most states provide the same protection—at least where the advertisement is published "in good faith, without knowledge of its false, deceptive, or misleading character." Cal.Bus. & Prof.Code § 17502. But some states make it a crime for the "publisher of any newspaper or periodical wilfully and knowingly to misrepresent the circulation of the newspaper or periodical, for the purpose of securing advertising or other patronage." Cal.Bus. & Prof.Code § 17533.

7. Interstate ramifications of control of advertising may create problems whenever two adjoining states have different regulations. In Head v. New Mexico Board of Examiners, 374 U.S. 424 (1963), cited by the dissent in *Bigelow*, New Mexico banned price advertising by optometrists but Texas did not. A Texas optometrist sought to advertise prices in a newspaper and over a radio station situated in Hobbs, New Mexico but having service areas largely in Texas. The New Mexico courts upheld injunctions against both the newspaper and the radio station and both appealed to the Supreme Court claiming a burden on interstate commerce. The Court unanimously affirmed against both media. Although interstate commerce might be burdened, it was not an unreasonable burden because no uniformity of

regulation was required in this situation and the media were not placed in a position in which they were being required to perform two inconsistent actions. The Court did not consider First Amendment arguments arising from the injunctions because they had not been made to the lower courts.

b. Noncommercial Speech

The cases that deal with efforts to regulate communication for the benefit of citizens' health, safety and welfare involve a complex set of variables. Apart from the question of "commercial speech," some of the fundamental issues are: What are the permissible interests the state seeks to protect or promote? How important are these interests? At whose expense are they being promoted? Are there other ways to achieve these goals? How many will actually benefit? We must also ask what kind of danger is created by the communication that is to be restrained, whether falsity is relevant, whether illegal conduct is espoused, whether there are persons other than the would-be speaker who have even stronger claims against the restraint, and who may assert such claims? What follows is a brief survey of a vast topic.

Health and Safety. Protection of health and safety presents perhaps the strongest case in this cluster for regulating communication. Yet even here there are serious questions about the power to regulate noncommercial speech. Could the state forbid the sale of cigarettes and at the same time bar newspapers from editorializing about the wisdom of smoking? The discussion of whether smoking is good, bad or neutral for health is one that should be encouraged in a society committed to freedom of communication. Is this equally true if the content includes deliberate falsity? Suppose the editorial urged citizens to defy the legislation and called for illegal conduct?

Personal Injury. In situations like the eggs and cholesterol case, the government seeks to protect the public by general regulation. In other situations, however, tort law may be utilized. A radio station catering to teenagers broadcast clues as to the whereabouts of a disc jockey and offered a cash prize to the first listener to reach him. Two teenagers reached the correct location but were not the first to arrive. While following the disc jockey to his next stop, the two drivers vied for position on the freeway and thereby caused a fatal accident. The court held that the station owed the decedent a duty of care and had violated it. Weirum v. RKO General, Inc., 15 Cal.3d 40, 539 P.2d 36, 123 Cal.Rptr. 468 (1975). Without relying on the fact that the contest was a boost for the station, the court easily rejected the station's First Amendment claim as "clearly without merit. The issue here is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to decedent. The

First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act." Is this sound? What about a reporter racing to a reported assassination of the city's mayor?

In September, 1974, a network television program shown in the early evening depicted a group of girls raping another girl with a broom. The fictional program was widely condemned. Four days later a girl was raped with a soda bottle by three 10 to 15-year-old girls, who had seen the program or had heard about it from friends at school. A suit against the network and its local affiliate was dismissed on the ground that broadcasters could not be liable for imitations by others of material presented on the air.

Sex Discrimination. In a totally different area, the Human Rights Commission of Rochester, Minn., found a newspaper in violation of the city's anti-discrimination ordinance because it identified married women by their husbands' given names. The Commission found the newspaper to be a public accommodation as defined in the ordinance. On appeal to the State Department of Human Rights, the complaint was dismissed as beyond the Commission's jurisdiction. Editor & Publisher, June 8, 1974, p. 18 and May 10, 1975, p. 20. If the statute had authorized the Commission to act in such cases, would the First Amendment have barred the action?

Securities Information. Securities legislation has by implication affected what financial columnists may write in the press about attractive investments. Although this is not commercial speech and is not challenged as to accuracy, no constitutional problem has been perceived in the regulation. In one case, for example, a financial reporter wrote laudatory articles about a company. He did not disclose that he had recently bought stock in the company. The stock rose dramatically and the author disposed of some or all of his shares. Later, the stock's value declined. Would a ban on such action raise serious First Amendment problems? Investors who lost money, unsuccessfully sued the newspaper in which the column had appeared. Zweig v. Hearst Corp., 521 F.2d 1129 (9th Cir.) certiorari denied 423 U.S. 1025 (1975), Justices Stewart and White dissenting. In what is asserted to be the first case of its kind, a financial columnist has pleaded guilty to violating the 1933 Securities Act by writing a glowing column about a company without revealing that he had received a $15,000 payment from two stock dealers to write the article. See IX Press Censorship Newsletter 83 (1976).

G. PROTECTING INTELLECTUAL CREATIVITY—COPYRIGHT

The laws of copyright are among the most obvious but least condemned restraints on freedom of expression. Article I, § 8, of the Constitution of the United States gives Congress 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 . . . ." The very first Congress utilized that authority to adopt copyright legislation and it has been with us in some form ever since.

The origins of copyright are interwoven with the licensing procedures we discussed in Chapter I. One technique for controlling the printing press was to organize printers into a group that became known as the Stationers Company. The Crown granted to that company a monopoly of all printing, with the power to seek out and suppress material published by non-members who violated the monopoly. The Crown's goal was to thwart seditious libel and other objectionable material. The printers, for their part, seized on the monopoly situation to control reproduction of whatever they printed. The result was the licensed printers' right to control copies based on the censorship of the 16th and 17th centuries. When licensing was discontinued in 1695, the rights of the printers were undermined. They petitioned Parliament to adopt protections resembling what they had under the licensing schemes. In 1709 Parliament responded with the Statute of Anne, which has set the pattern for copyright legislation both in England and in this country. The Stationers Company remained but its new role was to register printed material, which would serve to protect that material against unauthorized copying.

The first Congress adopted a similar procedure: printed matter could be protected by filing a copy with the newly established copyright office, headed by the "Register of Copyrights." The types of writings protected and the period of protection have been expanded since the 1790 statute, which protected only books, maps and charts for a period of 14 years plus renewal for a second 14-year term.

In 1976, the copyright statute enacted in 1909 was replaced with new legislation that preserves the basic philosophical strands of copyright law. Changes have been made in legal technicalities or to accommodate media that emerged after 1909 and did not easily fit within the old framework.

The copyright statute is found in title 17 of the United States Code. Section 102 of the new legislation sets out the basic pattern of protection when it states that copyright protection subsists in "original works of authorship fixed in any tangible medium of ex-

pression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." The statute lists such categories as literary works, musical works, dramatic works, motion pictures and sound recordings as coming within "works of authorship." The section then states the other side of the coin: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method or operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." What distinction is being drawn here?

Section 105 provides that copyright protection is not available for works of the United States Government. Section 106 states the nature of the protection extended to the copyright owner:

> Subject to sections 107 through 118, the owner of copyright under this title has the exclusive right to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Under the 1909 statute, published works were protected by federal law while unpublished works were protected under state law. Under the new legislation, all protection is to be found in a single national framework. Copyright protection used to last for 28 years with the opportunity to renew for another 28 years. Under the new statute, copyrights last for the author's life plus 50 years—as in most other countries. Copyright notices must still be affixed to published works but omission or error in placing the notice will no longer result in automatic forfeiture of the copyright. Perhaps the most vigorous political controversy concerned the relationship between broadcasters

and cable television. The complicated resolution of this dispute is discussed at p. 481, infra.

The main problems of protection are discussed in the excerpt that follows: the questions of what part of an author's work is protected from copying, and what justifications exist for permitting certain others to copy. Melville Nimmer is a professor of law at the University of California at Los Angeles.

DOES COPYRIGHT ABRIDGE THE FIRST AMENDMENT GUARANTEES OF FREE SPEECH AND PRESS?

Melville B. Nimmer

17 University of California at Los Angeles Law Review 1180 (1970).

. . .

. . . The first amendment tells us that "Congress shall make no law . . . abridging the freedom of speech, or of the press." Does not the Copyright Act fly directly in the face of that command? Is it not precisely a "law" made by Congress which abridges the "freedom of speech" and "of the press" in that it punishes expressions by speech and press when such expressions consist of the unauthorized use of material protected by copyright? But surely, many will conclude, the first amendment does not apply to copyright infringers. Yet, is such a conclusion justified? The language of the first amendment does not limit its protection to speech which is original with the speaker, but rather states that Congress shall make "no law" abridging freedom of speech; and Mr. Justice Black has said that this reference to "no law" means no law, "without any 'ifs' or 'buts' or 'whereases.'" If one adopts Justice Black's absolutist approach to the first amendment it is difficult to see how any copyright law can be regarded as constitutional.

It might be contended that copyright laws fall within a built-in exception to first amendment protection, not by the words of the first amendment, but by reason of another passage of the Constitution, namely the copyright clause, expressly authorizing Congress to grant to authors "the exclusive right" to their "writings." However, there are several reasons why refuge for copyright may not be found in this manner. First, if a completely literal reading of the first amendment is to be made, then we must likewise recognize that the first amendment is an amendment, hence superseding anything inconsistent with it which may be found in the main body of the Constitution. This, of course, includes the copyright clause. In any event, even were the original Constitution and the Bill of Rights to be

viewed as a single instrument, the copyright clause may not be read as independent of and uncontrolled by the first amendment. . . .

. . .

. . . Rather surprisingly, up to now the courts have not found it necessary to delineate the respective claims of copyright and freedom of speech. One can predict with confidence, however, that such a confrontation will eventually occur. It is not too soon for those concerned with copyright, and those concerned with freedom of speech (and I have suggested that the latter includes the former) to turn their minds to the policy questions which must underlie an acceptable definitional balance between these two interests.

II. Seeking a Definitional Balance

A. *The Conflicting Interests to be Weighed*

As a first step in reaching such a definitional balance, it is necessary to articulate what it is that is sought to be achieved by both copyright and freedom of speech. For copyright, the familiar constitutional phrase: "to promote the progress of science and useful arts" sums up the primary *raison d'être* for the protection of literary and artistic works. That is, congressional authorization to grant to individual authors the limited monopoly of copyright is predicated upon the dual premises that the public benefits from the creative activities of authors and that the copyright monopoly is a necessary stimulus to the full realization of such creative activities. In addition to and distinguishable from the economic rationale, there is also the author's interest in privacy. This second reason for copyright is mainly, though not entirely, applicable to unpublished works in what is today known as the sphere of common law copyright.[22] An author may wish to create a work merely as an act of self-expression, intending it for himself alone, or for only a selected and limited group of others. The law has respected this privacy interest (or "moral right" as it would be called in Europe) by granting to authors a right of first publication as a central component of copyright.

[Here the author summarizes attitudes toward free speech of Mill, Brandeis, and Meiklejohn and identifies three major justifications: "a necessary concomitant of a self-governing, or democratic society;" an end in itself, allowing self-fulfillment; a safety valve.]

These, then, are the conflicting interests that must be accommodated in drawing a definitional balance. On the copyright side, eco-

22. Common law copyright refers to state copyright laws, applicable only to unpublished works. See M. Nimmer, Nimmer on Copyright § 11 (1970). [The 1976 Act changes this—ed.]

nomic encouragement for creators must be preserved and the privacy of unpublished works recognized. Freedom of speech requires the preservation of a meaningful public or democratic dialogue, as well as the uses of speech as a safety valve against violent acts, and as an end in itself.

B. *A Balance Based Upon the Idea-Expression Dichotomy*

Does the law of copyright, as we know it today, effectively serve the interests underlying copyright, while not encroaching upon the interests underlying freedom of speech? That is to say, is there an acceptable if de facto definitional balance in the law as it presently exists? To find the answer we start with the fundamental principle that copyright does not protect an author's "ideas" per se. If it did, there would certainly be a serious encroachment upon first amendment values. The market place of ideas would be utterly bereft, and the democratic dialogue largely stifled if the only ideas which might be discussed were those original with the speakers.

But if copyright does not protect "ideas," what does it protect? The conventional formulation is that while copyright may not be claimed in an idea, it may be claimed in "the expression of the idea." Does that mean that only the exact words used by an author are protectable? If that were the rule, copyright interests would be badly served, indeed. The economic motivation of creation which underlies copyright would be almost completely vitiated if anyone could with impunity take an author's work by the device of making a few changes in wording, or even by closely paraphrasing the entire work. Judge Learned Hand long ago made clear that copyright "cannot be limited literally to the text, else a plagiarist would escape by immaterial variations." [32] If the reach of copyright is thus not limited to verbatim repetition, yet does not extend to ideas per se, how does one draw the line that separates non-protectible ideas from the protectible "expression of ideas"? Learned Hand had said that "wherever [the line] is drawn, it will seem arbitrary . . ." and that "the test for infringement of a copyright is of necessity vague." But Judge Hand vividly described the nature of the quest for "the expression of an idea" in what I call the "abstractions test":

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist of only its title; but there is a point in

32. Nichols v. Universal Pictures Co., 45 F.2d 119, 121 (2d Cir. 1930).

> this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas', to which, apart from their expression, his property is never extended.

Professor Zechariah Chafee (who, incidentally, is an example par excellence of one committed to both copyright and free speech) suggested the level of abstraction which will constitute the copyright line: "No doubt, the line does lie somewhere between the author's idea and the precise form in which he wrote it down. I like to say that the protection covers the 'pattern' of the work . . . the sequence of events, and the development of the interplay of characters." Though Professor Chafee's "pattern" test is particularly applicable to fictional works, it, together with Hand's "abstractions test," suggests the general nature of the dichotomy between non-protected ideas, and the protected "expression of ideas." It is the particular selection and arrangement of ideas, as well as a given specificity in the form of their expression which warrants protection under the law of copyright.[37]

Here, then, is a definitional balance under which ideas per se fall on the free speech side of the line, while the statement of an idea in specific form, as well as the selection and arrangement of ideas fall on the copyright side of the line. Does this particular balance adequately serve both the interests which underlie copyright, and those which freedom of speech are intended to protect? In general, I would defend this de facto definitional balance.

Does the copyright limitation whereby authors may not prohibit others from copying their abstract ideas serve to discourage creativity, or otherwise retard the "progress of science and useful arts"? Our experience tells us that it does not. Despite the fact that ideas, as distinguished from their "expression," are "free as air," we have witnessed an increasingly immense flow of works emanating from the creative segments of our society. It is true that we have no positive evidence as to whether the flow would have been still greater had ideas per se been legally protectible, but there is reason to believe that idea protection would have in fact been counterproductive. Most, if not all, writers draw from the stock of ideas of their predecessors. Professor Chafee reminded us that "a dwarf standing on the shoulders of a giant can see farther than the giant himself." If writers and other creators could not build upon the ideas of their

37. Underlying such protection is the requirement that the author's work be "original" with him, i.e., that he has not copied it from any other source. This is to be distinguished from the patent requirement of novelty, i.e., that the creation be the first of its kind. *See generally* Nimmer on Copyright § 10 (1970).

predecessors, not only would free speech be stifled, but the creative processes, themselves—the copyright side of the definitional balance —would also be severely circumscribed.

. . .

If on the whole, non-protection for ideas is consistent with the objectives sought under the copyright laws, is the other side of the definitional balance also defensible? That is, does the copyright prohibition on repeating or copying the "expression" of ideas comport with the underlying rationale for freedom of speech? In general, it seems to do so. Take the most important objective that underlies freedom of speech—the maintenance of the democratic dialogue. That process is also known as the marketplace of ideas, and not without reason. It is exposure to ideas, and not to their particular expression, that is vital if self-governing people are to make informed decisions. It is important that we have free access to the ideas of both William F. Buckley, Jr. and Eldridge Cleaver; and everyone should have the right to disseminate Buckley's and Cleaver's ideas, either by way of endorsement or criticism. But that process of enlightenment does not require the freedom to reproduce without permission either Buckley's book *Up From Liberalism*, or Cleaver's *Soul On Ice*. To reproduce the "expression" of their ideas may add flavor, but relatively little substance to the data that must inform the electorate in the decision-making process. Such minimal substance, lost through the copyright prohibition on reproduction of expression, is far out-balanced by the public benefit that accrues through copyright encouragement of creativity.

The other two justifications for free speech likewise are not measurably frustrated by the copyright abridgement of the right to reproduce an author's expression. The safety valve rationale is hardly applicable. It is not likely that men will resort to violence because they lack the legal right to reproduce the expression of another, even though such violence might result if idea dissemination were permitted only for ideas original with the speaker. Similarly, free speech as a function of self-fulfillment does not come into play. One who pirates the expression of another is not engaging in *self*-expression in any meaningful sense.

On the whole, therefore, I would conclude that the idea-expression line represents an acceptable definitional balance as between copyright and free speech interests. In some degree it encroaches upon freedom of speech in that it abridges the right to reproduce the "expression" of others, but this is justified by the greater public good in the copyright encouragement of creative works. In some degree it encroaches upon the author's right to control his works in that it renders his "ideas" per se unprotectible, but this is justified by the

greater public need for free access to ideas as a part of the democratic dialogue.

III. Justified Balancing in Favor of Free Speech

It is necessary now to turn to certain specific areas where it seems to me that the idea-expression dichotomy does not properly balance the conflicting interests in copyright and free speech. I propose to suggest several instances where it may well be that copyright protection for expression may not be justified given the countervailing interest in free speech.

A. *Copyright in Perpetuity?*

. . .

Consider, for example, the fact that under common law copyright, an author may claim protection in perpetuity for his unpublished works. Does the need for economic encouragement of creativity justify a perpetual term of copyright protection? It seems most unlikely that an author, assured of the economic fruits of his labor for his own lifetime, that of his children, and perhaps also his grandchildren, would elect not to engage in creative efforts because his posterity in perpetuity would not also so benefit. Likewise, the privacy rationale for copyright largely loses its meaning when the author who sought such privacy has been dead for a considerable period of time. Some may question why literary property should be treated differently from other forms of property? If I may own Blackacre in perpetuity, why not also *Black Beauty?* The answer lies in the first amendment. There is no countervailing speech interest which must be balanced against perpetual ownership of tangible real and personal property. There is such a speech interest with respect to literary property, or copyright. . . .

B. *The Wedding of Expression and Idea*

. . . In general, the democratic dialogue—a self-governing people's participation in the marketplace of ideas—is adequately served if the public has access to an author's ideas, and such loss to the dialogue as results from inaccessibility to an author's "expression" is counterbalanced by the greater public interest in the copyright system. But this conclusion requires reappraisal if there are certain areas of creativity where the "idea" of a work contributes almost nothing to the democratic dialogue, and it is only its expression which is meaningful. It has been said that "a work of art cannot be described; it can only be experienced." This is obviously true, as anyone who attempts to describe the "idea" of the *Mona Lisa* or of Michelangelo's *Moses* must realize. To the extent that a meaningful

democratic dialogue depends upon access to graphic works generally, including photographs as well as works of art, it must be said that little is contributed by the idea divorced from its expression. This, I hasten to add, does not compel the conclusion that all graphic works should be held incapable of copyright by reason of the first amendment. For most graphic works, the balance still favors copyright protection. Admittedly, the democratic dialogue gains little from free access to graphic work "ideas" divorced from expression. But even were the speech value of free access to graphic work "expressions" to be weighed against the copyright value in encouraging the creation of such graphic works, the copyright interest would appear to prevail in most cases. The additional enlightenment contributed to the democratic dialogue by reason of the visual impact of most graphic works is relatively slight as compared with the intellectual impact of a literary work. This is not to say that the visual impact of graphic works is totally without significance, but only that its weight, on balance, does not seem to equal the copyright interest that encourages the creation of graphic works.

At this point, however, it becomes necessary to strike the balance in the opposite direction with respect to certain types of graphic works. Consider the photographs of the My Lai massacre. Here is an instance where the visual impact of a graphic work made a unique contribution to an enlightened democratic dialogue. No amount of words describing the "idea" of the massacre could substitute for the public insight gained through the photographs. The photographic expression, not merely the idea, became essential if the public was to fully understand what occurred in that tragic episode. It would be intolerable if the public's comprehension of the full meaning of My Lai could be censored by the copyright owner of the photographs. Here I cannot but conclude that the speech interest outweighs the copyright interest. Something of the same considerations were at play in Time, Inc. v. Bernard Geis Associates,[64] the case involving the Zapruder home movie films of the John Kennedy assassination. Though Judge Wyatt in that case did not expressly invoke the first amendment, he did justify the defendant's right to copy frames of the film on the ground of the "public interest in having the fullest information available on the murder of President Kennedy." Note that in both the My Lai situation and in the Zapruder film case, the public could have learned the facts even without recourse to the photographs thereof. Judge Wyatt made a point of the fact that *Life Magazine's* copyright in the Zapruder film did not result in its having an "oligopoly" on the facts of the assassination. But without access to the

64. 293 F.Supp. 130 (S.D.N.Y.1968).

photographs, in Meiklejohn's phrase, "all facts and interests relevant to the problem . . . [would not be] fully and fairly presented . . . ." . . .

Similarly, in the welter of conflicting versions of what happened that tragic day in Dallas, the Zapruder film gave the public authoritative answers that it desperately sought; answers that no other source could supply with equal credibility. Again, it was only the expression, not the idea alone, that could adequately serve the needs of an enlightened democratic dialogue.

But if one agrees that the My Lai photographs and the Zapruder home movie film properly fall on the free speech side of the copyright-free speech definitional balance, the problem remains as to how to generalize from the My Lai and Zapruder specifics. Graphic works per se should not be deprived of full copyright protection. What, then, is an appropriate category within which to include the My Lai and Zapruder films? I would hesitate to define this group as including all graphic works in which there is a substantial "public interest" since this phrase is susceptible of including works which would contribute little to the democratic dialogue. I would, tentatively, suggest that the special category to which I am alluding be limited to "news photographs." Photographs would refer to all products of the photographic and analogous processes, including motion picture film and video tape, but would exclude other graphic works, such as paintings, sculpture, etc. The public interest in the latter works are usually because of the creative contribution of the artist, and not because of the factual content which they convey. . . .

. . .

IV. Unjustified Balancing in Favor of Free Speech

Up to now I have suggested a few specific and limited areas where, in my judgment, the demands of the first amendment require some limitation of copyright. However, if the first amendment justifies some limited use of the scalpel, it does not legitimize wholesale amputation in vital copyright areas. This, I fear, may be looming on the horizon under the combined banners of the first amendment and fair use. In Time, Inc. v. Bernard Geis Associates, the judge, after speaking of the "public interest in having the fullest information available on the murder of President Kennedy," actually relied not on the first amendment but rather on the doctrine of fair use in upholding the defendant's copying of the Zapruder film. I would suggest that a grave danger to copyright may lie in the failure to distinguish between the statutory privilege known as fair use and an emerging constitutional limitation on copyright contained in the first amendment. The scope and extent of fair use falls within the discretion of the Congress. The limitations of the first amendment are imposed

upon Congress itself. Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied. The first amendment privilege, when appropriate, may be invoked despite the fact that the marketability of the copied work is thereby impaired.

Judge Wyatt, in the *Bernard Geis* (Zapruder film) case, purported to rely upon fair use rather than upon the first amendment. He therefore found it necessary to take the position that the defendant's activities in publishing a book, containing copied frames of the Zapruder film, did not work any injury to the plaintiff's market for the same film. In reaching this conclusion, Judge Wyatt was forced to concede that "[t]here are projects for use by plaintiff [*Life Magazine*] of the film in the future as a motion picture or in books. . . ." He nevertheless denied the competitive disadvantage of defendant's use of film in its book because "the effect of the use of certain frames in the [defendant's] Book on . . . [plaintiff's proposed film and book projects] is speculative. It seems reasonable to speculate that the [defendant's] Book would, if anything, enhance the value of the copyrighted work. . . ." This is like arguing that if a motion picture company takes my novel and uses it as the basis of a film, I am not being injured because the film is likely to enhance the sale of my novel. Indeed, my book sale may not be harmed, but my ability to mount my own motion picture production based upon my novel will be. Similarly, were *Life Magazine* to attempt to publish a book using frames from the Zapruder film for the purpose of theorizing on the nature of the Kennedy assassination, can it be doubted that defendant's book which had the same objective would in some degree hurt the sale of the *Life* book? The result in the *Bernard Geis* case can be defended, if at all, not on the ground of fair use, but rather because of the previously described free speech elements inherent in the film.

These elements can be seen more clearly if we compare the *Bernard Geis* case with another fair use case in which such free speech elements are not present. I refer to Rosemont Enterprises, Inc. v. Random House, Inc.[78] That is the case in which Howard Hughes' company, Rosemont, acquired the copyright in a series of articles entitled "The Howard Hughes Story" which originally appeared in *Look Magazine*. As copyright owner, Hughes via Rosemont attempted to enjoin defendant Random House from publishing another (and unauthorized) biography of Mr. Hughes. The Court of Appeals for the Second Circuit held that a preliminary injunction had been erroneously issued, and vacated the injunction on the ground that the defendants appeared entitled to the defense of fair use. This,

78. 366 F.2d 303 (2d Cir. 1966).

despite the fact that the district court opinion indicated that almost 27% of the first *Look* article had been closely copied in the defendant's work, and some 14% of all of the articles had been thus copied. The court of appeals in reversing the district court did not question the fact of copying, and, indeed, acknowledged that there was "little doubt that portions of the Look articles were copied" in defendants' books. In concluding that the defense of fair use was nevertheless assertible, the court of appeals used language that in effect, though not in so many words appeared to invoke the first amendment. The court said: "By this preliminary injunction, the public is being deprived of an opportunity to become acquainted with the life of a person endowed with extraordinary talents. . . . 'Everyone will agree that at some point the public interest in obtaining information becomes dominant over the individual's desire for privacy.' Thus, in balancing the equities at this time in our opinion the public interest should prevail over the possible damage to the copyright owner."

Despite this first amendment type reasoning, *Rosemont* appears to be distinguishable from *Bernard Geis*. While the free speech elements may outweigh the copyright elements with respect to the Zapruder film in *Bernard Geis*, the copyright elements should be held to outweigh the free speech elements with respect to the Hughes biography in *Rosemont*. Why this distinction? Return to the idea-expression dichotomy. I have suggested that for the most part the needs of an enlightened democratic dialogue are adequately served if there is free access to ideas, even though the expression of such ideas may not be copied. This is not to say, of course, that the democratic dialogue —the marketplace of ideas—may consist of raw ideas alone not contained in some form of expression. Ideas to be meaningful must be expressed in words or by some other objective manifestation. The point is not that ideas are useful without expression, but rather that while public enlightenment may require the copying of ideas from others, it remains perfectly possible for the speaker (or writer) who copies ideas from another, to supply his own expression of such ideas. True, it would often be easier to copy the expression as well as the idea, but the value of such labor-saving utility is far outweighed by the copyright interest in encouraging creation by protecting expression. Moreover, this particular definitional balance breaks down in those special instances where the expression for a given idea may not be independently supplied by an idea copier. One who wished to fully convey the "idea" of the My Lai massacre photographs could do so only by copying the expression as well as the idea of the photographs. To attempt a simulated photograph with models posing as dead bodies in order to express the idea of the original My Lai photographs would be ludicrous. The expression must be copied along with the

idea not because it is onerous for an idea copier to create his own expression, but rather because the idea cannot be conveyed unless the expression as well is copied.

Compare this with the Howard Hughes biography in the *Rosemont* case. Clearly the facts of Hughes' life are "ideas" which may be copied from the *Look* articles. But the defendants in *Rosemont* went far beyond that, copying much of the expression as contained in the *Look* articles which *Rosemont* acquired. It misses the point to argue that biographies of public figures are of great public interest, and that the public must not be deprived of the opportunity to become acquainted with the lives of such persons. It was perfectly open to the defendants in *Rosemont* to copy the facts or ideas of Hughes' life as contained in the *Look* articles, or elsewhere, and to supply their own expression for such facts or ideas. Insofar as they chose to avoid the expenditure of time and skill necessary to evolve their own expressions, and instead copied the plaintiff's expression, there can be no first amendment justification for such copying. Where copying of the expression along with the idea may have been essential in the case of the My Lai photographs or the Zapruder film if the idea itself was to be effectively conveyed, copying of the expression in *Rosemont* was merely labor saving, and not essential, to the expression of the idea.

This, then, suggests a principle that may have ramifications far beyond the particular cases here focused upon. There can be no first amendment justification for the copying of expression along with idea simply because the copier lacks either the will or the time or energy to create his own independently evolved expression. The first amendment guarantees the right to speak; it does not offer a governmental subsidy for the speaker, and particularly a subsidy at the expense of authors whose well-being is also a matter of public interest.

This first amendment principle must, in turn, be distinguished from the doctrine of fair use. Congress may, in its discretion, limit the copyright monopoly under the doctrine of fair use. Still, if the first amendment does not require copying subsidies at the author's expense, the wisdom of congressionally-imposed subsidies paid for by authors is also questionable, whether tacitly or expressly based upon free speech principles.

. . .

Notes and Questions

1. There has also been recent interest in considering the economic justification for copyright protection. Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Comput-

er Programs, 84 Harv.L.Rev. 281 (1970); Tyerman, The Economic Rationale for Copyright Protection for Published Books: A Rejoinder to Prof. Breyer, 18 UCLAL.Rev. 1100 (1971); Breyer, Copyright: A Rejoinder, 20 UCLAL.Rev. 75 (1972).

2. As noted earlier, the grant of rights to the owner of the copyright is conditioned on a series of limitations expressed in §§ 107–118. These include permitting libraries to make one photocopy of an article and permitting persons to make phonograph records of music without permission upon payment of certain royalties. Section 111 deals with the cable television problem. Probably the most important of these limitations is found in § 107, dealing with the problem of fair use discussed by Nimmer. Until the 1976 statute, the problem of fair use had been left to develop as a judicially created exception to the rights of the copyright owner. There was great controversy over whether to recognize the defense explicitly and, if so, how to do it. The result is § 107:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, 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 made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (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; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

Does this change any of Nimmer's analysis?

3. Another important question—one requiring a balancing of property rights and first amendment rights—is to what extent a news organization can make unauthorized use of the research and labor of a competitor by either directly copying the work of its competitor or by "appropriating" the facts contained in a competitor's news release. Although the substance of news cannot be protected by common law or statutory copyright, the doctrine of unfair competition has been used to protect the gatherer of news from the direct, unauthorized reproduction of its material for commercial use. In International News Service v. Associated Press, 248 U.S. 215 (1918), I.N.S. was

enjoined from copying news from A.P. bulletin boards and early editions of A.P. member newspapers until "the commercial value" of the news to the complainant and all of its members had passed. The Court found unfair competition in the taking of material acquired through the expenditure of skill, labor, and money by A.P., for the purpose of diverting "a material portion of the profit" to I.N.S. Although the Court condemned the "habitual failure" of I.N.S. to give credit to A.P. as the source of its news, the misrepresentation was not considered essential to a finding of unfair competition: "It is something more than the advantage of celebrity of which complainant is being deprived."

This type of protection has been extended to other areas. Radio stations may not broadcast news items taken from a local newspaper, and a second publisher may not photograph an existing edition of a book in order to save the cost of setting type, whether or not the first edition was copyrighted. Where words and ideas are involved, the courts have been quite protective of the initiator, perhaps because of the fragile and ephemeral nature of the finished product.

Chapter V

INTRODUCTION TO BROADCASTING

Our discussion so far has dealt largely with print media rather than with users of the broadcast spectrum, to the extent that legal controls for the two differ. In this chapter we will learn how broadcasting operates and why this has led to legal regulation quite unlike that of the print sector. We shall also consider in detail two subjects that illuminate the interrelationship between the legal and the economic aspects of broadcasting: efforts to prevent undue concentration of ownership of broadcast facilities, and efforts to prevent networks from exercising too great an influence over programming. Several of the themes introduced in this chapter will be revisited when we discuss the licensing process in Chapter VI and specific constraints on content in Chapter VII. Major sections of the Communications Act of 1934 are reprinted in Appendix B.

A. THE SPECTRUM AND ITS UTILIZATION

1. The Nature of the Spectrum

The electromagnetic spectrum is a unique natural resource. Utilization does not use it up or wear it out. It does not require continual maintenance to remain usable. It is subject to pollution (interference), but once the interference is removed the pollution totally disappears. The value of the spectrum lies primarily in its use for conveying a wide variety of information at varying speeds over varying distances: in other words, for communications.

All electromagnetic radiation is a form of radiant energy, similar in many respects to heat, light, or X-radiation. All of these types of radiation are considered by physicists to be waves resulting from the periodic oscillations of charged subatomic particles. All radiation has a measurable frequency, or rate of oscillation, which is measured in cycles per second, or hertz. One thousand cycles per second equals one kilocycle per second (1 KHz); 1,000 kilocycles per second equals one Megacycle per second (1 MHz); and 1,000 Megacycles per second equals one Gigacycle per second (1 GHz). The frequencies of electromagnetic radiation that comprise the radio spectrum span a wide range, from 10 KHz to 3,000,000,000,000 cycles per second (3,000 GHz), all of which are nearly incomprehensibly rapid. Present technology allows use of the spectrum only up to 40 GHz.

The radio spectrum resource itself has three dimensions: space, time and frequency. Two spectrum users can transmit on the same frequency at the same time if they are sufficiently separate physically; the physical separation necessary will depend on the power at which each signal is transmitted. They then occupy different parts of the spectrum in the spatial sense. Similarly, the spectrum can be divided in terms of frequency, dependent on the construction of the transmitting and receiving equipment; or in a temporal sense, dependent largely on the hours of use.

The spectrum is subject to the phenomenon of interference. One radio signal interferes with another to the extent that both have the same dimensions. That is, two signals of the same frequency that occupy the same physical space at the same time will interfere with each other (co-channel interference). Signals on adjacent channels may also interfere with each other. Interference usually obscures or destroys any information that either signal is carrying. The degree to which two signals occupy the same physical space depends on the intensity of the radiated power at a given point, which in turn depends on the construction of the transmitting equipment and antenna.

The spectrum is divided into numbered bands, extending from Very Low Frequencies (VLF) to Very, Ultra, Super and Extremely High Frequencies (EHF) and beyond. The lower frequencies of the radio spectrum are used for "point-to-point" communications and for navigational aids. AM radio is located in the range between 300 and 3,000 KHz, known as the Medium Frequency band (MF). FM radio and VHF television (channels 2–13) are in the Very High Frequency band (VHF), from 30 to 300 MHz. The Ultra High Frequency band (UHF), from 300 to 3,000 MHz, is the location of UHF television (channels 14–83). Still higher frequencies are used for microwave relays and communication satellites.

The effective limitations on use of the radio spectrum are defined by (1) the propagation characteristics of the various frequencies and (2) the level of interference. Low frequency radio waves are best suited to long distance communications. In the lowest frequency bands the radio waves propagate primarily along the ground or water and follow the curvature of the earth. The attenuation of these "ground waves" generally increases with frequency; VLF waves may be propagated for thousands of miles, which explains their value for point-to-point communication. Ground waves in the HF band below VHF, can propagate no more than a few hundred miles and above that band they become unimportant. Sky wave propagation is important up to the start of the VHF band. These radio waves tend to depart from the earth's surface and are reflected by the ionosphere, an electrically charged region of the atmosphere 35 to 250 miles above the earth. The amount of reflection depends on the

level of daily solar activity, the time of day, the season, and geographical location, as well as the length of the signal path and the angle at which the waves strike the ionosphere. The reflection of sky waves is much greater at night when they may be transmitted over great distances. Above 30 MHz, radio waves tend to pierce the ionosphere rather than to be reflected, and line of sight transmission becomes increasingly necessary. As the frequency increases above 30 MHz, surface objects absorb radiation at an increasing rate, until a clean unobstructed line of sight becomes necessary at 1 GHz. In the very highest frequencies, the waves are subject to substantial absorption by water vapor and oxygen in the atmosphere and cannot be used for communication.

Interference constitutes the second major limitation on the use of the electromagnetic spectrum. As noted above, interference results when two signals attempt to occupy the same spectrum in all of its three dimensions. Even if two users wish to transmit on the same frequency, interference can be avoided by sufficient geographical separation between transmitters, limitations on the power radiated by each transmitter, limitations on antenna height, or separation of the signals in time. The first three techniques cause spatial differentiation; the last affects the temporal dimension.

Standard (AM) broadcasting propagates its waves by "amplitude modulation." The sound waves vary in power, producing variations in the height of the waves that are transmitted. The receiving unit decodes these height variations, reproducing the original sounds. AM transmissions occur in the MF band and thus have a long range primary service through ground waves, particularly near the lower end of the band. AM also can utilize sky waves to provide a secondary service at night.

FM broadcasting utilizes "frequency modulation" rather than "amplitude modulation." In this system the height of the wave is held constant but the frequency of the waves transmitted is varied. This type of broadcasting provides higher quality service with less interference than does AM, but it serves smaller areas, since the waves of the VHF band do not follow the surface of the earth and are not reflected by the ionosphere. This also means that FM service is unaffected by skywave interference at night.

Television utilizes separate signals for the visual and the sound components. The picture is transmitted by amplitude modulation and the sound by frequency modulation. Since the transmissions are either in the VHF or UHF bands, the range of the signal is short and television cannot utilize either long ground waves or sky waves.

2. Allocation of the Spectrum

The method of dividing the spectrum resource among prospective users is enormously complex and highly controversial. The general term "allocation policy" comprehends three separate but not always distinct processes, each of which involves both technical and nontechnical considerations. The allocation process is the division of the spectrum into blocks of frequencies to be used by specified services or users. Thus, the television service is allocated certain frequencies in the VHF and UHF bands, microwave users are allocated frequencies in the UHF and SHF bands, and so on. The second process, allotment, involves the distribution of spectrum rights within allocated bands to users in various geographical areas. Assignment, the third process, denotes the choice among potential individual users of allocated and allotted channels or frequency bands. We usually refer to all three processes under the general label of "allocation policy."

Perhaps the most important objective consideration in formulating an allocation policy is the technical usability of the spectrum itself. Technical usability is dependent primarily on three factors: the propagation characteristics of each frequency range, interference problems and their resolution, and limitations imposed by the communications system itself, especially the transmitting and receiving equipment. In other words, it is dependent on the physics of radio waves, other users of the spectrum, and the technical state of the electronics industry. Frequency characteristics themselves seldom pose significant problems, for although there are optimal frequency ranges for various services, these tend to be broad ranges. Consequently, there is usually considerable flexibility in the initial choice of a frequency for a given service except for whatever priority is given to whoever is already utilizing the space.

Several forms of interference may present problems, since interference can be caused by an overcrowded frequency, insufficient geographical separation, or unduly strong power levels. The third constraint on spectrum allocation involves the technology of the communications system used, especially the antenna system and the transmitting and receiving equipment. Any major change in receivers might create economic problems for the public and thus for the industry as a whole.

The problem of crowding in the broadcasting industry began early in the 1920's. The episode is recounted by Justice Frankfurter in his opinion for the Court in National Broadcasting Co. v. United States, 319 U.S. 190 (1943), a case to which we return later:

> Federal regulation of radio begins with the Wireless Ship Act of June 24, 1910, 36 Stat. 629, which forbade any steamer

carrying or licensed to carry fifty or more persons to leave any American port unless equipped with efficient apparatus for radio communication, in charge of a skilled operator. The enforcement of this legislation was entrusted to the Secretary of Commerce and Labor, who was in charge of the administration of the marine navigation laws. But it was not until 1912 when the United States ratified the first international radio treaty, 37 Stat. 1565, that the need for general regulation of radio communication became urgent. In order to fulfill our obligations under the treaty, Congress enacted the Radio Act of August 13, 1912, 37 Stat. 302. This statute forbade the operation of radio apparatus without a license from the Secretary of Commerce and Labor; it also allocated certain frequencies for the use of the Government, and imposed restrictions upon the character of wave emissions, the transmission of distress signals and the like.

The enforcement of the Radio Act of 1912 presented no serious problems prior to the World War. Questions of interference arose only rarely because there were more than enough frequencies for all the stations then in existence. The war accelerated the development of the art, however, and in 1921 the first standard broadcast stations were established. They grew rapidly in number, and by 1923 there were several hundred such stations throughout the country. The Act of 1912 had not set aside any particular frequencies for the use of private broadcast stations; consequently, the Secretary of Commerce selected two frequencies, 750 and 833 kilocycles, and licensed all stations to operate upon one or the other of these channels. The number of stations increased so rapidly, however, and the situation became so chaotic, that the Secretary, upon the recommendation of the National Radio Conferences which met in Washington in 1923 and 1924, established a policy of assigning specified frequencies to particular stations. The entire radio spectrum was divided into numerous bands, each allocated to a particular kind of service. The frequencies ranging from 550 to 1500 kilocycles (96 channels in all, since the channels were separated from each other by 10 kilocycles) were assigned to the standard broadcast stations. But the problems created by the enormously rapid development of radio were far from solved. The increase in the number of channels was not enough to take care of the constantly growing number of stations. Since there were more stations than available frequencies, the Secretary of Commerce attempted to find room for everybody by limiting the power and hours of operation of stations in order that several stations might use the same channel. The number of stations multiplied so rapidly, however, that by November, 1925, there were almost 600 stations in the coun-

> try, and there were 175 applications for new stations. Every channel in the standard broadcast band was, by that time, already occupied by at least one station, and many by several. The new stations could be accommodated only by extending the standard broadcast band, at the expense of the other types of services, or by imposing still greater limitations upon time and power. The National Radio Conference which met in November, 1925, opposed both of these methods and called upon Congress to remedy the situation through legislation.

[During 1926, courts held that the Secretary of Commerce lacked the power to stem the tide, and his pleas for self-regulation went unheeded by the burgeoning new industry.]

> From July, 1926, to February 23, 1927, when Congress enacted the Radio Act of 1927, 44 Stat. 1162, almost 200 new stations went on the air. These new stations used any frequencies they desired, regardless of the interference thereby caused to others. Existing stations changed to other frequencies and increased their power and hours of operation at will. The result was confusion and chaos. With everybody on the air, nobody could be heard. . . .

Radio's growth had been so chaotic that it was not clear for some time how broadcasting would be financed. A 1969 opinion observed:

> The present statute governing the Commission's authority over broadcasting services is derived in large part from the Radio Act of 1927, 44 Stat. 1162. Five years before the Radio Act was adopted, the problem of how radio broadcasts would be financed was still very much an open question. Proposals included endowment of stations by public-spirited citizens, municipal or state financing, donations from the listening public, and taxes on the sale of radio receivers; some variants of these schemes were attempted with limited success in the years preceding the Radio Act's passage. The concept of advertiser-financed programs apparently was first developed on a systematic basis by the American Telephone and Telegraph Company in 1922, as part of a plan which the company called "toll broadcasting"; initial public reaction to this system has been described as "lukewarm, and in some cases indignant." Various forms of advertising soon became a commonplace adjunct of radio programs, however, and in spite of occasional public and official attacks on the practice it had become a well-established—but hardly universal —method of financing radio programs by 1927 when congested air waves led Congress to establish detailed federal regulation of broadcasting.

National Ass'n of Theatre Owners v. Federal Communications Comm'n, 420 F.2d 194, 200–01 (D.C.Cir.1969), certiorari denied 397 U.S. 922 (1970). A leading historian of broadcasting reports that in 1927 "time-selling stations were still a minority; the climax of a struggle between commercial and noncommercial interests lay ahead." E. Barnouw, A Tower of Babel: A History of Broadcasting in the United States 200 (1966).

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3. The Federal Communications Commission

In 1927, Congress created a five-member Federal Radio Commission to rationalize the radio spectrum and make allocations. In 1934, the agency was expanded to seven members, given jurisdiction over telephone and telegraph communication as well, and renamed the Federal Communications Commission. See 47 U.S.C. §§ 154, 155. Each member is appointed by the President for a seven-year term subject to Senate confirmation. No more than four members may be from the same political party. The terms are staggered so that one expires each year. If a member resigns in the middle of a term, the new appointment is for only the unexpired portion of that term. One consequence is that many of those appointed do not have the independence of beginning with a seven-year term. The Chairman, chosen by the President, is the chief executive officer and has major administrative responsibilities including the setting of the agenda. A chart showing the organization of the Commission is presented in Appendix D.

Of the agency's several offices and bureaus for its various functions, the most important for our purposes is the Broadcast Bureau, which receives all applications for licenses, renewals and transfers. Under delegated authority from the Commission, the Bureau's staff is authorized to issue some licenses and renew others. In cases in which it has no such power, it may still recommend to the Commissioners which applications to grant and which to deny, and thus assume the position of an advocate within the agency. In addition, complaints of violations of the Fairness Doctrine or of the equal opportunities provision of § 315 are processed through the Broadcast Bureau.

When an adjudicatory hearing is required, usually in a licensing case, it is conducted by an Administrative Law Judge, formerly called a hearing examiner, who is an independent employee of the Commission. The Broadcast Bureau may also appear before the Administrative Law Judge to argue in favor of or against an applicant. The judge renders an initial decision that will become effective unless appealed. The appeal will be either to the Commission itself or to the Review Board. This Board, composed of senior employees of the Commission, sits in panels of three and reviews the initial decisions.

The Commission chooses whether or not to accept appeals from the Review Board.

Within the Commission the Broadcast Bureau takes positions and makes recommendations. But once the Commission renders a decision the Bureau's role ceases. The General Counsel then takes over to represent the Commission in any litigation that results from the Commission's decision. The General Counsel may also advise the Commission as it prepares to promulgate rules. Sometimes one part of the agency may disagree with another. For example, during reconsideration of the Fairness Report, p. 609, infra, the General Counsel's office proposed that complaints that a licensee had not sufficiently covered issues of public importance should be considered only at renewal time. The Broadcast Bureau opposed the proposal and the Commission agreed with the Bureau.

The Radio Act of 1927 and the Communications Act of 1934 rejected the idea of a market system of spectrum allocation and of any property rights in the spectrum resource. The Federal Communications Commission has the sole power to allocate the radio spectrum, to establish general standards of operation, and to license persons to use designated parts of the spectrum. The allocation and assignment process functions on three levels. First, allocations must be within the modest limits prescribed by various international treaties and membership in the International Telecommunications Union. These obligations allow flexibility in national spectrum usage, so long as there is no harmful interference beyond national boundaries. The broad categories are then broken down into more precise divisions at the national level by the Commission, and spectrum users are divided into highly specific classes based on domestic as well as international services. The Allocation Table lists eight major types of radio service: amateur, broadcasting, fixed, mobile, meteorological, radio-determination, radio astronomy, and space. These are further subdivided into about 50 categories. Third, the Commission designates precise channels to be used by specific systems within the allocated band and assigns users to, and licenses use of, those channels.

Approximately two-thirds of the usable spectrum space is shared by government and non-government users. The military and the Department of Transportation account for nearly three-quarters of the federal government use. Government allocations are made by the Interdepartmental Radio Advisory Committee in its advisory role to the Director of the Office of Telecommunications Policy, Executive Office of the President.

Many services must be placed, but some critics of Commission policies charge undue reliance on the bloc allocation concept, which calls for allocating discrete frequency bands to classes of users essen-

tially without regard to geographical location, and maintaining a relatively strict segregation among allocations. This can lead to such anomalous results as marine bands in Nebraska and forestry bands in New York City. These problems are exacerbated by the general administrative difficulty of changing an allocation once made: the start-up costs are so great and the capital investment is usually so heavy that there is a strong economic incentive not to move users from one frequency band to another. Thus, as new uses develop, they are allocated higher and higher frequencies, with little consideration of which frequencies are technically best suited for which services. For example, location of radio broadcasting in the AM band (535–1605 KHz) may be inefficient. Local broadcasting might be moved to the current FM band (88–108 MHz), which is much better suited technically to local radio, and long distance broadcasting might be moved to frequencies below 500 KHz to take advantage of the long distance ground wave propagation characteristics at those frequencies.

Another claim is that area coverage by broadcasting stations would require less spectrum if the Commission were to drop its so-called "local station goal." High powered stations in major urban centers could serve the entire country in only one-third the spectrum space presently used. Yet local stations are important; they are outlets for local news and forums for local citizens to express their views, they serve local advertisers, and they provide such local services as weather reports (which might be critical in areas subject to flash flooding or sudden tornadoes or storms).

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a. Radio Allocation

AM broadcasting occupies slightly more than 1 MHz of spectrum in the Medium Frequency band between 535 KHz and 1605 KHz. This is divided into 107 assignable channels each with a bandwidth of 10 KHz. AM stations are divided into four major classes: Class I "clear channel" stations are high powered stations designed to provide primary (groundwave) service to a metropolitan area and its environs and secondary nighttime (skywave) service to an extended rural area. Class II stations also operate on clear channels with primary service areas limited by interference from Class I stations. A Class II station must usually avoid causing interference within the normally protected service areas of Class I or other Class II stations. Class III stations are medium powered and are designed to provide service primarily to larger cities and contiguous rural areas. Class IV stations are low powered and operate on local channels to provide service to a city or town and contiguous areas.

The 1927 Act creating the Federal Radio Commission had charged the Commission to provide "fair, efficient, and equitable radio service" to all areas of the country. The Commission then proceeded by establishing general engineering constraints such as maximum interference standards, and by allocating each of the 107 frequencies to a class of stations. Within these general constraints, the Commission adopted a first-come-first-served approach. An applicant who could find a promising community could apply for a license to serve that community if it could find a channel that would satisfy the various general constraints. An applicant must show that it will not interfere excessively with the signals of existing stations nor expose too many of its new listeners to interference beyond certain acceptable limits. Additionally, AM applicants must now show that no FM channel is available to provide service to the area.

FM broadcasting, which began around 1940, is located in the VHF band. It occupies the frequencies between 88 and 108 MHz, which are excellent for aural broadcast service and allow an effective range of 30 to 75 miles. That spectrum space is divided into 100 assignable channels, each 200 KHz wide. The lowest 20 channels are reserved for noncommercial educational stations; the remaining 80 are given over to commercial use. Commercial FM channels are divided into three classes: A, B, and C. Class A channels are designed for use by low-power stations serving relatively small communities and the surrounding area. Class B channels are for medium-power stations intended to serve a sizable city or town or the principal city of an urbanized area. Class C channels are used by high-power stations serving a city and large surrounding areas. Noncommercial, educational FM stations operate with very low power on a fourth class of channel, Class D. Commercial FM assignments are based on a Table of Assignments, in which communities are assigned a specific number of FM stations of specified power and on specific channels. Licenses are given only for stations within the communities listed in the Table of Assignments or within a 15 mile radius—unless an application for a waiver is granted.

The future of radio as a local, regional, or even national medium of mass communication continues to be uncertain. Although radio was the dominant national communication medium, television has now become the broadcaster of nationally oriented programming. In reaction, radio has tended to become a localized and specialized medium. As a technical matter FM radio is local, limited as noted above to an effective range of 30 to 75 miles; by contrast, the AM band is a poor place to locate local radio service, since at night, skywave propagation extends far beyond the local service area. In many areas, local radio provides the only means of disseminating the important in-

formation such as local weather reports (including storm warnings), local political messages, and, inevitably, local advertising. There will always be remote areas in this country where local radio service is not economically feasible. These areas will need to be served by regional stations, such as those operating on clear channels.

A clear channel is one on which only one (or in some cases a second) station is licensed to operate. The clear channel policy is an outgrowth of the Federal Radio Commission's 1928 policy allocating 40 channels for clear channel status. These stations were counted on to serve not only their primary areas, but also much of the rest of the nation, through skywave propagation. As a result, no other stations were allowed to broadcast at night on clear channel frequencies, since that would interfere with the skywaves and reduce the station's coverage area. The policy on clear channel stations remains substantially the same today, although a single duplication per channel is allowed on some Class I channels and additional duplication is allowed on others. In 1928 there were enough other channels available to support local stations around the country. Today, regional and local stations are operating at or near their nighttime capacities; the only way to make new stations available for local communities is by extensive duplication on some of the 43 clear channels. The Commission relies on only 47 of 107 channels to support the vast majority of the more than 1700 nighttime broadcast stations, while 43 clear channels support about 140 stations.

It would be possible to eliminate some of the clear channels and allow operation at increased power on the remaining ones. The vacated clear channels would make numerous local and regional AM stations available. The new higher-power clear channel stations could still provide the entire country with at least secondary (skywave) service of a more than adequate nature. Engineering reports suggest that 12 stations operating at a power level of 750 kilowatts would provide at least four radio selections to every part of the country. Are serious social and political problems created by allowing such high power stations? An experiment that permitted a station to operate at 500kw instead of the normal maximum of 50kw was terminated by the Commission in 1939. The Cincinnati station was heard throughout the midwest and had become the most popular station in several states. For discussion of the early history and development of government policy on questions of power and allocation, see generally, W. Emery, Broadcasting and Government (rev. ed. 1971) and H. Warner, Radio and Television Law (1949).

The Commission has taken some steps to increase the efficient use of the spectrum. Since 1964, it has required licensees of jointly owned AM-FM combinations to take steps to program the two sta-

tions differently so as to reduce, and ultimately eliminate, duplication of programming on the two bands. At present, AM and FM are viewed in conjunction, as part of a single aural service. One sweeping proposal is to move all local radio service to the FM band. As noted, the FM frequencies are ideal for low noise, high fidelity aural broadcast service. Local coverage by FM promises superior technical characteristics, more consistent coverage, and less interference. The Commission has noted, moreover, that use of all the available FM assignments to meet the demands for aural service would leave almost no "white area," except where the population was extremely sparse. These areas could be served either by higher powered FM stations or by a few clear channel stations operating in the AM band. Since AM receivers are cheap, it might not be too burdensome to have some broadcasting in the AM band, even though most of it would be on FM. In addition to expected opposition from most AM broadcasters, access to FM sets is not yet sufficiently widespread to allow such a total shift to FM, especially with regard to automobile radios. A bill requiring that all radios costing over $15 be equipped for FM reception failed in Congress in 1974.

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b. Television Allocation

The first licensing of television stations in this country occurred in 1941 and involved 18 channels. The first assignment plan was developed in 1945, based solely on the VHF channels. It involved the assignment of about 400 stations to 140 major market centers. Early comers quickly preempted the 100 choice assignments. In 1948, because of unexpected problems with tropospheric interference and concern that the 1945 assignment plan could cause problems, the Commission ordered a freeze on channel assignments. The freeze ended with the issuance of the Sixth Report and Order on Television Allocations, 17 Fed.Reg. 3905, 1 R.R. 91:601 (1952), creating the Table of Assignments. The Commission also rejected the idea of moving all television to the UHF band. Instead, the 12 VHF channels were retained and 70 new UHF channels were added, so that the Table provided for about 620 VHF and 1400 UHF stations.

The Commission's official reports are referred to by volume number, F.C.C. or F.C.C.2d, followed by page number. When the Commission proposes rules for possible adoption, formal notice of the pending action must be given to the public. This is done through the Federal Register (Fed.Reg. or F.R.) as above. The register is organized chronologically and covers all federal agencies and departments. Regulations adopted by the Commission as well as its

rules of organization and internal operation are reported and grouped together in another official publication called the Code of Federal Regulations (C.F.R.). An unofficial service reports Commission rulemaking actions and case decisions. The full name of this service, Pike & Fischer's Radio Regulation, is abbreviated as R.R. or R.R.2d, and sometimes as P & F Radio Reg.

The Commission generated the Table of Assignments from its hierarchy of priorities: (1) to provide at least one television service to every part of the United States; (2) to provide each community with at least one television station; (3) to provide a choice of at least two television services to all parts of the U.S.; (4) to provide each community with at least two television stations; and (5) to assign remaining channels to communities on the basis of population, geographic location, and the number of television services already available to that community. Note the emphasis on "local" outlets. Is this a sound hierarchy?

In making these assignments the Commission decided to "intermix" VHF and UHF channels as a single service in the same markets. Many observers warned that the newer UHF channels could not survive but the Commission apparently believed that the demand for VHF would overflow into the UHF band and it also feared that failure to intermix would relegate UHF stations to markets overshadowed by VHF outlets in nearby metropolitan areas, or to remote rural areas. In any event, the Table of Assignments called for combined VHF and UHF channels in the following pattern: 6–10 for cities with population over 1,000,000; 4–6 for cities with 250,000 to 1,000,000; 2–4 for those with populations between 50,000 and 250,000; and 1–2 for communities under 50,000.

Because the Table tended to allot three VHF stations to most markets with only a few getting more than three, the three major networks could now program almost entirely through VHF affiliates. This gave them strong audience and advertiser support. (In 1971, for example, 108 of the nation's 207 television markets, covering 58 percent of the nation's television households, could receive the three networks but no VHF independent stations. R. Noll, M. Peck, and J. McGowan, Economic Aspects of Television Regulation 168 (1973)). Without adequate set penetration, UHF stations found it difficult if not impossible to secure advertising revenues and network affiliation. By the end of 1956, there were 395 VHF stations and 96 UHF stations on the air. Almost 300 VHF stations had joined the 108 that already existed and 161 UHF stations had gone on the air; in that period, however, 65 UHFs were forced out of business, while only four VHFs left the air. By this time Dumont, a fourth network, had collapsed. By 1960 only 75 (15 percent) of the 575 commercial sta-

tions on the air were UHF, even though 70 percent of the total channel assignments were UHF.

The Commission recognized that intermixture was not working. In 1956, while considering broader solutions such as the transfer of all television to the UHF band, the Commission adopted deintermixture as an "interim" measure in several communities, making them all-UHF. The proposal to shift stations to UHF proved impracticable, and an alternative proposal to secure more VHF spectrum space by obtaining "channel one" failed when the military refused to relinquish it. In 1961, the Commission planned to deintermix eight more communities. This time, however, the opposition from established VHF stations was formidable. After a fierce battle, Congress entered the fray and enacted a compromise: the All-Channel Receiver Act of 1962. The Act, which became § 303(s) of the Communications Act, authorized the Commission to order that all sets shipped in interstate commerce be capable of receiving both VHF and UHF signals. The VHF interests gave their support for the proposal in exchange for the Commission's indefinite suspension of deintermixture proposals. The Commission did require "all-channel" receivers and declared a mortatorium on most pending deintermixture proposals. The Commission's regulation came too late for many of the UHF pioneers of the 1950's. In 1971, nearly ten years after the passage of the Act, UHF licensees operated only 25 percent of the stations on the air, even though they had been allotted 70 percent of the channels. In that year, the Commission began steps to require detent ("click") dialing on all UHF receivers.

In 1975, the Office of Communication of the United Church of Christ petitioned the Commission to issue a Notice of Proposed Rule Making to add 62 VHF "drop-ins" in 41 cities. The petition was based on a study by the Office of Telecommunications Policy, concluding that the stations could be added with minimum technical interference to existing signals even though they would be "short-spaced" under the criteria of the Table of Assignments. A Commission staff study concluded that 30 VHF drop-ins could be added in 27 cities. In 1975, the Commission issued a Notice of Inquiry seeking comments on the technical and economic feasibility of VHF drop-ins. Commissioner Lee dissented, contending that the addition of the VHF drop-ins would destroy the economic viability of existing UHF stations and the proposal was therefore inconsistent with the national policy to promote an all-channel television system. The Commission is still studying drop-ins.

Critics have attacked the Commission for its UHF policy, for not using the VHF band fully, for allowing unnecessarily large separations, and for ignoring the natural barriers and the possibilities

of new equipment such as directional antennas. Growth in other uses of the spectrum makes the problem more complex. The demand for space for land mobile communication has greatly increased in recent years. The Commission has already reassigned UHF channels 70 through 83 for land mobile use. Channels 14 through 20 are now being shared by broadcasters and land mobile operators in the nation's large urban areas, and an advisory committee has recommended that the Commission transfer channels 32 through 69 from UHF television to land mobile users.

There is an extensive bibliography on a variety of suggestions that all or part of the spectrum be allocated by the market mechanism rather than the administrative process. Among these, see, H. Levin, The Invisible Resource (1971); Minasian, Property Rights in Radiation: An Alternative Approach to Radio Frequency Allocation, 178 J.L. & Econ. 221 (1975); DeVany, Eckert, Meyers, O'Hara, and Scott, A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study, 21 Stan.L. Rev. 1499 (1969); Coase, The Federal Communications Commission, 2 J.L. & Econ. 1 (1959).

c. Cable Television

A major recent technological development transmits television pictures by cable rather than through the spectrum, which could have an enormous impact on over-the-air broadcasters.

ON THE CABLE: THE TELEVISION OF ABUNDANCE

Report of the Sloan Commission on Cable Communication

12–16 (1971).

What Is a Coaxial Cable?

The pure cable system, to the extent that it is a self-contained entity, dispenses entirely with electromagnetic radiation. At its heart lies the coaxial cable which is in part described by the word "coaxial" itself. . . . [T]he coaxial cable consists of a small diameter inner conductor, a larger diameter outer conductor, a plastic foam to keep them apart and to maintain an electric field between them, and an outer sheath to protect the entire cable from the weather or whatever else might affect the operation of the system.

Such cable can be used to transmit electrical signals from zero frequency (direct current) to frequencies of several billion cycles per

second. The coaxial cable used to transmit television signals carries all frequencies between 40 million and 300 million cycles per second. (A telephone wire, by contrast, transmits frequencies between 300 and 5,000 cycles per second.) Since a television signal requires a bandwidth of 6 million cycles per second, a coaxial cable can carry, in principle, the equivalent of forty channels of television (although other considerations currently reduce this capacity in practice by about half, to twenty channels of television).

Because the cable must perform the entire task of carrying the signal from its point of origin to the set which is to receive it, there must be a physical cable link between the source of the signal, called the "head-end" of the system, and each subscriber on the system. [An omitted picture] shows how this is ordinarily effected, in a moderately densely populated area, and in its simplest form. From the head-end, a trunk-line runs out through the area to be covered. Feeder lines fan out from the trunk, in a fashion that brings at least one feeder line within approximately 75 to 150 feet of each residence in the area. From the feeder lines, drop lines can be connected directly to each set within a residence. Thus each home is physically linked within the head-end: it possesses a cable connection of its own. Any signal emanating from the head-end may be received at any home.

The task is not complete, however, when the cable is in place. An electrical signal necessarily loses strength as it passes along a conductor, and amplifiers must be inserted along the line to compensate for the loss; other amplifiers are necessary as bridges between trunk lines, feeder lines and drop lines. Initially vacuum tubes were utilized, but newer amplifiers employ solid state technology and indeed the whole field of amplifier design and development is in flux. Rapid growth of cable television will inevitably mean rapid development of the associated electronic technology.

It is the capacity and the cost of amplifiers that limit at present the capacity of the cable. Although existing coaxial cable in theory will carry forty channels, that theoretical limit cannot be met with existing amplifiers. It is, however, possible to lay cable in a fashion that enables the system operator to replace amplifiers as new designs become available; thus the same cable that today carries twenty channels or less may at some future date be adapted to carry the full load of forty.

Other electronic circuitry is necessary along the cable if it is to be fully utilized. Filters which block out part of the band make it possible to deny a household access to one or more channels; such fil-

ters might be necessary if, for example, a special channel were to be reserved for the medical profession. Electronic valves governing the direction in which the signal flows would make it possible to arrange for "up-stream" use of one or more channels; that is, transmission of a signal from a designated point or points back to the head-end.

Up to this point in our description, the system is without the television signal itself. This is fed into it from the head-end, which can provide programs in three fashions. The simplest requires nothing more than the erection of an antenna, which will pick signals out of the air from conventional television stations operating in the vicinity, and transmit them along the cable: the more elaborate the receiving antenna, the larger the "vicinity" and the more stations made available. If, however, a desired station is beyond the range of even the most elaborate antenna—if, for example, a cable operator in Las Vegas, Nevada, wishes to pick up a signal from Los Angeles—he need only erect his antenna somewhat closer to Los Angeles than Las Vegas and transmit the signal the rest of the way by means of a long-distance micro-wave or cable link, which can be rented from American Telephone and Telegraph or (under recently promulgated FCC rulings) from a competing operator. Finally, the cable system operator can set up, at his head-end television studio, facilities as elaborate as he chooses to pay for, ranging from a simple video-tape machine to a full studio with its complements of color television cameras, lights, monitors, and all the accompanying paraphernalia.

Note on the Origins of Cable Television

Cable transmission was first used in the 1950's to provide television reception to remote locations that otherwise would have received none. For example, a community located in the mountains of West Virginia could construct an antenna on high ground to receive the signals of nearby television stations and transmit them through cable to households in the community. Such systems were called CATV for "community antenna television." Since cable was the only means of bringing television service to these remote areas, television broadcasters welcomed the additional viewers.

It was soon realized, however, that cable could do more than merely provide television service to remote areas. In 1961, a cable operator began serving San Diego, a city already served by three VHF network affiliates. The cable operator erected an antenna capable of picking up signals from Los Angeles, 100 miles away. In addition to the three networks received locally, cable offered four independent stations that served Los Angeles with sports, old motion

pictures, and reruns of network shows. The San Diego experience demonstrated that the three channels offered by over-the-air signals were not enough to satisfy an ordinary audience and that viewers were willing to pay for more diversified programming through importation of distant signals. In effect, cable television service filled in the uneven pattern of FCC station allocation. Since cable offered a service alternative to that offered by local, over-the-air stations, television broadcasters began to view cable transmission as a competitive threat.

The spread of color television also provided a new impetus to cable development. VHF signals tend to bounce off large obstacles rather than bend around them. Hence a tall building can act like a weak transmitter, rebroadcasting the television signal at the same frequency as the station from which the signal originates. The result is interference, barely noticeable on a black-and-white set, but more pronounced in a color set. Cable provided the residents of large cities something that an over-the-air television signal could not—a high quality color picture. Hence, cable television invaded large cities, despite the presence of a full complement of VHF signals.

Finally, cable began to originate programming not available to viewers of network or independent television. Cable systems offered entertainment programming, sports events, and special programs designed to meet the interests of discrete groups. The discovery that viewers were willing to pay a few dollars more per month for programming not available on over-the-air television led to the development of pay cable service.

Pay cable involves the cable distribution of non-broadcast programming for which the subscriber is charged an additional program or channel fee beyond the regular monthly fee for the system's television signal reception service. What is reported to be the first pay cable system showing R- and X-rated films was introduced in 1976 in Ann Arbor, Michigan. Subscribers may sign up only for the Adult channel, for the Family channel, or both. First reports indicate that 73 percent of the subscribers are signing up for both and 23 percent for the Adult channel only. The system works with a key lock device to permit control of access to that channel. Broadcasting, Jan. 10, 1977, p. 47.

The systems for distributing subscription cable vary technically. The simplest method is to distribute the programming on one or more channels of a cable television system that cannot be received on conventional receiving sets. System subscribers who wish to receive the additional programming are supplied with a device that converts the

programming transmission so that it can be received on a conventional television set. Other systems permit a separate charge to be made for each program viewed. These either require the subscriber to purchase a ticket for each program in advance, which when inserted into a decoding device in the subscriber's home, provides access to the programming, or to utilize the return communications capacity of a cable system or a telephone connection to activate a central computer facility that releases the programming through the subscriber's decoding device and performs the billing functions. Over-the-air television also can provide pay service through the broadcast of a scrambled television signal which, on payment of a fee, subscribers are enabled to unscramble.

In April, 1975, Home Box Office, a pay TV cable service in the northeastern United States, announced the creation of a national pay cable network. Utilizing a combination of orbiting satellites, earth stations, and microwave relays, HBO will send out from a central studio in Manhattan a daily program package—current motion pictures, live sports events and special interest shows—for an estimated 70 hours per week. The broadcasting industry estimates that by 1977 one million TV homes may subscribe to the satellite network. Broadcasting, April 21, 1975, p. 16. In fact, it is now possible to subscribe to the pay-cable service without taking the basic service. This might appeal to those in metropolitan areas who already receive several channels without interference and who wish only to view the special programming available on pay cable.

Thus, cable has provided a variety of services. It began as a way of bringing to a community programming that would have been available but for geographical barriers. Then it imported programs from communities beyond the reach of normal reception. Later it became a service for those who wished to improve reception of their local signals. These features have been combined with each other as well as with the origination of new programming on cable. Now it is possible to obtain the origination without any of the other features—and this origination may be local or part of a network that programs specially for cable subscribers.

As of April, 1975, 3,240 cable systems were operating in the United States serving 6,980 communities and ten million subscribers, almost one-sixth of the nation's television households. The largest cable operator had almost 100,000 subscribers, while some systems had fewer than 100 subscribers. Over 600 systems originated programming in their own studios, averaging 13.5 hours weekly. Pay cable was carried by approximately 78 systems and reached 160,000 subscribers.

Note on Cable Programming

The Commission has long been concerned about the potential damage the new technology might cause to over-the-air broadcasters, as indicated by a series of regulations that restricted the flexibility of cable operators. In recent years, the Commission has become somewhat more permissive in this area. In each situation discussed, consider whether the regulation is sound.

1. *Cable Signal Carriage.* The Commission's regulations impose both positive and negative signal carriage obligations upon cable operators. First, the regulations require a cable operator to carry certain broadcast signals. For example, upon request of the licensee, a cable system located within a top-100 viewing market is required to carry the stations licensed to the community in which the system is located; stations licensed to other designated communities of the same major television market; stations that are "significantly viewed" in the community; educational television stations located in the community of the system; and certain television translator stations (a translator station retransmits the signals of a broadcast station for the purpose of providing television reception to the general public).

Second, the Commission's rules limit the number of broadcast signals that a cable system can import into a television market. For example, the distant signal rules permit a cable operator located in a top-50 market to import enough distant signals to provide television service from three network stations and three independents. Regardless of the availability of local signals, a top-50 cable system is also allowed to import a minimum of two distant independent stations. A cable system located in a second-50 market faces the same restrictions as a top-50 system, except that it may carry only two independent signals rather than three.

2. *Leapfrogging.* The harmful effect on local broadcasters of allowing cable systems to carry distant signals was partially alleviated by the Commission's ban on "leapfrogging." Leapfrogging describes the practice of a cable operator who carries a television signal other than the nearest distant signal. This could occur either because an available microwave relay system made the more distant signal easier and cheaper to carry or, more probably, because the distant station offered programs more likely to attract subscribers. The Commission (and broadcasters) feared that the major-market VHF independents in New York, San Francisco, Chicago, and Los Angeles, would become "super stations" carried over vast areas, a result inconsistent with the premise of a competitive broadcasting industry based on local stations. The leapfrogging rules sought to spread the benefits as-

sociated with cable carriage of a broadcast signal among television stations. Simply stated, the rules required cable operators who imported distant signals originating from a top-25 market to take such signals from one or both of the two nearest top-25 markets. When three independent signals could be carried, the third signal had to be that of an independent UHF located within 200 miles of the community, or, if there were no such station, either the signal of any independent VHF stations located within 200 miles or the signal of any independent UHF station.

In December, 1975, the Commission deleted all the leapfrogging rules from the cable regulations, effective in 1976. In concluding that the leapfrogging rules should be deleted, the Commission focused on the benefits to television stations from the rules, and, specifically, upon the effects of cable signal carriage on broadcast station revenues. It found that the most critical audience for a station is that in its city of license and immediately surrounding area. Stations obtain their financial support by delivering audiences to advertisers and local advertisers are willing to pay the station additional dollars for broadcast to a larger audience within the advertiser's market. Hence, cable transmission of nearby broadcast signals benefits the stations who can sell their advertising time at higher rates. The cable television mandatory signal rules are intended to assure stations access to this audience. Moreover, the Commission found that even in the absence of the leapfrogging rules, cable systems are strongly motivated to carry these nearby signals since the cable system need not incur the costs of importing signals from a distant market.

Beyond the broadcast station's immediate area, however, where signals are available only through the use of microwave relay facilities or satellite transmission, a larger audience will not necessarily benefit the imported station. Distant carriage is of little value to advertisers who have no sales outlet in the distant market. Included in this group are local advertisers (40 percent of the sales of advertising time of independent television stations) as well as regional advertisers when carriage is extended outside the region. A car dealer in Chicago, for example, is not likely to pay for an audience in Philadelphia. In addition, when local stations enforce their exclusivity rights (see the next section) against imported distant signals, often associated advertising is also deleted. Hence, cable signals' carriage may convey only limited benefits to stations located outside the cable system's viewing area.

Based on these considerations, the Commission concluded that the leapfrogging rules could not be justified on the grounds that they

were necessary to spread the benefits of cable signal carriage among television stations. Is the remaining concern about "super stations" serious?

3. *Exclusivity.* Whereas the restrictions on distant signal carriage and leapfrogging focus on fragmentation of a local station's audience, the Commission's "exclusivity" rules (formerly called "non-duplication" rules) are directed at the apparent problem of "unfair competition" resulting from cable's ability to transmit programs for which it need pay no copyright charge. The exclusivity rules have two parts. First, if given reasonable notice, a cable system with more than 1,000 subscribers was initially required to black out network programs broadcast on an imported station whenever such programs were being broadcast on the same day by local stations. In 1972, the Commission amended the restriction to require deletion only when imported network programs are being broadcast simultaneously by local stations. Since much of a network affiliate's broadcast time is devoted to network programming, the exclusivity rules reduce the incentive to import network stations.

Second, the regulations greatly restrict the ability of cable systems having more than 1,000 subscribers and operating in a top-100 market to carry any distant signals consisting of syndicated programming under exclusive contract to a local station within one year of its release for television broadcast exhibition. The rules also restrict the importation of feature films and first-run non-series programs. Both copyright holders and affected television broadcast stations are entitled to assert the exclusivity rule to preclude cable transmission.

4. *Access and Origination.* In addition to the Commission's negative restrictions upon cable signal carriage, the Commission also imposes positive obligations upon cable operators. In 1972, the Commission ordered new cable systems in top-100 markets to provide capacity for 20 channels and two-way transmissions. This requirement was modified in 1976 when the rules were extended to systems serving more than 3500 subscribers, whether or not the systems are located in a major market. Cable systems operating prior to 1972, which had been ordered to comply by 1977, were given until 1986 to comply with the capacity requirement. Citizen groups have appealed the Commission's delay in implementation.

The regulations also require that every cable system constructed after March 31, 1972, serving more than 3500 subscribers, provide at least three local access channels: one for the public, one for use by local education authorities, and one especially designated for local gov-

ernment use. The public access channel must be made available without charge, although a charge for production costs of live studio presentations exceeding five minutes may be assessed. The educational access and governmental access channels must be provided free of charge for five years. If a cable system has channels available after satisfying the signal transmission and access requirements, it must offer them to the public as leased access channels.

The public access channels must be made available on a first-come, non-discriminatory basis and a cable system may not exercise control over program content on any of the access channels.

In 1969 the Commission ordered all cable systems serving more than 3,500 subscribers to provide origination cablecasting for local production and presentation of programs other than automated services in order to foster local programming in as many communities as possible. In effect, the revenue derived from importation of distant signals was to be used to subsidize a local outlet in a community too small to support an over-the-air station. The Supreme Court upheld the requirement but in 1974 the Commission abolished the origination requirement on the ground that quality local programming could not be obtained by mandate. Today, cable origination is voluntary.

5. *Siphoning.* The Commission believes that pay cable poses a threat of "siphoning" programs away from over-the-air television since cable operators, charging monthly for the programs, would be able to pay more for programs than over-the-air stations. Hence, the Commission adopted the "anti-siphoning" regulations to assure that cablecasting does not force the public to pay for what it formerly received "free." Simply stated, the regulations greatly limit the ability of origination cablecasters to charge a per-program or per-channel fee to transmit feature films or live sports events that have appeared or may appear on over-the-air television in the cablecaster's viewing market. Appeals are pending by pay cable groups and the Justice Department against the Commission's restrictions on what programs pay cable may show.

Pay television has been viewed as a threat not only to established broadcasters but also to owners of motion picture theatres. This group unsuccessfully challenged the Commission's elaborate regulations for pay television, called STV—"subscription television"—by the Commission. National Ass'n of Theatre Owners v. Federal Communications Comm'n, 420 F.2d 194 (D.C.Cir.1969) certiorari denied 397 U.S. 922 (1970).

6. *Copyright Problems.* As noted in the general discussion of copyright at p. 445, supra, news media presented serious problems under the 1909 statute. When cable systems picked up signals from broadcasters and transmitted them to subscribers, the owners of the copyrights in the programs claimed that their rights had been infringed. Twice the Supreme Court rejected that claim on the ground that the 1909 statute could not be read to bar the practice. In the 1976 copyright statute, in § 111, a complex compromise provides, in effect, that cablecasters need pay no royalties for programs on "local" (or "must carry") stations that they are required to carry. Cablecasters are permitted to carry the copyrighted programs of "distant" (or "may carry") stations without the owner's consent in return for the payment of a compulsory royalty fee. This fee is fixed by statute and depends on the size of the cable system and whether the distant station is commercial or educational. A large system will be charged .675 percent of its gross receipts for the importation of its first distant commercial signal and .425 percent for each of the next three signals, regardless of how many of the programs on these stations are actually copyrighted. (Almost all television programs are copyrighted.) It has been estimated that very large cable systems will pay annual royalties of tens of thousands of dollars. For a lucid summary of the situation see Botein, The New Copyright Act and Cable Television—A Signal of Change, 24 Bulletin of the Copyright Society 1 (1976).

The political battles over the relationship between over-the-air broadcasting and cable television have reached the highest levels of government, producing a slew of studies. The problems are political rather than technical: a search for a position acceptable to the two groups involved. See D. LeDuc, Cable Television and the FCC (1973). A symposium of ten articles may be found in 24 Catholic U.L.Rev. 677 (1975). See also Presidential Cabinet Committee, Cable: Report to the President (1974), and publications of the White House Office of Telecommunications Policy and the House Communications Subcommittee.

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4. A Note on the Economics of Television

The basic unit in the broadcasting system is the individual station that receives the license from the Federal Communications Commission. As of April 30, 1976, 1,031 television stations were authorized to operate in the United States. These included 627 VHF

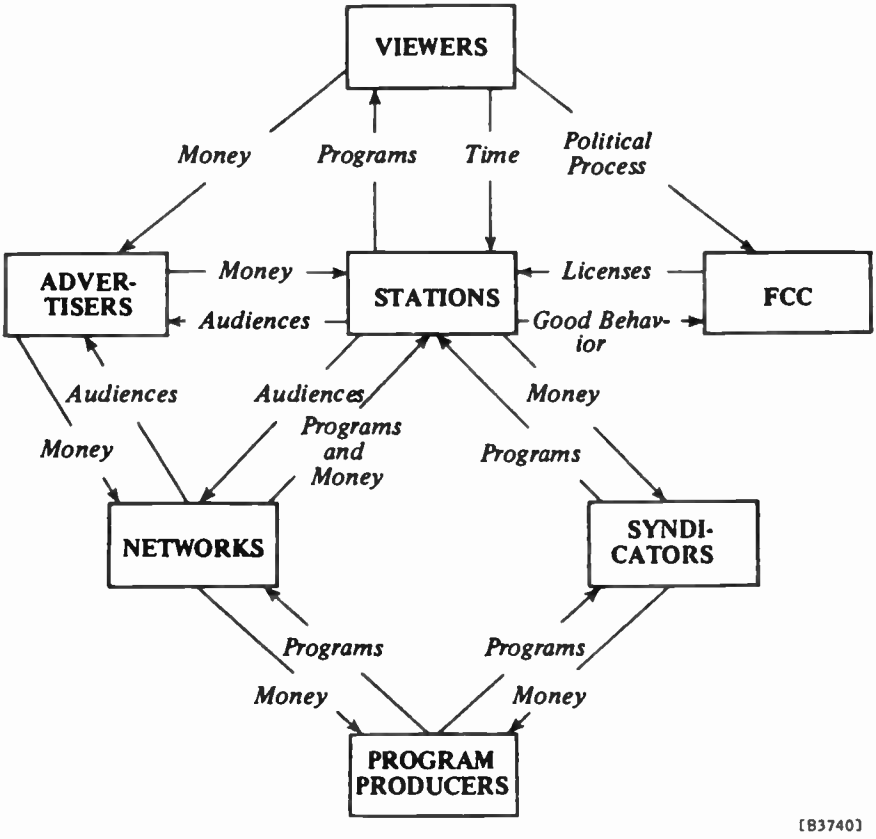
and 404 UHF. Of the total authorized, 610 VHF and 350 UHF were actually in operation, with the remainder either under construction or off the air for financial or technical reasons. Of the operating stations 708 were commercial (513 VHF and 195 UHF), while the remainder were noncommercial.

Because of multiple ownership limitations to be discussed, the ownership of the commercial stations is widely distributed. Nevertheless, there are several group owners whose holdings include the maximum five VHFs. Among these group owners are the three major networks. Each owns and operates one VHF in New York City, Los Angeles, and Chicago. The fourth and fifth VHFs are located in six different cities. These 15 O & O's (owned and operated) are a major source of profit for the television networks. Thus, in 1975, the pre-tax income of the networks from network activities was $208.5 million, while the profit from the 15 O & O's was $105.7 million. The O & O's realize 90 percent of their revenue from non-network sales because of their desirable frequencies in major cities. Broadcasting, May 3, 1976, p. 45. For an extended study of the economics of the industry, see Noll, Peck and McGowan, Economic Aspects of Television Regulation 58–96 (1973) and B. Owen, Economics and Freedom of Expression 87–169 (1975).

Almost all the other commercial stations are "affiliated" with one or more networks by contractual arrangements. Of the 708 commercial stations, some 600 are affiliated with a network, CBS and NBC having about 210 each and ABC slightly under 200. A few stations hold no affiliations. As a general rule, unaffiliated VHFs—"independents"—are located in markets that have more than three VHFs so no network affiliation is available. UHF stations generally can secure a network affiliation only in markets in which there are fewer than three commercial VHFs. Group owners, other than the networks, may produce some programs for their group or may treat their stations as individual facilities with each one affiliated with a different network or no network. According to a recent study 76 percent of all VHF stations in the top 100 markets are licensed to group owners. The stations owned by each of the three networks reach many more viewers than the stations owned by any other group. The study also shows that group ownership has steadily increased over the last 20 years. Howard, The Contemporary Status of Television Group Ownership, 53 Journ.Q. 399 (1976).

The following chart, from B. Owen, J. Beebe, and W. Manning, Jr., Television Economics 7 (1974), gives an understanding of the

structure and economics of the television industry and of television program procurement and production:*



The station would seem to be central and its economic relationships are complex. Although it would have been possible for stations to develop their own programming and sell time to advertisers or to have the advertisers prepare programming and place it on individual stations, the industry has developed differently. The most important feature from the outset has been the role of the networks. It would have been possible for a network to own no stations and to perform no function other than as a broker between individual stations and national advertisers with no involvement in programming, or it could have arranged for the distribution of programs, often simultaneously, over common carrier interconnections. Instead, networks emerged as

* Reprinted by permission of the publisher, from *Television Economics* by Bruce M. Owen, Jack H. Beebe and Willard G. Manning, Jr. (Lexington, Mass.: Lexington Books, D. C. Heath and Co., 1974).

group owners who each controlled stations in five of the largest cities in the country. These have been profitable in their own right and have formed a solid base of guaranteed viewers.

To make the brokering function simpler and to maximize the audiences they can deliver, networks seek affiliates in each of the 200-odd market areas. A station, owned individually or by a group, will eagerly seek affiliation. The station will be relieved from having to create or purchase much of its programming because the network will supply programs to the affiliates and the profit will be more than it could make by remaining independent. The affiliate will be able to sell advertising for some spots in and around the network programming. Moreover, the network will pay fees to affiliates depending upon how much network programming they carry in excess of about 20 hours per week. The result is that the station clears time for the most popular programs without charge in order to be able to sell the available commercial time for these features, and is persuaded to clear for the next tier of programs by receiving a fee. To obtain these advantages the station turns its audience over to the network for the agreed-upon programming and gives up most of its independent efforts. Occasionally, the relationship is discontinued. In 1976, for example, in a move considered by all observers to be highly unusual, CBS dropped a Spokane television affiliate, apparently for not clearing enough network programs and because of "some question about its audience position in the market." There were two other commercial stations in the community, each affiliated with one of the other networks. The ABC affiliate then announced that it would switch to CBS—and the former CBS station became an ABC affiliate.

In late 1976 Westinghouse Broadcasting Company, a group owner, petitioned the Federal Communications Commission to investigate the relationship between the networks and their affiliates. The aim was to reduce the networks' power by such devices as limiting network intrusion into local time and giving affiliates greater opportunity to reject unwanted network programming. For an illuminating discussion of the problem from Westinghouse's standpoint, see the interview with Westinghouse's president, Donald McGannon, in Rubin, Can This Man Break the Network Stranglehold?, MORE, Jan. 1977, p. 24. Mr. McGannon asserted that affiliates often do not see a network program until it is actually on the screen. "It happens every day of the week on every station."

Following on the heels of the Westinghouse petition, the Department of Justice asked the Commission to consider whether the networks should be ordered to sell their owned and operated stations. What might that accomplish? The Commission has announced that it will undertake a study of network practices.

Program production is generally thought to fall into two categories: the production of news, documentaries, and public affairs programs, and the production of entertainment programming. Although news programming is unremunerative and could be left to local stations, the fact that so much of the news is on a national level, has led the networks themselves to undertake much of the production responsibility for these programs. Although the networks could contract with independent producers for this programming, they have uniformly decided to develop their own news and public affairs organizations and to produce all of their own programs in this category. Moreover, networks will not buy documentaries from independent producers. The probable explanation is that the networks want total editorial control over this sensitive area to protect their stations from complaints and charges that may arise.

The considerations in entertainment programming are obviously quite different. In the earlier days of television, advertisers developed their own programming, perhaps through independent producers, and bought time to present the program and related commercials. The network simply sold time and access to the O & O's and affiliates in a single deal. As television developed, networks became more aware of the importance of continuity throughout the evening's entertainment programming, so that one show would link with the next to produce the largest loyal audiences. This required considering what the other networks were programming. Advertiser-initiated programming could aim for demographically discrete groups but could not accommodate all these concerns. By now, advertiser-prepared programs have virtually disappeared and network productions play a minor role. The independent producer pattern has become dominant. This entails inter-dependence of independent producers, local stations, and advertisers, and the networks.

Independent stations must operate in a totally different pattern because they must provide all their own programs. Independents tend to exist in markets with more than three stations and thus compete not only with each other but also with network affiliates. If one of the networks did not have an affiliate in a market it would make sense for the network to obtain an affiliate to increase the audience it can provide advertisers, and for the station to become an affiliate because network programming is more popular than alternatives, and affiliates are generally much more profitable than independents. If the network alternative is unavailable, the independents produce some inexpensive local programming and purchase programming from syndicators, who negotiate with individual stations rather than networks. The stations generally bargain for exclusive local rights for a period of time. Some programs are prepared by producers specially for syndication but others have previously run on net-

works ("off-network programs") and are now being offered to the independents—or to affiliates who want to fill open time. Occasionally, independents join together to form an impromptu network for simultaneous showing of a sporting event or other single feature, but that is unusual, and is likely to be a program that three networks have rejected.

Rerun syndications are generally preferred to original syndications because they are proven commodities. Station managers will be able to predict how successful a rerun of specific material will be in their listening area. Also, off-network syndications may be less expensive because most of the original creative costs have been returned by the network runs, whereas a first-run syndication must return its costs all at once. To reduce this differential, first-run syndications must be less expensive shows that do not compete with the types of off-network programs that are most commonly and successfully syndicated; first-run syndications have moved out of the situation comedy-mystery-detective script situation into game shows and talk shows. Independent stations have "stripped" some of the syndicated programs by presenting them at the same viewing time five days each week. The original program may have been shown on the network once a week but enough backlog has been developed so that a station using syndication programming may be able to show the program daily and thereby build a loyal audience on a day by day basis. This will help the independent's quest for local and national advertising.

By 1977, interest in the creation of "fourth networks" had revived, apparently inspired by the conclusion that the three major networks could not absorb all the national advertising available. As a result, some independent stations and advertising agencies and some producers began to discuss the possibility of limited networks. Proposals included using a particular time slot every night, a particular producer providing programming for three hours of prime time on Saturday night, and a particular advertiser assuring sponsorship for two hours on Sunday night. Independent stations in about 20 large cities would participate, and affiliates in other cities would be asked to substitute programs from the new network for those offered by one of the three major networks. An extensive discussion of the possibilities appears in N. Y. Times, January 19, 1977, p. C22.

Advertisers may deal at one of several levels. National advertisers may work through networks as well as in specific local markets through "national spot" advertising. Local advertisers will deal directly with local stations, both affiliates and independents. In all cases, the rates are determined by the size and characteristics of the audience that can be delivered to the advertiser.

To keep matters in perspective, it is perhaps well to realize that television accounted for only 17 percent of advertising expenditures in 1971—half of that being attributable to network sales. By comparison, newspapers carried 30 percent of the total, magazines and radio seven percent each, direct mail 15 percent, and miscellaneous media accounted for the remaining 24 percent. See B. Owen, J. Beebe, and W. Manning, Jr., Television Economics 9 (1974).

Inevitably the governmental regulation of broadcasting is charged with political overtones. The Commission's decisions can have an enormous impact on the political process, and conversely, the Commission and its decisions are often targets of political pressure from both the legislative and executive branches as well as those regulated. For a comprehensive look at the situation, including several case studies and a reference bibliography, see E. Krasnow and L. Longley, The Politics of Broadcast Regulation (1973). The relationship between legal, political, and economic questions is discussed in Freedom of the Press (An American Enterprise Institute Round Table, 1976), which includes a lawyer, a government official, a political columnist and a broadcaster.

B. JUSTIFICATIONS FOR GOVERNMENT REGULATION

NATIONAL BROADCASTING CO. v. UNITED STATES

Supreme Court of the United States, 1943.
319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344.

[After conducting a study of business practices and ownership patterns of radio networks in 1941, the Federal Communications Commission concluded that the major networks (NBC and CBS) exerted too much control over the broadcast industry through control over local station programming. To correct this situation, the Commission issued the Chain Broadcasting Regulations, which defined permissible relationships between networks and stations in terms of affiliation, network programming of affiliates' time, and network ownership of stations. These regulations were aimed at dissuading individual licensees from entering contracts that gave the networks the power to exert such control over licensees. NBC challenged the Commission's authority to adopt regulations controlling licensee behavior not related to technical and engineering matters. After con-

sidering the Chain Broadcasting Regulations themselves, the Court turned to the Commission's authority to adopt the regulations.]

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

. . .

Section 1 of the Communications Act states its "purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." Section 301 particularizes this general purpose with respect to radio: "It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." To that end a Commission composed of seven members was created, with broad licensing and regulatory powers.

Section 303 provides:

"Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

. . . . . .

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act . . . ;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

. . . . . .

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

. . . . . .

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act. . . ."

The criterion governing the exercise of the Commission's licensing power is the "public interest, convenience, or necessity." §§ 307

(a), (d), 309(a), 310, 312. In addition, § 307(b) directs the Commission that "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same."

The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.

The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the "public interest, convenience, or necessity," a criterion which "is as concrete as the complicated factors for judgment in such a field of delegated authority permit." Federal Communications Comm'n v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940). "This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. [ ] The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services. . . ." Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285 (1933).

The "public interest" to be served under the Communications Act is thus the interest of the listening public in "the larger and more effective use of radio." § 303(g). The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." Federal Communications Comm'n v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940). The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and

technically qualified to operate a station? Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity." [ ]

The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio. Section 303(g) provides that the Commission shall "generally encourage the larger and more effective use of radio in the public interest"; subsection (i) gives the Commission specific "authority to make special regulations applicable to radio stations engaged in chain broadcasting"; and subsection (r) empowers it to adopt "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act."

These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the "larger and more effective use of radio in the public interest." We cannot find in the Act any such restriction of the Commission's authority. Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. The stations might interfere with each other so that neither could be clearly heard. One station might dominate the other with the power of its signal. But the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified, might apply for and obtain the licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area. The language of the Act does not withdraw such a situation from the licensing and regulatory powers of the Commission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses.

. . .

We conclude, therefore, that the Communications Act of 1934 authorized the Commission to promulgate regulations designed to correct the abuses disclosed by its investigation of chain broadcasting. There remains for consideration the claim that the Commission's exercise of such authority was unlawful.

. . .

Since there is no basis for any claim that the Commission failed to observe procedural safeguards required by law, we reach the con-

tention that the Regulations should be denied enforcement on constitutional grounds. Here, as in New York Central Securities Corp. v. United States, 287 U.S. 12, 24–25 (1932), the claim is made that the standard of "public interest" governing the exercise of the powers delegated to the Commission by Congress is so vague and indefinite that, if it be construed as comprehensively as the words alone permit, the delegation of legislative authority is unconstitutional. But, as we held in that case, "It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary." Ibid. [ ]

We come, finally, to an appeal to the First Amendment. The Regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different. The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice, which we hold is comprehended within the statutory criterion of "public interest"), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

Affirmed.

[Justice Murphy, joined by Justice Roberts, dissented. Given the immense potential of radio as a medium of communication, discussion and propaganda, he was concerned about the amount of control

the government might exercise over broadcasting. He concluded that the Communications Act should be strictly construed—and that Congress neither explicitly nor implicitly conferred upon the Commission power to regulate the contractual relations between the stations and the networks.]

Notes and Questions

1. The origin of the phrase, "public interest, convenience and necessity," § 309(a), or "public convenience, interest or necessity," § 307(a), is unclear from legislative documents. A former chairman of the Commission, Newton Minow, suggests the origin in Equal Time 8–9 (1964): Senator Clarence C. Dill, who had played a major part in the early legislation, told Minow that the drafters had reached an impasse in attempting to define a regulatory standard for this new, uncharted activity. A young lawyer who had been loaned to the Senate by the Interstate Commerce Commission proposed the words because they were used in other federal statutes.

Judge Henry Friendly, in The Federal Administrative Agencies 54–55 (1962), comments on the standard:

> The only guideline supplied by Congress in the Communications Act of 1934 was "public convenience, interest, or necessity." The standard of public convenience and necessity, introduced into the federal statute book by Transportation Act, 1920, conveyed a fair degree of meaning when the issue was whether new or duplicating railroad construction should be authorized or an existing line abandoned. It was to convey less when, as under the Motor Carrier Act of 1935, or the Civil Aeronautics Act of 1938, there would be the added issue of selecting the applicant to render a service found to be needed; but under those statutes there would usually be some demonstrable factors, such as, in air route cases, ability to render superior one-plane or one-carrier service because of junction of the new route with existing ones, lower costs due to other operations, or historical connection with the traffic, that ought to have enabled the agency to develop intelligible criteria for selection. The standard was almost drained of meaning under section 307 of the Communications Act, where the issue was almost never the need for broadcasting service but rather who should render it.

2. How much of the excerpt addresses the question of the extent of Congressional delegation as opposed to the question of whether the statute and the regulations issued pursuant to the statute are constitutional?

3. The Radio Commission's first obligation was to clear the airwaves to avoid destructive interference. It decided in 1928 that "as

between two broadcasting stations with otherwise equal claims for privileges, the station which has the longest record of continuous service has the superior right." Great Lakes Broadcasting Co., 3 F. R.C.Ann.Rep. 32 (1929), modified on other grounds, 37 F.2d 993 (D. C.Cir.), certiorari dismissed, 281 U.S. 706 (1930). In that case, involving three competing stations, the Commission also stated, however, that if there was a "substantial disparity" in the services being offered by the stations, "the claim of priority must give way to the superior service." The Commission was soon evaluating service in terms of program content. In *Great Lakes*, the Commission contented itself with noting that stations using formats that appeal to only a "small portion" of the public were not serving the public interest because each member of the listening public is entitled to service from each station in the community.

4. In its early years the Radio Commission showed no hesitation in denying renewal of licenses because of the content of the speech uttered over the station. Section 29 of the 1927 Act, reenacted as § 326 of the 1934 Act, provided in relevant part:

> Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communication. . . .

In 1930 the Commission denied renewal of a license to KFKB on the ground that the station was being controlled and used by Dr. J. R. Brinkley to further his personal interest. Dr. Brinkley had three half-hour programs daily in which he answered anonymous inquiries on health and medicine and usually recommended several of his own tonics and prescriptions that were known to the public only by numerical designations. Druggists paid a fee to Dr. Brinkley for each sale they made.

In affirming the denial of renewal, KFKB Broadcasting Ass'n v. Federal Radio Comm'n, 47 F.2d 670, (D.C.Cir. 1931), the court rejected the station's argument that the Commission had censored in violation of § 29:

> This contention is without merit. There has been no attempt on the part of the commission to subject any part of appellant's broadcasting matter to scrutiny prior to its release. In considering the question whether the public interest, convenience, or necessity will be served by a renewal of appellant's license, the

commission has merely exercised its undoubted right to take note of appellant's past conduct, which is not censorship.

In Trinity Methodist Church, South v. Federal Radio Comm'n, 62 F.2d 850 (D.C.Cir. 1932) certiorari denied 288 U.S. 599 (1933), the controlling figure was the minister of the church, Dr. Shuler, who regularly defamed government institutions and officials, and attacked labor groups and various religions. The Commission's denial of renewal was affirmed. The court concluded that the broadcasts "without facts to sustain or to justify them" might fairly be found not to be within the public interest:

> If it be considered that one in possession of a permit to broadcast in interstate commerce may, without let or hindrance from any source, use these facilities, reaching out, as they do, from one corner of the country to the other, to obstruct the administration of justice, offend the religious susceptibilities of thousands, inspire political distrust and civic discord, or offend youth and innocence by the free use of words suggestive of sexual immorality, and be answerable for slander only at the instance of the one offended, then this great science, instead of a boon, will become a scourge and the nation a theater for the display of individual passions and the collision of personal interests. This is neither censorship nor previous restraint, nor is it a whittling away of the rights guaranteed by the First Amendment, or an impairment of their free exercise. Appellant may continue to indulge his strictures upon the characters of men in public office. He may just as freely as ever criticize religious practices of which he does not approve. He may even indulge private malice or personal slander—subject, of course, to being required to answer for the abuse thereof—but he may not, as we think, demand, of right, the continued use of an instrumentality of commerce for such purposes, or any other, except in subordination to all reasonable rules and regulations Congress, acting through the Commission, may prescribe.

5. The second case, 26 years later, involved a direct effort by the Commission to affect the content of broadcast material.

RED LION BROADCASTING CO. v. FEDERAL COMMUNICATIONS COMMISSION *

Supreme Court of the United States, 1969.
395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371.

MR. JUSTICE WHITE delivered the opinion of the Court.

The Federal Communications Commission has for many years imposed on radio and television broacasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine, which originated very early in the history of broadcasting and has maintained its present outlines for some time. It is an obligation whose content has been defined in a long series of FCC rulings in particular cases, and which is distinct from the statutory requirement of § 315 of the Communications Act that equal time be allotted all qualified candidates for public office. Two aspects of the fairness doctrine, relating to personal attacks in the context of controversial public issues and to political editorializing, were codified more precisely in the form of FCC regulations in 1967. The two cases before us now, which were decided separately below, challenge the constitutional and statutory bases of the doctrine and component rules. *Red Lion* involves the application of the fairness doctrine to a particular broadcast, and *RTNDA* arises as an action to review the FCC's 1967 promulgation of the personal attack and political editorializing regulations, which were laid down after the *Red Lion* litigation had begun.

I.

A.

The Red Lion Broadcasting Company is licensed to operate a Pennsylvania radio station, WGCB. On November 27, 1964, WGCB carried a 15-minute broadcast by the Reverend Billy James Hargis as

* [Together with United States v. Radio Television News Directors Ass'n, which involved rules promulgated by the Commission to make the personal attack doctrine and political editorializing obligations more precise and more readily enforceable. In brief, the personal attack rules provided that 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 must notify the person or group, send a transcript and offer opportunity to respond—with some exceptions. The political editorial rule provided that when a licensee editorially endorsed a candidate for political office, other candidates for the same office were to be advised of the endorsement and offered a reasonable opportunity to respond. The same opportunity was to be extended to any candidate who was attacked in an editorial. The Court of Appeals for the Seventh Circuit held that the rules violated the First Amendment.]

part of a "Christian Crusade" series. A book by Fred J. Cook entitled "Goldwater—Extremist on the Right" was discussed by Hargis, who said that Cook had been fired by a newspaper for making false charges against city officials; that Cook had then worked for a Communist-affiliated publication; that he had defended Alger Hiss and attacked J. Edgar Hoover and the Central Intelligence Agency; and that he had now written a "book to smear and destroy Barry Goldwater." When Cook heard of the broadcast he concluded that he had been personally attacked and demanded free reply time, which the station refused. After an exchange of letters among Cook, Red Lion, and the FCC, the FCC declared that the Hargis broadcast constituted a personal attack on Cook; that Red Lion had failed to meet its obligation under the fairness doctrine as expressed in Times-Mirror Broadcasting Co., 24 P & F Radio Reg. 404 (1962), to send a tape, transcript, or summary of the broadcast to Cook and offer him reply time; and that the station must provide reply time whether or not Cook would pay for it. On review in the Court of Appeals for the District of Columbia Circuit, the FCC's position was upheld as constitutional and otherwise proper. [ ]

. . .

C.

Believing that the specific application of the fairness doctrine in *Red Lion*, and the promulgation of the regulations in *RTNDA*, are both authorized by Congress and enhance rather than abridge the freedoms of speech and press protected by the First Amendment, we hold them valid and constitutional, reversing the judgment below in *RTNDA* and affirming the judgment below in *Red Lion*.

II.

The history of the emergence of the fairness doctrine and of the related legislation shows that the Commission's action in the *Red Lion* case did not exceed its authority, and that in adopting the new regulations the Commission was implementing congressional policy rather than embarking on a frolic of its own.

A.

Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacaphony of competing voices, none of which could be clearly and predictably heard. Consequently, the Federal Radio Commission was established to allocate frequencies among competing applicants in

a manner responsive to the public "convenience, interest, or necessity."

Very shortly thereafter the Commission expressed its view that the "public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies . . . to all discussions of issues of importance to the public." . . . After an extended period during which the licensee was obliged not only to cover and to cover fairly the views of others, but also to refrain from expressing his own personal views, Mayflower Broadcasting Corp., 8 F.C.C. 333 (1940), the latter limitation on the licensee was abandoned and the doctrine developed into its present form.

There is a twofold duty laid down by the FCC's decisions and described by the 1949 Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). The broadcaster must give adequate coverage to public issues, [ ], and coverage must be fair in that it accurately reflects the opposing views. [ ] This must be done at the broadcaster's own expense if sponsorship is unavailable. [ ] Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source. . . .

When a personal attack has been made on a figure involved in a public issue, both the doctrine of cases such as *Red Lion* and *Times Mirror Broadcasting Co.*, 24 P & F Radio Reg. 404 (1962), and also the 1967 regulations at issue in *RTNDA* require that the individual attacked himself be offered an opportunity to respond. Likewise, where one candidate is endorsed in a political editorial, the other candidates must themselves be offered reply time to use personally or through a spokesman. These obligations differ from the general fairness requirement that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attacked party's side himself or choosing a third party to represent that side. But insofar as there is an obligation of the broadcaster to see that both sides are presented, and insofar as that is an affirmative obligation, the personal attack doctrine and regulations do not differ from the preceding fairness doctrine. The simple fact that the attacked men or unendorsed candidates may respond themselves or through agents is not a critical distinction, and indeed, it is not unreasonable for the FCC to conclude that the objective of adequate presentation of all sides may best be served by allowing those most closely affected to make the response, rather than leaving the response in the hands of the station which has attacked their candidacies, endorsed their opponents, or carried a personal attack upon them.

B.

The statutory authority of the FCC to promulgate these regulations derives from the mandate to the "Commission from time to time, as public convenience, interest, or necessity requires" to promulgate "such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this chapter. . . ." 47 U.S.C. § 303 and § 303(r). The Commission is specifically directed to consider the demands of the public interest in the course of granting licenses, 47 U.S.C. §§ 307(a), 309(a); renewing them, 47 U.S.C. § 307; and modifying them. Ibid. Moreover, the FCC has included among the conditions of the Red Lion license itself the requirement that operation of the station be carried out in the public interest, 47 U.S.C. § 309(h). This mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power "not niggardly but expansive," National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943), whose validity we have long upheld. [ ] It is broad enough to encompass these regulations.

The fairness doctrine finds specific recognition in statutory form, is in part modeled on explicit statutory provisions relating to political candidates, and is approvingly reflected in legislative history.

In 1959 the Congress amended the statutory requirement of § 315 that equal time be accorded each political candidate to except certain appearances on news programs, but added that this constituted no exception "*from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.*" Act of September 14, 1959, § 1, 73 Stat. 557, amending 47 U.S.C. § 315(a) (emphasis added). This language makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard. Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction. Here, the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation. Thirty years of consistent administrative construction

left undisturbed by Congress until 1959, when that construction was expressly accepted, reinforce the natural conclusion that the public interest language of the Act authorized the Commission to require licensees to use their stations for discussion of public issues, and that the FCC is free to implement this requirement by reasonable rules and regulations which fall short of abridgment of the freedom of speech and press, and of the censorship proscribed by § 326 of the Act.

The objectives of § 315 themselves could readily be circumvented but for the complementary fairness doctrine ratified by § 315. The section applies only to campaign appearances by candidates, and not by family, friends, campaign managers, or other supporters. Without the fairness doctrine, then, a licensee could ban all campaign appearances by candidates themselves from the air and proceed to deliver over his station entirely to the supporters of one slate of candidates, to the exclusion of all others. In this way the broadcaster could have a far greater impact on the favored candidacy than he could by simply allowing a spot appearance by the candidate himself. It is the fairness doctrine as an aspect of the obligation to operate in the public interest, rather than § 315, which prohibits the broadcaster from taking such a step.

. . .

In light of the fact that the "public interest" in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public; the fact that the FCC has rested upon that language from its very inception a doctrine that these issues must be discussed, and fairly; and the fact that Congress has acknowledged that the analogous provisions of § 315 are not preclusive in this area, and knowingly preserved the FCC's complementary efforts, we think the fairness doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority. . . .

III.

The broadcasters challenge the fairness doctrine and its specific manifestations in the personal attack and political editorial rules on conventional First Amendment grounds, alleging that the rules abridge their freedom of speech and press. Their contention is that the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency. No man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the

views of his opponents. This right, they say, applies equally to broadcasters.

A.

Although broadcasting is clearly a medium affected by a First Amendment interest, United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948), differences in the characteristics of new media justify differences in the First Amendment standards applied to them. [ ] For example, the ability of new technology to produce sounds more raucous than those of the human voice justifies restrictions on the sound level, and on the hours and places of use, of sound trucks so long as the restrictions are reasonable and applied without discrimination. [ ]

Just as the Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others. Associated Press v. United States, 326 U.S. 1, 20 (1945).

When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology.

It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 and the Communications Act of 1934, as the Court has noted at length before. National Broadcasting Co. v. United States, 319 U.S. 190, 210–214 (1943). It was this reality which at the very least necessitated first the division of the radio spectrum into portions reserved respectively for public broadcasting and for other important radio uses such as amateur operation, aircraft, police, defense, and navigation; and then the subdivision of each portion, and assignment of specific frequencies to individual users or groups of users. Beyond

this, however, because the frequencies reserved for public broadcasting were limited in number, it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few.

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.

This has been the consistent view of the Court. Congress unquestionably has the power to grant and deny licenses and to eliminate existing stations. FRC v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933). No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because "the public interest" requires it "is not a denial of free speech." National Broadcasting Co. v. United States, 319 U.S. 190, 227 (1943).

By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in § 326, which forbids FCC interference with "the right of free speech by means of radio communication." Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective

right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. See FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940); FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 361–362 (1955); 2 Z. Chafee, Government and Mass Communications 546 (1947). It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. Associated Press v. United States, 326 U.S. 1, 20 (1945); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964). See Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv.L.Rev. 1 (1965). It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

B.

Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far. They assert that under specified circumstances, a licensee must offer to make available a reasonable amount of broadcast time to those who have a view different from that which has already been expressed on his station. The expression of a political endorsement, or of a personal attack while dealing with a controversial public issue, simply triggers this time sharing. As we have said, the First Amendment confers no right on licensees to prevent others from broadcasting on "their" frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use.

In terms of constitutional principle, and as enforced sharing of a scarce resource, the personal attack and political editorial rules are indistinguishable from the equal-time provision of § 315, a specific enactment of Congress requiring stations to set aside reply time under specified circumstances and to which the fairness doctrine and these constituent regulations are important complements. That provision, which has been part of the law since 1927, Radio Act of 1927, § 18, 44 Stat. 1170, has been held valid by this Court as an obligation

of the licensee relieving him of any power in any way to prevent or censor the broadcast, and thus insulating him from liability for defamation. The constitutionality of the statute under the First Amendment was unquestioned. Farmers Educ. & Coop. Union v. WDAY, 360 U.S. 525 (1959).

Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public.[18] Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." Associated Press v. United States, 326 U.S. 1, 20 (1945).

C.

It is strenuously argued, however, that if political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective. Such a result would indeed be a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purposes of the doctrine would be stifled.

At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative. The communications industry, and in particular the networks, have taken pains to present controversial issues in the past, and even now they do not assert that they intend to abandon their efforts in this regard.

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

It would be better if the FCC's encouragement were never necessary to induce the broadcasters to meet their responsibility. And if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications. The fairness doctrine in the past has had no such overall effect.

That this will occur now seems unlikely, however, since if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues. It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. The statute, long administrative practice, and cases are to this effect.

Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them. 47 U.S.C. § 301. Unless renewed, they expire within three years. 47 U.S.C. § 307(d). The statute mandates the issuance of licenses if the "public convenience, interest, or necessity will be served thereby." 47 U.S. C. § 307(a). In applying this standard the Commission for 40 years has been choosing licensees based in part on their program proposals. In FRC v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 279 (1933), the Court noted that in "view of the limited number of available broadcasting frequencies the Congress has authorized allocation and licenses." In determining how best to allocate frequencies, the Federal Radio Commission considered the needs of competing communities and the programs offered by competing stations to meet those needs; moreover, if needs or programs shifted the Commission could alter its allocations to reflect those shifts. Id., at 285. . . .

D.

The litigants embellish their First Amendment arguments with the contention that the regulations are so vague that their duties are impossible to discern. Of this point it is enough to say that, judging

the validity of the regulations on their face as they are presented here, we cannot conclude that the FCC has been left a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech. . . .

We need not and do not now ratify every past and future decision by the FCC with regard to programming. There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues. But we do hold that the Congress and the Commission do not violate the First Amendment when they require a radio or television station to give reply time to answer personal attacks and political editorials.

E.

It is argued that even if at one time the lack of available frequencies for all who wished to use them justified the Government's choice of those who would best serve the public interest by acting as proxy for those who would present differing views, or by giving the latter access directly to broadcast facilities, this condition no longer prevails so that continuing control is not justified. To this there are several answers.

Scarcity is not entirely a thing of the past. Advances in technology, such as microwave transmission, have led to more efficient utilization of the frequency spectrum, but uses for that spectrum have also grown apace. Portions of the spectrum must be reserved for vital uses unconnected with human communication, such as radio-navigational aids used by aircraft and vessels. Conflicts have even emerged between such vital functions as defense preparedness and experimentation in methods of averting midair collisions through radio warning devices. "Land mobile services" such as police, ambulance, fire department, public utility, and other communications systems have been occupying an increasingly crowded portion of the frequency spectrum and there are, apart from licensed amateur radio operators' equipment, 5,000,000 transmitters operated on the "citizens' band" which is also increasingly congested. Among the various uses for radio frequency space, including marine, aviation, amateur, military, and com-

mon carrier users, there are easily enough claimants to permit use of the whole with an even smaller allocation to broadcast radio and television uses than now exists.

Comparative hearings between competing applicants for broadcast spectrum space are by no means a thing of the past. The radio spectrum has become so congested that at times it has been necessary to suspend new applications. The very high frequency television spectrum is, in the country's major markets, almost entirely occupied, although space reserved for ultra high frequency television transmission, which is a relatively recent development as a commercially viable alternative, has not yet been completely filled.[25]

The rapidity with which technological advances succeed one another to create more efficient use of spectrum space on the one hand, and to create new uses for that space by ever growing numbers of people on the other, makes it unwise to speculate on the future allocation of that space. It is enough to say that the resource is one of considerable and growing importance whose scarcity impelled its regulation by an agency authorized by Congress. Nothing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated, and for which wise planning is essential. This does not mean, of course, that every possible wavelength must

25. In a table prepared by the FCC on the basis of statistics current as of August 31, 1968, VHF and UHF channels allocated to and those available in the top 100 market areas for television are set forth:

COMMERCIAL

Market Areas	*Channels Allocated*		*Channels On the Air, Authorized, or Applied for*		*Available Channels*	
	VHF	UHF	VHF	UHF	VHF	UHF
Top 10	40	45	40	44	0	1
Top 50	157	163	157	136	0	27
Top 100	264	297	264	213	0	84

NONCOMMERCIAL

Market Areas	*Channels Reserved*		*Channels On the Air, Authorized, or Applied for*		*Available Channels*	
	VHF	UHF	VHF	UHF	VHF	UHF
Top 10	7	17	7	16	0	1
Top 50	21	79	20	47	1	32
Top 100	35	138	34	69	1	69

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be occupied at every hour by some vital use in order to sustain the congressional judgment. The substantial capital investment required for many uses, in addition to the potentiality for confusion and interference inherent in any scheme for continuous kaleidoscopic reallocation of all available space may make this unfeasible. The allocation need not be made at such a breakneck pace that the objectives of the allocation are themselves imperiled.

Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government. Some present possibility for new entry by competing stations is not enough, in itself, to render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest.

In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional.[28] The judgment of the Court of Appeals in *Red Lion* is affirmed and that in *RTNDA* reversed and the causes remanded for proceedings consistent with this opinion.

It is so ordered.

Not having heard oral argument in these cases, MR. JUSTICE DOUGLAS took no part in the Court's decision.

28. We need not deal with the argument that even if there is no longer a technological scarcity of frequencies limiting the number of broadcasters, there nevertheless is an economic scarcity in the sense that the Commission could or does limit entry to the broadcasting market on economic grounds and license no more stations than the market will support. Hence, it is said, the fairness doctrine or its equivalent is essential to satisfy the claims of those excluded and of the public generally. A related argument, which we also put aside, is that quite apart from scarcity of frequencies, technological or economic, Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public. Cf. Citizen Pub. Co. v. United States, 394 U.S. 131 (1969).

Notes and Questions

1. The Court states that the differences among the technical aspects of media warrant different regulatory treatment. Compare Jackson, J., concurring, in Kovacs v. Cooper, 336 U.S. 77, 97 (1949): "The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself. . . ."

2. The Court states that only a tiny fraction of those who want to broadcast are able to do so "even if the entire radio spectrum is utilized. . . ." Who decided how much of the spectrum to allocate to radio? Could a niggardly or inefficient allocation of radio space justify government exercise of its regulatory power? The notion of "scarcity" plays a major role in the Court's analysis. What does the term appear to mean in the opinion?

Consider whether scarcity is present in the following contexts: (a) all three radio outlets allocated to a community are being used; (b) of the five radio outlets allocated three are being used; (c) all 40 radio outlets allocated to an urban area are being used; (d) seven of the 40 outlets are vacant.

3. Does Justice White's next-to-last paragraph suggest that the reality of scarcity in the past will be enough to justify continuing regulation even if it were determined that no scarcity exists today?

4. Accepting limits on the part of the spectrum allocated to radio, does it follow that government must be involved in assigning space to specific applicants? Even if government is involved in the individual assignments, might the channels be assigned by other devices, such as auctioning them off in perpetuity? Or for a period of years?

5. Justice White says that "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. [ ] It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." What philosophical strands are being brought together here? For a thoughtful discussion written before *Red Lion*, see Kalven, Broadcasting, Public Policy and the First Amendment, 10 J.Law & Econ. 15 (1967).

When Justice White says that the "right" involved in the case belongs to "the public" and that this "right may not constitutionally be abridged either by Congress or by the FCC," is he suggesting that the absence of government control of broadcasters' programming would

deny the public's constitutional right to "receive suitable access to social, political, esthetic, moral and other ideas and experiences?"

6. Is the Court's concern about licensees refusing to air controversial material if they must provide response time consistent with the Court's analysis in *Tornillo* p. 359, supra? Is it surprising that the Court did not cite *Red Lion* in its decision in *Tornillo?*

7. There is reason to believe that Fred Cook's demand for reply time was part of a broader effort to use the Fairness Doctrine to soften attacks on the Kennedy administration by right-wing political commentators. The plan was to monitor right-wing programs and then to demand reply time for personal attacks or to demand balance under the general Fairness Doctrine. F. Friendly, The Good Guys, The Bad Guys and the First Amendment (1976). If the result was that licensees cancelled several right-wing commentators would that affect your reaction to the *Red Lion* decision? Was this a misuse of the doctrine?

8. Aside from the spectrum scarcity arguments there are intrinsic differences between print and broadcast media. There is a physical limit to the number of words that can be uttered intelligibly over a broadcasting facility during a 24-hour day. Based on an estimate of about 200,000 words, using normal speaking patterns, one author suggests that a newspaper is the equivalent of between one and three 24-hour programs. But the reader of a newspaper can at any time go directly to what interests him and skim or ignore the rest. In broadcasting, the choice is made for the listener by the broadcaster; the speed, content, and sequence are fixed. Baxter, Regulation and Diversity in Communications Media, 64 Am.Econ.Rev. 392 (1974). Might such differences justify greater regulation of broadcasting?

9. Other differences between the print and electronic media emphasize the greater impact of broadcasting in conveying certain types of information. The vivid telecasts during the Vietnam War are thought to have been a strong factor in the shift of public attitude against that war, beyond the potential of any verbal journalism. Another major difference is the role of sound in broadcasting, which makes it possible to use songs and jingles effectively in advertising. During the discussion of the broadcast advertising of cigarettes, one court observed:

> Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are "in the air." In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can *avoid* these commercials only by frequent-

> ly leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.

Banzhaf v. Federal Communications Comm'n, 405 F.2d 1082, 1100–01 (D.C.Cir.1968), certiorari denied 396 U.S. 842 (1969). Does this suggest an additional basis for regulating some aspects of broadcasting?

In considering this, recall the refusal of the Supreme Court to declare unconstitutional all motion picture censorship. In Times Film Corp. v. Chicago, 365 U.S. 43 (1961), the Court, 5–4, refused to hold "that the public exhibition of motion pictures must be allowed under any circumstances" and that the state may punish only after the fact. As the Pentagon Papers case, p. 379, supra, suggests, prior restraints may be permissible in some exceptional circumstances. Since the film producers were presumably not claiming greater protection than what was given print media, might the motion picture decision be simply an anticipation of that development? Or might the Court be concerned about the explicit and vivid depiction of sexual episodes—and fear the impact of the medium on viewers more than it fears the printed page in such circumstances? Might such a concern with motion pictures apply to television? Recall that 47 U.S.C. § 326 bans the Commission from "censorship" of programming.

Does the *Banzhaf* view of broadcasting imply a "captive audience" comparable to the addressees of sound trucks in residential neighborhoods, or political advertisements in mass transit vehicles? Is turning off the program like averting your eyes from offensive wording on someone's jacket? Recall the captive audience discussion in Chapter IV. Is it relevant to this aspect of the discussion that most television sets and radios are in private homes?

10. The Supreme Court returned to these questions once again in Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973). The Court decided that broadcasters were not obligated under the First Amendment to accept paid advertisements from "responsible" individuals and groups. The majority relied upon *Red Lion*. The case with its complex array of opinions is discussed at p. 599, infra.

Justice Stewart in a separate concurring opinion stated "I agreed with the Court in *Red Lion*, although with considerable doubt, because I thought that that much Government regulation of program content was within the outer limits of First Amendment tolerability."

In another concurring opinion, Justice Douglas stated of *Red Lion*: "I did not participate in that decision and, with all respect,

would not support it. The Fairness Doctrine has no place in our First Amendment regime." He argued that the uniqueness of the spectrum was "due to engineering and technical problems. But the press in a realistic sense is likewise not available to all. Small or 'underground' papers appear and disappear; and the weekly is an established institution. But the daily papers now established are unique in the sense that it would be virtually impossible for a competitor to enter the field due to the financial exigencies of this era. The result is that in practical terms the newspapers and magazines, like TV and radio, are available only to a selected few."

11. The following excerpt discusses the scarcity question from an economic perspective. Publications that are entitled "Law Review" or "Law Journal" of a university are periodicals produced and edited by law school students. In these publications, notes such as this one have been written and edited by the students. Articles with by-lines are generally written by attorneys or professors, and are edited by the student editors.

NOTE, RECONCILING *Red Lion* AND *Tornillo:* A CONSISTENT THEORY OF MEDIA REGULATION

28 Stanford Law Review 563, 575–78 (1976).

Although there is no strict physical limitation on intensive and extensive spectrum utilization, it would be misleading to say that the spectrum is unlimited. Increasing the number of broadcasting stations can be accomplished only at the cost of improving the quality of receivers and transmitters, or of depriving other users of their ability to employ the spectrum for non-broadcasting purposes. However, it is no basis for a distinction between the broadcast and print media that the resources used by one are limited, and the resources used by the other are not. Communication through the print media is as dependent on the availability of paper, presses, and delivery trucks as broadcast communication is upon the availability of frequencies, antennas, cameras, and microphones. There is a limitation on each of these resources, not just the electromagnetic spectrum resource used by the broadcast media.

The point should also be made that the question of physical limitation is irrelevant in a very important sense. If there are 100 broadcasting channels available, and only 50 who wish to broadcast, the limitation is of no real significance. The critical relationship, as the Court appears to recognize, is between the number of available channels and the number who wish to use them. One form of the Court's justification for the existence of the licensing scheme incor-

porates this recognition in the argument that government rationing of the spectrum is required because there are more wishing to use the spectrum than there are channels available for use. This is equivalent to a determination that the broadcast spectrum is "scarce," in the strict economic meaning of that term.[59] However, the argument has at least four serious defects. First, it is clearly inadequate to distinguish the broadcast and print media because the print media also employ scarce resources.[60] Second, it is difficult to attach precise meaning to the demand for use of the broadcast spectrum because licenses are available free of charge to the successful combatant in an FCC hearing. Any scarce good, if made available through such a process, would produce results similar to those found in broadcasting. Imagine a situation, for instance, in which paper was made available free of charge to those newspaper publishers who most convincingly demonstrated their ability to serve the public interest. The fact that newspapers are in demand would mean that the license would become a valuable asset. Prospective publishers would be willing to expend considerable effort in making the required showing, and to the body hearing conflicting claims, it would appear that there existed a drastic shortfall between the amount of paper available and the amount of paper needed.[61] Because paper is in reality traded on the market, the amount available and the amount needed tend to come into balance, and the market price can be easily interpreted as indicating the monetary value of paper at any time. On the other hand, because the electromagnetic spectrum is handed out for free, need always appears to exceed availability, and there is no equivalent measure of its value. For this reason alone, the Court ought to be less eager to say that because of the large numbers of would-be broadcast-

59. If scarcity is to be used as a justification for government regulation, then scarcity must exist in the absence of regulation. Thus the relevant question is not whether a government *license* is a scarce resource, but whether the *right to broadcast* is scarce in the *absence* of government regulation. The chaos pervading the early broadcasting industry is probably sufficient demonstration that the spectrum is scarce in this strict economic sense. [ ]

60. "Economic resources are scarce, while free resources, such as air, are so abundant that they can be obtained without charge. The test of whether a resource is an economic resource or a free resource is price: economic resources command a nonzero price but free resources do not." E. Mansfield, Microeconomics 9 (1970). Clearly, resources used by the print media, such as paper, presses, labor and real estate, satisfy this test since they can be obtained only at a price.

61. So long as the price of the license were to be held at zero, there would be competing applicants. [ ] The cost of a license hearing is not negligible, however, and one would predict that applicants would contine to appear only as long as the value of the license, representing a time- and risk-discounted stream of revenues to be collected from newspaper publication, did not exceed the sum of the cost of operating the newspaper (similarly discounted) plus the cost of the license proceeding.

ers, extraordinary government interference in the process of free expression is justified.

The third criticism relates to the effect of government allocation of the spectrum on the number of available channels. It was shown earlier that there are two basic means for increasing the availability of frequencies for use by broadcasters, "intensive" and "extensive" spectrum utilization. Government controls "extensive" spectrum use by determining the ranges of frequencies that are available to the broadcast licensing process. A serious defect in this state of affairs is that the absence of a clear indicator of spectrum value makes it impossible to tell whether "enough" of the spectrum is allocated to broadcasting uses.

The current allocation scheme also makes "intensive" spectrum utilization difficult by limiting the rights of licensees to transfer or subdivide their interests in the spectrum. . . . Current licensees have no authority to transfer or to subdivide their interests in the spectrum and again, because of the absence of a measure of spectrum value, there is no convenient way to know whether current spectrum use is intensive "enough." The implications for the Court's analysis are the same as those from the previous argument. Channel limitation should probably not serve as the constitutional basis for interference in the editorial process before it can be shown that such a limitation exists in a meaningful sense.[67]

The fourth criticism is related to government involvement *per se* in the spectrum allocation process. Even assuming that there are not enough channels to go around, there is no compelling reason why it is the government that should perform the rationing function. Few economic or "scarce" goods are allocated through government rationing, and if one were making the initial choice of how to allocate the spectrum, it would be a compelling argument *against* government allocation that the spectrum is an important input to private business institutions with functions related primarily to free speech. So long as the Court continues to view FCC licensing as a *necessary* remedy to spectrum "scarcity," it tolerates too great a role for government in the process of free expression.

67. Private parties wishing to participate in intensifying spectrum use are currently remitted to cumbersome administrative procedures. [ ] More importantly, it is not clear that private parties ever face incentives which would lead them to propose intensive spectrum use when this would be desirable from a social standpoint. Because increased competition would be inimical to the interests of established broadcasters taken as a whole, current licensees have more at stake in keeping newcomers out than the individual newcomer has in entering. . . .

Chapter VI

BROADCAST LICENSING

In this chapter we consider the substantive and procedural aspects of the licensing activities of the Federal Communications Commission. As we have seen, the Commission was charged with reducing interference on the airwaves, which eventually, in the name of the public interest, involved licensing. We follow this process through from the initial stage of awarding a vacant spot, to the question of renewal of those already established, and finally to the conditions of transferring a license. We begin with a general concern implicit in all these stages: the Commission's efforts to maximize diversity of ownership of broadcast facilities.

A. CONCENTRATION OF OWNERSHIP OF BROADCAST FACILITIES

1. INTRODUCTION

As we saw when considering the NBC case, the Commission has long been concerned about excessive concentration of control over the process of deciding what programs to present. There are several ways to attack the problem. One, utilized in that case, is to prevent the networks from imposing their power on the licensees. Another we shall consider shortly is to order licensees to obtain their programs from non-network sources for certain periods of the day. Still another, which gets at this problem indirectly but also attacks other problems, is to attempt to diversify the ownership of broadcast facilities. In this section we consider that type of regulation. (For greater detail, see M. Franklin, Mass Media Law, Chap. VII (1977) and W. K. Jones, Cases and Materials on Electronic Mass Media, Chap. IV (1976).

In *National Broadcasting Co.* the Court upheld the power of the Commission to promulgate regulations that affected control over programming decisions. In its nonconstitutional discussion, the Court recognized the problems of narrow control of broadcasting decisions:

> In essence, the Chain Broadcasting Regulations represent a particularization of the Commission's conception of the "public interest" sought to be safeguarded by Congress in enacting the Communications Act of 1934. The basic consideration of policy underlying the Regulations is succinctly stated in its Report: "With the number of radio channels limited by natural factors,

> the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them. If a licensee enters into a contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest. . . . The net effect [of the practices disclosed by the investigation] has been that broadcasting service has been maintained at a level below that possible under a system of free competition. Having so found, we would be remiss in our statutory duty of encouraging 'the larger and more effective use of radio in the public interest' if we were to grant licenses to persons who persist in these practices." (Report, pp. 81, 82.)
>
> We would be asserting our personal views regarding the effective utilization of radio were we to deny that the Commission was entitled to find that the large public aims of the Communications Act of 1934 comprehend the considerations which moved the Commission in promulgating the Chain Broadcasting Regulations. . . .

As this case suggests, the Commission has used rules in this area as a form of general legislative decree. It is perhaps easier in this area than in others to utilize rules because much of the concern is quantitative—how many stations may a person control, etc.—and it is possible to write rules that define the boundaries of permissible ownership. In addition, however, the Commission may also look at particular cases in which an applicant seeks a station and would not be barred by the ownership rules, but yet the Commission perceives that to grant that application might not be in the "public interest." Whatever rules it promulgates and whatever decisions it announces in particular cases, the Commission must always be guided by its perception of the public interest, convenience and necessity.

Rules indicate how the Commission is likely to resolve similar cases in the future. The Commission also has the alternative of issuing general policy statements, which avoid some of the uncertainty of case-by-case adjudication without binding the Commission to a set of rigid rules that it must either follow or amend for a particular case.

For our purposes, the most significant example of the policy statement was one issued by the Commission in 1965 when it announced a general Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 5 R.R.2d 1901 (1965). In this statement, the Commission specified the factors that it would weigh most heavily when two or more applicants competed for a single station vacancy and only one of the applicants could prevail. In that proceeding the Commission stated that there were two primary objectives on which the applicants would be compared:

> We believe that there are two primary objectives toward which the process of comparison should be directed. They are, first, the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications. The value of these objectives is clear. Diversification of control is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities. . . .
>
> . . .
>
> 1. *Diversification of control of the media of mass communications.*—Diversification is a factor of primary significance since, as set forth above, it constitutes a primary objective in the licensing scheme.
>
> As in the past, we will consider both common control and less than controlling interests in other broadcast stations and other media of mass communications. The less the degree of interest in other stations or media, the less will be the significance of the factor. Other interests in the principal community proposed to be served will normally be of most significance, followed by other interests in the remainder of the proposed service area and, finally, generally in the United States. However, control of large interests elsewhere in the same State or region may well be more significant than control of a small medium of expression (such as a weekly newspaper) in the same community. The number of other mass communication outlets of the same type in the community proposed to be served will also affect to some extent the importance of this factor in the general comparative scale.

The question of undue concentration of ownership of mass communications can arise in several different ways. In all of them there is the question of which policy the Commission should adopt, the further question of whether some limitations or constraints are desirable, and if so, whether the limitations should be applied retroactively or only prospectively. The problem is that the Commission may not act until a particular matter is brought to its attention. Usually several licensees will have taken steps that are alleged to be against the public interest, and others come to the Commission and seek a rule preventing this kind of concentration. If the Commission agrees that the concentration that has begun to develop is undesirable and promulgates a rule, should it apply that rule to those already in violation, or simply announce that no new combinations or concentrations may occur thereafter? This is a consideration in analyzing the various kinds of controls.

2. Local Concentration

Local concentration of control of mass media facilities has been a problem for the Commission at least since 1938, when it received an application for a standard broadcasting station in Flint, Michigan from applicants who already controlled another corporation that operated a standard broadcasting station in the same area. Although there were no rival applicants the Commission refused to grant the second facility without a compelling showing that the public interest would be served in such a situation.

This was the beginning of the so-called "duopoly" rule, which the Commission formalized in a general rule that it would not grant a license to any applicant who already held a similar facility or license so located that the service areas of the two would overlap.

In the 1960's the Commission returned to this subject and recognized that the dwindling number of American newspapers made the impact of individual broadcasting stations "significantly greater." This reinforced the need for diversity in the broadcast media and led the Commission to announce that it would virtually never grant a duopoly again.

During this period, however, the Commission was granting to the same applicant one AM, one FM and one television station in the same locality because this was not a duplication of facilities in the same service area. In 1970 the Commission moved the next step and adopted the so-called "one-to-a-customer" rule. This meant that in the future the Commission would not grant a television license to the owner of an AM station in the community, or vice-versa. The Commission rejected an argument "that the good profit position of a multiple owner in the same market results in more in-depth informational programs being broadcast and, thus, in more meaningful diversity. We do not doubt that some multiple owners may have a greater capacity to so program, but the record does not demonstrate that they generally do so. The citations and honors for exceptional programming appear to be continually awarded to a very few licensees—perhaps a dozen or so multiple owners out of a total of hundreds of such owners." In the Matter of Amendment of § 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations. 22 F.C.C. 2d 306 (1970).

When an AM licensee sought to add an FM station, that presented a special problem because traditionally FM had been weak as a competitive force, and indeed the Commission during the 1950's had encouraged AM stations to acquire FM stations. But by 1970 FM stations were becoming more powerful competitors and were becoming

increasingly profitable. For that reason, the Commission did not automatically approve the continuation of AM–FM combinations—but neither did it ban the formation of new ones. Instead, it announced that it would continue to review these situations one by one.

As for UHF stations, the Commission acknowledged that they were still weak competitively and that few would go on the air unless affiliated with an established radio station. Therefore the Commission refused to adopt a firm rule against radio-UHF combinations but again indicated that it would review those on a case by case basis. Finally, the Commission announced that its ban on VHF-radio combinations would apply only in the future and no divestitures would be required, due to the large number of existing combinations and a sense that ordering divestiture for such a large group might very well lead to unfairness.

When the Commission adopted its one-to-a-customer rules, it also proposed the adoption of another set of rules that would proscribe common ownership of newspapers and broadcast facilities serving the same area, and require divestiture of prohibited combinations. Although the Commission had flirted with such a regulation in the early 1940's, it abandoned the attempt. The basis for the Commission movement in 1970 was an awareness that ninety-four television stations were affiliated through common control with newspapers in the same city. In addition, of course, "some newspapers own television stations in other cities, which also serve the city in which the newspaper is located." The Commission thought this situation was very similar to the joint ownership of two television stations in the same community, something the Commission has never permitted. "The functions of newspapers and television stations as journalists are so similar that their joint ownership is, in this respect, essentially the same as the joint ownership of two television stations." After extensive consideration the Commission adopted rules in 1975 that prohibit granting a license for a television or radio station to any applicant who already controls, owns, or operates a daily newspaper serving part of the same area.

The rule was to apply retroactively to only a few small communities where the sole newspaper owned the sole television station. Common ownership of the only newspaper and the only radio station was to be dissolved unless the community had an independently owned television station. Multiple Ownership Rules, Second Report and Order, 50 F.C.C.2d 1046, 32 R.R.2d 954 reconsidered, 53 F.C.C.2d 589, 33 R.R.2d 1603 (1975). The Commission rejected widespread divestiture as too "harsh" without a clear showing of need. Some appealed the prospective ban itself, others the limited use of divestiture. On March 1, 1977, the Court of Appeals upheld the ban but

rejected the Commission's reluctance to apply it retroactively. "Divestiture" was misleading because "it implies that the broadcaster has that which the Communications Act specifically states he does not have—an interest in the license beyond its expiration date." The court concluded that the importance of structural diversity as a way to diversify content warranted a "presumption" of divestiture unless the evidence "clearly discloses that cross-ownership is in the public interest." The matter was remanded.

The Commission has barred television stations from owning co-located cable systems and has barred network ownership totally, but does not consider newspaper-cable combinations a problem.

3. National Concentration

We have continued to stress the Commission's determination to keep nationwide entities from dominating broadcasting. This was one of the main thrusts of the NBC case. Stations were not to become wholly dependent on networks, nor could any single owner exert control over a large number of stations. Beginning in 1940 the Commission adopted rules limiting the number of stations that might be held by a single owner. In 1953 the Commission resolved that the rules should prohibit the ownership or control, directly or indirectly, by any party of more than seven AM stations, seven FM stations, and seven television stations of which not more than five could be VHF. The Commission explained its position as follows:

> The vitality of our system of broadcasting depends in large part on the introduction into this field of licensees who are prepared and qualified to serve the varied and divergent needs of the public for radio service. Simply stated, the fundamental purpose of this facet of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest. In this connection, we wish to emphasize that by such rules diversification of program services is furthered without any governmental encroachment on what we recognize to be the prime responsibility of the broadcast licensee. (See Section 326 of the Communications Act.) . . .

The Commission chose an equal number of AM and FM stations because at that time 538 of the 600 FM stations were owned by AM licensees, the result of a conscious Commission policy to encourage AM stations to put FM stations on the air since most of those operating FM stations alone were finding it extremely unprofitable. The number seven was chosen "in order that present holdings of such stations be not unduly disrupted." Very few owners had holdings

in excess of seven and the Commission planned to hold a divestiture hearing for each of them. Rules and Regulations Relating to Multiple Ownership, 18 F.C.C. 288 (1953).

This limitation rule was challenged immediately by a group owner who claimed that the Commission was illegally using the rule procedure to foreclose the right of an applicant to a hearing as to whether the license would be in the public interest, by making a categorical judgment linking the public interest with a given maximum concentration of holdings. The Supreme Court rejected the challenge in United States v. Storer Broadcasting Co., 351 U.S. 192 (1956). The Court viewed the Commission's action as "but a rule that announces the Commission's attitude on public protection against such concentration." The opinion did state, however, that the Commission's responsibility to behave in the public interest required it to grant a hearing to an applicant who had already reached the maximum number of stations but nonetheless asserted sufficient reasons why the rule should be waived in its particular case. Might that cover a situation, for example, in which an applicant had seven AM stations and proposed to acquire an eighth station in a very sparsely populated area of the United States where no one had ever before wanted to start a station? Might it be better to leave that vacant than to allow the applicant to have an eighth station?

4. Regional Concentration

In addition to the two extremes of national and local concentration, two threats that have arisen from two very different sets of circumstances, the Commission also seeks to minimize regional concentration. The problem to be avoided here is that of having undue concentration in the ownership of broadcast stations that do not overlap with each other, but are clustered in a single region. In 1975, the Commission proposed a regulation to prohibit ownership or control by any person of more than four broadcast stations in the same state, treating an AM–FM combination as one station. The Commission claimed that it was not acting to prevent monopoly or antitrust but, rather, to prevent the development of situations that "while perhaps short of monoply, nevertheless are inconsistent with the maximum utilization of the spectrum in the public interest. It is obviously undesirable and contrary to the Congressional purpose to have the limited spectrum concentrated in a relatively few hands." Broadcasters in large, sparsely populated states objected that the rule should not apply equally in densely populated small states and in sparsely populated large states. The proposal has apparently been abandoned.

The Commission was also considering a rule to bar an owner of two broadcast stations within a hundred miles of each other, from acquiring any third station that was within a hundred miles of either

of the other two. This approach would be independent of boundaries. What do you think of these two approaches to regional concentration?

Each of these concerns—excessive national, regional and local concentration—inevitably meshes with the others. Are all three equally at odds with the public interest, convenience and necessity?

5. Conglomerates in Broadcasting

Occasionally the problem has been raised, not in terms of multiple ownership of competing media, but concern about other businesses in which a prospective licensee is engaged. The prime example is a merger that was proposed between ABC, which in its capacity as group owner, owned seventeen broadcasting stations, and International Telephone and Telegraph, a vast conglomerate with manufacturing facilities, telecommunication operations and other activities in sixty-six countries throughout the world.

Critics were concerned that ITT would use the broadcasting facilities to further the interests of the parent corporation in ways that might include distorting the news and making editorial decisions on grounds other than professional journalistic criteria. The Commission rejected these concerns on the ground that "it is too late in the day to argue that such outside business interests are disqualifying. . . . We cannot in this case adopt standards which when applied to other cases would require us to restructure the industry unless we are prepared to undertake that task. We could not, in good conscience, forbid ABC to merge with ITT without instituting proceedings to separate NBC from RCA, both of which are bigger than the respective principals in this case." The Commission granted the application for transferring of the seventeen licenses by a 4 to 3 vote. Memorandum Opinion and Order 7 F.C.C.2d 245, 9 R.R.2d 12 (1966).

While an appeal by the Justice Department on antitrust grounds was pending, the parties abandoned their proposed merger. Would there be any problem if, for example, General Motors sought to acquire a television station in Detroit? Are different questions raised if a book publisher or motion picture producer seeks a television license?

As the NBC case showed, network affiliation may present some of the same problems as concentrated ownership. Further aspects of that question are considered at p. 584, infra.

B. INITIAL LICENSING

In the 1934 Act, Congress empowered the Federal Communications Commission to grant licenses to applicants for radio stations for periods of up to three years "if public convenience, interest, or necessity will be served thereby." § 307(a). Section 307(b) requires the Commission to make "such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

As we have seen, the Commission responded by allocating a portion of the spectrum for standard (AM) radio service and then subdividing that space further by requiring very powerful stations to use certain frequencies and weaker stations to utilize others and some stations to leave the air at sundown. The Commission used its rule making powers to develop these allocations and then set engineering standards of separation and interference. The 1934 Act empowered the Commission to promulgate "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter. . . ." § 303(r). The Commission did not allocate the AM frequencies to particular cities. Instead, it left it to those interested in broadcasting to determine whether they could organize an AM broadcast facility in a given location that complied with the various allocation and interference rules. With FM and television, the Commission utilized rule making to allocate particular frequencies to particular cities. An applicant for one of these licenses must apply for the assigned frequency in the listed, or a nearby, community or must seek to change the frequency assignments through an amendment of the rules.

1. The Administrative Process at Work

In this section we consider the process by which the Commission grants licenses to applicants. To seek a license for a broadcast frequency, an applicant first asks the Commission for a construction permit to build the facility. If the construction permit is granted, the license will then follow almost automatically if the facility is constructed on schedule.

Let us consider an actual set of facts. In the late 1950's, Louis Adelman applied for a construction permit (the required preliminary step to the license itself) to operate a class III station on 1300 kilocycles with a power of 1 kilowatt, daytime only, in Hazleton, Pennsylvania. The Commission then announced that anyone else interested in that area must file by a certain date so that the Commission would have maximum choice. Guinan Realty Co. filed for the same type of facility to be operated in Mount Carmel, Pennsylvania, only 25 miles from Hazleton. Given the congestion of the spectrum, particu-

larly in the northeastern United States, it is not surprising that both parties sought the same frequency, one that had been allocated for a daytimer of limited power. Such a conflict could arise only in terms of AM radio licensing because frequencies are not assigned to specific cities.

The Commission's first step was to determine whether both construction permits could be issued. Its Engineering Bureau reported that since simultaneous operation of both stations would cause mutually destructive interference, one application at most should be granted. The Commission then requested the staff of the Broadcast Bureau, which handles licensing matters generally, to consider whether each applicant possessed the basic legal, financial, and technical qualifications required by Congress in the 1934 Act. These include questions such as whether the applicant is an American citizen, has the resources to build the station and run it until revenue can reasonably be expected to begin, and has organized a staff capable of adhering to proper engineering standards. Neither party challenged the other on these issues and the Broadcast Bureau concluded that both applicants met all essential qualifications. We consider these qualifications in more detail shortly.

Section 309(a) provides that if after examining an application the Commission concludes that the "public interest, convenience, and necessity" will be served it shall grant the application. But subsection (e) provides that "if a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in [subsection (a)], it shall formally designate the application for hearing . . . and shall forthwith notify the applicant . . . of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue. . . ." Since the Commission had two conflicting applications from parties who met the basic qualifications, it could go no further without a hearing. Pursuant to the statute's requirements, the Commission ordered a hearing at which the two applicants might present evidence on certain questions. The hearing was to be held before a "hearing examiner," a civil servant on the staff of the Commission who regularly conducts hearings ordered by the Commission. The examiner functions much as a trial judge, except that the Commission decides which issues are relevant to the decision. These officials have since been renamed Administrative Law Judges, but their functions remain the same.

The four issues the Commission identified in this case derived from staff review of the applications and the conflicting supporting arguments made by the parties and their lawyers. They were:

1. To determine the areas and populations which would receive primary service from the proposed operations and the

availability of other primary service to such areas and populations.

2. To determine whether, because of interference received, the proposed operation of the Guinan Realty Co. would comply with section 3.28(c) of the Commission's rules; and if compliance with section 3.28(c) is not achieved, whether circumstances exist which would warrant a waiver of said section of the rules.

3. To determine in the light of section 307(b) of the Communications Act of 1934, as amended, which of the operations proposed in the above-captioned applications would better provide a fair, efficient, and equitable distribution of radio service.

4. To determine in the light of the evidence adduced pursuant to the foregoing issues which of the applications should be granted.

Notice that the first three issues are addressed to particular problems in this case. The fourth is a formal conclusory issue that is used in all cases to ask for the examiner's final conclusion as to which applicant should prevail. This last is known as the general issue.

The evidentiary hearing was held on June 12, 1958. Not surprisingly, in view of the nature of the issues, all the evidence took the form of written exhibits. The parties were then allowed additional time to file documents urging the examiner to decide in their favor. In addition, the Broadcast Bureau, which is empowered to participate in internal agency hearings, also proposed conclusions to the examiner. The Bureau asserted that the public interest would be furthered by a grant of the facility to Guinan.

On November 6, 1958, the examiner issued a ten-page opinion stating the type of proceeding, the facts found, and the conclusions based on the populations and areas that would benefit from each of the two proposed services. He determined that Hazleton with a population of 35,500 already had one standard (AM) station that was authorized to operate without time limits and received "primary service" from three other stations. "Primary service" as used in the first issue refers to an area determined by engineering data in which the signal is particularly strong. The broad area Adelman proposed to serve already received primary service from between 7 and 14 stations, depending on one's location within it.

Mount Carmel, with a population of 14,000, had no local standard broadcast station and received primary service from only one station. The proposed service would bring a second primary service to seven other communities with 35,000 listeners. The rural area around Mount Carmel that Guinan proposed to serve already received between three and ten primary services. The examiner also made findings

about the size of "the greater Hazleton area" and the county in terms of population, retail sales volume, bank clearings, payrolls, transportation, and whether the area was generally on the upswing. The same findings were made for the Mount Carmel area. The examiner noted that Hazleton had two local newspapers while Mount Carmel had one. Neither applicant controlled a newspaper.

The examiner then turned to the problem of interference raised by the second issue. Section 3.28(c) of the Commission's rules was one of several adopted by the Commission dealing with interference. It provided that interference should "not affect more than 10 percent of the population in the proposed station's primary service area" where a daytime only station was involved.

The second issue asks the examiner to find the facts of interference and to recommend whether a waiver should be granted if violation is found. The examiner found that Guinan's proposed service would cause interference with reception of Baltimore station WFBR affecting 38,000 of the 168,000 persons who would normally be in Guinan's protected primary service area. This was 22.5 percent of the population and 38.3 percent of the area proposed to be served. Since Guinan was seeking only a daytimer, the interference would violate the 10 percent rule of 3.28(c). He concluded, however, that the violation should be waived and then turned to consider which application should be granted:

> 19. A determination is now required as to which application would better provide a fair, efficient, and equitable distribution of radio service in accordance with the mandate of section 307(b) of the Communications Act. The operation proposed by Adelman would provide the fifth primary service and the second local transmission facility to the city of Hazleton, and a new primary service to a total of 126,745 persons. By contrast, the station proposed by Guinan Realty would provide a first local outlet to Mount Carmel, a second primary service to that community, a second primary service to 49,633 persons in communities of over 2,500 persons including Mount Carmel, and a new primary service to a total of 130,246 persons. Whereas Adelman's proposal would provide the 8th to 15th primary service to portions of the rural area within its proposed 0.5-mv./m. contour, the station proposed by Guinan Realty would provide a 4th to an 11th such service to portions of the rural area within its primary service area. The foregoing demonstrates that there is a greater need for the service which would be furnished by the proposed station at Mount Carmel than that proposed for Hazleton, and that a grant to Guinan Realty would result in a more efficient, fair, and equitable distribution of radio service.

20. The parties will recognize, and it should be here stated, that the foregoing conclusions are substantially constituted of the proposed conclusions submitted by Bureau counsel; they are adopted because the facts of record and the law applicable here support them. . . .

21. The conclusion that a waiver of section 3.28(c) of the Commission's rules should be granted to Guinan Realty was independently (not comparatively) derived as a threshold proposition despite the 22.5-percent nonserved population figure because the magnitude of the indicated inefficiency is outweighed in importance to the public interest by the affirmative values of the broadcast service proposed; i. e., a 1st transmission facility in the relatively large city of Mount Carmel, a 2d—hence a first opportunity to choose—primary reception service for residents of that city, as well as for more than 35,000 urban residents in other cities, and an additional (4th to 11th) primary service to 130,000 persons in the Mount Carmel area. . . .

. . .

23. Consideration has been given to the economic facts set out in the findings, as well as to the substantially different urban populations of the two cities; no ultimate advantage here inures to Hazleton because the need for the proposed station is clearly greater at Mount Carmel which has no locally situated broadcast station, one primary service, and one daily newspaper, whereas Hazleton has an existing broadcast station, three additional primary services, and two daily newspapers for dissemination of news within and to the community's residents. Upon consideration of all the facts of record and of the matters presented in the pleadings on behalf of the parties, and particularly the matters hereinabove discussed, it is concluded that a grant of the Guinan Realty application would better serve the public interest, convenience, and necessity.

It is ordered, This 6th day of November 1958, that, unless an appeal to the Commission from this initial decision is taken by any of the parties, or the Commission reviews the initial decision on its own motion in accordance with the provisions of section 1.153 of the rules, the application of Daniel F. Guinan, Richard H. Guinan, Francis D. Guinan, and Lawrence E. Guinan, d/b as Guinan Realty Co., for a construction permit for a new standard broadcast station to operate on 1300 kc. with power of 1 kw., directional antenna, daytime only, at Mount Carmel, Pa., *Is granted; And it is further ordered,* That the application of Louis Adelman for use of the same facilities at Hazleton, Pa., *Is denied.*

Note that the last paragraph indicates that the examiner is doing more than recommending a decision. He issues an order in the Commission's name that may be reviewed at the behest of a party or the Commission itself. In this case Adelman appealed to the Commission. (In 1962 the Commission created a Board of Review, staffed by civil servants, to hear certain designated types of cases on appeal from the examiners.)

The Commission, with five of its seven members present, heard oral argument in the case on September 18, 1959. Again, the Broadcast Bureau participated in the case along with the two applicants. On April 18, 1960, the Commission released an opinion announcing a 4–1 decision. The opinion retraced the basic facts found by the examiner. It then rejected the examiner's waiver of § 3.28(c). Noting that the interference in Guinan's case would be more than twice that allowed by the rule, the Commission decided that

> 6. Since we have found and concluded that a waiver of section 3.28(c) in the circumstances here existing is not warranted with respect to the Guinan application, this application must be denied. At the time of designation. Adelman was found to be legally, financially, and technically qualified to construct and operate his proposed station. A grant to Adelman would serve the purposes of section 307(b) of the Communications Act of 1934, as amended, and would be in the public interest. A comparison between Adelman and Guinan on section 307(b) grounds is unnecessary in view of the denial of Guinan's application for failure to comply with section 3.28(c).
>
> Accordingly, *It is ordered*, This 8th day of April 1960, that the application of Louis Adelman for construction permit for a new standard broadcast station at Hazleton, Pa., *Is granted*, and the application of Daniel F. Guinan, Richard H. Guinan, Francis D. Guinan, and Lawrence E. Guinan, d/b as Guinan Realty Co., for construction permit for a new standard broadcast station at Mount Carmel, Pa., *Is denied.*

The dissenter, Commissioner Cross, wrote no opinion. The Commission's opinion was reported at 28 F.C.C. 432, 18 R.R. 97.

Guinan, now the unsuccessful party, sought reconsideration by the Commission on two grounds. The first was that of "newly discovered evidence:" that its earlier estimates of interference were too high and that it could now prove that it would not even be in violation of § 3.28(c). The Commission rejected this evidence, noting that the figures originally used were Guinan's own. The second claim reargued a point the Commission believed it had adequately rejected the first time. The Broadcast Bureau opposed the reconsideration, apparently on grounds that Guinan had presented nothing new or

worth hearing, even though the Bureau had supported Guinan earlier on the merits. The opinion denying reconsideration is reported at 29 F.C.C. 1223, 18 R.R. 106a.

This is the final step in the administrative process. Congress, however, in the 1934 Act provided that parties dissatisfied with the administrative result might appeal to the federal courts. Most administrative proceedings are subject to such judicial review. Section 402 provides that appeals may be taken from orders of the Commission in many types of cases, including denials of construction permits or licenses, but usually only to the United States Court of Appeals for the District of Columbia.

Guinan decided to avail itself of this opportunity and filed an appeal within the prescribed time. This appeal is entitled Guinan v. Federal Communications Commission because Guinan's claim is that the Commission has made a mistake in its decision. Adelman, of course, is still very much an interested party and "intervenes" in this case, becoming what the court calls the "intervenor," and defends the Commission decision. The Broadcast Bureau is no longer involved because it functions only within the Commission. The Commission is now represented by its general counsel's office.

The appeal was argued October 4, 1961 and decided December 7, 1961. As in most appellate cases, the court restated the facts in abbreviated form and then turned to the issues presented.

GUINAN v. FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals, District of Columbia Circuit, 1961.
297 F.2d 782.

Before MR. JUSTICE REED, retired, and DANAHER and BASTIAN, Circuit Judges.

BASTIAN, CIRCUIT JUDGE.

. . .

Appellant urges that the Commission was arbitrary and capricious in its refusal to grant a waiver of Section 3.28(c) of its rules, and that, in so doing, it improperly disregarded the provisions of Section 307(b) of the Communications Act of 1934, as amended, and relevant and material evidence of record. It is further argued that the Commission, even assuming its refusal to waive the rule in question to be proper, erroneously failed to compare the respective needs of Hazleton and Mount Carmel for the service proposed.

. . .

We do not agree. There need not be, contrary to appellant's contention, a comparative treatment of respective community needs in a situation where two applicants are competing for a mutually ex-

clusive permit, once it has been established that one of the competing applicants is basically unqualified. [ ] And this is precisely what the Commission did here—it found appellant basically unqualified in view of the serious violation of the 10% rule which would be entailed in its waiver.

. . .

We think that waiver of Section 3.28(c) is a matter committed factually to the discretion of the Commission and, had the Commission determined under the circumstances that a waiver should have been granted, we would not have been in position to overrule that decision. In other words, this is just the sort of problem which the Commission was established to determine. It is to be borne in mind that the language of Section 3.28(c) indicates that there shall be no waiver except in exceptional circumstances and where the Commission finds that it would be in the public interest. We do not think it can be fairly said that the Commission did not take into consideration the public interest. The record bears out the fact that the Commission did not ignore the non-engineering aspects of Mount Carmel's need for appellant's proposed station. To the contrary, in fact, the Commission reviewed the public interest needs of Mount Carmel, as for example the population of the community and its presumptive need for or the desirability of a first local station, but found these needs not compelling in the face of appellant's extreme intrusion upon the policy underpinning Section 3.28(c). The tenor and scope of the Commission's analysis of this question can be gleaned from the language found in paragraph 3 of its decision:

> "In reaching this conclusion, the Commission has given the most careful consideration to the Hearing Examiner's thorough and able treatment of the problem, but, for the reasons to be detailed, we cannot agree that a waiver is dictated either by our opinion in Southern Broadcasters, Inc., 24 FCC 521, 15 RR 349, *or by all of the facts in the case.*" [Emphasis added.]

We think that the Commission, in reaching its determination, did not act arbitrarily, capriciously or in disregard of the public interest aspect of the Communications Act. United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); National Broadcasting Co. v. United States, 319 U.S. 190 (1943). We feel the Commission gave full and fair consideration to distribution of service, as well as efficiency, in its denial of the waiver.

Appellant further argues that the Commission improperly and prejudicially denied its petition for rehearing and reconsideration, basing its argument on alleged new evidence to show that appellant's proposed operation would not in fact violate the 10% rule. The evidence originally introduced by appellant, indicating a violation of the

rule [22.5%], was obtained, essentially, on the basis of soil conductivities in the manner prescribed by the Commission's rules, even though the rules clearly indicate that the preferred basis on which to predicate such evidence is actual field intensity measurements. In other words, appellant, with full knowledge of the facts, chose the easier of two methods to garner the evidentiary data it needed.

The request for rehearing was a matter committed to the sound discretion of the Commission.

. . . We find no abuse of that discretion in the record before us. Appellant does not offer *newly discovered* evidence but, rather, evidence easily discoverable initially, and apparently only now deemed crucial by appellant when seen from the highland of hindsight.

As we find no error in the Commission's decision and orders, they are

Affirmed.

Notes and Questions

1. What does this case suggest about the relationship between the Commission and its hearing examiner? Is the examiner any more qualified to decide the waiver issue than is the Commission? Whom did Congress authorize to grant construction permits and licenses?

2. What does this case say about the relationship between the Commission and the courts? Why does the court state that if the Commission had granted the waiver the court would also have affirmed? Would you expect the court to adopt this view in a case in which the Commission has decided a sensitive free speech issue?

3. Congress has further provided that parties dissatisfied by a court of appeals decision may seek further review in the Supreme Court by writ of certiorari. § 402(j). In this case, however, Guinan did not pursue that last step, apparently resigned to the fact that its case did not present the type of important legal question that the Supreme Court is likely to want to decide.

4. Notice that reliance on the administrative process may postpone a final decision. Instead of a decision by a single district judge followed by an appeal to the court of appeals, an elaborate administrative process replaces the single district court step. Why might Congress have decided to utilize the administrative process at all in this type of case? What are its merits more generally?

5. Certain other issues arise in the course of awarding licenses as well as renewals that should be noted at this point.

6. *Standing.* When an applicant for a broadcasting license, or for the preliminary step of a construction permit, presents its application

the Commission must be confident that it has received all the relevant facts. When several applicants seek the same spot, each is likely to be eager to bring to the Commission's attention its opponents' shortcomings. When there is only one applicant, the situation is different even though the Broadcast Bureau may participate.

For many years, the Commission has taken a narrow view of when outsiders had standing to enter Commission litigation. It took court decisions to grant standing to other licensees who claimed electrical interference or who claimed that economic harm would result from a grant of a license. Then the question became whether groups of citizens or listeners had standing to challenge license renewals. In a major decision that did grant standing, Office of Communications of United Church of Christ v. Federal Communications Comm'n, 359 F.2d 994 (D.C.Cir. 1966), the opinion by then Circuit Judge Burger said in part:

> The argument that a broadcaster is not a public utility is beside the point. True it is not a public utility in the same sense as strictly regulated common carriers or purveyors of power, but neither is it a purely private enterprise like a newspaper or an automobile agency. A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligations imposed by law. A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot. After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty.
>
> . . .
>
> Public participation is especially important in a renewal proceeding, since the public will have been exposed for at least three years to the licensee's performance, as cannot be the case when the Commission considers an initial grant, unless the applicant has a prior record as a licensee. In a renewal proceeding, furthermore, public spokesmen, such as Appellants here, may be the only objectors. In a community served by only one outlet, the public interest focus is perhaps sharper and the need for airing complaints often greater than where, for example, several channels exist. Yet if there is only one outlet, there are no rivals at hand to assert the public interest, and reliance on opposing applicants to challenge the existing licensee for the channel

> would be fortuitous at best. Even when there are multiple competing stations in a locality, various factors may operate to inhibit the other broadcasters from opposing a renewal application. An imperfect rival may be thought a desirable rival, or there may be a "gentleman's agreement" of deference to a fellow broadcaster in the hope he will reciprocate on a propitious occasion.

He also noted that the fears of regulatory agencies that they will be flooded with applications are rarely borne out.

In the decade since this case, the feared flood has not developed, though citizen groups are playing a much more active part in the regulatory processes of the Commission than ever before, as we shall see. The role of citizen groups is extensively discussed in D. Guimary, Citizens' Groups and Broadcasting (1975).

7. *Hearings.* Recognition of a petitioner's standing to intervene does not automatically guarantee that a hearing will be held on the issues raised. In Stone v. Federal Communications Comm'n, 466 F.2d 316 (D.C.Cir. 1972), 16 District of Columbia, community leaders petitioned to deny a renewal application on several specific grounds. The Commission's denial of a hearing was upheld. First, the court noted that under § 309(d) the petition must contain "specific allegations of fact" indicating a grant of the license to the applicant would not be in the public interest. Moreover,

> . . .
>
> Aside from the sufficiency of a petition to deny, the FCC is not required to hold a hearing where it finds, on the basis of the application and other pleadings submitted, no substantial and material questions of fact to exist and that granting the application would serve the public interest. Nor is a hearing required to resolve undisputed facts. And, where the facts required to resolve a question are not disputed and the "disposition of [an appellant's] claims [turns] not on determination of facts but inferences to be drawn from facts already known and the legal conclusions to be drawn from those facts," the Commission need not hold a hearing. Finally, a hearing is not required to resolve issues which the Commission finds are either not "substantial" or "material," regardless of whether the facts involved are in dispute.

8. *Negotiation and Agreement.* Another possibility is to negotiate. In order to avoid the expense of defending against petitions to deny renewals, broadcasters have begun entering into agreements with citizen groups that challenge their license applications or renewals. In return for withdrawal of the challenge, a broadcaster typically undertakes to make certain changes in its station's operation. The

broadcaster may promise to change its employment policies, to support local production of broadcast programming, or to attempt to expand certain types of programming.

The Commission generally allows broadcasters to enter into the agreements if they maintain responsibility at all times for determining how best to serve the public interest. Does recognition of these private agreements serve the public interest? Does it allow a broadcaster to "buy off" citizen groups who may be in the best position to point out programming deficiencies or offensive overcommercialization?

A somewhat different problem is raised when an attack comes from a competing applicant rather than a citizen group's petition to deny. In a fight over Channel 11 in New York City, Forum, Inc. was seeking to obtain the license held by WPIX, Inc. The administrative law judge found Forum to be financially unqualified and also found that it had not conducted an adequate ascertainment study. Rather than pursue a challenge through Commission proceedings, WPIX and Forum entered into a settlement agreement under which, in return for Forum's withdrawal, WPIX agreed to reimburse Forum for legitimate expenses incurred in prosecuting its application, to elect Forum's managing partner (and majority shareholder) to WPIX's board of directors, and to start a $100,000 Program Development Fund dedicated to the creation of local programs. The Bureau urged that the Commission reject the agreement because it believed that the administrative law judge's decision was unsound and that Forum would be a better licensee than the incumbent. (Section 311(c) requires Commission approval of this type of agreement).

9. *Judicial Review.* As we saw in the Guinan episode, Congress has provided review of Commission decisions by appeal to the United States Court of Appeals for the District of Columbia. A recent indication of how the court views its role in reviewing broadcast licensing is found in Greater Boston Television Corp. v. Federal Communications Comm'n, 444 F.2d 841, 850–53 (D.C.Cir. 1970) cert. den. 403 U.S. 923 (1971), to which we return shortly for its substantive part (footnotes citing a wealth of authorities have been excluded):

> Assuming consistency with law and the legislative mandate, the agency has latitude not merely to find facts and make judgments, but also to select the policies deemed in the public interest. The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination. . . .

> Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making. If the agency has not shirked this fundamental task, however, the court exercises restraint and affirms the agency's action even though the court would on its own account have made different findings or adopted different standards. Nor will the court upset a decision because of errors that are not material, there being room for the doctrine of harmless error. . . .

This posture of self-restraint would apply to administrative agencies generally.

2. Substantive Considerations

In addition to requiring proof that a grant will serve the "public convenience, interest, or necessity," § 307(a), the Act also requires that each applicant demonstrate that it meets basic "citizenship, character, and financial, technical, and other qualifications," § 308(b). An applicant who fails to satisfy any one of the following "basic qualifications" is ineligible to receive a license.

a. *Legal Qualifications.* An applicant for a license must comply with the specific requirements of the Communications Act and the Commission's rules. For example, there are restrictions on permitting aliens to hold radio and broadcast licenses. § 310(b). Prior revocation of an applicant's license by a federal court for an antitrust violation precludes grant of a new application. § 313. An application will be denied if its grant would result in violation of the Commission's multiple ownership rules or chain broadcasting regulations.

b. *Technical Qualifications.* An applicant for a broadcast station must also comply with the Commission's standards for transmission. These standards include such issues as interference with existing or allocated stations and efficiency of operation, gains or losses of service to affected populations, structure, power and location of the antenna, coverage and quality of the signal in the areas to be served, and studio location and operating equipment utilized.

c. *Financial Qualifications.* Although the applicant must show that it has an adequate financial base to commence operations, it need not demonstrate that it can sustain operations indefinitely. The test applied by the Commission is that the applicant must have sufficient funds to operate the station for an initial period, currently set at one year. The Commission may also inquire into the applicant's estimates of the amounts that will be actually required to operate the sta-

tion and the reliability of its proposed sources of funds, such as estimated advertising revenues.

d. *Character Qualifications.* Character issues that may be investigated by the Commission include past criminal convictions of the applicant, trafficking in broadcast licenses, anticompetitive business practices, lack of candor or misrepresentation to the Commission, failure to keep the Commission informed of changes in the applicant's status, and other situations that raise questions as to the integrity or reliability of the applicant in the broadcasting function. For example, after a full investigation, in Star Stations of Indiana, 51 F.C.C. 2d 95, 32 R.R.2d 1151 (1975), the Commission denied Star's several renewal applications, finding that the involvement of its principal stockholder in improper campaign contributions, slanted news broadcasts, and misrepresentations to the Commission warranted disqualifying Star from operating its stations. The Commission's decision was affirmed per curiam 527 F.2d 853 (D.C.Cir. 1975) and certiorari was denied, 425 U.S. 992 (1976).

e. The final category of basic qualifications, "other," has been interpreted to refer primarily to character issues but it may also overlap with public interest considerations. When the Commission sets the applicant's case for a hearing, it may designate a particular issue, such as an allegation of anticompetitive business practices, either as one related to the applicant's basic qualifications or as one concerning the public interest. An adverse Commission decision on either basis will deprive the applicant of a license.

One result of the basic qualification approach is that at times one or more applicants for a vacant frequency might be rejected. The result is that the frequency remains vacant until an applicant appears who meets all the basic qualifications. Can a vacant frequency be preferable to one over which someone is broadcasting? Is this consistent with the initial purpose of licensing?

In addition to examining the basic qualifications of all applicants, the Commission will also determine whether there are public interest grounds for denying a grant to an otherwise qualified applicant. The following excerpt indicates the scope of such an inquiry.

TOWARDS SIMPLICITY AND RATIONALITY IN COMPARATIVE BROADCAST LICENSING PROCEEDINGS

Robert A. Anthony

24 Stanford Law Review 1, 19–24 (1971).

Any consideration deemed by the Commission to bear upon the appropriateness of the requested grant can be brought into this open-ended category. It should be borne in mind that such issues

may be raised by third parties through petition to deny, intervention, or informal objection, as well as by the Commission and its staff. Thus, there can be no exhaustive list of such considerations.

Program service plans. The application form calls for extensive information about proposed programming, and this information is always examined. With certain exceptions that largely implement statutes, however, the Commission has not announced specific standards to appraise or regulate the content or format of programming. What the Commission has done is to set forth, in a 1960 Policy Statement that remains the basic document in this area, its general conception of a licensee's programming and public service responsibilities. The main thrust of the 1960 pronouncement is to call upon the licensee to search out the needs and interests of the communities he serves, and to try diligently to supply balanced programming to fill those needs. This policy forms the basis for the three main ways in which the Commission examines an initial applicant's programming plans.

First, the Commission demands and scrutinizes a detailed showing of what the applicant has done *to ascertain the needs and interests of the community* he proposes to serve. More recent Commission actions have translated the somewhat precatory language of the 1960 statement into more concrete and mandatory specifications of what the applicant must do to satisfy the Commission on this score. Generally, he must consult with leaders of representative groups, interests, and organizations, and also conduct a demographically valid sampling of the views of the general public. Knowledge of the community and its problems based on long residence is not enough. He must elicit, summarize, and evaluate suggestions as to how the station could help meet community needs. An insufficient showing is ground for denial of the application.

The applicant's *proposed programming* is then appraised.[113] He must submit a list of "typical and illustrative programs or program series (excluding Entertainment and News)" that he plans to broadcast to meet what he has soundly ascertained to be the needs and interests of the community to be served. Additionally, the applicant

113. It is not an impermissible form of censorship to consider proposed programming, provided the scrutiny is directed to the nature of the programs rather than the views of the applicant. Johnston Broadcasting Co. v. FCC, 175 F.2d 351, 359 (D.C.Cir. 1949). A question has remained whether the Commission, under 47 U.S.C. § 303(b) (1970), could specify minimum programming time to be devoted to categories such as news, public affairs, public service, local live shows, and the like. The Commission's 1960 Policy Statement identified program categories but stated that choice of program matter was primarily for the judgment of the licensee. 25 Fed.Reg. at 7295, 20 R.R. at 1913. Strong dicta in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) have been widely read as affirming the Commission's authority constitutionally to require minimum proportions of broadcast time to be devoted to specified categories. [ ]

must state what portion of his broadcast time he intends to devote to programming falling under each of the following three categories: news, public affairs, and "all other programs, exclusive of entertainment and sports."[115] For television applications, there must also be a breakdown of proposed program sources as among local, network and recorded. The Commission has refrained from setting any precise or explicit numerical standards for evaluating proposals under these categories; applicants must be aware of current practices.[117] The same is true with respect to the applicant's policy toward the discussion of public issues and the number of public service announcements he proposes to present.

The third principal programming issue examined at the initial application stage concerns *proposed commercial practices.* The application form calls for a statement of the maximum proportion of broadcast time to be allocated to commercial matter. Although the 1960 Policy Statement took a general stand against "abuses," there exist no announced standards specifying how much advertising is too much. In 1963 the Commission proposed to adopt by rule the limitations on advertising contained in the National Association of Broadcasters' voluntary codes, but encountered strong Congressional sentiment that any such rule would exceed the Commission's authority, and terminated the rulemaking proceeding. Thus, again, applicants must look for guidance to current practices, rather than to published guidelines. . . .

Potential economic injury to existing licensees. The courts have held that the Commission must hear and decide allegations that a new station in the area would cut into the economic support for an existing station to the extent of impairing its ability to serve the public.[123] There is, however, a heavy burden of proof and persuasion on the protesting licensee, and apparently in no case has a grant of a new broadcast facility been denied on such grounds.[125] . . .

115. . . . Reports and Orders, Amendment of Section IV of Broadcast Application Forms 301, 303, 314 & 315, supra note 109, limited the categories listed on the form to the three cited in the text, which are thought to be areas in which competition and profit are not necessarily effective to motivate good performance. See Cox, *The Federal Communications Commission*, 11 B.C.Ind. & Com.L. Rev. 595, 615 (1970).

117. The Broadcast Bureau, in the initial processing stage, will advise the applicant of proposals deemed insufficient under current practice. The applicant will usually amend to satisfy the Bureau; hence, few cases come to hearing on such issues.

123. See Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C.Cir. 1958) . . . .

125. . . .
See generally, Meeks, *Economic Entry Controls in FCC Licensing: The Carroll Case Reappraised*, 52 Iowa L.Rev. 236 (1966). Protests on economic injury grounds have been discouraged by the prospect that, if the community were found incapable of supporting both the new and the old station, the existing licensee's renewal might be heard comparatively with the application for the new facility. . . .

Undue concentration of control of mass media. Under the multiple-ownership rules, even if the applicant would remain within the fixed limits previously mentioned, the Commission may consider whether the grant "would result in a concentration of control of . . . broadcasting in a manner inconsistent with public interest, convenience, or necessity." This provision may be thought of as identifying a discretionary public interest issue that complements the legal qualifications issue of whether the fixed maxima would be exceeded. The Commission may also consider whether a broadcast license grant would result in undue concentration of the control of media of all sorts, including newspapers and other non-broadcast media, particularly in or near the local service area. . . .

Anticompetitive and monopolistic practices. The Commission may weigh, as a public interest issue, allegations of an applicant's anticompetitive practices or monopolistic tendencies, in both the broadcast and non-broadcast fields.

Discreditable record in other broadcast operations. Prior broadcast activities of the applicant—such as fairness violations, broadcast of obscenities, or a programming record falling badly short of what had been promised in a prior application—can give rise to public interest issues, not necessarily going to character or other qualifications.

. . .

Equal employment opportunity. A new section of the application form, effective January 1971, elicits information about the applicant's policy on this subject, which could give rise to a public interest issue.

. . .

Notes and Questions

1. *Program content.* The Commission's concern with program content has existed since the beginning of radio regulation. At the outset, when the Radio Commission was charged with removing licensees from the overcrowded airwaves, it decided that "as between two broadcasting stations with otherwise equal claims for privileges, the station which has the longest record of continuous service has the superior right." But, if there was a substantial disparity between the stations, the Commission concluded that "on a proper showing the claim of priority must give way to the superior service." Great Lakes Broadcasting Co., 3 F.R.C.Ann.Rep. 32 (1929), modified on other grounds, 37 F.2d 993 (D.C.Cir.) certiorari dismissed 281 U.S. 706 (1930).

The Commission believed that the "entire listening public within the service area of a station, or of a group of stations in one commu-

nity, is entitled to service from that station or stations." Specialized stations were entitled to little or no consideration. In the Commission's opinion "the tastes, needs, and desires of all substantial groups among the listening public should be met, in some fair proportion by a well-rounded program, in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports and news, and matters of interest to all members of the family find a place." Recognizing that communities differed and that other variables were relevant, the Commission did not erect a "rigid schedule."

2. In 1946, the Commission issued a report entitled Public Service Responsibility of Broadcast Licensees (known generally as the "Blue Book"). The Commission stressed that although licensees bore the primary responsibility for program service, the Commission would still play a part: "In issuing and in renewing the licenses of broadcast stations, the Commission proposes to give particular consideration to four program service factors relevant to the public interest." One category was the carrying of "sustaining" (unsponsored) programs during hours "when the public is awake and listening." This would provide balance by allowing the broadcast of certain types of programs that did not lend themselves to sponsorship, including experimental programs. Second, the Commission called for local live programs to encourage local self-expression. Third, the Commission expected "programs devoted to the discussion of public issues." Finally, the Commission, expressing concern about excessive advertising, announced that "in its application forms the Commission will request the applicant to state how much time he proposes to devote to advertising matter in any one hour."

3. In 1960, the Commission changed direction in the Policy Statement cited in n. 113 of the Anthony excerpt. It recognized the emerging importance of network programming, but insisted that local licensees retained responsibility to program for their particular areas. Although such needs would vary, and no general formula could be announced, the Commission did "expect its broadcast licensees to take the necessary steps to inform themselves of the real needs and interests of the areas they serve and to provide programming which in fact constitutes a diligent effort, in good faith, to provide for those needs and interests." The Commission noted that the major elements "usually necessary to meet the public interest, needs and desires of the community . . . have included" a list of 14 general categories. The distinction between sustaining and sponsored programs was explicitly abandoned.

4. *Ascertainment.* Since shortly after its 1960 statement, the Commission has stressed the licensee's obligation to learn the nature of

the community it is serving. The Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650, 21 R.R. 2d 1507 (1971), standardized the Commission's policy with respect to ascertainment of, and programming for, community needs. It placed specific ascertainment requirements upon all commercial applicants for new broadcast stations, modification of existing facilities, and renewals. The Primer required that an applicant determine the economic, ethnic, and social composition of the communities it proposed to serve and that principals or management level employees consult with leaders from each significant community group. The applicant was also to consult with a random sample of members of the general public. Finally, the applicant had to set forth in its license application program proposals designed to meet community problems identified. The ascertainment had to take place within six months of the application.

The courts have readily accepted the Commission's emphasis on the importance of the ascertainment process. In Henry v. Federal Communications Comm'n, 302 F.2d 191 (D.C.Cir.), certiorari denied 371 U.S. 821 (1962), Suburban Broadcasters filed the sole application for a permit to construct the first commercial FM station in Elizabeth, New Jersey. Although Suburban was found legally, technically, and financially qualified, the Commission found that Suburban had made no inquiry into the characteristics or programming needs of Elizabeth and was "totally without knowledge of the area." Suburban's program proposals for Elizabeth were identical to those submitted in its application for an AM station in Berwyn, Illinois, and in the application of two of its principal stockholders for an FM station in Alameda, California. Although acknowledging the community's "presumptive need" for its first FM service, the Commission denied the permit, finding that a grant would not serve the public interest.

On appeal, the Commission's denial was upheld on the ground that an applicant may be required to "demonstrate an earnest interest in serving a local community by evidencing a familiarity with its particular needs and an effort to meet them." This case gave the name "Suburban issue" to claims that an applicant has inadequately ascertained the nature of the community it proposes to serve.

In Bamford v. Federal Communications Comm'n, 535 F.2d 78 (D.C.Cir. 1976), an application for a new FM station in Corpus Christi, Texas, was denied on the ground that the applicant had failed to comply with the Ascertainment Primer. Bamford could show interviews with 45 community leaders, drawn primarily from civic and business organizations, interviews with 23 members of the general public and impermissible post card responses from 50 additional members of the public. The Review Board found the survey inadequate for lack of a random survey of the general public and for

failing to interview "leaders" of two significant groups in the community: Spanish-Americans and the poor. The applicant had submitted no information on income distribution in the area, which was then known to include over 18 percent of the population below the poverty level. The Commission refused to review the Board's denial and the court upheld the administrative decision.

5. *Past Record of the Applicant.* In WBNX Broadcasting Co., 12 F.C.C. 837, 4 R.R. 244 (1948), the American Jewish Congress (AJC) intervened in a comparative proceeding in which News Syndicate, Inc. (News), owner of the New York Daily News and the New York Sunday News, sought a broadcast license. AJC offered testimony by which it sought to prove that because the News had shown bias against minority groups and had published irresponsible and defamatory news items and editorials concerning minorities, it had demonstrated that it could not be relied upon to operate its station with fairness to all groups and points of view in the community. News moved to strike from the record all evidence relating to the content and policies of its newspapers.

The Commission denied the motion. It held that although the Commission is not interested in "whether or not the applicant is a Democrat or Republican, is Protestant, Catholic or Jewish, is a conservative or radical, or has a personal preference or antipathy for any particular religious or racial group," the fairness with which a licensee deals with particular racial or religious groups in the community, in the exercise of its power to determine who can broadcast what over its facilities, is a substantial aspect of operation in the public interest. In the Commission's view, the issue was whether the applicant, whatever its own views, was likely to give a "fair break" to others who did not share them. The Commission found that evidence of acts of unfairness by the applicant, such as denial of any opportunity to reply to attacks, or the repeated making of irresponsible charges without regard to the truth of such charges, was relevant to whether a grant would be in the public interest. (A similar issue arose in Brandywine-Main Line Radio, Inc. v. Federal Communications Comm'n, 473 F.2d 16 (D.C.Cir. 1972) certiorari denied 412 U. S. 922 (1973) discussed at p. 563, infra.)

A dissenting Commissioner argued that the Commission had no authority to examine the news and editorial policies of an applicant's newspaper for the purpose of determining what the policies of the applicant might or might not be in the future operation of a broadcast station.

6. *The Carroll Doctrine*—The Commission had long been reluctant to give weight to claims of potential economic injury to existing licensees. Federal Communications Comm'n v. Sanders Bros. Radio

Station, 309 U.S. 470 (1940), settled the proposition that economic injury to an existing station is not a ground for denying a new application. The Court in *Sanders* acknowledged, however, that economic injury to a licensee might lead to injury to the public interest.

The public interest issue was raised in Carroll Broadcasting Co. v. Federal Communications Comm'n, 258 F.2d 440 (D.C.Cir. 1958). West Georgia sought a license for a new standard broadcast station in Bremen, Georgia, located 12 miles from Carroll's existing studio in Carrolltown, Georgia. Carroll petitioned to deny West Georgia's application, contending that a grant would result in such economic injury to Carroll that its ability to serve the public would be impaired. Relying on its belief that "Congress had determined that free competition shall prevail in the broadcast industry," the Commission refused to adopt the proposed issue of economic injury to an existing licensee as ground for denying a license application. The court disagreed with the Commission and remanded for further findings:

> Thus, it seems to us, the question whether a station makes $5,000 or $10,000, or $50,000 is a matter in which the public has no interest so long as service is not adversely affected; service may well be improved by competition. 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 rather than two stations. To license two stations where there is revenue for only one may result in no good service at all. So economic injury to an existing station, while not in and of itself a matter of moment, becomes important when on the facts it spells diminution or destruction of service. At that point the element of injury ceases to be a matter of purely private concern.
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> . . .
>
> This opinion is not be to construed or applied as a mandate to the Commission to hear and decide the economic effects of every new license grant. It has no such meaning. We hold that, when an existing licensee offers to prove that the economic effect of another station would be detrimental to the public interest, the Commission should afford an opportunity for presentation of such proof and, if the evidence is substantial (i.e., if the protestant does not fail entirely to meet his burden), should make a finding or findings.

7. *Equal Employment Opportunity.* In addition to the general public interest issues of employment discrimination by licensees, the Commission's rules generally require that each applicant for a broadcast license, for assignment or transfer of control of a license, and renewal applicants who have not previously done so "file with the Com-

mission programs designed to provide equal employment opportunities for Negroes, Orientals, American Indians, Spanish-surnamed Americans, and women."

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3. The Comparative Proceeding

If two or more applicants file for use of the same or interfering facilities the Commission must proceed by way of comparative hearing among all qualified applicants to determine which will best serve the public interest. An applicant in a comparative proceeding must not only meet minimum qualifications but must also prevail when judged on the Commission's comparative criteria. These criteria, which involve considerations other than those applied in the non-comparative proceeding, have evolved through adjudication rather than rule-making.

POLICY STATEMENT ON COMPARATIVE BROADCAST HEARINGS

Federal Communications Commission, 1965.

1 F.C.C.2d 393, 5 R.R.2d 1901.

BY THE COMMISSION: COMMISSIONERS HYDE AND BARTLEY DISSENTING AND ISSUING STATEMENTS; COMMISSIONER LEE CONCURRING AND ISSUING A STATEMENT.

[The Commission noted that choosing one from among several qualified applicants for a facility was one of its primary responsibilities. The process involved an extended hearing in which the various applicants were compared on a variety of subjects. The "subject does not lend itself to precise categorization or to the clear making of precedent. The various factors cannot be assigned absolute values. . . ." Moreover, the membership of the Commission is continually changing and each member has his or her own idea of what factors are important. Thus, the statement is not binding and the Commission is not obligated to deal with all cases "as it has dealt in the past with some that seem comparable." Nonetheless, it is "important to have a high degree of consistency of decision and of clarity in our basic policies." The statement was to "serve the purpose of clarity and consistency of decision, and the further purpose of eliminating from the hearing process time-consuming elements not substantially related to the public interest." The Commission declared that this statement "does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license." The Commission then turned

to the merits and identified "two primary objectives:" "best practicable service to the public" and "maximum diffusion of control of the media of mass communications."]

Several factors are significant in the two areas of comparison mentioned above, and it is important to make clear the manner in which each will be treated.

1. *Diversification of control of the media of mass communications.*—Diversification is a factor of primary significance since, as set forth above, it constitutes a primary objective in the licensing scheme [quoted at p. 516, supra].

2. *Full-time participation in station operation by owners.*—We consider this factor to be of substantial importance. It is inherently desirable that legal responsibility and day-to-day performance be closely associated. In addition, there is a likelihood of greater sensitivity to an area's changing needs, and of programing designed to serve these needs, to the extent that the station's proprietors actively participate in the day-to-day operation of the station. This factor is thus important in securing the best practicable service. It also frequently complements the objective of diversification, since concentrations of control are necessarily achieved at the expense of integrated ownership.

We are primarily interested in full-time participation. . . .

Attributes of participating owners, such as their experience and local residence, will also be considered in weighing integration of ownership and management. While, for the reasons given above, integration of ownership and management is important per se, its value is increased if the participating owners are local residents and if they have experience in the field. Participation in station affairs on the basis described above by a local resident indicates a likelihood of continuing knowledge of changing local interests and needs. Previous broadcast experience, while not so significant as local residence, also has some value when put to use through integration of ownership and management.

. . .

3. *Proposed program service.*— . . . The importance of program service is obvious. The feasibility of making a comparative evaluation is not so obvious. Hearings take considerable time and precisely formulated program plans may have to be changed not only in details but in substance, to take account of new conditions obtaining at the time a successful applicant commences operation. Thus, minor differences among applicants are apt to prove to be of no significance.

The basic elements of an adequate service have been set forth in our July 27, 1960 "Report and Statement of Policy Re: Commission en banc Programing Inquiry," 25 F.R. 7291, 20 Pike & Fischer, R. R. 1901, and need not be repeated here.[9] And the applicant has the responsibility for a reasonable knowledge of the community and area, based on surveys or background, which will show that the program proposals are designed to meet the needs and interests of the public in that area. See Henry v. Federal Communications Comm'n, 112 U.S.App.D.C. 257, 302 F.2d 191, certiorari denied 371 U.S. 821 (1962). Contacts with local civic and other groups and individuals are also an important means of formulating proposals to meet an area's needs and interests. Failure to make them will be considered a serious deficiency, whether or not the applicant is familiar with the area.

Decisional significance will be accorded only to material and substantial differences between applicants' proposed program plans. [ ] Minor differences in the proportions of time allocated to different types of programs will not be considered. Substantial differences will be considered to the extent that they go beyond ordinary differences in judgment and show a superior devotion to public service. For example, an unusual attention to local community matters for which there is a demonstrated need, may still be urged. We will not assume, however, that an unusually high percentage of time to be devoted to local or other particular types of programs is necessarily to be preferred. Staffing plans and other elements of planning will not be compared in the hearing process except where an inability to carry out proposals is indicated.

In light of the considerations set forth above, and our experience with the similarity of the program plans of competing applicants, taken with the desirability of keeping hearing records free of immaterial clutter, no comparative issue will ordinarily be designated on program plans and policies, or on staffing plans or other program planning elements, and evidence on these matters will not be taken under the standard issues. The Commission will designate an issue where examination of the applications and other information before it makes such action appropriate, and applicants who believe they can demonstrate significant differences upon which the reception of evidence will be useful may petition to amend the issues.

No independent factor of likelihood of effectuation of proposals will be utilized. The Commission expects every licensee to carry out its proposals, subject to factors beyond its control, and subject to rea-

9. Specialized proposals necessarily have to be considered on a case-to-case basis. We will examine the need for the specialized service as against the need for a general-service station where the question is presented by competing applicants.

sonable judgment that the public's needs and interests require a departure from original plans. If there is a substantial indication that any party will not be able to carry out its proposals to a significant degree, the proposals themselves will be considered deficient.[11]

4. *Past broadcast record.*—This factor includes past ownership interest and significant participation in a broadcast station by one with an ownership interest in the applicant. It is a factor of substantial importance upon the terms set forth below.

A past record within the bounds of average performance will be disregarded, since average future performance is expected. Thus, we are not interested in the fact of past ownership per se, and will not give a preference because one applicant has owned stations in the past and another has not.

We are interested in records which, because either unusually good or unusually poor, give some indication of unusual performance in the future. . . .

. . .

5. *Efficient use of frequency.*[12]—In comparative cases where one of two or more competing applicants proposes an operation which, for one or more engineering reasons, would be more efficient, this fact can and should be considered in determining which of the applicants should be preferred. . . .

6. *Character.*—The Communications Act makes character a relevant consideration in the issuance of a license. See section 308(b), 47 U.S.C. 308(b). Significant character deficiencies may warrant disqualification, and an issue will be designated where appropriate. Since substantial demerits may be appropriate in some cases where disqualification is not warranted, petitions to add an issue on conduct relating to character will be entertained. In the absence of a designated issue, character evidence will not be taken. Our intention here is not only to avoid unduly prolonging the hearing process, but also to avoid those situations where an applicant converts the hearing into a search for his opponents' minor blemishes, no matter how remote in the past or how insignificant.

7. *Other factors.*—As we stated at the outset, our interest in the consistency and clarity of decision and in expedition of the hearing process is not intended to preclude the full examination of any relevant and substantial factor. We will thus favorably consider pe-

11. It should be noted here that the absence of an issue on program plans and policies will not preclude cross-examination of the parties with respect to their proposals for participation in station operation. . . .

12. This factor as discussed here is not to be confused with the determination to be made of which of two communities has the greater need for a new station. See Federal Communications Comm. v. Allentown Broadcasting Corp., 349 U.S. 358 (1955).

titions to add issues when, but only when, they demonstrate that significant evidence will be adduced.[13]

. . .

DISSENTING STATEMENT OF COMMISSIONER HYDE

. . .

The proposed fiat as to the weight which will be given to the various criteria—without sound predication of accepted data and when considered only in a vacuum and in the abstract—must necessarily result in a degree of unfairness to some applicants and in the fashioning of an unnecessary straitjacket for the Commission in its decisional process. How can we decide in advance and in a vacuum that a specific broadcaster with a satisfactory record in one community will be less likely to serve the broadcasting needs of a second community than a specific long-time resident of that second community who doesn't have broadcast experience? How can we make this decision without knowing more about each applicant? The majority now says that experience can always be acquired and, therefore, that it is less important than local residence. But the knowledge acquired from such local residence can by the same token be obtained just as easily—if not more easily—than broadcast experience. It seems clear to me that the importance to be given to the element of experience in one case or to the element of local residence in another case will necessarily vary in light of the additional factors involved in each case.

. . .

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I believe that our comparative hearings should be expedited by eliminating what has amounted to extensive bickering in the record over minutiae.

As I see it, however, the Commission majority is attempting the impossible here when it prejudges the decisional factors in future cases. My observation is that there are no two cases exactly alike. There are so many varying circumstances in each case that a factor in one may be more important than the same factor in another. Broadcasting—a dynamic force in our society—experiences constant change. I have expressed it differently on occasions by saying, "There's nothing static in radio but the noise." If we are to encourage the larger and more effective use of radio in the public interest, we must avoid becoming static ourselves.

13. Where a narrow question is raised, for example on one aspect of financial qualification, a narrowly drawn issue will be appropriate. In other circumstances, a broader inquiry may be required. This is a matter for ad hoc determination.

CONCURRING STATEMENT OF COMMISSIONER ROBERT E. LEE

Even though I recognize the policy statement adopted by the Commission to be the result of a sincere effort to clarify the historical process of selecting a winner in comparative broadcast hearings, I am concurring with considerable reluctance. . . .

Over the years I have participated in decisions in hundreds of "comparative proceedings" and candor compels me to say that our method of selection of the winning applicant has given me grave concern. I realize, of course, that where we have a number of qualified applicants in a consolidated proceeding for a single facility in a given community, it is necessary that we grant one and deny the others. The ultimate choice of the winner generally sustains the Commission's choice despite the recent rash of remands from the court. Thus, it would appear that we generally grant the "right" application. However, I am not so naive as to believe that granting the "right application" could not, in some cases, be one of several applications.

The criteria that the Commission now says will be decisive—assuming all other things are substantially equal—in choosing among qualified applicants for new broadcast facilities in comparative hearings are not new. However, the policy statement does tend to restrict the scope somewhat of existing factors and if undue delay in the disposition of comparative broadcast hearings is thus prevented, some good will have been accomplished.

I wish to make clear that my concurrence here does not bind me with respect to the weight I might see fit to put upon the various criteria in a given case. . . .

Historically, a prospective applicant hires a highly skilled communications attorney, well versed in the procedures of the Commission. This counsel has a long history of Commission decisions to guide him and he puts together an application that meets all of the so-called criteria. There then follows a tortuous and expensive hearing wherein each applicant attempts to tear down his adversaries on every conceivable front, while individually presenting that which he thinks the Commission would like to hear. The examiner then makes a reasoned decision which, at first blush, generally makes a lot of sense—but comes the oral argument and all of the losers concentrate their fire on the "potential" winner and the Commission must thereupon examine the claims and counterclaims, "weigh" the criteria and pick the winner which, if my recollection serves me correctly, is a different winner in about 50 percent of the cases.

The real blow, however, comes later when the applicant that emerged as the winner on the basis of our "decisive" criteria sells the

station to a multiple owner or someone else that could not possibly have prevailed over other qualified applicants under the criteria in an adversary proceeding. It may be that there is no better selection system than the one being followed. If so, it seems like a "hell of a way to run a railroad," and I hope these few comments may inspire the Commission to find that better system even if it requires changes in the Communications Act.

Notes and Questions

1. The 1965 Policy Statement eliminated three specific criteria—staffing and related plans, likelihood of effectuation of proposals, and proposed studies and equipment—that had formerly been used for comparison.

2. We consider Commissioner Lee's point about the transferability of licenses at p. 580, infra.

3. Although the Commission has emphasized localism, there has always been an undercurrent of doubt. In the early 1960's, when the Commission appeared to favor not only local programs but also live presentations, Judge Friendly observed, "I wonder also whether the Commission is really wise enough to determine that live telecasts, so much stressed in the decisions, *e. g.*, of local cooking lessons, are always 'better' than a tape of Shakespeare's Histories." Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards, 75 Harv.L.Rev. 1055, 1071 (1962). This concern was restated in a different context by a former chairman of the Commission:

> [T]he automatic preference accorded local applicants disregards the possibility that, depending on the facts of a particular case, a competitor's proposed use of a professional employee-manager from outside the community might very well bring imagination, an appreciation of the role of journalism, and sensitivity to social issues far exceeding that of a particular local owner-manager.

Hyde, FCC Policies and Procedures Relating to Hearings on Broadcast Applications, 1975 Duke L.J. 253, 277 (1975).

The Chairman of the House Communications Subcommittee has estimated that even now local television averages 80 percent non-local programming and "maybe that's the way the viewers want it." Chairman VanDeerlin was discussing a proposed re-writing of the 1934 Communications Act to take place during 1977–78. At this point he was suggesting that Congress should reconsider the desirability of localism. See Broadcasting, Nov. 22, 1976, p. 20.

4. *Minority Ownership.* New issues may reflect changes in licensing policy. In TV 9, Inc. v. Federal Communications Comm'n, 495 F.2d

929 (D.C.Cir. 1973) rehearing and rehearing en banc denied (1974) cert. den. 419 U.S. 986 (1974), Comint Corporation, Mid-Florida Television Corporation, and six other applicants sought a construction permit for Channel 9 in Orlando, Florida. In making the award to Mid-Florida, the Commission rejected Comint's contention that it was entitled to special consideration because two of Comint's principals were local black residents and 25 percent of those to be served by Channel 9 were black. The Commission's position was that the Communications Act was "color blind" and did not permit considerations of color in the award of licenses. The court disagreed and ruled that the ownership interests and participation of the two black residents gave Comint an edge in providing "broader community representation and practicable service to the public by increasing diversity of content, especially of opinion and viewpoint."

5. Does the problem result because of action or inaction by the Commission itself, or because Congress has given the Commission little guidance in determining the public interest in particular cases? Are there alternative methods of awarding licenses that would avoid the Commission's subjective determinations of public interest?

Professor Anthony, supra, at 61–99, proposes a new system for making the choice among competing applicants. First, to simplify the comparative proceeding, two or three subject areas could be identified as most important. The applicants would then be evaluated individually in these areas on the basis of fixed objective standards and awarded credits in each area. For example, an applicant who had no other media interest would receive three credits in the area of diversification of control while an applicant with an interest in any medium located more than 100 miles from the community to be licensed would receive two credits. Finally, applicants would be ranked on the basis of the credits earned and the license awarded to the applicant with the highest ranking. Anthony suggests that "conditions" could be attached to the grant if the Commission desires to further other goals.

Commission Chairman Wiley has proposed that the comparative hearing be replaced by a lottery among "qualified" applicants. Because the existing comparative proceeding is plagued by uncertain criteria, long delays, and speculative judgments, there is no reason to believe that selection by lottery would lead to results inferior to those under the present system. Broadcasting, Mar. 29, 1976, p. 24. Other critics of the existing system have proposed that the Commission award the license to the highest bidder among otherwise qualified applicants, or that the license be awarded to the first qualified applicant to apply.

C. RENEWAL OF LICENSES

The initial license period was limited to three years by § 307(d), and the Commission considers renewal applications from about one-third of all licensees each year. This now means consideration of over 2,000 applications annually. At the outset, as it sought to unclutter the AM spectrum, the Commission frequently denied renewals, but after the initial flurry, denials were rare unless the broadcaster's behavior fell far below par.

Due to the significant United Church of Christ case, p. 531, supra, citizen groups may file petitions to deny renewals, and the Broadcast Bureau may of course advise the Commission of shortcomings of renewal applicants. Furthermore, the increasing lack of free space on the AM and VHF bands has forced prospective broadcasters to compete with licensees for their space, usually asserting serious failings by the incumbent. This has necessitated "comparative renewal" proceedings, discussed later in this section.

Denial of renewals has become an increasingly harsh penalty, as the market value of stations has risen commensurate with their scarcity. Thus the Commission has bent over backwards to avoid resorting to this ultimate sanction.

We shall consider possible bases for denial in this section, looking first at the types of business practices that are likely to get licensees into trouble.

1. INTRODUCTION

FEDERAL COMMUNICATIONS COMMISSION v. WOKO, INC.

Supreme Court of the United States, 1946.
329 U.S. 223, 67 S.Ct. 213, 91 L.Ed. 204.

[Pickard, a vice-president of CBS, owned 24 percent of the stock in WOKO, Inc., an Albany, New York radio station. Pickard obtained the stock in return for getting the station CBS affiliation and other benefits. He wanted his interest in WOKO kept secret to prevent CBS from learning about it. For 12 years, WOKO, Inc. concealed Pickard's ownership in reports and applications to the Commission and its general manager furnished false testimony at Commission hearings on the question. Section 308(b) of the Act required that applications be made under oath and § 312(a) provided that station licenses may be revoked for false statements in the application. Although WOKO had been rendering public service of ac-

ceptable quality, the Commission refused to renew the license because of the misrepresentations.]

MR. JUSTICE JACKSON delivered the opinion of the Court.

. . .

The Court of Appeals for the District of Columbia reversed the Commission's decision denying renewal of the license, a majority for the various reasons that we will consider. The dissenting Chief Justice noted that he did "very heartily agree with the view that this is a hard case. The Commission's drastic order, terminating the life of the station, punishes the innocent equally with the guilty, and in its results is contrary to the Commission's action in several other comparable cases. But that the making of the order was within the discretion of the Commission, I think is reasonably clear." 153 F.2d 623, 633. We granted certiorari because of the importance of the issue to the administration of the Act.

. . .

It is said that in this case the Commission failed to find that the concealment was of material facts or had influenced the Commission in making any decision, or that it would have acted differently had it known that the Pickards were the beneficial owners of the stock. We think this is beside the point. The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones. We do not think it is an answer to say that the deception was unnecessary and served no purpose. If the applicant had forthrightly refused to supply the information on the ground that it was not material, we should expect the Commission would have rejected the application and would have been sustained in so doing. If we would hold it not unlawful, arbitrary or capricious to require the information before granting a renewal, it seems difficult to say that it is unlawful, arbitrary or capricious to refuse a renewal where true information is withheld and false information is substituted.

We are told that stockholders owning slightly more than 50 per cent of the stock are not found to have had any part in or knowledge of the concealment or deception of the Commission. This may be a very proper consideration for the Commission in determining just and appropriate action. But as matter of law, the fact that there are innocent stockholders can not immunize the corporation from the consequences of such deception. If officers of the corporation by such mismanagement waste its assets, presumably the State law affords adequate remedies against the wrongdoers. But in this as in other matters, stockholders entrust their interests to their chosen officers and often suffer for their dereliction. Consequences of such acts can-

not be escaped by a corporation merely because not all of its stockholders participated.

Respondent complains that the present case constitutes a departure from the course which the Commission has taken in dealing with misstatements and applications in other cases. Much is made in argument of the fact that deceptions of this character have not been uncommon and it is claimed that they have not been dealt with so severely as in this case. [ ] But the very fact that temporizing and compromising with deception seemed not to discourage it, may have led the Commission to the drastic measures here taken to preserve the integrity of its own system of reports. The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission in determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable.

. . .

Lastly, and more importantly, the Court of Appeals suggested that in order to justify refusal to renew, the Commission should have made findings with respect to the quality of the station's service in the past and its equipment for good service in the future. Evidence of the station's adequate service was introduced at the hearing. The Commission on the other hand insists that in administering the Act it must rely upon the reports of licensees. It points out that this concealment was not caused by slight inadvertence nor was it an isolated instance, but that the Station carried on the course of deception for approximately twelve years. It says that in deciding whether the proposed operations would serve public interest, convenience or necessity, consideration must be given to the character, background and training of all parties having an interest in the proposed license, and that it cannot be required to exercise the discretion vested in it to entrust the responsibilities of a licensee to an applicant guilty of a systematic course of deception.

We cannot say that the Commission is required as a matter of law to grant a license on a deliberately false application even if the falsity were not of this duration and character, nor can we say that refusal to renew the license is arbitrary and capricious under such circumstances. It may very well be that this Station has established such a standard of public service that the Commission would be justified in considering that its deception was not a matter that affected its qualifications to serve the public. But it is the Commission, not the courts, which must be satisfied that the public interest will be served by renewing the license. And the fact that we might not have made the same determination on the same facts does not warrant a

substitution of judicial for administrative discretion since Congress has confided the problem to the latter. We agree that this is a hard case, but we cannot agree that it should be allowed to make bad law.

The judgment of the Court of Appeals is reversed and the case remanded to that court with direction to remand to the Commission.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.

Notes and Questions

1. The argument about innocent shareholders might be made in almost all cases other than the one-owner station. It has two main forms—either that one co-owner acted improperly without the knowledge of the others or that an employee acted improperly without the knowledge of some or all owners. In the employee cases the Commission tries to show that the owners of the license failed in their responsibility to exercise supervision over employees so as to provide a separate basis for nonrenewal.

2. In Continental Broadcasting, Inc. v. Federal Communications Comm'n, 439 F.2d 580 (D.C.Cir.) certiorari denied 403 U.S. 905 (1971), the licensee's application for renewal was set for hearing on a variety of issues. The examiner found that the station manager had engaged in a series of actions calculated to deceive the Commission. He also found, however, that the principal officers of the licensee had not been guilty of knowing participation in the misconduct, that they had manifested concern for proper conduct of the station's affairs and that they had tardily acted to clean "the Augean stable." He recommended a one-year probationary renewal. Continental filed no objections but the Broadcast Bureau did object and urged denial of the application for renewal. The Commission adopted the examiner's findings but denied renewal on the ground that the manager's behavior "must be imputed to the licensee because of its failure to exercise adequate control and supervision over the management and operation of WNJR consistent with its responsibilities as a licensee." On appeal, the denial of renewal was affirmed. The court held that the failure of control in the first instance justified the Commission's action. Also, the court held that the Commission did not err in refusing to consider the licensee's program performance. The attempts to deceive the Commission disqualified the licensee from renewal.

3. *Penalties and Short Renewals.* Before 1960 the Commission had few weapons for dealing with misbehavior, since Congress assumed that denial of renewal would suffice in most cases, with revocation during the term to handle the most serious violations. But the Commission came to view denial of renewal as too harsh for all but the most serious violations of rules or other misbehavior. In the 1960

amendments to the Communications Act, Congress explicitly authorized shorter renewals by amending § 307(d), but this could not be utilized until the end of the license period. To fill this gap, Congress responded with §§ 503(b) et seq. to provide the Commission with "an effective tool in dealing with violations in situations where revocation or suspension does not appear to be appropriate." Under § 503(b), the Commission could impose a fine, called a forfeiture, against a licensee who had violated a specific rule. The forfeiture might amount to $1,000 for a single offense and up to $10,000 for multiple offenses. The Commission might feel more free to resort to forfeitures, since revocation and suspension might harm the community as well as the licensee.

The added array of sanctions reduced the likelihood that the denial of renewal would be used for what the Commission perceived to be lesser transgressions of the rules. The Commission has resorted extensively to the short-term renewal. The expectation is that if the licensee performs properly during that period it will then return to the regular renewal cycle. In addition to its probationary impact, a short renewal imposes burdens of legal expenses and administrative effort in preparing and defending the application.

Single instances of fraudulent behavior toward advertisers or conducting rigged contests, traditionally led to forfeitures or short-term renewals. Recently, however, the Commission has apparently begun to carry through on a threat to deny renewal to broadcasters who commit fraud on advertisers or others. Among the most common types of fraud are billing advertisers for commercials that were never actually broadcast and the practice of "double-billing." This latter involves cooperative advertising in which a national manufacturer promises to share advertising expenses with its local retailers. The retailer gets a discount for volume, but the station sends it two bills—one for the actual discounted amount due and a second based on a higher non-discounted rate to be forwarded to the national manufacturer as the basis for the sharing.

4. *Promise v. Performance.* As we saw, in initial licensing the applicant must list the types of programming that it proposes to present and the proportions of each type of programming. At renewal time, how should the Commission treat disparities between the application and the actual performance? The Commission's general reluctance to deny renewals has usually led it to overlook such disparity. The subject is discussed extensively in Moline Television Corp., 31 F.C.C. 2d 263, 22 R.R.2d 745 (1971), dealing with an assertion that an applicant obtained a station by lavish promises and failed to carry them out. But the Commission noted that it had attacked that problem in its 1965 Policy Statement, p. 543, supra, by deciding to put no

weight upon the promises in the first place unless there were vast differences between rival proposals. In the period between 1965 and the Moline case in 1971, the Commission noted that it had "not awarded a preference to any applicant based on proposed programming. The door to a sorry episode has been firmly closed."

In 1976, the Commission adopted a quantitative guideline for the "promise versus performance" issue in renewals. Matter of Revision of FCC Form 303, Application for Renewal of Broadcast Station Licenses, 59 F.C.C.2d 750, 37 R.R.2d 1 (1976). Dealing with radio and television services, the Commission identified three nonentertainment categories: news, public affairs, and "all other," which includes agricultural, religious, and instructional programs. The Commission then announced that "an actual decrease of 15% in any of the three nonentertainment program categories or a 20% decrease overall should be explained to the Commission. This refers to decreases between the composite week performance and the amount promised in the applicant's last renewal application. . . ." (The "composite week" refers to a practice by which the Commission each year identifies one Sunday, one Monday, etc. from the prior year by which to judge whether licensees have honored their obligations. This avoids the necessity of considering an entire year's data at renewal time.) Is this a desirable development?

In addition, "applicants will be required to explain to the Commission *any* variations in their past commercial practices exceeding the commercial minutes per hour proposed in the previous application."

5. In 1975, the Commission adopted separate guidelines for ascertainment of community problems by commercial broadcast renewal applicants. Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418, 35 R.R.2d 1555 (1975). The Commission eliminated the requirement that a renewal applicant file with the Commission a "compositional survey" of the communities served. Instead, the guidelines establish a checklist of structural and institutional groups common to most communities. A licensee must interview leaders from each of the groups unless it can show that a group is not present in its community. Second, the Report allows half of the community leader interviews to be conducted by employees below management level and establishes standards for determining what is a reasonable number of interviews in communities of varying sizes. Third, the leader interviews must be conducted periodically throughout the license term rather than within the six months preceding the renewal application. Fourth, each year the licensee must complete a list of ten significant problems, needs, and interests ascertained during the preceding year and indicate the programs broadcast in response to these problems. The Report generally exempts from its re-

quirements stations in communities with a population under 10,000. Do these procedures make sense in terms of the Commission's goals?

Commissioner Robinson dissented. Citing data indicating that more than half of all stations decreased the amount of time devoted to local programming after the 1971 ascertainment requirements were imposed, he contended that there was no evidence that the formal ascertainment process was worth the costs.

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2. Speech Considerations

As you will recall, p. 493, supra, in its early days the Commission was not hesitant about denying license renewals when it disapproved of the speech being uttered. The potential implications of that practice were not tested because the situation eased after the famous Mayflower Broadcasting Corp., 8 F.C.C. 333, (1940), in which the Commission renewed a license but appeared to criticize the licensee for editorializing: "A truly free radio cannot be used to advocate the causes of the licensee. . . . In brief, the broadcaster cannot be an advocate." The case apparently deterred controversial discussion and therefore reduced the need for the Commission to judge speech directly. The situation changed after the Commission's Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1 R.R. pt. 3, ¶91.21 (1949), which directed licensees to devote a reasonable portion of their broadcast time to the discussion of controversial issues of public importance and to encourage the presentation of various views on these questions. This has also affected renewal cases.

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH v. FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals, District of Columbia Circuit, 1968.
403 F.2d 169.
Certiorari denied, 394 U.S. 930, 89 S.Ct. 1190, 22 L.Ed.2d 459 (1969).

Before Wilbur K. Miller, Senior Circuit Judge, and Burger and Wright, Circuit Judges.

Burger, Circuit Judge:

The Federal Communications Commission granted renewal of the license of Trans American Broadcasting Company for Station KTYM, Inglewood, California. Appellant, the Anti-Defamation League, opposed renewal claiming that certain programs of the Licensee had contained anti-Semitic material. After investigation of

these charges renewal was granted without an evidentiary hearing on Appellant's opposition.

The material challenged as anti-Semitic originated in certain 15 minute paid-time programs under the control of a commentator, one Richard Cotten. The Commission readily acknowledges that on several of Cotten's 15 minute programs of commentary he made offensive comments concerning persons of the Jewish faith, equating Judaism with Socialism and Socialism with Communism. Two broadcasts, one on October 7, 1964, and one on May 27, 1965, were singled out and transcripts of those programs were before the Commission. The League's complaint is that the Licensee did nothing to remedy these programs until the programs were called to its attention and then declined either to cancel the program or to control Cotten in any way. The Licensee then offered the League free equal time to respond to Cotten's paid broadcasts or use the time in any way it desired. The League advised the Commission that it would not accept the tender of free time.

In granting renewal of the KTYM license without conducting an evidentiary hearing on the content of Cotten's programs, the Commission explained that no dispute of fact as to the content of the Cotten program existed and no issue as to KTYM's performance was raised apart from the Cotten programs. The Commission determined that as to a specific attack by Cotten on Arnold Forster, General Counsel of the League, KTYM had violated the "fairness doctrine" because the station had failed to give advance notice of the facts to Forster or the League. However, the Commission concluded that this was an isolated violation which neither afforded a basis for denying the license renewal nor necessitated an evidentiary hearing since the station had offered free time for a reply. That offer was still outstanding when the Commission acted.

The Commission considered the broad issue raised by the League that Cotten's utterances were so contrary to the public interest that a Licensee carrying such programs should be disqualified for renewal. The Commission declared that its historic policy in conformity with Congressional authority precluded censorship of programs:

> The Commission has long held that its function is not to judge the merit, wisdom or accuracy of any broadcast discussion or commentary but to insure that all viewpoints are given fair and equal opportunity for expression and that controverted allegations are balanced by the presentation of opposing viewpoints. Any other position would stifle discussion and destroy broadcasting as a medium of free speech. To require every licensee to defend his decision to present any controversial program that has been complained of in a license renewal hearing would cause most—if not all—licensees to refuse to broadcast any program

that was potentially controversial or offensive to any substantial group. More often than not this would operate to deprive the public of the opportunity to hear unpopular or unorthodox views.

. . .

Appellant's primary argument is that "recurrent bigoted appeals to anti-Semitic prejudice" and tolerance of personal attacks without notice to those attacked, constituted a basis for denial of license renewal and required an evidentiary hearing on those issues.

. . .

Our examination of the record satisfies us that the Commission acted within its authority in denying an evidentiary hearing as to the undisputed facts which formed the basis of Appellant's claims. The disposition of Appellant's claims turned not on determination of facts but inferences to be drawn from facts already known and the legal conclusions to be derived from those facts.

The First Amendment aspect also deserves some comment.

. . .

Commissioner Loevinger, while concurring fully with the decision of the Commission, restated some basic propositions which seem to us unanswerable:

For the FCC to promulgate rules regarding permissible and impermissible speech relating to religion would be not only an egregious interference with free speech in broadcasting, but also an unconstitutional infraction of the free exercise clause and the establishment clause of the First Amendment.

. . .

It is not only impractical—and impossible in any ultimate sense—to separate an appeal to prejudice from an appeal to reason in this field, it is equally beyond the power or ability of authority to say what is religious or racial. There are centuries of bloody strife to prove that man cannot agree on what is or is not "religion."

. . .

Nevertheless these subjects will and must be discussed. But they cannot be freely discussed if there is to be an official ban on the utterance of "falsehood" or an "appeal to prejudice" as officially defined. All that the government can properly do, consistently with the right of free speech, is to demand that the opportunity be kept open for the presentation of all viewpoints. Yet this would be impossible under the rule espoused by the ADL. . . . If what the ADL calls "appeals to racial or religious prejudice" is to be classed with hard-core obscenity, then it has no right to be heard on the air, and the only views which are entitled to be broadcast on matters of concern to the ADL are those which

the ADL holds or finds acceptable. This is irreconcilable with either the Fairness Doctrine or the right of free speech.

> Talk of "responsibility" of a broadcaster in this connection is simply a euphemism for self-censorship. It is an attempt to shift the onus of action against speech from the Commission to the broadcaster, but it seeks the same result—suppression of certain views and arguments. . . . Attempts to impose such schemes of self-censorship have been found as unconstitutional as more direct censorship efforts by government. [ ]

While the Commission has the power and indeed the duty to consider a pattern of libelous conduct in a license renewal hearing, the First Amendment demands that it proceed cautiously and Congress, as we have noted, limited the Commission's powers in this area. We hold that the record reflects substantial evidence in support of the Commission's decision.

Affirmed.

J. SKELLY WRIGHT, CIRCUIT JUDGE, concurring:

Subject to the following observations, I join the court's opinion in this case.

The Anti-Defamation League charges that Station KTYM, knowingly and on repeated occasions, allowed to be broadcast a series of programs containing false and defamatory statements about Jews in general and on one occasion about some Jewish individuals in particular. Two types of program content are thus challenged—libeling an individual and attacking a group—and different approaches are required for each.

With respect to individual libel, I start with the premise that a license to run a radio station is not a license to libel. False defamatory statements, made knowingly or with reckless disregard of their falsity, cannot claim the shelter of the First Amendment. New York Times Co. v. Sullivan, [ ]. A radio station, like a newspaper, cannot claim immunity from libel laws.[2]

Thus when a station allows a series of programs in which individuals are repeatedly defamed and the station is put on notice (for example, by the complaint of an offended individual) that such programs contain false and unsubstantiated statements, in a renewal proceeding involving that station's license the Commission should: (1) determine whether the station knew of the falsity of the material

2. . . .
There is one narrowly drawn exception: a radio station is not responsible for libelous statements made in a political broadcast by a candidate for public office. Farmers E. & C. Union, etc. v. WDAY, 360 U.S. 525, (1959). This is so because § 315(a) of the Federal Communications Act precludes a station from deleting any of the material from such a speech. The station here, however, is under no such disability. . . .

or allowed it to be broadcast in reckless disregard of its truth or falsity (the standard of New York Times Co. v. Sullivan), and (2) consider whether such programming is in the public interest. Neither the First Amendment nor a policy of encouraging stimulating and constructive radio broadcasting would preclude the Commission from refusing to renew a license because of repeated individual libels; nor would the Commission be prevented from cancelling the license of a broadcaster who persisted in such a course of programming.[3] In the instant case there is no pattern of repeated individual libels. Therefore I concur in affirming the Commission.

Attacking a group presents a harder problem. Under the law of libel, defamation of a broad group or class is not usually actionable. And this kind of speech, detestable as some of its anti-Semitic and racist aspects may be, approaches the area of political and social commentary. To this extent it makes a stronger claim for First Amendment protection.[5] I share the desire of the Commission and the court to foster free and full debate on political and social issues. For this reason, broadcasters should not be so burdened in this area that they would shy away from presenting controversial issues.

Station KTYM offered the Anti-Defamation League substantial time to reply to the anti-Semitic broadcasts. This application of the "fairness doctrine" will have to suffice. To go further, requiring stations to check the truth of all commentary attacking a group or class, might result in a "chilling effect," constraining stations to steer clear of controversial material. However, as this case illustrates, there is a substantial flaw in the theory of the fairness doctrine. Not surprisingly, the Anti-Defamation League refused to dignify or exacerbate the attack by replying. It is likely that other groups would similarly refuse to reply. Under such circumstances, the Commission may decide to require a licensee to seek with reasonable diligence exponents of other views when it presents one side of a controversial issue in which a group or class is attacked.[6]

3. This would not be prohibited "censorship," 47 U.S.C. § 315 (1964), any more than would the Commission's considering on a license renewal application whether a broadcaster allowed "coarse, vulgar, suggestive, double-meaning" programming; programs containing such material are grounds for denial of a license renewal. Palmetto Broadcasting Co., 23 Pike & Fischer R.R. 483, 484 (1962), affirmed 334 F.2d 534, certiorari denied 379 U.S. 843 (1964).

5. In Beauharnais v. People of State of Illinois, 343 U.S. 250 (1952), a divided Supreme Court upheld a conviction under a statute outlawing defamation of a racial or religious group. However, far from spawning progeny, *Beauharnais* has been left more and more barren by subsequent First Amendment decisions, to the point where it is now doubtful that the decision still represents the views of the Court.

6. Nothing I have said would preclude the Commission from finding that a station was not in the public interest whose regular programming consisted solely of views slanted toward one

The requirements I would place on broadcasters, and the Commission, in dealing with material libeling an individual or attacking a group, are consistent with the Commission's overall policy of broadcaster responsibility. For example, in the context of protecting the public from rigged quiz shows, the Commission, in its report on Program Policy, 20 Pike & Fischer R.R. 1901, 1904 (1960), stated:

> ". . . [T]he Commission had made its position clear that, in fulfilling its obligation to operate in the public interest, a broadcast station is expected to exercise reasonable care and prudence with respect to its broadcast material in order to assure that no matter is broadcast which will deceive or mislead the public. . . ."

And in a major statement on the fairness doctrine, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed.Reg. 10415, 10421 (1964), the Commission stated:

> ". . . Under fundamental communications policy, the licensee, with the exception of appearances of political candidates subject to the equal opportunities requirement of Section 315 *is fully responsible for all matter which is broadcast over his station.* It follows that when a program contains a personal attack, the licensee must be fully aware of the contents of the program, whatever its source or his actual involvement in the broadcast. . . ." (Emphasis added.)

Thus it is clear to me that the Commission is not helpless to act in this area.

Notes and Questions

1. What are the disagreements between the majority and the concurring judge?

2. What is the relevance of New York Times v. Sullivan in this context?

3. The concurring judge suggests that some groups will not dignify arguments by responding to them. Should that affect the analysis? Should there be other remedies available to them?

4. Does this case suggest that no speech uttered by a broadcaster can be grounds for denial of renewal unless it is specifically prohibited, such as obscenity, or the broadcaster fails to observe the Fairness Doctrine and its personal attack part?

side of a controversial issue or issues, even if the station allowed the other side time to reply. The Commission could conclude that a station which offered more rounded programming better served the public.

5. In the concurring opinion, footnote 3 asserts that the Commission had denied license renewals in other cases based on the content of speech. The case cited involved a disc jockey's patter, which was alleged to be improper but was not alleged to violate the obscenity statute. When the Commission began investigating the matter, the licensee denied all knowledge of the offending content. The Commission found the denial incredible and this raised a character question. The court of appeals affirmed the denial of renewal on the character basis, but did not pass on the substantive speech basis.

Another kind of deception was attempted by a minister whose initial efforts to acquire a station for his seminary were challenged by groups who believed that his past record showed that he would not honor the Fairness Doctrine or his other obligations. The prospective licensee responded by promising to provide balance. Within ten days of obtaining the license, the licensee began drastically altering its format and groups complained that the licensee was not living up to its obligations. The Commission denied renewal on two grounds: alleged violations of the Fairness Doctrine, and deception practiced on the Commission in obtaining the license. On appeal, the court affirmed, 2–1. Two judges agreed on the deception ground while the dissenter found that ground "too narrow a ledge" for decision. He thought that the Commission had really denied renewal because of speech uttered on the station and he concluded that this was impermissible. Brandywine-Main Line Radio, Inc. v. Federal Communications Comm'n, 473 F.2d 16 (D.C.Cir. 1972) certiorari denied 412 U.S. 922 (1973), Douglas, J. dissenting.

In recent years the Commission has been more willing to base denials of renewal directly on improper speech. In United Television Co., 55 F.C.C.2d 416, 34 R.R.2d 1465 (1975), the Commission denied renewal to a station accused of violating 18 U.S.C. § 1304 by broadcasting information concerning lotteries. This was done by ministers who "broadcast programs offering three-digit scripture citations in return for monetary donations." The licensee conceded that the language used in the broadcasts referred to numbers games. The Commission, rejecting the claim that freedom of religion was involved, asserted that it had the power to determine whether asserted beliefs are "sincerely held" and whether the ministers were in "good faith." Since the numbered references were not part of any creed and "the representations of the ministers concerning financial blessings defy belief," the Commission concluded that no First Amendment problem was involved. There was no specific reference to the speech and press parts of the First Amendment. This behavior alone was held to warrant denial and to bar United from a comparative hearing. In addition to this misbehavior, the licensee was found to have engaged in false and misleading advertising as well as violations of technical rules. United has filed an appeal.

Surely the most widescale nonrenewal occurred when the Commission refused to renew licenses for eight educational stations in Alabama as well as an application for a construction permit for a ninth. Alabama Educational Television Commission, 50 F.C.C.2d 461, 32 R.R.2d 539 (1975). The Commission found that "blacks rarely appeared on AETC programs; that no black instructors were employed in connection with locally-produced in-school programs; and that unexplained decisions or inconsistently applied policies caused the preemption of almost all black-oriented network programming." The Commission concluded that the "licensee followed a racially discriminatory policy in its overall programming practices and, by reason of its pervasive neglect of a black minority consisting of approximately 30 percent of the population of Alabama, its programming did not adequately meet the needs of the public it was licensed to serve." Although a station need not meet minority needs by special programming, the licensee "cannot with impunity ignore the problems of significant minorities in its service areas." Two dissenters argued that the improvements in the last few years should justify more lenient treatment. The majority used that improvement, which came only after the challenges to renewal, to waive its usual rule that an applicant who is denied renewal is ineligible to reapply for that same station. The state agency here was permitted to reapply but it would be on an equal footing with any other applicant.

The court of appeals displayed similar concern in a less extreme case involving a commercial station. In Alianza Federal de Mercedes v. Federal Communications Comm'n, 539 F.2d 732 (D.C.Cir. 1976), a community group petitioned to deny renewal of the license for KOB-TV in Albuquerque on the ground that presentation of between three and seven hours of programming per year on minority community problems was not responsive to the needs of a population of which 40 percent was Mexican-American. The court responded:

> Although we have held in *Stone* [466 F.2d 316] and *Columbus Broadcasting Coalition* [505 F.2d 320], that programming is a matter largely in the discretion of the licensee and is not to be measured by a simple percentage test, we are troubled by appellants' contentions, and by the issue whether the minimal amount of public interest programs serving the needs of a 40% minority does not create a disparity so significant as to amount to a difference in kind rather than in degree. Excluding news shows, KOB-TV spent a maximum of 6%, and a minimum of 2% of its public interest programming dealing with the problems of interest to the Mexican-American community. The Commission could find that such a gross disparity in allocation of programming time indicates a broadcaster's failure to serve his community's needs. Such a finding could suffice to deny renewal as a matter

> of law, or to establish a prima facie case that the broadcaster was not acting in the public interest and that a hearing was required.

The court concluded, however, that the claim should have been presented initially to the Commission and was raised too late for consideration.

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3. Comparative Renewals

In the early years of regulation of each medium, except perhaps for AM, so many vacant frequencies existed that few applicants tried to oust incumbents. When such a challenge did occur, the Commission undertook the difficult comparison of the incumbent's actual performance and the challenger's proposed operation. In a major case involving renewal of the license of a Baltimore AM station, the Commission's analysis showed some reasons favoring the incumbent and others favoring the challenger. Hearst Radio, Inc. (WBAL), 15 F. C.C. 1149, 6 R.R. 994 (1951). Although the incumbent had not integrated ownership and management this did not matter because its actual performance was now available for review. Similarly, although the incumbent also controlled an FM station, a television station and a newspaper in Baltimore, it had not abused its power so this was not a serious problem. The Commission found little difference in programming despite the challenger's strong assertions to the contrary, and concluded:

> We have found that both of the applicants are legally, technically, and financially qualified and must therefore choose between them as their applications are mutually exclusive. We have discussed at some length why the criteria which we may sometimes consider as determining factors when one of the applicants is not operating the facilities sought and where the applicants have not proved their abilities, are not controlling factors in the light of the record of operation of WBAL. The determining factor in our decision is the clear advantage of continuing the established and excellent service now furnished by WBAL and which we find to be in the public interest, when compared to the risks attendant on the execution of the proposed programming of Public Service Radio Corporation, excellent though the proposal may be.

This decision was thought to give renewal applicants such an advantage that prospective challengers sought entry by other means, such as buying an existing facility or seeking available, though less desirable, vacant frequencies. In its 1965 Policy Statement on Com-

parative Broadcast Hearings, p. 543, supra, the Commission noted that it was not attempting to deal with "the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license." Yet, later that year, in a case in which two applicants were challenging the incumbent, the Commission stated that, on further consideration, it had "concluded that the policy statement should govern the introduction of evidence in this and similar proceedings where a renewal application is contested. . . . However, we wish to make it clear that the parties will be free to urge any arguments they may deem applicable concerning the relative weights to be afforded the evidence bearing on the various comparative factors." Seven (7) League Productions, Inc., 1 F.C.C.2d 1597 (1965). Is this a rejection of *Hearst?*

The following case is the culmination of an extended battle for Channel 5 in Boston. It began as a comparative proceeding among new applicants, but later the nature of the controversy became murky and a decision by the Commission in 1969 might have been seen as having serious implications for renewal applicants. In any event, the dispute stimulated much Commission, Congressional, and judicial action.

GREATER BOSTON TELEVISION CORP. v. FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals, District of Columbia Circuit, 1970.
444 F.2d 841.
Certiorari denied, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971).

[In 1954, four mutually exclusive applicants sought a license to operate Channel 5 in Boston. In 1957, after hearings, the Commission selected WHDH, Inc., a wholly-owned subsidiary of the publisher of the Boston Herald-Traveler newspaper. WHDH began broadcasting while the losing applicants appealed. It then became known that the president of WHDH, Inc. had had two private contacts with the Commission chairman while the case was pending before the Commission. The court remanded the case to the Commission which held, after further hearings, that there had been a "meaningful and improper, albeit subtle, attempt to influence the Commission" and concluded that although the contacts did not disqualify the applicant they did reflect adversely upon it in comparison with the other applicants. In 1960, the Commission reopened the entire case for further hearings. The court of appeals approved. In 1962, after hearings, the Commission again selected WHDH. But in view of Mr.

Choate's misbehavior WHDH got only a four-month license. In 1963, WHDH filed for renewal and the Commission in an unusual move gave applicants two months to prepare competing applications. It then ordered a comparative hearing among WHDH, BBI, Charles River, and Greater Boston. Meanwhile, the four-month license had been appealed—by WHDH as being too short and by Greater Boston which opposed any grant to WHDH. While this appeal was pending, Mr. Choate died, and the court in 1964 remanded the case to the Commission to consider the effect of his death on the case. The court authorized the Commission to consolidate the rethinking of the four-month license with the hearing on the renewal question, and the Commission did so.

In this consolidated proceeding in 1966 the hearing examiner recommended a grant to WHDH. He disqualified Greater Boston on two non-comparative matters. On comparative grounds, he preferred WHDH on the basis of the experience it had acquired during the years. He found WHDH weak on integration of ownership and management and on diversification of media ownership. He concluded, however, that WHDH was in essence a renewal applicant that had performed well during its term and should be renewed. In 1969 the Commission disagreed and awarded the license to BBI. It treated WHDH as an initial applicant competing with other such applicants and it applied the criteria of its 1965 Policy Statement. It found WHDH's past record within the bounds of average performance and thus not entitled to special credit. On diversification grounds, WHDH fared badly. BBI and Charles River received substantial preferences over WHDH on this issue and BBI a slight preference over Charles River because the latter owned a nearby FM station. On integration of ownership and management, WHDH again fared badly. As between the other two, BBI got a significant preference. BBI and Charles River had offsetting demerits on the matter of proposed program service. The new license was awarded to BBI, but the four-month grant to WHDH was reaffirmed. On rehearing, WHDH claimed the benefits of a renewal applicant established in *Hearst Radio, Inc.* (WBAL). The Commission responded that this was not an ordinary renewal case because of the "unique events and procedures" in the case. Although it had been operating 12 years, WHDH had received its first license in 1962 and then only for four months and that grant had been appealed. As the court notes, the Commission decision caused swift reaction: "The television industry began organizing its forces to seek legislative reversal of what seemed to be a Commission policy, reversing *Hearst*, that placed all license holders on equal footing with new applicants every time their three-year licenses came up for renewal."

In the first parts of its opinion, the court recounted at length the facts and also discussed the standards for judicial review of administrative decisions, in a passage quoted at p. 533, supra.]

Before TAMM, LEVENTHAL and MACKINNON, CIRCUIT JUDGES.

LEVENTHAL, CIRCUIT JUDGE:

. . .

B. *Issues Posed by Appellant WHDH, Inc.*

1. *Contention that WHDH Was Entitled to Same Consideration As Renewal Licensee*

WHDH's central contention rests on its 4-month operating license, duly granted by the Commission in 1962, and the Commission's determination, in the decision before us on this appeal, to adhere to the grant of the original application of WHDH to that extent.

WHDH makes no serious contention that it could protest the grant to intervenor BBI if the Commission proceeded validly in comparing these applications by the criteria used by the Commission for appraisal of new applicants for facilities. On that basis it is undeniable that a strong preference would be available to BBI in view of the "integration" and "diversity" criteria. WHDH objects that such preferences were set forth by the 1965 Policy Statement governing comparative hearings involving new applications for new facilities, and are not properly available in a renewal proceeding. It was by application of the criteria generally used for renewal proceedings that the Examiner entered a decision in favor of WHDH. The failure of the Commission to apply renewal criteria is the core of the WHDH appeal.

The application of the criteria in the 1965 Policy Statement is said to impose an unlawful forfeiture on WHDH amounting to a denial of due process, and to constitute an improper refusal to honor the established policy of promoting broadcast license stability.

. . .

. . . The Commission's opinion of May 19, 1969, entered on reconsideration, expressly puts this case in a special and unique category because of the past history of WHDH.[33]

This interpretation of its action is underscored by the 1970 Policy Statement on Comparative Hearings Involving Renewal Appli-

33. The Commission said (par. 40):

> In closing, we think it should be made clear that our decision herein differs in significant respects from the ordinary situation of new applicants contesting with an applicant for renewal of license, whose authority to operate has run one or more regular license periods of 3 years. . . . Those unique events and procedures, we believe, place WHDH in a substantially different posture from the conventional applicant for renewal of broadcast license.

cants. This Statement in essence carries forward the general policy on renewals expressed in Hearst Radio, Inc. . . .

. . .

The Commission's 1970 Policy Statement carries a proviso, . . . indicating that it is inapplicable to "those unusual cases, generally involving court remands, in which the renewal applicant, for sui generis reasons, is to be treated as a new applicant." In such cases the applicant's record will be examined, but subject to the comparative analysis called for by the 1965 Policy Statement.

We think the distinction drawn by the Commission, in both this case and the 1970 statement, providing for special consideration of certain renewal applicants, as in remand cases, as if they were new applicants, to be reasonable both generally and in its application to the case before us.

. . .

. . . The Commission—wise in the ways of the administrative world—must be given reasonable latitude in its efforts to keep its processes free of taint. . . .

There is no chart that can forecast the flow and pace of sound administrative discretion, and hence there is always some possibility of surprise. . . .

. . .

The complaint of WHDH must be appraised in the light of the courses available to the Commission for coping with the problem presented by the activities of Mr. Choate. At one extreme, the Commission was being asked (by Greater Boston) to take it into account to such extent as would in effect impose an absolute disqualification; this it did not do.

WHDH in effect suggests the other extreme—a brushing aside of the entire matter on the ground that the offending officer is no longer involved, and the corporation has not profited by his delict. The Examiner used this conception on the ground that no reason for deterrence could apply to the unimplicated officers presently managing the station. But the policy of deterrence may have a broader significance. It may take into account that an officer might well be willing to try his hand at an impropriety if all that is involved is a calculated risk as to his own position (which would be enormously enhanced if he is successful), whereas he would possibly be deterred if he realized that his mal-adventure, if discovered, would be costly to the friends and associates who had invested in the enterprise.

In between these extremes are possibilities like a comparative hearing with a demerit assigned to WHDH; that was done by the Commission in its Decision of September 25, 1962, which, however, left the Commission with the conviction that while it would still make

a grant to WHDH, a customary 3-year grant was not in the public interest.

The Commission's action in exposing WHDH to another public hearing with new applicants, a hearing scheduled soon after the date of its order, is a disadvantage from the viewpoint of WHDH, but we cannot say it was contrary to the public interest. After this court's remand, to take account of Choate's death, the Commission set a course that retained its order for a hearing with new applicants, but avoided a specific demerit for WHDH in that comparative consideration. This was preferable to an approach wherein a demerit would be inserted into the comparison with new applicants, preferable both for WHDH and, it would seem, for the public interest.[38] WHDH insists, however, on an approach which would give it all the rights and expectancies of an ordinary renewal applicant. In the ordinary case such expectancies are provided in order to promote security of tenure and to induce efforts and investments, furthering the public interest, that may not be devoted by a licensee without reasonable security. This position does not fairly characterize the situation of a licensee which, by virtue of its officer's impropriety, has been given only temporary operating authority of one kind or another (including the 4-month license). This was the conclusion of both the Hearing Examiner and the Commission (as refined on reconsideration), and we think it within the range of reasonable discretion.

The determination that in certain cases a renewal application must be conducted on the basis of a new comparative consideration is not necessarily a "punishment" for wrongdoing. The same result may follow even where the ineptitude and errors of the Commission may be more to blame than the licensee for the state of affairs precipitating that result. The central consideration is that there is a special class of cases where this method of reaching the optimum decision in the public interest may be fairly invoked without undercutting whatever expectancies may attach in general to licensees seeking renewal.

. . .

2. *Other Issues*

The other issues raised by WHDH do not require reversal. It was rated inferior to its rivals on the diversification and integration criteria.

38. When an applicant is required to bear a demerit assigned for non-comparative reasons, the public may wind up being denied the services of a superior broadcaster. Where that demerit is not necessary for deterrent reasons, it would seem counterproductive. As to the final comparative hearing the blend of deterrence and public interest in selecting the broadcaster was accomplished by requiring WHDH to face a de novo comparative hearing, but without a continuing demerit.

a. *Diversification of Control of Media of Mass Communications*

The Commission assigned a preference to Diversification of Control of the Media of Mass Communications. Plainly the Commission does not exceed its powers in seeking to avoid rather than foster a concentration of control of the sources of news and opinions.

. . .

The Commission need not be confined to the technique of exercising regulatory surveillance to assure that licensees will discharge duties imposed on them, perhaps grudgingly and perhaps to the minium required. It may also seek in the public interest to certify as licensees those who would speak out with fresh voice, would most naturally initiate, encourage and expand diversity of approach and viewpoint.

Further, as the Commission pointed out, its concept of the public interest contemplated initiating of editorials by licensees. This embraces selection of topics for probing, and emphasis given to topics, as well as fairness in presentation of views on each topic. There is a public interest in diversity in policy areas lit by the lantern of editorial probes, and for that matter by reportorial assignments and coverage.

. . .

In terms of comparative consideration the choice between Charles River and BBI is closer than the issue whether to retain WHDH. In the last analysis, the Commission's order turns on the criterion of integration, of full-time participation in station operation by owners. Charles River's appeal is based on the fact that BBI's is only a paper claim.

. . .

The Commission considered that the ultimate facts favored BBI on the integration factor. . . . The Commission indicated its reasoning with reasonable clarity. It relied on the participation of the six BBI stockholders, and indicated what function each would perform. The findings are supported by substantial evidence in the record. "[I]t is the Commission, not the courts, which must be satisfied that the public interest will be served." [ ] We see no reason to disturb its judgment.

Affirmed.

Notes and Questions

1. Is the Commission's stance in this situation a meaningful deterrent?

2. What are the implications of this case for renewal applicants? Is it clear why the case produced a great outcry from the industry?

3. The chronology of the lengthy litigation is traced in Smith and Prince, WHDH: The Unconscionable Delay, 18 J.Broadcasting 85 (1973–74). The infamous episode is also the subject of S. Quinlan, The Hundred Million Dollar Lunch (1974), referring to Mr. Choate's improper contacts.

4. After the Commission's decision to grant the license to BBI, incumbents demanded the enunciation of a clear renewal policy. The Commission responded in early 1970, before the decision in *Greater Boston*, with a policy statement that the Commission believed reaffirmed *Hearst Radio, Inc.* That Policy Statement was challenged in the following case.

CITIZENS COMMUNICATIONS CENTER v. FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals, District of Columbia Circuit, 1971.
447 F.2d 1201.

Before WRIGHT, MACKINNON and WILKEY, CIRCUIT JUDGES.

J. SKELLY WRIGHT, CIRCUIT JUDGE:

Appellants and petitioners in these consolidated cases challenge the legality of the "Policy Statement on Comparative Hearings Involving Regular Renewal Applicants," 22 F.C.C.2d 424, released by the Federal Communications Commission on January 15, 1970, and by its terms made applicable to pending proceedings. Briefly stated, the disputed Commission policy is that, in a hearing between an incumbent applying for renewal of his radio or television license and a mutually exclusive applicant, the incumbent shall obtain a controlling preference by demonstrating substantial past performance without serious deficiencies.[3] Thus if the incumbent prevails on the threshold

3. The Policy Statement declares: ". . . Promotion of [the public interest], with respect to competing challenges to renewal applicants, calls for the balancing of two obvious considerations. The first is that the public receive the benefits of the statutory spur inherent in the fact that there can be a challenge, and indeed, where the public interest so requires, that the new applicant be preferred. The second is that the comparative hearing policy in this area must not undermine predictability and stability of broadcast operation.

. . .

"We believe that these two considerations call for the following policy—namely, that if the applicant for renewal of license shows in a hearing with a competing applicant that its program service during the preceding license term has been substantially attuned to meeting the needs and interests of its area, and that the operation of the station has not otherwise been characterized by serious deficiencies, he will be preferred over the newcomer and his application for renewal will be granted. His operation is not based merely upon promises to serve solidly the public interest. He has done so. Since the basic purpose of the act—substantial service to the public—is being met, it follows that the considerations of predictability and stability, which also contribute vitally to that basic purpose, call for renewal." [ ]

issue of the substantiality of his past record, all other applications are to be dismissed without a hearing on their own merits.

Petitioners contend that this policy is unlawful under Section 309(e) of the Communications Act of 1934 and the doctrine of Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327 (1945). . . .

. . .

We find that the judicial review sought by petitioners is appropriate at this time. Without reaching petitioners' other grounds for complaint, we hold that the 1970 Policy Statement violates the Federal Communications Act of 1934, as interpreted by both the Supreme Court and this court.

. . .

Although the 1965 Policy Statement explicitly refrains from reaching the "somewhat different problems raised where an applicant is contesting with a licensee seeking renewal," the Communications Act itself places the incumbent in the same position as an initial applicant. Under the 1952 amendment to the Act, both initial and renewal applicants must demonstrate that the grant or continuation of a license will serve the "public interest, convenience, and necessity." The Communications Act itself says nothing about a presumption in favor of incumbent licensees at renewal hearings; nor is an inability to displace operating broadcasters inherent in government management, as is established by the fact that in its early years of regulation the Federal Radio Commission often refused to renew licenses.

Nonetheless, the history of Commission decision and of the decisions of this court reflected until recently an operational bias in favor of incumbent licensees; despite Commissioner Hyde's observation in his dissent to the 1965 Policy Statement that there was no rational or legal basis for its purported nonapplicability to comparative hearings involving renewals, it was commonly assumed that renewal decisions would continue to be governed by policy established in the well known *Hearst* [19] and *Wabash Valley* [20] cases. These two cases, which began with the unassailable premise that the past performance of a broadcaster is the most reliable indicator of his future performance, were typical of the Commission's past renewal rulings in that their actual effect was to give the incumbent a virtually insuperable advantage on the basis of his past broadcast record *per se*. In *Hearst* the Commission ruled that the incumbent's unexceptional record of past programming performance, coupled with the unavoidable uncertainty whether the challenger would be able to carry out its program proposals, was sufficient to overcome the incumbent's demerits on other comparative criteria. And in *Wabash Valley* the Commission held

19. Hearst Radio, Inc. (WBAL), 15 F. C.C. 1149 (1951).

20. Wabash Valley Broadcasting Corp. (WTHI-TV), 35 F.C.C. 677 (1963).

that a newcomer seeking to oust an incumbent must make a showing of superior service and must have some preference on other comparative criteria.

Then, in the very controversial *WHDH* case, the Commission for the first time in its history, in applying comparative criteria in a renewal proceeding, deposed the incumbent and awarded the frequency to a challenger. Indicating a swing away from *Hearst* and *Wabash Valley*, in practical if not theoretical terms, the Commission stated its intention to insure that "the foundations for determining the best practicable service, as between a renewal and a new applicant, are more nearly equal at their outset." Finding that because the incumbent's programming service had been "within the bounds of the average" it was entitled to no preference, and that the incumbent was inferior on the comparative criteria of diversification and integration, the Commission awarded the license to one of the challengers.

The *WHDH* decision became the immediate subject of fierce attack, provoking criticism from those who feared that it represented a radical departure from previous law and that it threatened the stability of the broadcast industry by undermining large financial investments made by prominent broadcasters in reliance upon the assumption that licenses once granted would be routinely renewed. While the Commission's decision was still on appeal to this court, ultimately to be affirmed, the broadcast industry sought to obtain from Congress the elimination or drastic revision of the renewal hearing procedure. A bill introduced by Senator Pastore, Chairman of the Communications Subcommittee of the Senate Commerce Committee,[25] proposed to require a two-stage hearing wherein the renewal issue would be determined prior to and exclusive of any evaluation of challengers' applications. The bill provided that if the Commission finds the past record of the licensee to be in the public interest, it shall grant renewal. Competing applications would be permitted to be filed only if the incumbent's license is not renewed. Although more than 100 congressmen and 23 senators quickly announced their support, the bill was bitterly attacked in the Senate hearings by a number of citizens groups testifying, *inter alia*, that the bill was racist, that it would exclude minorities from access to media ownership in most large communities, and that it was inimical to community efforts at improving television programming.

The impact of such citizen opposition measurably slowed the progress of S. 2004. Then, without any formal rule making proceedings, the Commission suddenly issued its own January 15, 1970 Policy Statement, and the Senate bill was thereafter deferred in favor of the

25. S. 2004, 91st Cong., 1st Sess. (1969).

Commission's "compromise." The 1970 Policy Statement retains the single hearing approach but provides that the renewal issue must be determined first in a proceeding in which challengers are permitted to appear only for the limited purpose of calling attention to the incumbent's failings.[28] The Policy Statement sets forth that a licensee with a record of "substantial" service to the community, without serious deficiencies, will be entitled to renewal notwithstanding promise of superior performance by a challenger. Only upon a refusal to renew because of the incumbent's past failure to provide substantial service would full comparative hearings be held. Thus, in effect, the Policy Statement administratively "enacts" what the Pastore bill sought to do. The Statement's test for renewal, "substantial service," seems little more than a semantic substitute for the bill's test, "public interest," and the bill's two-stage hearing, the second stage being dependent on the incumbent's failing the test, is not significantly different from the Statement's summary judgment approach. The "summary judgment" concept of the 1970 Policy Statement, however, runs smack against both statute and case law, as the next section of this opinion will show.

III

Superimposed full length over the preceding historical analysis of the "full hearing" requirement of Section 309(e) of the Communications Act is the towering shadow of *Ashbacker*, supra, and its progeny, perhaps the most important series of cases in American administrative law. *Ashbacker* holds that under Section 309(e), where two or more applications for permits or licenses are mutually exclusive, the Commission must conduct one full comparative hearing of the applications. Although *Ashbacker* involved two original applications, no one has seriously suggested that its principle does not apply to renewal proceedings as well. This court's opinions have uniformly so held, as have decisions of the Commission itself.

. . .

We do not dispute, of course, that incumbent licensees should be judged primarily on their records of past performance. Insubstantial past performance should preclude renewal of a license. The licensee, having been given the chance and having failed, should be through. Compare *WHDH*, supra. At the same time, *superior* performance should be a plus of major significance in renewal

28. The Commission has in effect abolished the comparative hearing mandated by § 309(a) and (e) and converted the comparative hearing into a petition to deny proceeding. The petition to deny proceeding is separately provided for in the Act under § 309 (d), but this section is intended to cover only those situations in which the petitioner does not seek the license himself but seeks only to prevent its award again to the incumbent.

proceedings.[35] Indeed, as *Ashbacker* recognizes, in a renewal proceeding, a new applicant is under a greater burden to "make the comparative showing necessary to displace an established licensee." 326 U.S. at 332. But under Section 309(e) he must be given a chance. How can he ever show his application is comparatively better if he does not get a hearing on it?

The Commission's 1970 Policy Statement's summary procedure would deny him that hearing.[36]

The suggestion that the possibility of nonrenewal, however remote, might chill uninhibited, robust and wide-open speech cannot be taken lightly. But the Commission, of course, may not penalize exercise of First Amendment rights. And the statute does provide for judicial review. Indeed, the failure to promote the full exercise of First Amendment freedoms through the broadcast medium may be a consideration against license renewal. Unlike totalitarian regimes, in a free country there can be no authorized voice of government. Though dependent on government for its license, independence is perhaps the most important asset of the renewal applicant.

The Policy Statement purports to strike a balance between the need for "predictability and stability" [37] and the need for a competi-

35. The court recognizes that the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service. Given the incentive, an incumbent will naturally strive to achieve a level of performance which gives him a clear edge on challengers at renewal time. But if the Commission fails to articulate the standards by which to judge superior performance, and if it is thus impossible for an incumbent to be reasonably confident of renewal when he renders superior performance, then an incumbent will be under an unfortunate temptation to lapse into mediocrity, to seek the protection of the crowd by eschewing the creative and the venturesome in programming and other forms of public service. The Commission in rule making proceedings should strive to clarify in both quantitative and qualitative terms what constitutes superior service. [ ] Along with elimination of excessive and loud advertising and delivery of quality programs, one test of superior service should certainly be whether and to what extent the incumbent has reinvested the profit on his license to the service of the viewing and listening public. We note with approval that such rule making proceedings may soon be under way.

36. . . . According to the uncontested testimony of petitioners, no more than a dozen of 7,500 broadcast licenses issued are owned by racial minorities. The effect of the 1970 Policy Statement, ruled illegal today, would certainly have been to perpetuate this dismaying situation. While no quota system is being recommended or required, and while the fairness doctrine no doubt does serve to guarantee some minimum diversity of views, we simply note our own approval of the Commission's long-standing and firmly held policy in favor of decentralization of media control. Diversification is a factor properly to be weighed and balanced with other important factors, including the renewal applicant's prior record, at a renewal hearing. . . .

37. The Commission's fears for the stability of the industry seem groundless in view of the fact that in the year following the *WHDH* opinion—that is, in the period when feared instabili-

tive spur. It does so by providing that the qualifications of challengers, no matter how superior they may be, may not be considered unless the incumbent's past performance is found not to have been "substantially attuned" to the needs and interests of the community. Unfortunately, instead of stability the Policy Statement has produced *rigor mortis*. For over a year now, since the Policy Statement substantially limited a challenger's right to a full comparative hearing on the merits of his own application, not a single renewal challenge has been filed.

. . .

Wherefore it is ORDERED: (1) that the Policy Statement, being contrary to law, shall not be applied by the Commission in any pending or future comparative renewal hearings. . . .

MACKINNON, CIRCUIT JUDGE.

I concur in the foregoing opinion. While I recognize the desire and need for reasonable stability in obtaining renewal licenses, under the present statute as construed by Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327 (1945), I do not consider it possible to provide administratively that operating licensees who furnish program service "*substantially* attuned to meeting the needs and interests of its area . . . [without] *serious* deficiencies . . . will be preferred over the newcomer and *his* application for renewal will be granted." Such policy would effectively prevent a newcomer applicant from being heard on the merits of his application, no matter how superlative his qualifications. It would also, in effect, substitute a standard of *substantial* service for the *best possible* service to the public and effectively negate the hearing requirements of the statute as interpreted by the Supreme Court. If such change is desired, in my opinion, it must be accomplished by amendment of the statute.

Notes and Questions

1. The court later clarified its opinion, responding to charges of the Commission's non-compliance. After noting that the Commission had indicated some uncertainty as to what had been meant by "superior," the court stated, 463 F.2d 822, 823–24 (1972):

> We used the word "superior" in its ordinary dictionary meaning: "far above the average." Webster's New World Dictionary 1463 (college ed. 1968). And we suggested specific criteria for use in determining whether an incumbent had performed in a "superior" manner, including (1) elimination of excessive and loud advertising; (2) delivery of quality programs; (3) the extent to which the incumbent has reinvested the profit

ty was greatest—only eight out of approximately 250 (or three per cent of) television license renewals were challenged. [ ]

from his license to the service of the viewing and listening public; (4) diversification of ownership of mass media; and (5) independence from governmental influence in promoting First Amendment objectives.

While we suggested further that the Commission, in rule making proceedings, "clarify in both quantitative and qualitative terms what constitutes superior service," [ ], we did not intend that that suggestion be included in the court's mandate. The Commission at this time, pending acquisition of additional experience in this area, apparently prefers to proceed on a case-by-case basis in comparative renewal hearings to develop the criteria suggested by petitioners and by this court as appropriate for rule making. This court at this time will not require the Commission to proceed by rule making since that judgment is one basically for the Commission.

Are the five criteria helpful?

2. The next significant development in comparative renewal policy involved RKO General's license for KHJ, Channel 9 in Los Angeles. The examiner recommended denial of renewal and granting of the license to the challenger. He criticized KHJ's past programming, particularly its concentration on old films and its ignoring of community criticism of excessive violence in the movies. The Commission reversed the examiner and granted the renewal. In comparing the various factors, the Commission concluded that RKO's programming and community relations, though not "unusually good" or "superior," were also not "insubstantial" or "unusually poor." Thus the "record must be deemed to be within the bounds of average performance expected of all licensees" and warranted neither a merit nor a demerit. After reviewing all the factors the Commission concluded that the two applicants were essentially equal and that the outcome rested on a decision that "credit must be given in a comparative renewal proceeding, when the applicants are otherwise equal, for the value to the public in the continuation of the existing service."

The challenger's appeal was rejected, Fidelity Television, Inc. v. Federal Communications Comm'n, 515 F.2d 684 (D.C.Cir.) certiorari denied 423 U.S. 926 (1975). One ground of appeal concerned the Commission's refusal to consider programming proposals even though Fidelity proposed to offer 22 percent less entertainment and twice as much educational and news programming as KHJ. The court observed that the Commission's refusal to consider this on the ground that differences were only judgmental, might be questionable, but found that the refusal was also based on the defensible ground of the challenger's inadequate ascertainment. The court then upheld the determination that KHJ's performance was "average" because it was

not "bereft of the support of substantial evidence." The court stressed that this was not a situation in which a "superior applicant is denied a license because to give it to him would work a 'forfeiture' of his opponent's investment."

In this type of situation what is the value of incumbency? How does this relate to *Hearst*? Is the Commission's approach different from what it proposed in the 1970 Policy Statement?

3. During the early 1970's broadcasters sought legislation clarifying the position of licensees in the renewal process. Their reliance on the Commission had been shaken by their perception of the WHDH case and the Commission's efforts to reassure them failed when the Policy Statement was upset. The pressure on Congress was aimed mainly toward obtaining a renewal standard that avoided the comparative treatment for an incumbent that had generally been acceptable during the prior period. In 1974, the broadcasters nearly succeeded. Different bills passed the House, 379–14, and the Senate, 69–2, but a conference was never held because the Chairman of the House Interstate Commerce Committee refused to name conferees. He was angry because he believed the broadcasters had reneged on a deal by maneuvering on the floor of each house to raise the term of the license to five years from the Committee's proposed four years.

The concern about the length of the term was felt most strongly by smaller broadcasters who were hoping to avoid the paperwork and legal expenses that now occur every three years. These are also broadcasters who are not usually subject to challenges. The holders of licenses in the large urban areas cared more about the standards to be utilized in renewal cases and less about the length of the term. The result of the maneuvering was that neither group got anything.

Efforts in the next Congress were equally unsuccessful. Senate proponents insisted that the House had to act first because of what had happened in 1974. The idea failed to gain approval in the House in 1976.

The Chairman of the House Communications Subcommittee reported to a convention of the NAB that the data belied claims of renewal instability: only two licensees have lost stations as a result of petitions to deny (in Jackson, Mississippi, and the Alabama educational stations); only one station has ever lost its license in a comparative hearing (the "unique" WHDH case); only ten stations have been forced to renewal hearings as the result of petitions to deny; and the industry's renewal rate has been at least 99.19 percent over the last several years. See Broadcasting, Mar. 29, 1976, p. 34. Are these statistics altogether persuasive?

4. The contest between renewal applicant and challenger produced an extensive discussion of virtually the entire array of issues in

Cowles Florida Broadcasting, Inc., (WESH–TV), 60 F.C.C.2d 372, 37 R.R.2d 1487 (1976). The administrative law judge, in recommending renewal, characterized the renewal applicant's performance as "thoroughly acceptable." The Commission granted renewal 4–3, but the majority, after its own study of the record, concluded that the performance was "superior" and warranted renewal even though the challenger had gained advantages on several other issues, including diversification, integration, and minority participation. Although it gave "primary weight" to the renewal applicant's past performance, the Commission acknowledged that under Belo Broadcasting Corp., 47 F.C.C.2d 540, 30 R.R.2d 975 (1974), other comparative criteria from the 1965 Policy Statement must be considered.

One dissenter thought that the majority had distorted the record to find "superior" service. He thought it only "solid" and would have held that enough to justify renewal but felt constrained to dissent because the court of appeals had set a higher standard. Another dissenter followed much the same path and urged alternative licensing techniques such as lotteries and auctions.

In an order "clarifying" its earlier opinion, a majority of the Commission explained that its previous use of "superior" was not meant to suggest "exceptional when compared to other broadcast stations" in the area or elsewhere. Rather, the intention was to distinguish "between the two situations—one where the licensee has served the public interest but in the least permissible fashion still sufficient to be renewed in the absence of competing applications, and the other where the licensee has done so in a solid, favorable fashion." The licensee was said to be in the second group. Some observers thought this decision might afford broadcasters "the kind of security at renewal time that they had hoped to receive from legislation." Broadcasting, Jan. 10, 1977, p. 20. The losing applicant for the license has filed an appeal.

D. TRANSFERS OF LICENSES

In part because of the Commission's renewal policies, radio and television licenses have acquired substantial value. When a licensee decides to leave broadcasting altogether or to switch services or locations at the end of a license period, the licensee has no opportunity to reap profit. To reap profits, the licensee must seek renewal and, during the term, sell the facilities and goodwill and assign the license to a prospective buyer. In some ways this "transfer" procedure resembles the sale of any business, but the Commission's rules substantially affect the transaction. Other government agencies may also be

involved in transfers. Thus, the Commission's approval of a transfer does not foreclose efforts by the Department of Justice to upset the transaction because of violations of the antitrust laws. United States v. R.C.A., 358 U.S. 334 (1959).

Section 310(d) of the Communications Act requires the Commission to pass on all transfers and find that "the public interest, convenience, and necessity will be served thereby." The prospective transferee is to be treated as though it were making an application under § 308 for a permit or license. Section 310(d), however, also provides that in deciding whether the public interest would be served by the transfer the Commission "may not consider whether the public interest . . . might be served by the transfer . . . to a person other than the proposed transferee or assignee." Why might Congress have imposed this limitation?

When a transferee applies for its first full three-year term, should it be judged as an original applicant who must compete in a comparative hearing without any advantage of incumbency or as a renewal applicant? What are the justifications for each view?

Despite the possible objections to transfer applications, most are granted, usually with little or no delay. Thus, for example, in 1974, 369 radio stations involving $308 million and 24 television stations involving $119 million changed hands. Broadcasting, April 7, 1975, p. 55. This kind of turnover suggests a problem for the Commission. If licenses acquire substantial value a tendency may develop to build up stations and then sell them at a profit. Not only may this undermine the "public interest" philosophy; it may also render suspect the elaborate process of choosing licensees, including the comparative hearing, if the winner can turn around and sell the station to a competitor who meets the basic qualifications but who fared badly in the comparative hearing.

In an effort to meet this problem, the Commission has adopted regulations aimed at "trafficking" in licenses. 47 C.F.R. § 1.597 (1975). Specifically, except in the most unusual cases, it will schedule a hearing in every case in which a licensee proposes a transfer within the first three years after acquiring the license. § 1.597(a). Beyond that, the Commission may frown upon applicants who have a history of obtaining licenses only to transfer them—even beyond the three year period. The Commission examines these applications on a case-by-case basis.

Note on Format Changes

Until 1970, the foregoing summary would have covered most of the major problems related to transfers, but then the question of format change arose and it has plagued the courts and the Commission ever since. This problem, which so far occurs only in the context of

radio, arises when a prospective transferee proposes to change the station's distinctive programming format.

The first case arose when the sole classical music station in central Atlanta was about to be sold to a transferee that proposed a format of "a blend of popular favorites, Broadway hits, musical standards, and light classics." A survey showed that about 16 percent of the Atlanta population preferred the existing to the proposed format. The Commission decided that no hearing was required in the case and granted the transfer over objections of a citizen group. On appeal, the court held that a hearing was required to resolve several questions, including the financial losses of the present licensee and whether it served the public interest to deny 16 percent of the population their preferred radio service. Recognizing that majority rule might be appropriate if only one station were allocated to Atlanta, the court emphasized that several of the 20 stations already had a format like the one proposed. The Commission was required to consider the allocation of channels to achieve the "greatest good of the greatest number." Citizens Committee to Preserve the Voice of the Arts in Atlanta v. Federal Communications Comm'n, 436 F.2d 263 (D.C.Cir. 1970).

After several other cases, the Commission granted a transfer, without hearing, of a classical music station in Chicago. Citizens Committee to Save WEFM v. Federal Communication Comm'n, 506 F.2d 246 (D.C.Cir. 1974). The transferee planned to devote most of its time to "rock music." Five of the 61 radio stations serving the area already had rock formats. The Commission rejected a challenge on the ground that two other stations in the area programmed classical music so that this did not present the "unique format" issue of the Atlanta case. On appeal, the court en banc, reversed and spoke of the "disappearance of a distinctive format." It emphasized that under § 309(d)(2) a hearing must be held "if a substantial and material question of fact is presented" or if the Commission for any reason is unable to find that grant of the application would be consistent with "the public interest, convenience, and necessity." The majority found several questions that demanded a hearing, including whether a "fine arts" station was a substitute for WEFM and whether WEFM was losing money because of the format or for other reasons. The majority recognized the problem of labelling formats, observing that if two stations call themselves classical music stations but one emphasizes music of this century and the other rarely plays such music, "the loss of either would unquestionably lessen diversity in the area." The court also ruled that since the third classical station could be heard only in part of the area that can hear WEFM, it was not an adequate substitute.

The Commission had to consider whether the change would deprive some "significant segment of the public of the benefits of ra-

dio" and, if so, whether the public interest is served by approving the transfer. The court could not believe that Congress, when it decided to grant licenses at no charge rather than put them up for bids, intended the Commission to allow unpoliced competition without regard to diversity:

> There is, in the familiar sense, no free market in radio entertainment because over-the-air broadcasters do not deal directly with their listeners. They derive their revenue from the sale of advertising time. More time may be sold, and at higher rates, by a station that has a larger *or* a demographically more desirable audience for advertisers. Broadcasters therefore find it to their interest to appeal, through their entertainment format, to the particular audience that will enable them to maximize advertising revenues. If advertisers on the whole prefer to reach an audience of a certain type, e. g., young adults with their larger discretionary incomes, then broadcasters, left entirely to themselves by the FCC, would shape their programming to the tastes of that segment of the public.
>
> This is inherently inconsistent with "secur[ing] the maximum benefits of radio to all the people of the United States," and not a situation that we can square with the statute as construed by the Supreme Court. We think it axiomatic that preservation of a format [that] would otherwise disappear, although economically and technologically viable and preferred by a significant number of listeners, is generally in the public interest. There may well be situations in which that is not the case for reasons within the discretion of the FCC to consider, but a policy of mechanistic deference to "competition" in entertainment program format will not focus the FCC's attention on the necessity to discern such reasons before allowing diversity, serving the public interest because it serves more of the public, to disappear from the airwaves.

The Commission has responded to the court's mandate by deciding that its current policies will produce program diversity and that "practical considerations with constitutional overtones" necessitate a decision to "refrain from the detailed supervision of entertainment formats which the Court of Appeals holds to be a part of the Commission's statutory responsibilities." Entertainment Formats of Broadcast Stations, 60 F.C.C.2d 858, 37 R.R.2d 1679 (1976). The opinion, which indicates that the Commission will carry out the mandate in the WEFM case, includes an appendix detailing the variety of radio formats in the 25 largest markets. Several groups have filed appeals.

How would you resolve this perplexing question?

Chapter VII

LEGAL CONTROL OF BROADCAST PROGRAMMING —SOURCES AND CONTENT

Although we have already considered a few issues in regulating substantive content of broadcasting, in this Chapter we are concerned primarily with that aspect of regulation. The Commission has long been concerned, at least indirectly, with content. Indeed, in licensing we have seen that it believed local control would enhance program content. It limited concentration of ownership in part to achieve diverse programming. The policy has been to support indirect techniques for achieving diverse programming with the hope that "better" programs would result.

Sometimes, the Commission has attempted more directly to influence, but not control, program content. In the first section, we consider one actual demand, ordering licensees not to take programming from networks at certain times—and one possible step, that of ordering licensees to allow outsiders to have access to the microphone. We then consider another way of regulating content indirectly: requiring the licensee who programs certain types of material to program certain responsive material, specifically the Fairness Doctrine and the equal opportunities provision. In both situations one question will be whether the licensee may avoid a controversial subject completely or whether these obligations constitute subtle direct control. Finally, we turn to direct forms of control in which the Commission or the Congress has barred the broadcast of certain content.

Aside from these special regulations, broadcasters generally have the same rights and responsibilities as those discussed in Chapters III and IV for media generally.

A. CONTROL OF SOURCES OF PROGRAMS

1. The Prime Time Access Rule

In this section we trace a development that has both academic and practical interest, as we consider how the Federal Communications Commission has used its rule making and waiver power to deal with the problem of network control over evening programming. The effort to diversify ownership of broadcasting facilities did not

alter programming extensively because network affiliation was not affected. The Commission then began to deal directly with control of programming. Among other things, the episode reveals the struggle for control of early evening programming since 1970 and explains the move toward game shows during those hours.

In 1965, the Commission issued a notice of proposed rulemaking in which it sought, among other things, to limit the networks' control over programming during prime time. After extensive comments and hearings, the Commission decided in 1970 to adopt a rule providing that after Sept. 1, 1971,

> . . . no television station, assigned to any of the top 50 markets in which there are three or more operating commercial television stations, shall broadcast network programs offered by any television network or networks for a total of more than 3 hours per day between the hours of 7 p. m. and 11 p. m. local time, except that in the Central time zone the relevant period shall be between the hours of 6 p. m. and 10 p. m.

Competition and Responsibility in Network Television Broadcasting, 23 F.C.C.2d 382, 18 R.R.2d 1825 (1970). This prime time access rule (PTAR I) exempted fast-breaking news events, on-the-spot coverage of news events, and political broadcasts by candidates.

The Commission presented several reasons for its action. Primarily, it was concerned that during the 1960's the number of first-run syndicated entertainment series had fallen. The role of "off-network" entertainment series (programs that had been on the networks earlier and were now being syndicated to other stations) had grown enormously, as had the role of the networks in preparing new programs. Even among independent stations, "which should be the backbone of the syndication market," first-run syndications were being replaced by off-network programs. Only 14 of the top 50 markets had at least one independent VHF station.

Finally, the financial involvement of the networks in evening programming had doubled during the 1960's, and the independently produced programs had fallen by 90 percent. The Commission deplored this "unhealthy situation" and asserted that the new rule would provide a "healthy impetus to the development of independent program sources, with concomitant benefits in an increased supply of programs for independent (and, indeed, affiliated) stations. The entire development of UHF should be benefited." The Commission then turned to a major argument from opponents:

> 24. It is urged upon us that the absence of prime time syndicated programing is a function of the economics of television program production. It is argued at length, and much data is submitted in support of the contention—particularly by CBS and

> NBC—that production costs and financial risk involved in production of quality prime time programs are so great that no producer can afford to engage in their production for syndication. There is sharp disagreement in the record before us on this score. Westinghouse and others say that given reasonable access to top rated evening time in the top 50 markets, program producers—both present and potential—can and will supply programs for the syndication market reasonably competitive with network prime time offerings. There appears to be no compelling reason to conclude that they could not and would not do so. There is no doubt that network television program costs have increased in the past 10 years. But we do not think that such increased costs are necessarily a bar to successful production for television syndication. It is familiar doctrine that dollar costs in television are not as crucial to economic success as are the costs an advertiser must incur to place his message before his prospective customers. A higher dollar cost to reach a larger audience is acceptable to most advertisers. He gauges his cost efficiency on the cost of reaching a thousand homes with his commercial message. The result is that the program cost which would be prohibitive in low-rated time will be quite acceptable in high-rated time with its larger audience. This is the rationale of the [underlying] proposal. The matter cannot be determined with absolute certainty short of some operational experience under competitive conditions. The likelihood that independent production will succeed is sufficiently great, in our judgment, that it should be given an opportunity. The rule can readily be changed or rescinded if it fails to achieve its purpose.

The Commission also adopted rules "designed to eliminate the networks from distribution and profit-sharing in domestic syndication and to restrict their activities in foreign markets to distribution of programs of which they are the sole producers." This was the Commission's first direct regulation of networks: previously it had reached networks through regulating licensees. These restrictions were defended on the ground that networks had a conflict of interest in choosing programs. Independent producers who sought to exhibit their products on a network had to bargain with the networks, who were their "principal competitors in syndication and foreign sales." The Commission concluded that "networks do not normally accept new, untried packager-licensed programs for network exhibition unless the producer/packager is willing to cede a large part of the valuable rights and interests in subsidiary rights to the program to the network."

Two commissioners dissented from the prime time rule, on the ground that it would not produce quality programs because an in-

dependent producer had no assurance that its program would be selected by enough stations in large markets to make quality programs worthwhile. They argued that the Commission should encourage the development of more outlets so that broadcasters would not program only for mass audiences.

A constitutional and statutory challenge to the rules was rejected in Mt. Mansfield Television, Inc. v. Federal Communications Comm'n 442 F.2d 470 (2d Cir. 1970). The court relied on *Red Lion's* observations that the peculiar qualities of each medium must be considered in deciding the application of the First Amendment. It also quoted from cases, such as Associated Press v. United States, p. 100, supra, that stressed the virtues of "the widest possible dissemination of information from diverse and antagonistic sources," and observed:

> When viewed in the light of these principles, the prime time access rule, far from violating the First Amendment, appears to be a reasonable step toward fulfillment of its fundamental precepts, for it is the stated purpose of that rule to encourage the "[d]iversity of programs and development of diverse and antagonistic sources of program service" and to correct a situation where "[o]nly three organizations control access to the crucial prime time evening television schedule." The specific arguments raised by the petitions reflect basic misconceptions of that purpose and of the First Amendment principles outlined above.
>
> For example, petitioner Columbia Broadcasting System, Inc. attempts an analogy between the prime time access rule and an imaginary governmental edict prohibiting newspapers in the 50 largest cities from devoting more than a given portion of their news space to items taken from national news services. This analogy completely overlooks the essential fact that "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Red Lion Broadcasting Co., Inc.*, supra 395 U.S. at 388.
>
> To argue that the freedom of networks to distribute and licensees to select programming is limited by the prime time access rule, and that the First Amendment is thereby violated, is to reverse the mandated priorities which subordinate these interests to the public's right of access. The licensee is in many ways a "trustee" for the public in the operation of his channel. The prime time access rule is intended to promote "the widest possible dissemination from diverse and antagonistic sources . . . ." *Associated Press*, supra 326 U.S. at 20. The evidence demonstrates that despite the fairly wide range of choice

> available to licensees, they have consistently decided to limit themselves to one program source during prime time. Thus, while the rule may well impose a very real restraint on licensees in that they will not be able to choose, for the specified time period, the programs which *they* might wish, as a practical matter the rule is designed to open up the media to those whom the First Amendment primarily protects—the general public. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press*, supra at 20.

The Court found statutory authority to promulgate PTAR I in the power of the Commission to regulate in the public interest, citing *National Broadcasting Co.*, p. 487, supra. It also upheld the Commission's adoption of the syndication and financial interest rules, the first direct regulation of networks (rather than regulating licensees of stations), as within the Commission's statutory power because they were "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." 442 F.2d at 481.

The Commission considered requests for waiver of the off-network provisions of PTAR I. This permitted certain off-network programs to be presented during prime time without being counted toward the permissible three hours of network and off-network material each evening. What considerations might lead the Commission to grant waivers for "Wild Kingdom," "National Geographic," "Six Wives of Henry VIII," and "Animal World," but to deny waivers to "Lassie" and "Hogan's Heroes"?

In October, 1972, the Commission issued a Notice of Inquiry and Notice of Proposed Rule Making in which it announced its intention to consider whether to modify or repeal PTAR I. In November 1973, the Commission adopted PTAR II, which modified PTAR I in several ways. The major change was to eliminate access time altogether on Sunday evenings and reduce it to one half-hour other evenings.

In Nat'l Ass'n of Independent Television Producers & Distributors v. Federal Communications Comm'n, 502 F.2d 249 (2d Cir. 1974), the court held that the effective date of PTAR II, giving only eight months' warning, was unreasonably short. The reduction of total access time from 14 half-hours to six or fewer per week and the change from one-hour to half-hour access periods would cause economic harm to independent producers of television programming who would not have adequate time to withdraw programs being produced in reliance on PTAR I. Lower quality television programs were anticipated since PTAR II did not provide the twelve to eighteen-month lead

time necessary for network program planning. The court also suggested that "[t]he Commission may choose to utilize the additional time available to it to reconsider its changes in the rule."

In January, 1975 the Commission adopted PTAR III, effective September, 1975. The provisions are similar to PTAR I, covering one hour per night, except for certain exemptions that reflect waivers regularly granted under PTAR I and new provisions for the use of feature films. Exemptions cover network or off-network "public affairs" programming, documentaries, and programs designed for children. The Commission also noted that it expected "that stations subject to the rule will devote an appropriate portion of 'cleared time' or at least of total prime time to material particularly directed to the needs or problems of the station's community . . ., including programming addressed to the special needs of minority groups." 50 F.C.C.2d at 852, 32 R.R.2d at 722.

It reaffirmed its view that the rule lessens network dominance by releasing a portion of prime time for licensees of individual stations to use to respond to their respective communities and by encouraging a new body of syndicated programming. It also denied that the rule leads to lack of diversity and to low quality programs, arguing that the rule had not yet been fully tested. Although the Justice Department argued that to assure stability the Commission should guarantee that PTAR III would remain in effect at least five years, the Commission refused to do so.

Three commissioners filed separate concurring statements. Each expressed reservations as to whether the Prime Time Access Rule was in the public interest, but concluded that the rule had not yet been fully tested. Commissioner Robinson filed a strong dissent.

IN THE MATTER OF CONSIDERATION OF THE OPERATION OF, AND POSSIBLE CHANGES IN, THE PRIME TIME ACCESS RULE, § 73.658(k) OF THE COMMISSION'S RULES.

(Docket 19622)

SECOND REPORT AND ORDER

Federal Communications Commission, 1975.
50 F.C.C.2d 829, 889, 32 R.R.2d 697, 724.

DISSENTING STATEMENT OF COMMISSIONER GLEN O. ROBINSON

I. INTRODUCTION

The central concern which is addressed by the prime time access rule is "network dominance." The Commission's continued struggle with "network dominance" has been an adventure fully worthy of Don Quixote. Since the 1930's when the Commission first sallied

forth in quest of a remedy for this evil—the initial result of which was the first "chain broadcasting" rules in 1941 [1]—the Commission has doggedly pursued this aim of cutting down the networks' power. The intent has been noble, but the results have left the Commission, like its famous precursor, with a doleful countenance. . . .

. . .

. . . The access rule is retained—but so too are most of the waivers—in the form of permanent exceptions—for "special" network programs (primarily public affairs, documentaries and children's programs). There appears to be no recognition that each part of the modified rule undercuts the other. Access is good, but it does not produce the kind of programming which we like so we have to provide the opportunity for such programming; we like such programming but if we see too much of it we see it as evidence of "network dominance" since it can only be supplied by network brokers.

. . .

The prime time access rule, as originally promulgated, was intended to serve several, interrelated objectives that can, I think, be fairly summarized as follows: (1) to reduce network "dominance" over programming decisions, (2) to provide market opportunities to new creative talent which were presumed to be foreclosed by the network triopoly, (3) to re-establish local control of programming decisions which were presumed to have been increasingly appropriated by the networks (an increase in local programming was mentioned only incidentally as a benefit in the original order; however, it has since become an important rationale of the rule), and (4) to increase the supply of first-run syndicated programming. The objectives stated in the Commission's present decision are essentially the same though (as in the 1970 decision) they are not described precisely in the same terms.

II. The Concept of Network Dominance

Throughout this proceeding and predecessor proceedings, the phrase "network dominance" has been repeatedly invoked in justification of a prime time rule. But this phrase is rarely defined, nor has anyone convincingly shown how the purported evils of "network dominance" are to be overcome simply by prohibiting the three national network companies from programming more than three prime time hours nightly.

Presumably, network dominance refers to the power which three national brokers of local station time and national programming have in selecting the nation's television program menu. In general, pro-

1. These rules are, of course, essentially still in effect and are now applicable to television as well as radio. 47 C.F.R. 73.131–.138; 73.231–.238; 73.658.

gram suppliers must deal with one of these three network companies or forego national distribution of their product. This limited number of potential buyers, it is asserted, presents the real threat of arbitrariness in program selection and the denial of access to program suppliers with new ideas. A second form of "network dominance" which emerges in the discussion of the rule is the ability of networks to persuade local affiliates to clear time for network programming. As networks expand their activities to new day parts, they progressively pre-empt the local station's ability to make its own program choices. The rule would return this choice to the stations, if for only one hour per day.

Unfortunately, there appears to be only a limited understanding that the chief cause of "network dominance," making inevitable some form of network power, derives from the Commission's own television frequency allocations. There are but three national networks for one important reason—our allocations policy has dispersed VHF station allocations so as to allow most households to receive no more than three. With only three competitive stations in markets comprising two-thirds of the nation's television households, there can be no more than three brokers for any given hour of national broadcasting. It is a basic economic fact that, with a few exceptions, programs receiving less than national exposure cannot hope to compete for audiences with those achieving network distribution. If network distribution were not national, program budgets would have to be much lower per dollar of advertising generated. Network distribution allows the most efficient use of television advertising revenues in the stimulation of program production.

A network is more than a mere broker of station time. It is also an investor in programming. By agreeing in advance to commit its local affiliates to a given program series, and by guaranteeing program suppliers a sum certain (in the form of a license fee) for a number of programs well in advance of exhibition, the network makes possible the investment of $250,000 or more per hour of entertainment fare. Without this "preselling," producers would not commit themselves to such program budgets.

To the extent that the Commission laments the decline in station program selection and the growth of "network dominance" in this process, it laments the development of efficient program brokerage. In this sense, what has been obtained from the prime time access rule is just what should have been expected: a fragmented array of low-cost, low-quality programs offered to local stations directly by producers without the intervention of a broker. Enormous energies and expenses are required in this distribution process—expenses which are diverted directly from program budgets.

As time passes, it may be possible for program brokers to develop for just the access period. If this were to happen, however, we would be no closer to the goals which the majority hopes to attain than we were with PTAR I or II. Since market forces would distill no more than three such brokers from the set of current program distributors, the *best* that can be realistically hoped for is the development of a new triopoly, which would "dominate" the access period. Unfortunately, this optimum is likely to be difficult to accomplish if there are any scale economies in performing network brokerage. A mere seven hours per week may not be sufficient to make efficient use of the personnel required to establish and enforce affiliate contracts, negotiate for program rights, select and schedule new program series and perform various research functions. The result may well be that a much greater share of the revenues for this period will be diverted to these brokerage functions than is true for the three existing networks.

At some point it is necessary to submit to the limitations of the real world. Although we would have it otherwise, the fact that there are only three station outlets limits us to three brokers of television programs at any given hour. As a result, program decisions will be virtually the same as those currently made by the three national network firms, reflecting the tastes of the mass audience.

. . .

It could be argued that increasing the number of brokers of programs for prime time from three to six, by limiting the existing three to no more than three hours, is a major improvement, because then program suppliers can turn to six rather than three potential buyers. I do not think that this state of affairs would constitute any significant improvement. The same economic forces apply to each set of three brokers seeking to fill a given period with programming opposite only two rivals. . . .

. . .

IV. Local Station Programming Responsibility

The Commission has always sought to encourage local station responsibility for program material and its selection. It was for this reason that various forms of "option time," allowing networks to mandate a number of hours of prime time without giving the local station the option to carry or reject the programming, were prohibited in 1963. That same aim of promoting greater station freedom in choosing programs is inherent in the present access rule.

For entertainment programming, and for most high quality programming other than local news, the goal of local station responsibility for programming in typical prime-time hours is as a practical mat-

ter difficult to achieve. Such programs are not produced for a local, but rather for a national market. . . .

The Commission seems virtually to admit as much in creating a broad exemption from the access rule for "special" network programs —most notably children's programs, documentaries and public affairs programs. Thus, on the one hand the Commission applauds the freedom given local stations by the access period, but on the other hand it acknowledges that this compulsory freedom has killed (or, without repeated waivers, would have killed) high quality programming. So the Commission engineers a number of permanent exceptions to the rule so that we can continue to enjoy high quality programming—of the kind which we like.[26] . . .

. . .

The access rule has lowered program quality so much that individual station managers have been less reluctant to offer local programs opposite the access shows than they would be to pre-empt a network show opposite two other network programs. The audience loss is simply smaller for these examples of public-service broadcasting than it would be in the absence of the rule. In short, to the extent that the rule has encouraged greater local-station responsibility over programming, it has done so because the array of nationally-distributed programs has been of very low quality. Continuing to guarantee local station licensees low-quality competition on rival stations in order to induce them to fulfill their responsibility to broadcast in the public interest is an unacceptable strategy. The Commission ought to be able to design a better method of enforcing licensees' obligations to the public.

. . .

VI. The Choices Faced by the Commission

. . . .

One alternative for reducing "network dominance" without affecting network power over the price of programs or advertising messages and without affecting program decisions, is simply to divide the broadcast day into several segments, separate but equal. The

26. I note the seeming contradiction between the Commission's statement on the one hand, that it is unable to make a judgment on the quality of game shows and other access programs, and on the other hand its creation of an exemption for "public affairs," "documentaries" and "children's programs." This paradox simply mirrors and carries forward a larger paradox: the tension between the Commission's expressed concern that we not allow our own programming preferences to dictate the nature of the rule, as contrasted with the obvious fact that having the rule in the first place substitutes our choice for public choice in television programming.

Commission is beginning such a division with the access rule, but it is not striving for equality in the segments. This seems to betray less than a full conviction in the logic of its decision. If we really want to cut the prime time market into separate segments, why not divide prime time into two equal two-hour periods, allowing an individual network broker to program only one of these segments? Or—indeed—why not extend the division into other day parts so as perhaps to create three or four sets of brokers during different program hours? Of course, such a division would literally increase the number of network organizations and, thus, reduce "network dominance" but it would have little other effect. Program suppliers could seek to vend their wares in six or nine offices rather than in three, but the number of programming hours and the economics of program selection would be unchanged. The producer with a show designed to delight ten percent of the audience would encounter six or nine closed doors, not three. It is important, however, that the division of the broadcast day be effected in such a manner as to give each network a fairly large number of weekly program hours. . . .

. . .

If we wish to commit ourselves seriously to reducing "network dominance," I believe we have to focus our attention on the basic source of the problem: the limited number of economically competitive television stations in each market. What is wanted is a means to increase the number of stations. One step in this direction—a limited one—might be VHF drop-ins. Alternatively (or additionally), some form of deintermixture—by community or region—might be undertaken in order to strengthen UHF and thereby to permit an increase in station outlets. I am well aware that both drop-ins and deintermixture are not simple, easy solutions. Both have drawbacks and limitations.[33] Perhaps the most important liability is political; in fact memory of the warfare that these measures produced in the late 1950's and early 1960's makes me hesitate even to suggest them. However, I see no other less controversial solutions. Cable could of-

33. Drop-ins would provide an incomplete solution since the number of drop-ins that has so far been considered as technically feasible would fall short of the number necessary to support a fourth network. See Basen and Hanley, *Market Size, VHF Allocations and the Viability of Television Stations* (unpublished manuscript, September 1974). In the case of deintermixture the chief drawback is the relative inferiority of UHF—essentially a function of two things: the added cost of providing service coverage commensurate to VHF, and the inadequate technical capability of present receivers. See Corporation for Public Broadcasting, *A Quantitative Comparison of the Relative Performance of VHF and Broadcast Systems* Tech. Mono. 1 (1974). However, the first problem would be minimized if competition with VHF were eliminated in particular markets, and the second problem would probably disappear if a substantial number of UHF-only markets were created, creating a substantial economic incentive for set manufacturers to correct the problem.

fer a competitive solution. But, of course, the growth and development of cable is currently as controversial as drop-ins or deintermixture, and the Commission's refusal to permit freer development of cable, and particularly its refusal to liberate pay cable from what I think are unwarranted fetters, has for now virtually foreclosed this competitive option in the same way that its allocations decisions have limited intra-broadcast competition.

Unless the Commission confronts the issue of network *economic power* head-on, it will simply sit as a constant arbitrator among groups competing for the scarcity rents which it has created by its allocations plan and the current access rule. The Commission should not be forced to determine how these rents should be divided between large Hollywood motion picture companies and smaller purveyors of game shows. Rather, it should carry out its authority to increase competitive outlets in a manner which prevents the development of monopoly power. If it is unwilling to do this, it should simply return to the *status quo ante*, allowing the three national network companies to program as much or as little of the prime-time period as they wish. This last is obviously the most realistic option at this point; and in light of the past few years' experience, together with what I believe are the demonstrable facts of economic life, I think the Commission should embrace it.

Notes and Questions

1. Another challenge followed. In Nat'l Ass'n of Independent Television Producers & Distributors v. Federal Communications Comm'n, 516 F.2d 526 (2d Cir. 1975), the court generally upheld PTAR III, but remanded to the Commission for reconsideration of several aspects of the rule. The Commission responded and PTAR III became effective in September, 1975.

2. Given the effects on programming diversity of the economics of station allocation and control, a close relationship exists between the concerns expressed in the Multiple Ownership Rules, the Prime Time Access Rules, and the search for feasible alternative structures. If a greater number of viewing options were available in each market, there would be an economic incentive for broadcasters to try to satisfy the strong tastes of smaller groups rather than to fight each other for a share of the mass audience.

3. Even with the existing configuration of station allocation and ownership, evidence suggests that the Prime Time Access Rule does not achieve its primary goals; the Commission's own economist rejected the value of the rule in reducing network dominance. (Final Report, "The Economic Consequences of the Federal Communications Commission's Prime-Time Access Rule on the Broadcasting and Pro-

duction Industries" (September, 1973)). In the case reviewing PTAR III, the court observed with respect to the prime time rules:

> The result has been, as could have been expected to some degree, that it is largely the cheaper productions, daytime fare, that have been put into cleared prime time slots. What was not anticipated by the Commission was the monotony of the product. A kind of Gresham's law seems to operate in first-run syndication—the cheaper tending to drive the dearer out of circulation. The fact is, as the Commission concedes, that the degree of diversity in programming for access time has been disappointing. In the entertainment area, the emphasis has largely been on game shows and animal shows, game shows constituting 41.9% of the 2,100 access half hours on 150 stations in one season. [ ] Comedies, dramas, and Westerns in access time have dropped significantly. Comedy has been virtually eliminated. The Commission notes a similar lack of diversity, however, with respect to the three networks themselves which all show a crime drama at the same hour in prime time, also giving the viewer no choice.
>
> On the other hand, as the Commission found, and as the public *amici* stress, programs of local interest, on matters of concern to the people served by local stations, have begun to obtain a foothold on commercial stations in the access time period. One may assume that in the long run game shows will pall to some extent and that independent producers will have to turn to more variegated fare if they wish to survive, but any prophecy on public taste, certainly by judges, would be hazardous indeed.

4. What kind of programming would you expect if a monopolist had full control over all three networks during prime time? How might that programming compare with what might happen if we all could receive programs supplied over six national networks?

After concluding that the Commission's emphasis on localism was yielding very few benefits, one group of authors has proposed a six-channel nationwide system operating on VHF: such a system "would have been profitable and less costly to the economy than the present system of local stations. And viewers would have six rather than three networks to choose among." R. Noll, M. Peck and J. McGowan, Economic Aspects of Television Regulation 108–20 (1973). The analysis is questioned in Besen and Mitchell, Book Review, 5 Bell J. of Econ. and Management Science 301, 313–14 (1974).

5. Under PTAR I, the Commission had to pass upon waivers for specific network programs, said to be in the public interest, that would preempt access time. As noted, these *ad hoc* decisions gave

rise to contentions that the Commission was regulating program content in violation of the First Amendment. In PTAR III the Commission attempted to define categories reflecting waivers granted under PTAR I that justified intrusion by network programs into access time without recourse to the waiver procedure. This led to a major constitutional challenge to PTAR III. The court considered the problem at some length (516 F.2d at 536–38):

> . . . Recognizing that the practical situation did permit the release of some time slots in access time, the Commission did not go all the way. Instead, it used the idea of opening time slots which appeared freeable, as bait to the stations to use, but only for program categories believed to be in the "public interest."
>
> This is said to be in violation of the First Amendment. It is true that the Commission has never before considered what types of program may be played at particular times. And it may be that *mandatory* programming by the Commission even in categories would raise serious First Amendment questions. On the other hand, the general power of the F.C.C. to interest itself in the kinds of programs broadcast by licensees has consistently been sustained by the courts against arguments that the supervisory power violates the First Amendment. [ ]
>
> . . .
>
> The only way that broadcasters can operate in the "public interest" is by broadcasting programs that meet somebody's view of what is in the "public interest." That can scarcely be determined by the broadcaster himself, for he is in an obvious conflict of interest. "There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all." Red Lion, supra, 395 U.S. at 392. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." Id. at 390.
>
> Since the public cannot through a million stifled yawns convey that their television fare, as a whole, is not in their interest, the Congress has made the F.C.C. the guardian of that public interest. All that the Commission can do about it is to encourage competitive fare. If a large segment of the public prefers game shows to documentaries, the Commission can hardly do more than admit paradoxically that taste *is* a matter for dispute. The Commission surely cannot do its job, however, without interesting itself in general program format and the kinds of programs broadcast by licensees. . . .
>
> The Commission by this amendment of the rule is not ordering any program or even any type of program to be broadcast in

> access time. It has simply lifted a restriction on network programs if the licensee chooses to avail himself of such network programs in specified categories of programming. . . .
>
> . . .
>
> . . . The Commission has not used the carrot-and-stick approach. The newly exempted categories are more a function of the time factor than of editorial policy. The Commission realized that by cutting the networks to three rather than four hours of prime time through PTAR I, it had limited the diversity of programs that could be played in that more restricted prime time. What naturally fell by the wayside during prime time were the less commercially attractive programs including programs for children, documentary films and public affairs presentations.
>
> It is suggested that the Commission should have elected to force the stations to carve out *network* prime time for these programs. Whether or not the Commission could have done this—a course that would doubtless have evoked constitutional protests from the networks—it is not for this court to say. Nor is it for this court to say that the Commission had, in any event, no right to choose between reasonable alternatives.

At one point the court says that the Commission was using the open slots as "bait." Yet, elsewhere the court says that the Commission "has not used the carrot-and-stick approach." Can both statements be right? Does the use of such enticement raise constitutional questions? Can a valid distinction be drawn between program categories used at license renewal time and their use in the access area?

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2. The Public Forum and Access to Broadcasting

The prime time access rule indirectly controlled content by forbidding a licensee to use certain sources for programs at certain hours. A second, and related, technique would be to require licensees to obtain some portion of their programming from specified sources. Congress and the Commission have already done precisely that, but only after the licensee has previously presented programming to which response was thought appropriate. The Personal Attack Rules, challenged in *Red Lion*, required the licensee to allow an identified person or group to have access to the microphone, and Congress has included a similar requirement in political campaigns, which we shall soon consider in detail.

The most significant effort to force broadcasters to allow persons or groups to initiate programming whose content was not within the

control of the licensee occurred in Columbia Broadcasting System, Inc. v. Democratic National Committee, discussed at p. 510, supra. As you will recall, two groups wished to place commercials but were rebuffed by the licensees. The Commission refused to order the stations to accept all comers. The DNC and BEM thus could claim only that they had a First Amendment right to access to the microphone that was being abridged by some government action. Their claim that the broadcaster's action amounted to government action fragmented the Court. Three justices met it head on and rejected it. They were concerned that the "concept of journalistic independence could not co-exist with a reading of the challenged conduct of the licensee as government action" because a government medium could not exercise editorial judgment as to what content should be carried or excluded.

The three observed, however, that even if the First Amendment applied to this case, the groups were not entitled to access. Here, they relied on Meiklejohn's theme that the essential point was "not that everyone shall speak, but that everything worth saying shall be said." Congress and the Commission might reasonably conclude that "the allocation of journalistic priorities should be concentrated on the licensee rather than diffused among many. This policy gives the public some assurance that the broadcaster will be answerable if he fails to meet its legitimate needs. No such accountability attaches to the private individual. . . ."

Three other justices agreed that even if government action were involved in the case, there was no violation of the groups' rights under the First Amendment. They therefore refused to pass on the question of government involvement.

Justice Douglas, concurring, did not decide the question. He noted that if a licensee were to be considered a federal agency it would "within limits of its time be bound to disseminate all views." If a licensee was not considered a federal agency "I fail to see how constitutionally we can treat TV and radio differently than we treat newspapers." He agreed that "The Commission has a duty to encourage a multitude of voices but only in a limited way, viz., by preventing monopolistic practices and by promoting technological developments that will open up new channels. But censorship or editing or the screening by Government of what licensees may broadcast goes against the grain of the First Amendment."

In dissent Justice Brennan, with whom Justice Marshall concurred, disagreed:

> Thus, given the confluence of these various indicia of "governmental action"—including the public nature of the airwaves, the governmentally created preferred status of broadcasters, the

> extensive Government regulation of broadcast programming, and the specific governmental approval of the challenged policy—I can only conclude that the Government "has so far insinuated itself into a position" of participation in this policy that the absolute refusal of broadcast licensees to sell air time to groups or individuals wishing to speak out on controversial issues of public importance must be subjected to the restraints of the First Amendment.

The dissenters then concluded that the absolute refusal did violate the First Amendment. "The retention of such *absolute* control in the hands of a few Government licensees is inimical to the First Amendment, for vigorous, free debate can be attained only when members of the public have *some* opportunity to take the initiative and editorial control into their own hands." The emergence of broadcasting as "the public's prime source of information," has "made the soapbox orator and the leafleteer virtually obsolete."

The case, however, indicates only that the Constitution does not create a right of access to broadcasting. It does not address the question whether Congress might enact a statute requiring broadcasters as a condition of their licenses to give a certain period of time per day or week to members of the public. How might those who wish to speak be selected? Would such a statute be valid? Might the Commission issue a rule to the same effect? Even if such a statute or rule would be constitutional, would it be sound? What does this controversy say about the "agenda-setting" role of media?

In the DNC–BEM case much of the majority's approach was based on the power to enforce the broadcaster's responsibility to program in the public interest because of the two prongs of the Fairness Doctrine. It is ironic that the Fairness Doctrine, resisted by the broadcasters in *Red Lion*, also shields them from having to give unlimited access to their broadcasting facilities. As a broadcaster, which would you find a greater interference with your freedom—the Fairness Doctrine or a rule requiring you to give some persons or groups access to your facilities?

B. THE FAIRNESS DOCTRINE

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1. In General

Beginning with *Red Lion*, p. 495, supra, and at several points during the licensing discussion, we have had occasion to note the existence of, and to consider aspects of, the Commission-created Fairness Doctrine. We now consider the doctrine itself.

The Commission has been concerned with fairness and the exposure of varying views since its earliest days. Indeed, the Radio Commission in 1928 indicated as much in a discussion of the implications of the limited spectrum. It observed that there was not room "for every school of thought, religious, political, social, and economic, each to have its separate broadcasting station, its mouthpiece in the ether." Such ideas "must find their way into the market of ideas by the existing public-service stations, and if they are of sufficient importance to the listening public the microphone will undoubtedly be available. If it is not, a well-founded complaint will receive the careful consideration of the commission in its future action with reference to the station complained of." Great Lakes Broadcasting Co., 3 F.R.C.Ann.Rep. 32 (1929), modified on other grounds, 37 F.2d 993 (D.C.Cir.) certiorari dismissed, 281 U.S. 706 (1930). The doctrine evolved through case law until it became the subject of a major report in 1949. In 1959, it was mentioned in a statute for the first time when § 315 was amended. In 1974, the Commission undertook a general review of the entire Fairness Doctrine in a single report. We first consider that report and then single out for discussion the major points raised and developments since 1974.

IN THE MATTER OF

THE HANDLING OF PUBLIC ISSUES UNDER THE FAIRNESS DOCTRINE AND THE PUBLIC INTEREST STANDARDS OF THE COMMUNICATIONS ACT

(FAIRNESS REPORT)

Federal Communications Commission, 1974.
48 F.C.C.2d 1, 30 R.R.2d 1261.

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A SEPARATE STATEMENT; COMMISSIONER QUELLO CONCURRING AND ISSUING A SEPARATE STATEMENT.

[The Commission first restated its commitment to the goal of "uninhibited, robust, wide open" debate on public issues and the need to recognize that achievement of this goal must be compatible with the public interest in "the larger and more effective use of radio" § 303(g). This included the fact that "ours is a commercially-based broadcast system" and that the Commission's policies "should be consistent with the maintenance and growth of that system." The Commission then quoted a critical passage from its Report on Editorializ-

ing, 13 F.C.C. 1246, 1249 (1949), in which the Fairness Doctrine was formally announced:

> It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day. . . . The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community. It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

The 1974 Report stressed that two basic duties were involved: "(1) the broadcaster must devote a reasonable percentage of time to the coverage of public issues; and (2) his coverage of these issues must be fair in the sense that it provides an opportunity for the presentation of contrasting points of view." The Commission also noted that in 1970 it had described the two parts of the Fairness Doctrine "as the single most important requirement of operation in the public interest—the *sine qua non* for grant of a renewal of license." The Commission denied that imposition of these two duties could be inhibiting:

> 18. In evaluating the possible inhibitory effect of the fairness doctrine, it is appropriate to consider the specifics of the doctrine and the procedures employed by the Commission in implementing it. When a licensee presents one side of a controversial issue, he is not required to provide a forum for opposing views on that same program or series of programs. He is simply expected to make a provision for the opposing views in his *overall programming*. Further, there is no requirement that any precisely equal balance of views be achieved, and all matters concerning the particular opposing views to be presented and the appropriate spokesmen and format for their presentation are left to the licensee's discretion subject only to a standard of reasonableness and good faith.
>
> 19. As a matter of general procedure, we do not monitor broadcasts for possible violations, but act on the basis of com-

plaints received from interested citizens. These complaints are not forwarded to the licensee for his comments unless they present *prima facie* evidence of a violation. Allen C. Phelps, 21 FCC2d 12 (1969). Thus, broadcasters are not burdened with the task of answering idle or capricious complaints. By way of illustration, the Commission received some 2,400 fairness complaints in fiscal 1973, only 94 of which were forwarded to licensees for their comments.

20. While there may be occasional exceptions, we find it difficult to believe that these policies add significantly to the overall administrative burdens involved in operating a broadcast station. . . . The Supreme Court has made it clear and it should be reemphasized here that "if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues." Red Lion Broadcasting Co. v. FCC, 395 U.S. at 393.

As to the first duty imposed, the Commission noted that ordinarily, the problems identified during the ascertainment of community needs "would be featured prominently in the list of public issues selected by the station for program coverage." Also:

We have, in the past, indicated that some issues are so critical or of such great public importance that it would be unreasonable for a licensee to ignore them completely. [ ] But such statements on our part are the rare exception, not the rule, and we have no intention of becoming involved in the selection of issues to be discussed, nor do we expect a broadcaster to cover each and every important issue which may arise in his community.

26. We wish to emphasize that the responsibility for the selection of program material is that of the individual licensee. That responsibility "can neither be delegated by the licensee to any network or other person or group, or be unduly fettered by contractual arrangements restricting the licensee in his free exercise of his independent judgments." Report on Editorializing, 13 FCC at 1248. We believe that stations, in carrying out this responsibility, should be alert to the opportunity to complement network offerings with local programming on these issues, or with syndicated programming.

The Commission then turned to the second, and more frequently litigated, aspect of the Fairness Doctrine.]

2. A Reasonable Opportunity for Opposing Viewpoints

. . .

28. It has frequently been suggested that individual stations should not be expected to present opposing points of view and that it should be sufficient for the licensee to demonstrate that the opposing

viewpoint has been adequately presented on another station in the market or in the print media. See WSOC Broadcasting Co., 17 P & F Radio Reg. 548, 550 (1958). While we recognize that citizens receive information on public issues from a variety of sources, other considerations require the rejection of this suggestion. First, in amending section 315(a) of the Communications Act in 1959, Congress gave statutory approval to the fairness doctrine, including the requirement that broadcasters themselves provide an opportunity for opposing viewpoints. See BEM, 412 U.S. at 110, note 8. Second, it would be an administrative nightmare for this Commission to attempt to review the overall coverage of an issue in all of the broadcast stations and publications in a given market. Third, and perhaps most importantly, we believe that the requirement that *each* station provide for contrasting views greatly increases the likelihood that individual members of the public will be exposed to varying points of view. . . .

a. What is a "controversial issue of public importance"?

29. It has frequently been suggested that the Commission set forth comprehensive guidelines to aid interested parties in recognizing whether an issue is "controversial" and of "public importance." However, given the limitless number of potential controversial issues and the varying circumstances in which they might arise, we have not been able to develop detailed criteria which would be appropriate in all cases. For this very practical reason, and for the reason that our role must and should be limited to one of review, we will continue to rely heavily on the reasonable, good faith judgments of our licensees in this area.

30. Some general observations, however, are in order. First of all, it is obvious that an issue is not necessarily a matter of significant "public importance" merely because it has received broadcast or newspaper coverage. "Our daily papers and television broadcasts alike are filled with news items which good journalistic judgment would classify as newsworthy, but which the same editors would not characterize as containing important controversial public issues." Healey v. FCC, 460 F.2d 917, 922 (D.C.Cir.1972). Nevertheless, the degree of media coverage is one factor which clearly should be taken into account in determining an issue's importance. It is also appropriate to consider the degree of attention the issue has received from government officials and other community leaders. The principal test of public importance, however, is not the extent of media or governmental attention, but rather a subjective evaluation of the impact that the issue is likely to have on the community at large. If the issue involves a social or political choice, the licensee might well ask himself whether the outcome of that choice will have a significant im-

pact on society or its institutions. It appears to us that these judgments can be made only on a case-by-case basis.

31. The question of whether an issue is "controversial" may be determined in a somewhat more objective manner. Here, it is highly relevant to measure the degree of attention paid to an issue by government officials, community leaders, and the media. The licensee should be able to tell, with a reasonable degree of objectivity, whether an issue is the subject of vigorous debate with substantial elements of the community in opposition to one another. It is possible, of course, that "programs initiated with no thought on the part of the licensee of their possible controversial nature will subsequently arouse controversy and opposition of a substantial nature which will merit presentation of opposing views." Report on Editorializing, 13 FCC at 1251. In such circumstances, it would be appropriate to make provision for opposing views when the opposition becomes manifest.

b. What specific issue has been raised?

32. One of the most difficult problems involved in the administration of the fairness doctrine is the determination of the *specific* issue or issues raised by a particular program. This would seem to be a simple task, but in many cases it is not. . . .

. . .

c. What is a "reasonable opportunity" for contrasting viewpoints?

. . .

37. The first point to be made with regard to the obligation to present contrasting views is that it cannot be met "merely through the adoption of a general policy of not refusing to broadcast opposing views where a demand is made of the station for broadcast time." Report on Editorializing, 13 FCC at 1251. The licensee has a duty to play a conscious and positive role in encouraging the presentation of opposing viewpoints.[13] . . .

38. In making provision for the airing of contrasting viewpoints, the broadcaster should be alert to the possibility that a particular issue may involve more than two opposing viewpoints. Indeed, there may be several important viewpoints or shades of opinion which warrant broadcast coverage.

. . .

13. This duty includes the obligation defined in Cullman Broadcasting Co., 40 FCC 576, 577 (1963) . . . .

> We do not believe that the passage of time since *Cullman* was decided has in any way diminished the importance and necessity of this principle. If the public's right to be informed of the contrasting views on controversial issues is to be truly honored, broadcasters must provide the forum for the expression of those viewpoints at their own expense if paid sponsorship is unavailable.

41. In providing for the coverage of opposing points of view, we believe that the licensee must make a reasonable allowance for presentations by genuine partisans who actually believe in what they are saying. The fairness doctrine does not permit the broadcaster "to preside over a 'paternalistic' regime," BEM, 412 U.S. at 130, and it would clearly not be acceptable for the licensee to adopt a "policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner. . . ." . . .

42. This does not mean, however, that the Commission intends to dictate the selection of a particular spokesman or a particular format, or indeed that partisan spokesmen must be presented in every instance. We do not believe that it is either appropriate or feasible for a governmental agency to make decisions as to what is desirable in each situation. In cases involving personal attacks and political campaigns, the natural opposing spokesmen are relatively easy to identify. This is not the case, however, with the majority of public controversies. Ordinarily, there are a variety of spokesmen and formats which could reasonably be deemed to be appropriate. We believe that the public is best served by a system which allows individual broadcasters considerable discretion in selecting the manner of coverage, the appropriate spokesmen, and the techniques of production and presentation.

43. Frequently, the question of the reasonableness of the opportunity provided for contrasting viewpoints comes down to weighing the *time* allocated to each side. Aside from the field of political broadcasting, the licensee is not required to provide equal time for the various opposing points of view. Indeed, we have long felt that the basic goal of creating an informed citizenry would be frustrated if for every controversial item or presentation on a newscast or other broadcast the licensee had to offer equal time to the other side. . . . Similarly, we do not believe that it would be appropriate for this Commission to establish any other mathematical ratio, such as 3 to 1 or 4 to 1, to be applied in all cases. We believe that such an approach is much too mechanical in nature and that in many cases our pre-conceived ratios would prove to be far from reasonable. In the case of a 10-second personal attack, for example, fairness may dictate that more time be afforded to answer the attack than was given the attack itself.

. . .

E. Fairness and Accurate News Reporting

58. In our 1949 Report on Editorializing, we alluded to a licensee's obligation to present the news in an accurate manner:

> It must be recognized, however, that the licensee's opportunity to express his own views . . . does not justify or em-

> power any licensee to exercise his authority over the selection of program material to distort or suppress the basic factual information upon which any truly fair and free discussion of public issues must necessarily depend. . . . A licensee would be abusing his position as public trustee of these important means of mass communication were he to withhold from expression over his facilities relevant news or facts concerning a controversy or to slant or distort the presentation of such news. No discussion of the issues involved in any controversy can be fair or in the public interest where such discussion must take place in a climate of false or misleading information concerning the basic facts of the controversy, 13 FCC at 1254–55.

It is a matter of critical importance to the public that the basic facts or elements of a controversy should not be deliberately suppressed or misstated by a licensee. But, we must recognize that such distortions are "so continually done in perfect good faith, by persons who are not considered . . . ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentations as morally culpable. . . ." J. S. Mill, On Liberty 31 (People's ed. 1921). Accordingly, we do not believe that it would be either useful or appropriate for us to investigate charges of news misrepresentations in the absence of substantial extrinsic evidence or documents that on their face reflect deliberate distortion. See The Selling of the Pentagon, 30 FCC2d 150 (1971).

[The Commission then considered editorial advertising and advertisements for commercial goods or services. As examples of editorial advertising, the Report cited a brief spot urging a constitutional amendment to override a decision of the Supreme Court legalizing abortion, and Standard Oil commercials that implied the desirability of building the Alaskan pipeline to speed development of Alaska's North Slope. National Broadcasting Co., 30 F.C.C.2d 643, 22 R.R.2d 407 (1971). To invoke the Fairness Doctrine, such a commercial must present a "meaningful statement which obviously addresses, and advocates a point of view on, a controversial issue of public importance." The Commission then reconsidered its attitude toward wholly commercial advertising, in the context of advertisements for brands of cigarettes that led to a ruling requiring the presentation of anti-smoking messages. It renounced that position, noting that the cigarette commercials themselves "did not provide the listening public with any information or arguments relevant to the underlying issue of smoking and health." The Report noted, now with approval, a dissenting commissioner's statement at the time that the Commission was not really encouraging a balanced debate but, rather, was simply imposing its view that it was in the public interest to discourage smoking.]

69. This precedent would not have been particularly troublesome if it had been limited to cigarette advertising as the Commission originally intended. In 1971, however, the D.C. Circuit ruled that the cigarette precedent could not logically be limited to cigarette advertising alone. Friends of the Earth v. FCC, 449 F.2d 1164 (D.C.Cir. 1971). In this decision, it was suggested that high-powered cars pollute the atmosphere more than low-powered cars. It was then determined that the fairness doctrine was triggered by the advertisements there involved because they extolled the virtues of high-powered cars and thus glorified product attributes aggravating an existing health hazard, namely air pollution. . . .

70. We do not believe that the underlying purposes of the fairness doctrine would be well served by permitting the cigarette case to stand as a fairness doctrine precedent. . . . Accordingly, in the future, we will apply the fairness doctrine only to those "commercials" which are devoted in an obvious and meaningful way to the discussion of public issues.

The Federal Trade Commission Proposal

71. The Federal Trade Commission has filed a statement in this inquiry which proposes the creation of a right of access to respond to four categories of commercial announcements. Very generally, these categories are as follows: (a) those advertisements that explicitly raise controversial issues; (b) those that raise such issues implicitly; (c) those that make claims based on scientific premises that are in dispute; and (d) those that are silent about negative aspects of the advertised products.

72. We have already discussed the first two categories and the applicability of the fairness doctrine with respect thereto. One of our major difficulties with the FTC's categories is that they seem to include virtually all existing advertising. . . .

. . .

75. We do not believe that the fairness doctrine provides an appropriate vehicle for the correction of false and misleading advertising. The fairness doctrine is only one aspect of the public interest. A Congressionally-mandated remedy for deceptive advertising already exists in the form of various FTC sanctions. If an advertisement is found to be false or misleading, we believe that the proper course is to ban it altogether rather than to make its claims a subject of broadcast debate. . . .

[Commissioner Hooks concurred except as to commercial announcements. Here he urged that broadcasters allocate two percent of their customary commercial time "as an open access period in which views in contrast to those embraced in commercial messages could be aired."

He thought the original cigarette decision had been unsound. Broadcasters had to present the hazards of smoking under their obligation to serve the public interest, just as they would be expected to alert their listeners to some other "imminent health menace, e. g., flood, famine, or plague." This was a broadcaster's primary duty without regard to the Fairness Doctrine. He objected to the Commission's resolution because of the difficulty of distinguishing between commercials that discussed controversial issues and those that did not.

Commissioner Quello also concurred in a separate opinion.]

Notes and Questions

1. In 1976, the Commission denied reconsideration of the Report. 58 F.C.C.2d 691, 36 R.R.2d 1021 (1976). Commissioner Robinson dissented because he doubted the value of the efforts involved and was concerned about the intrusion into editorial decisions. He noted that in 1973 and 1974, of 4,280 formal fairness complaints only 19 resulted in findings adverse to the licensee. These included seven in the political editorial area, seven cases of personal attack, and five general fairness complaints. Of the 19 violations, only eight resulted in tangible penalty to the licensee—seven political editorializing cases and one personal attack case involved forfeitures under § 503. Since this sanction is available only for violations of formal rules, it is not available for violations of the uncodified general doctrine.

2. Commissioner Robinson recognized that so long as *Red Lion* was the law the Commission could not eliminate the Fairness Doctrine completely. He favored the suggestion made by the Committee for Open Media, under which a licensee might choose to meet its obligations under the Fairness Doctrine by allowing access to its facilities. The proposal was to allow 35 one-minute messages per week scheduled at different times, including prime time. Half the spots would be allocated on a first-come, first-served basis and the other half would use "a representative spokesperson" system. If an excessive number wanted to speak Commissioner Robinson suggested that speakers might be chosen by lot or by queueing so as to minimize licensee bias. Efforts would be made to prevent monopolization by one outside group. Commissioner Robinson thought few licensees would choose to relinquish their control in this way, but he thought it offered the Commission an opportunity to avoid judging content and he urged offering this alternative to licensees. For a study of the operation of Free Speech Messages in San Francisco, see Harris, Free Speech Messages: When the Public Gets Access, What Does It Say?, Access 34 p. 20 (1976).

In a separate statement Chairman Wiley attacked the access proposal on grounds that it encouraged licensees to abdicate editorial control and emphasized a single programming technique: the access announcement. "In my opinion a more varied, interesting and informative coverage would be possible if professional journalists played a conscious and positive role in the process."

The Fairness Report has been challenged in an appeal in the Court of Appeals for the District of Columbia in National Citizens Committee for Broadcasting v. Federal Communications Comm'n, No. 74–1700, filed July 3, 1974, but held in abeyance until after the denial of reconsideration.

3. *Note on Affirmative Duty to Raise Issues.* The Commission refers to the Fairness Doctrine as having two parts. Virtually all the litigation and discussion have involved the second part: the requirement that a licensee who has presented one side of a controversial issue of public importance must present contrasting views.

In 1976, for the first time, the Commission applied the first part. A Congresswoman sent an 11-minute tape opposing strip mining to West Virginia radio stations to counter a presentation in favor of strip mining that had been distributed to many stations by the U. S. Chamber of Commerce. One station, WHAR, refused to play the tape because it had not presented the first program. Indeed, it had presented nothing on the issue except items on regular newscasts taken from the A.P. news service. Several persons and groups complained to the Commission contending that in this part of West Virginia at this time the question of strip mining was of primary importance. In its renewal application WHAR had cited "development of new industry" and "air and water pollution" as issues of great concern to its listeners. In addition, bills on the subject were pending in Congress at the time and local newspapers were extensively discussing the question. (Presentation of a five-minute tape by an outspoken foe of strip mining was not relevant because he did not discuss the economic or ecological aspects of strip mining or the pending legislation.)

The Commission asserted that although a violation of the first part "would be an exceptional situation and would not counter our intention to stay out of decisions concerning the selection of specific programming matter," this was such a case and demonstrated an "unreasonable exercise" of discretion. The Commission quoted the passage from *Red Lion* that "if the present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues." The lack of any prior request to program on this subject was irrelevant because "it is the station's obligation to make an affirmative effort to program on

issues of concern to its community." The role of the AP news items was minimal because it was not even clear which ones were aired. "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." The station was ordered to tell the Commission within 20 days how it intended to meet its fairness obligations. Rep. Patsy Mink, 59 F.C.C.2d 987, 37 R.R.2d 744 (1976).

What is the difference between saying (1) a station has an obligation to present programs on the need for good dental hygiene, even though the subject may not be controversial, and (2) a station must present programs on a controversial issue in the community? Are both covered by the Fairness Doctrine?

What is the justification for requiring each station in a community to present a range of views on controversial issues of public importance? Why is it not enough if the spectrum as a whole provides contrasting viewpoints? This issue was implicit in the KTYM case, p. 557, supra. Is there more—or less—reason to require a station to raise important subjects when other stations in the community are doing so? Thus, in the strip mining case, should it matter that other broadcasters are devoting extensive coverage to the subject? What has this obligation to do with "fairness"?

Another indication of the new importance of the first part of the Fairness Doctrine may be seen in the Review Board's decision in United Broadcasting Co., 59 F.C.C.2d 1412, 37 R.R.2d 1169 (1976). In a comparative renewal proceeding, the Board added a specific issue: whether the incumbent had "broadcast a reasonable amount of public affairs programming in a manner responsive to the community's needs and interests." This issue was added because of a preliminary showing that the station had broadcast a minimal amount of public affairs programs over the last several years. The only two full length programs were broadcast between 6:30 a. m. and 7:30 a. m. on Sunday mornings. All the rest of the programs, including editorials, were broadcast during the "graveyard" hours of 1:01–5:30 a. m. The licensee, the NAB, and the Broadcast Bureau are all urging the Commission to overturn the Review Board's action.

4. At one point the Commission quotes a court to the effect that not everything that is thought newsworthy by journalists necessarily presents a controversial issue of public importance. What are some examples of divergence between the two?

5. In an omitted part of the Report, the Commission rejected the suggestion that it let fairness complaints accumulate in the licensee's

file and decide at renewal time whether the licensee's overall performance raised serious questions. The Commission asserted that although that might be easier for licensees, the present practice of referring serious complaints to licensees as received would further the public's interest in restoring balance promptly.

6. A potentially significant case involved a complaint that a network documentary about the failure of some private pension plans had been unfairly one-sided. The network responded that the program was about "some problems in some pension plans." The Commission concluded that the network had presented a one-sided program on the operation of the overall private pension system and must provide balance. On appeal, the court, 2–1, reversed the Commission on the ground that the Commission was wrong in thinking that it was the proper body to decide the subject of the program. Instead, the court held that it was for the network to decide what the program was about and the Commission could reject the network's characterization only if it was found to be unreasonable. Since that was not the case here, the Commission's order could not stand.

The entire court voted to review the panel's decision en banc. But at that stage the Commission asked that the case be remanded to be dismissed. That occasioned another round of judicial opinions but finally the case was remanded to the Commission and all decisions were vacated. All the action is reported in National Broadcasting Co. v. Federal Communications Comm'n, 516 F.2d 1101 (D.C.Cir. 1974–75). An effort by the complainant, Accuracy in Media (AIM), to get the Supreme Court to reinstate the case, failed when the Court denied AIM's petition for certiorari. 424 U.S. 910 (1976).

7. Although the Pensions controversy evaporated, its core issue reappeared soon thereafter in a case in which the Commission ruled that a personal attack had occurred during the discussion of a controversial issue of public importance. The licensee had argued that time for reply was not justified because the attack did not take place during such a discussion. On appeal, the court ruled that the Commission had used the wrong standard when stating that it "believed" that the comment was sufficiently related to an earlier discussion of a meat boycott to justify the conclusion that the personal attack occurred during a continuation of that discussion. The court concluded that the proper approach was for the Commission to judge "the objective reasonableness of the licensee's determination" that the meat boycott discussion had long since ended. Straus Communications, Inc. v. Federal Communications Comm'n, 530 F.2d 1001 (D.C. Cir. 1976).

See also Polish American Congress v. Federal Communications Comm'n, 520 F.2d 1248 (7th Cir. 1975) certiorari denied 424 U.S. 927

(1976), in which the complainants had claimed that a skit of Polish jokes on television violated the personal attack part of the Fairness Doctrine. The Commission rejected the complaint. On appeal, the court stated that the order must be upheld "if the Commission properly determined that ABC's conclusion that the broadcast did not involve a controversial issue of public importance was not unreasonable nor in bad faith." The court concluded that "the Commission was correct in ruling that ABC did not overstep its discretion in failing to find a controversial issue of public importance." This was true whether the issue was stated to be (1) whether "Polish Americans are inferior to other human beings in terms of intelligence, personal hygiene, etc." or (2) whether "promulgating" Polish jokes by broadcasting them is desirable. If the former, ABC could reasonably conclude that even if some people felt that way they had not generated enough support to raise a controversial issue of public importance. Even if they had, ABC could conclude that the skit presented did not constitute a "discussion" of this issue. If the issue was the latter, no controversy was shown.

8. Occasionally, entertainment programming may raise problems under the Fairness Doctrine. One typical example would be a story in which a character considers whether to seek an abortion. See Diocesan Union of Holy Name Societies, 41 F.C.C.2d 297, 28 R.R.2d 545 (1973) (involving a pro-abortion theme). Must contrasting views be presented? If so, must it be by other entertainment programming or will an interview program suffice? What about implicit presentations, such as a series featuring a happily married couple of different faiths? Must the licensee provide for contrasting views against interfaith marriages? The cases are collected and discussed in Rosenfeld, The Jurisprudence of Fairness: Freedom Through Regulation in the Marketplace of Ideas, 44 Ford.L.Rev. 877, 901–04 (1976).

9. The owner of a station in the same county as WXUR, which was denied renewal in *Brandywine-Main Line*, p. 563, supra, reported that his station presented two guests on a call-in show on consecutive days. The first day Dr. McIntire, the principal figure behind WXUR, appeared. Every question called in was favorable to his position. The next day, the guest was an opponent, who believed strongly in the Fairness Doctrine and who had attacked the operation of WXUR. He did not receive a single supportive call. The owner's point was that "liberal intellectuals" are most comfortable with each other and shy away from the less educated. When the "average liberal-intellectual" listens to radio he seeks out classical music or an all-news or educational station. "If he should tune in to a talk station and listen to some of the 'drivel' broadcast, he would become furious and switch to a station with which he is more at home." The

conclusion was that if the liberal hopes to convert others to his viewpoint he must become a proselytizer, and call-in shows are an easy way to reach large numbers of voters. Tannen, Liberals and the Media, The Progressive, April, 1974, p. 11. Is this report an accurate picture of "liberal" attitudes? If so, does that affect your view of the Fairness Doctrine? Recall the unwillingness of the Anti-Defamation League to respond to attacks on Jews, p. 557, supra. Are there other explanations for the one-sided telephone calls?

10. Chairman Wiley had urged abandoning the Fairness Doctrine for radio in the large major markets. He saw little reason for the doctrine in such markets as Chicago, with 65 commercial radio stations and New York, with 43 stations. Contrasting viewpoints were likely to emerge in such a situation and scarcity was not a sound rationale for the Fairness Doctrine. A majority of the Commission in denying reconsideration of the Fairness Report, rejected his proposal, saying only "The Commission has decided not to proceed at this time with a proposal by the Chairman for an experimental suspension of the fairness doctrine in larger radio markets." 58 F.C.C.2d 691, 699, n. 11, 36 R.R.2d 1021, 1033, n. 11 (1976). See also Broadcasting, Mar. 1, 1976, p. 49. The director of OTP has recently urged a similar experiment.

11. The following case involves a decision on commercials after the issuance of the Fairness Report.

PUBLIC INTEREST RESEARCH GROUP v. FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals, First Circuit, 1975.
522 F.2d 1060.
Certiorari denied, 424 U.S. 965, 96 S.Ct. 1458, 47 L.Ed.2d 731 (1976).

[A Maine licensee carried many commercials for snowmobiles. Bills were pending in the state legislature that would restrict the power, speed and noise of snowmobiles. Environmental groups complained that listeners were hearing only one side of the controversial questions about the desirability of snowmobiles. When the licensee failed to respond, the complainants asked the Commission to order that the other side be aired quickly because the legislature would soon act. After the complaint was filed the licensee broadcast one half-hour program on the pending legislation but complainants asserted that this could not offset five months of repeated ads. The Commission rejected the complaint on the ground that although adverse environmental effects from snowmobiles might involve a controversial issue of public importance, the commercials here were not devoted "in

an obvious and meaningful way to the discussion" of that issue and hence did not raise one side of it.]

Before McENTEE and CAMPBELL, CIRCUIT JUDGES, TAURO, DISTRICT JUDGE.

LEVIN H. CAMPBELL, CIRCUIT JUDGE [after stating the facts and reviewing the history of the regulation of commercials under the Fairness Doctrine].

The upshot of the 1974 report is that the FCC cigarette decision is overruled as Commission precedent—on the grounds that without meaningful substantive discussion such as that found in "editorial advertisements" the usual product commercial cannot reasonably be said to inform the public on any side of a controversial issue of public importance, and that application of fairness doctrines to product ads "tends only to divert the attention of broadcasters from their public trustee responsibilities in aiding the development of an informed public opinion." Henceforth Commission policy will be to apply the fairness doctrine only to those commercials which "are devoted in an obvious and meaningful way to the discussion of public issues."

The present decision affecting snowmobiles conforms faithfully to the principles just summarized. . . . The Commission has now repudiated these precedents, has announced a policy which would allow no such exceptions, and has done so with appropriate notice and, we believe, sufficient clarity of analysis. . . . In the absence of statutory or constitutional barriers, an agency may abandon earlier precedents and frame new policies. [ ] Thus the decision's mere nonconformity with earlier agency precedent does not render it arbitrary and capricious.

. . .

We turn next to whether the Commission's exclusion of product commercials which are not facially controversial from fairness obligations is within its statutory authority. The fairness doctrine is not a creature of statute but was evolved over the years by the Commission under the "public interest" standard of the Communications Act. Thus complainants are able to point to little in the way of relevant legislation. Complainants argue that Congress, largely by acquiescence, has "codified" both the fairness doctrine and the Commission's former application of it to product ads. They contend that the fairness doctrine now applies to *all* controversial issues, and that since snowmobiles are controversial—especially when advertised at a time when their regulation was being debated in the Maine legislature—the agency acted illegally in declining to apply the doctrine.

But this argument assumes a degree of legislative specificity which simply does not exist. . . . But it is a long step from *Red Lion* and the 1959 legislative statements cited therein, to a holding

that the Commission is bound to interpret product commercials not explicitly discussing public issues as generating controversy to which fairness obligations attach. As the aftermath of the cigarette case suggests, there may be no practical stopping place if this approach is accepted; the court in *Friends of the Earth*, foreclosed the luxury of a halfway approach. (Thus in the present case, if the Commission were to be impressed with the public importance of the snowmobile issue, it could now rule for complainants only at the cost of reopening what might seem like a pandora's box.) Given the necessity of product advertising in American broadcasting, and the administrative difficulties and costs of determining when a product is so controversial as to trigger fairness obligations, we cannot, merely from the generalized congressional endorsements described in *Red Lion*, say that the Commission acted contrary to statute when it struck the current balance between product advertising and the fairness doctrine. We think Congress left questions of application and accommodation to the Commission under the general public interest standard; the Commission's present ruling is not so plainly inimical to the public interest as to be illegal.

. . .

There is finally the question whether the Commission's policy violates the first amendment. Complainants argue that the fairness doctrine serves the first amendment by requiring airwave licensees to be true public forums for the presentation of divergent views. The essence of this argument seems to be that the first amendment requires the fairness doctrine either to be enforced to the hilt or to be supplemented by regulations designed to ensure access to the broadcasting media by all points of view. Cf. *CBS*, supra, 412 U.S. at 185–90, 93 S.Ct. 2080 (Brennan, J., dissenting).

This approach does not seem to us to have commanded a majority of the Court (although, to be sure, *CBS* involved issues of access rather than fairness). Furthermore, we have doubts as to the wisdom of mandating, rather than merely allowing, government intervention in the programming and advertising decisions of private broadcasters. It is certainly possible to argue, as complainants suggest here, that "[the] uninhibited marketplace of ideas in which truth will ultimately prevail," see *Red Lion*, supra, 395 U.S. at 390, might be better served by a continued extension of the fairness doctrine to product advertising. But we do not view that question, in the short and long run, as so free from doubt that courts should impose an inflexible response as a matter of constitutional law. We believe the first amendment permitted the Commission not only to experiment with full-scale application of the fairness doctrine to advertising but also to retreat from its experiment when it determined from experience that the extension was unworkable. In any event, at

present we cannot say that the first amendment requires the Commission to force the presentation of alternate views in response to product advertisements which do not explicitly expound a point of view on a public issue.

. . .

Affirmed.

Notes and Questions

1. Does this case speak to the wisdom of the Commission's change of position regarding commercials?

2. Will it be difficult to tell when a commercial involves a "meaningful statement which obviously addresses, and advocates a point of view on, a controversial issue of public importance?"

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2. Personal Attack Rules

As we saw in *Red Lion*, p. 495, supra, the personal attack part of the general Fairness Doctrine has been crystallized into a rule, 47 C. F.R. § 73.123:

> (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 1 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, on 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).

The first point to note is that the episode must occur "during the presentation of views on a controversial issue of public importance." This limitation means that personal attacks unrelated to such a dis-

cussion do not invoke the rule—and presumably are left exclusively to defamation suits. Why is this distinction drawn? Apart from the difficulty, already discussed, of identifying the appropriate issue, even the word "during" may cause trouble. In Straus Communications, Inc. v. Federal Communications Comm'n, 530 F.2d 1001 (D.C. Cir. 1976), Bob Grant, host on a talk show, had been discussing a consumers' meat boycott at 10:30 a.m. and had been trying to reach Congressman Rosenthal, a leader of the boycott, by telephone. When this failed, Grant observed that he hoped that the Congressman wasn't reluctant because of past differences they had had. About two hours later, during a discussion of mothballed ships in the Hudson River, a caller told Grant: "Too bad there aren't more people like you on the air." Grant replied: "Well, when I hear about guys like Ben Rosenthal, I, I have to say I wish there were a thousand Bob Grants' cause then you wouldn't have . . . wouldn't have . . . a coward like him in the United States Congress. Thank you for your call, sir."

The licensee asserted that the attack had not come "during" presentation of views on a controversial issue because the boycott issue that had triggered the statement had not been discussed for two hours. The Commission rejected this claim on its own assessment of the issues, but the court upheld the licensee on the ground that its determination that the boycott discussion had ended was reasonable and made in good faith. The question of whether the Congressman's refusal to be interviewed on the show was itself a controversial issue of public importance was said to be open to the Commission on remand, but the court noted that the Commission in the past had rejected the "mistaken impression that an attack on a specific person" was itself such an issue. In a "clarification" the Commission stated that the rule now applies to comments "during" or "related to" discussion of a controversial issue of public importance. Straus Communications, Inc., 61 F.C.C.2d 460, 38 R.R.2d 212 (1976).

The licensee also argued that the word "coward" did not come within the rule in any event because some of the dictionary meanings "do not implicate the physical courage of the individual so labeled." The court observed that it would have been "proper for the Commission to find, even applying its generous 'reasonableness and good faith' standard of review" that the remark attacked "honesty, character, integrity or like personal qualities."

Occasionally a group may get too large for application of the rule. In Diocese of Rockville Centre, 50 F.C.C.2d 330, 32 R.R.2d 376 (1973), a licensee had broadcast a statement that perhaps an earlier writer was correct when he stated "The Roman Church is filled with men who were led into it merely by ambition, who though they might have been useful and respectful as laymen, are hypocritical and im-

moral." The Commission ruled that the group is not sufficiently "identified" unless the licensee "could reasonably be expected to know exactly who or what finite group" is best able to inform the public of the contrasting viewpoint. The reference to "men" who fill the "Roman Church" was found too vague. See also, Polish American Congress v. Federal Communications Comm'n, 520 F.2d 1248 (7th Cir. 1975) certiorari denied 424 U.S. 927 (1976), involving a complaint based on the broadcasting of Polish jokes. The Commission's refusal to order reply was upheld on the ground that no controversial issue of public importance was involved. The court noted it did not have to pass on the question of the size of the group. Recall the Anti-Defamation League case, p. 557, supra, involving an attack on an entire religious group.

If the rule had applied to Congressman Rosenthal how much time would he have received? Would he have had to pay for it? Those who suffer personal attacks that do not occur in the context of discussions of controversial issues of public importance have recourse only to the law of defamation or privacy considered earlier.

The Commission has made clear that attacks during discussion of controversial issues of public importance are not misbehavior—and wide-open debate is encouraged—so long as the rules are followed.

C. EQUAL OPPORTUNITIES AND FAIRNESS IN POLITICAL CAMPAIGNS

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1. EQUAL OPPORTUNITIES—SECTION 315

In the Radio Act of 1927, § 18 provided:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station; . . . *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this paragraph. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

This became § 315 of the 1934 Act. Although the Commission has explicit rule making power to carry out the provisions of § 315(a), few rules have been promulgated. Most of the problems involve requests in the heat of an election campaign and for this reason very few decisions have been reviewed by the courts.

One major limitation on the applicability of § 315 was defined in 1951 when it was held that the section did not apply to uses of a

broadcast facility on behalf of a candidate unless the candidate appeared personally during the program. This meant that friends and campaign committees could purchase time without triggering § 315. Felix v. Westinghouse Broadcasting Co., 186 F.2d 1 (3d Cir. 1951). This raised a separate set of problems discussed at p. 628, infra.

Another basic question was resolved in Farmers Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525 (1959), when the Court unanimously held that a licensee was barred from censoring the comments of a speaker exercising rights under § 315. The Court also held, 5–4, that the section preempted state defamation law and created an absolute privilege that protected the licensee from liability for statements made by such a candidate. Are these rulings sound? Because of the way the litigation arose, neither party challenged the constitutionality of § 315. Note, however, that although the station is protected from liability for defamation, the person who utters the statements is subject to liability under the general rules of defamation considered earlier.

During its early years the statute apparently caused few serious problems. The advent of television, however, changed matters dramatically. In 1956, the Commission issued two major rulings during the presidential campaign. In one it ruled that stations carrying President Eisenhower's appearance in a two-to-three minute appeal on behalf of the annual drive of the United Community Funds would be a "use" of the facility by a candidate that would trigger the equal opportunities provision. The section carried no exception for "public service" nor did it require the appearance to be "political." Columbia Broadcasting System (United Fund), 14 R.R. 524 (F.C.C.1956). One week before the election, President Eisenhower requested and received 15 minutes of free time from the three networks to discuss the sudden eruption of war in the Middle East. His Democratic opponent's request for equal time was rejected by the networks. One day before the election, the Commission, without opinion and with one dissent, upheld the networks' position. Columbia Broadcasting System (Suez Crisis), 14 R.R. 720 (F.C.C.1956).

This response to an incumbent speaking as President rather than as candidate was unusual for the Commission, which usually interpreted "use" very broadly. It did so, again, in 1959 when a third-party candidate for mayor of Chicago, Lar Daly, asked equal time on the basis of two series of television clips of his opponents, incumbent Mayor Daley and the Republican challenger. One group of clips showed the two major candidates filing their papers (46 seconds); Mayor Daley accepting the nomination (22 seconds); and a one-minute clip asking the Republican why he was running. A second group of clips included "nonpolitical" activities such as a 29-second clip of Mayor Daley on a March of Dimes appeal and 21 seconds of his

greeting President Frondizi of Argentina at a Chicago airport. The Commission, in a long opinion, ruled that both groups required equal time. Columbia Broadcasting System, Inc. (Lar Daly), 26 F.C.C. 715 (1959). It relied on the words "use" and "all" in the statute and thought the issue of who initiated the appearance (such as the March of Dimes asking the Mayor to appear) to be irrelevant. Although formal campaigning was the most obvious way of putting forward a candidacy, "of no less importance is the candidate's appearance as a public servant, as an incumbent office holder, or as a private citizen in a nonpolitical role." Such "appearances and uses of a nonpolitical nature may confer substantial benefits on a candidate who is favored."

Congressional response was swift—and negative. Hearings began within days after the decision and the result was an amended version of § 315:

> Sec. 315. (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

Recall the significance of this episode to the Court in *Red Lion*, p. 495, supra.

In 1960, Congress suspended the operation of § 315 so that the stations could give time to national candidates without creating a §

315 obligation. This permitted the Kennedy-Nixon debates to be held without need to provide free time for the many minority candidates. There was no incumbent and no major third party candidate—two factors that made the debates politically possible.

In 1962, the Commission decided that a station that had broadcast meetings of the Economic Club of Detroit regularly for five years would leave itself open to claims for equal opportunities if it carried a Club program of a debate between the two major candidates for governor of Michigan. The Commission did not deny the event was "newsworthy," but it rejected the claim that this was on-the-spot coverage of a bona fide news event under § 315(a)(4) because the debate had been planned for a long time and had been built around the two candidates. It was also not a bona fide news interview because the control was in the Economic Club and not the station—as is the case in such programs as Meet the Press. The Goodwill Station, Inc. (WJR), 40 F.C.C. 362, 24 R.R. 413 (1962). A companion case required equal opportunities for the Prohibition Party candidate for governor of California after NBC televised a debate between Edmund G. Brown and Richard Nixon that was held before a convention of United Press International. National Broadcasting Co. (Wyckoff), 40 F.C.C. 370, 24 R.R. 401 (1962).

Presidential election problems returned in 1964. First, the Commission ruled that coverage of an incumbent President's press conferences were not exempt under either § 315(a)(2) or (4). Nor were those of his main challenger. Columbia Broadcasting System (Presidential Press Conference), 3 R.R.2d 623 (F.C.C.1964). Then, two weeks before the election, the three networks granted President Johnson time to comment on two events that had just occurred: a sudden change of leadership was announced in Moscow, and China exploded a nuclear device. The Commission adhered to its 1956 ruling that this was not a "use." It also upheld a network claim that this program came within § 315(a)(4) as a bona fide news event. Republican National Committee (Dean Burch), 3 R.R.2d 647 (F.C.C.1964). An appeal of this ruling to the court of appeals led to an affirmance on a divided vote, 3–3, without opinion. A petition for certiorari was denied, Goldwater v. Federal Communications Comm'n, 379 U.S. 893 (1964), with Justice Goldberg, joined by Justice Black, dissenting with opinion. They argued that the case presented substantial questions and that the Commission seemed not to be consistent in its own decisions.

In 1968, Senator Eugene McCarthy announced early that he was a candidate for the Democratic nomination for President against the incumbent, Lyndon Johnson. During a traditional year-end interview with television reporters, President Johnson criticized Senator McCarthy and made several political statements. McCarthy sought

"equal time" but the Commission denied the request on the ground that the President had not announced that he was a candidate for reelection and thus did not come within the statute or the Commission's rules on who is a "legally qualified candidate" for office. Eugene McCarthy, 11 F.C.C.2d 511, 12 R.R.2d 106 (1968). On appeal, the Commission's position was affirmed. McCarthy v. Federal Communications Comm'n, 390 F.2d 471 (D.C.Cir. 1968):

> Since Congress has delegated to the Commission the duty to implement Section 315, our review is limited to determining whether the Commission's long-standing regulation is unreasonable or in contravention of the statutory purpose. In making this determination, "This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers." This is particularly true where the Commission has been assigned a responsibility of the kind here involved.
>
> The obvious difficulty in determining whether a likely public figure is a candidate within the intent of the statute justifies the Commission in promulgating a more or less absolute rule. If the application of such a rule more often than not produces a result which accords with political reality, its rational basis is established. But no rule in this sensitive area can be applied mechanically without, in some instances at least, resulting in unfairness and possible constitutional complications.
>
> As we read the Commission's ruling, if the President had announced his candidacy prior to the December 19 program, petitioner would be entitled to equal time irrespective of the content of that program. But program content, and perhaps other criteria, may provide a guide to reality where a public figure allowed television or radio time has not announced for public office.
>
> Considering the content and the timing of the not unprecedented year-end interview with the President, we cannot say that the application of the Commission's rule in this case . . . produced an unreasonable result.

Shortly thereafter, President Johnson abruptly announced that he would not seek reelection.

In 1972, the problems centered around the Democratic nomination. Just before the crucial California primary, CBS held a joint session of Face the Nation, expanded from its regular half-hour to one hour, featuring Senators Humphrey and McGovern, the two leading candidates in the primary and for the nomination. The network claimed that this was a bona fide news interview and thus exempt under § 315(a)(2) from time requests by other Democratic candi-

dates. Similar programs on other networks raised similar questions. The Commission found the changes did not deprive the programs of their bona fide character as interviews, and perceived and intended its opinion to accord "with the remedial purpose of the 1959 amendments to accord leeway to licensee journalistic decisions." Hon. Sam Yorty and Hon. Shirley Chisholm, 35 F.C.C.2d 572, 24 R.R.2d 447 (1972). On Chisholm's appeal, the ruling was vacated and remanded. Chisholm v. Federal Communications Comm'n, 24 R.R.2d 2061 (D.C. Cir. 1972). The court thought the program more a debate than an interview. On remand, the Commission begrudgingly complied and ordered the networks to grant Chisholm one-half hour of prime time before the election. 35 F.C.C.2d 579, 24 R.R.2d 720 (1972).

Through the 1960's and 1970's various proposals were made in Congress to amend or repeal § 315. Nothing came of any of them. But in 1975, the Commission responded dramatically to two petitions. It overruled its 1962 decisions that coverage of a debate did not come within the exemption for on-the-spot coverage of bona fide news events. The Commission said that it had misinterpreted legislative history when it required the appearance of the candidate to be "incidental" to the coverage of a separate news event. The Commission now concluded that in 1959, Congress intended to run the risks of political favoritism among broadcasters in an effort to allow broadcasters to "cover the political news to the fullest degree." Debates are now exempt if they are controlled by someone other than the candidates or the broadcaster, as with the Economic Club and UPI convention and if they are judged to be bona fide news events under § 315(a)(4).

In a companion ruling, the Commission overruled its 1964 decision on press conference coverage. It decided that full coverage of a press conference by any incumbent or candidate would come within the exemption for on-the-spot coverage of a bona fide news event if it "may be considered newsworthy and subject to on-the-spot coverage." But the Commission refused to bring a press conference within the exemption for bona fide news interviews because the licensee did not "control" the format and the event was not "regularly scheduled." Petitions of Aspen Institute and CBS, Inc., 55 F.C.C.2d 697, 35 R.R. 2d 49 (1975). Two commissioners dissented. One questioned holding that political debates and politically motivated press conferences do not call for equal opportunities, but that a short appearance for the United Fund does.

Appeals were taken against both parts of the Commission's 1975 rulings. The main contentions were that the Commission had not followed the Congressional mandate when it permitted the candidate to "become the event" under the (a)(4) exemption, and that the statute did not allow the Commission to uphold licensee decisions so long as

they are in "good faith"—that it is for the Commission to make these judgments. By a vote of 2–1, the court affirmed both rulings, Chisholm v. Federal Communications Comm'n, 538 F.2d 349 (D.C.Cir. 1976). The opinions disagreed over the significance of the complex legislative history, with the majority concluding that the Commission's interpretation was "reasonable." Rehearing en banc was denied. A petition for certiorari was denied, —— U.S. —— (1976) White, J., dissenting.

Seizing on the Commission's rulings, the League of Women Voters set up "debates" between the two major Presidential candidates in 1976. They were held in theatres before invited audiences. The candidates were questioned by panelists selected by the League after consultation with the participants. Television was allowed to cover the events—but the League imposed restrictions against showing the audience or any audience reactions. Although the networks complained about the restrictions and about the way the panelists were selected, they did carry the programs live and in full.

Are the restrictions and the manner in which the "debates" were planned and staged consistent with the view that the networks were giving "on-the-spot coverage of a bona fide news event" under § 315 (a)(4)? If the coverage is exempt, what about broadcaster liability for defamations?

Network efforts to obtain outright repeal or suspension of § 315 during 1976 had foundered on the argument that Congress should see what happened under the new rulings even though they were not the equivalent of a suspension of § 315.

One problem arose from a ruling of the Broadcast Bureau that if a station taped a debate between Congressional candidates of the two major parties and then broadcast the entire debate at a later time, the program would not be exempt because it was not "on-the-spot coverage." The Commission, 3–2, disagreed when the delay was one day. Delaware Broadcasting Co., 60 F.C.C.2d 1030, 38 R.R.2d 831 (1976).

The other subdivisions, (a)(1) and (a)(3), have given rise to fewer problems. In 1976, supporters of Ronald Reagan complained when a Miami television station broadcast six-minute interviews with President Ford on five consecutive evening newscasts. The complaint asserted that the segments were from a single half-hour interview that had been broken up into five parts. The Commission held that even if the 30-minute interview would not have been exempt under § 315, inclusion of the segments within newscasts would not preclude "exempt status pursuant to § 315(a)(1) unless it has been shown that such a decision is clearly unreasonable or in bad faith." Even though this was broadcast during the last week of a primary

campaign and might benefit President Ford, the complainants "have not shown that the licensee in deciding to air them, considered anything other than their newsworthiness." Citizens for Reagan, 58 F.C.C.2d 925, 36 R.R.2d 885 (1976). Does the statute's use of "bona fide" support the Commission's decision to leave the decision in the first instance with the licensee? What is the relevance of the licensee's purpose in presenting the program? Of the likely impact of the program on the public?

The Commission appears to be holding firm to its earlier decisions broadly defining "use" in cases of "nonpolitical" appearances. Thus, in United Way of America, 35 R.R.2d 137 (F.C.C.1975), which was decided at about the same time as the Aspen-CBS petitions, the Commission, 4–3, adhered to its earlier rulings that an appearance by candidate Ford inaugurating an annual charity fund drive came within § 315. The Commission has also adhered to its view that appearances by television personalities or film stars after they have announced their candidacy for office constitutes a "use" under § 315. In Adrian Weiss, 58 F.C.C.2d 342, 36 R.R.2d 292 (1976), the Broadcast Bureau ruled that the showing of old Ronald Reagan films on television would require the offering of equal opportunities to other Republican presidential aspirants. The Bureau relied heavily on the claim that nonpolitical uses can be very effective. The Commission refused to review the Bureau's decision, with two Commissioners concurring separately and two dissenting. These four all thought that common sense dictated exempting movies made before Reagan actively entered politics but the two concurring Commissioners thought that any change should be made by Congress. In Pat Paulsen, 33 F.C.C.2d 297, affirmed 33 F.C.C.2d 835, 23 R.R.2d 861 (1972), affirmed 491 F.2d 887 (9th Cir. 1974), the Commission rejected a comedian's argument that applying § 315 would deprive him of due process and equal protection by forcing him to give up his livelihood in order to run for public office. Their interpretation was held permissible "to achieve the important and legitimate objectives of encouraging political discussion and preventing unfair and unequal use of the broadcast media."

Content problems under § 315 are rare, but do arise. Among the candidates running in 1972 for the Democratic nomination for Senator from Georgia, one was broadcasting the following spot announcement:

> I am J. B. Stoner. I am the only candidate for U.S. Senator who is for the white people. I am the only candidate who is against integration. All of the other candidates are race mixers to one degree or another. I say we must repeal Gambrell's civil rights law. Gambrell's law takes jobs from us whites and gives those jobs to the niggers. The main reason why niggers want

integration is because the niggers want our white women. I am for law and order with the knowledge that you cannot have law and order and niggers too. Vote white. This time vote your convictions by voting white racist J. B. Stoner into the run-off election for U.S. Senator. Thank you.

Several groups asked the Commission to rule that a licensee may, and has the responsibility to, withhold announcements under § 315 if they "pose an imminent and immediate threat to the safety and security of the public it serves." The groups alleged that the spot had created racial tension and that the Mayor of Atlanta had urged broadcasters not to air the advertisement. Letter to Lonnie King, 36 F.C.C.2d 635, 25 R.R.2d 54 (1972). The Commission refused to issue the requested order:

> The relief requested in your letter would amount to an advance approval by the Commission of licensee censorship of a candidate's remarks. By way of background, we note that Constitutional guarantees do not permit the proscription of even the advocacy of force or of law violation "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). And a prior restraint bears a heavy presumption against its constitutional validity. Carroll v. Princess Anne, 393 U.S. 175, 181 (1968). While there may be situations where speech is "so interlaced with burgeoning violence that it is not protected," Carroll v. Princess Anne, 393 U.S. at 180, and while a similar approach might warrant overriding the no-censorship command of Section 315, we need not resolve that difficult issue here, for we conclude on the basis of the information before us that there is no factual basis for the relief you request. Despite your report of threats of bombing and violence, there does not appear to be that clear and present danger of imminent violence which might warrant interfering with speech which does not contain any direct incitement to violence. A contrary conclusion here would permit anyone to prevent a candidate from exercising his rights under Section 315 by threatening a violent reaction. In view of the precise commands of Sections 315 and 326, we are constrained to deny your requests.

The Commission concluded with a quotation from its KTYM decision, p. 557, supra. Are the situations analogous?

In 1971, as part of the Federal Election Campaign Act, Congress passed two amendments to the Communications Act. It added a provision to § 312 requiring licensees to give or sell reasonable amounts of time to federal candidates. If sales were involved, § 315(b) required that during the 45 days before an election, stations charge

political advertisers the lowest commercial rates for the time. The first provision has been construed to permit licensees to reject requests for awkward blocs of time. Thus, a licensee was upheld when it refused to sell 4½ hours in a single bloc for a telethon. On the other hand, the Commission told a station to sell 30-second and 60-second spots to candidates even though for 20 years that station had refused to sell time to candidates in less than five-minute blocs because it thought election issues too complex for spot treatment. Another station that offered spots and five-minute blocs was told that its refusal to sell a 30-minute bloc was a denial of "reasonable access."

If the equal opportunities provision is constitutional, is it sound? Proposals for change have been presented to virtually every Congress in the last 20 years. Should it be repealed? Should it be repealed for some offices but not for others? Some have suggested repealing it for president and vice-president. Others argue that it is most needed in those contests. What are the arguments each way?

What about a proposal for proportionate time, whereby any party that gets a certain percentage of the vote at the last election would be entitled to a period of time reflecting its percentage of that vote? Is the idea sound? Are the administrative problems too complex to handle?

Periodically, the Commission issues notices, or primers, which summarize the obligations owed by licensees in the particular areas and supply a series of questions and answers about the most common situations. For a recent 50-page effort in the § 315 area, see Public Notice, Use of Broadcast Facilities by Candidates for Public Office, 24 F.C.C.2d 832, 19 R.R.2d 1913 (1970). The National Association of Broadcasters has published a 100-page book on § 315, Political Broadcast Catechism (1976).

To compare the ideas of fairness, personal attack, and equal opportunities, it is helpful to consider when, in each situation, the licensee acquires an obligation, what must be done to meet it, and what part the licensee may play in selecting speakers, determining how long to allow for responses, and the hours at which responses must be presented.

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2. Fairness and Political Campaigns

Since § 315 was construed not to cover appearances by anyone other than candidates, and since the section also does not cover ballot propositions, many important political campaign broadcasts must be regulated under provisions much less precise than § 315. Not surprisingly, as television has become increasingly important in election

campaigns, questions not covered by § 315 have arisen more frequently.

Uses by Supporters. Turning first to a close parallel situation, what are the controlling principles when Candidate A's friends or campaign committee purchase time to further his candidacy or to attack B, his opponent? In its Letter to Nicholas Zapple, 23 F.C.C.2d 707, 19 R.R.2d 421 (1970), the Commission stated that the 1959 amendment to § 315 had explicitly recognized the operation of the Fairness Doctrine when the candidate's own appearance was exempted from § 315. The doctrine was thought equally applicable here. Moreover, when a candidate is supported or his opponent attacked, although the licensee has the responsibility of identifying suitable speakers for opposing views, "barring unusual circumstances, it would not be reasonable for a licensee to refuse to sell time to spokesmen for or supporters of candidate B comparable to that previously bought on behalf of candidate A." But there was no obligation to provide B's supporters with free time. Although usually requiring that time be given away, if necessary, to get contrasting views before the public, the Commission thought this unsound in the political arena. To hold otherwise would require licensees, or other advertisers, to subsidize B's campaign. The rejection of subsidization meant that even if A's friends mounted a personal attack on B, B would not get free time. The Commission has adhered closely to the *Zapple* ruling.

Official Use of Television. The most pervasive problem has concerned the use of television by those in power who are not announced candidates for reelection. In a series of cases the Democratic National Committee sought to obtain response time from the networks after speeches by President Nixon.

DEMOCRATIC NATIONAL COMMITTEE v. FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals, District of Columbia Circuit, 1973.
481 F.2d 543.

Before WINTER, CIRCUIT JUDGE for the Fourth Circuit, and MACKINNON and ROBB, CIRCUIT JUDGES.

MACKINNON, CIRCUIT JUDGE:

Once again we are confronted with the issue on appeal of whether the FCC has properly applied its fairness doctrine to a particular set of facts. The petitioner, the Democratic National Committee (hereinafter DNC), contends that the Commission erred in determining that the three major television networks had acted reasonably in pursuing their obligation to provide adequate coverage of public is-

sues in their refusal in August-October 1971 to make available free prime-time television air to DNC to respond to certain Presidential addresses concerning the Administration's economic policy.

The Presidential broadcasts at issue consisted of the following appearances on all three networks:

(1) An address on August 15, 1971, announcing the Administration's new economic program, broadcast by the networks live on television and radio between 9:00 p. m. and 9:20 p. m., EDT.

(2) A Labor Day address on September 6, 1971, clarifying the new program, broadcast by the networks live on radio only between 12:00 noon and 12:15 p. m., EDT.

(3) An address delivered on September 9, 1971, at the request of the Democratic congressional leadership to a joint session of Congress explaining the President's new economic policy and outlining legislation designed by the Administration to help achieve the policy's goals. The networks broadcast this speech live on television and radio during non-prime time from 12:30 p. m. to 1:08 p. m., EDT.

(4) An address on October 7, 1971, announcing Phase II of the new economic program, broadcast live by the networks on television and radio between 7:30 p. m. and 7:46 p. m., EDT.

Petitioner also argues that three non-prime-time press conferences with then Treasury Secretary John Connally dealing with the President's economic program should be weighed along with the President's personal addresses.

DNC sought permission from the networks to respond to some of these broadcasts, and, upon being refused, filed a complaint with the Commission seeking an order to compel NBC, CBS and ABC to provide free time for the presentation of its viewpoint on the national economy. In its arguments to the Commission, DNC again pressed its contention that Presidential addresses should give rise to an *automatic right of reply* by spokesmen of the opposing party—a position emphatically rejected by us in Democratic National Committee v. F. C.C., 460 F.2d 891, certiorari denied 409 U.S. 843 (1972). In addition, DNC argued that under the Commission's decision in Committee for the Fair Broadcasting of Controversial Issues, 25 F.C.C.2d 283 (1970) (hereinafter *Fair Committee*) these facts must give rise to a right of reply. In *Fair Committee* the Commission held that five uninterrupted prime-time television (and radio) Presidential addresses dealing with the Indochina war in a seven month period where coverage had otherwise been roughly in balance, presented a unique situation requiring the networks to provide an opportunity for some

spokesman for the other side to respond with one uninterrupted prime-time appearance. [After an extended review of the Commission's decision in *Fair Committee*, the court quoted from earlier DNC litigation:]

. . . "Thus in opinion after opinion, the Commission and the courts have stressed the wide degree of discretion available under the fairness doctrine and we have clearly stated time after time, *ad infinitum ad nauseam*, that the key to the doctrine is no mystical formula but rather the exercise of reasonable standards by the licensee." Democratic National Committee v. F.C.C., supra, 460 F.2d at 903. And in our recent *Democratic National Committee* case we held unequivocally that a Presidential address does not automatically give rise to a special right to respond. Id., 460 F.2d at 904–905.

In light of these established principles it is clear the DNC was not entitled automatically to any right to reply. That there is no equal-opportunities rule in the context of the fairness doctrine is now beyond dispute. The Commission must look to all the relevant facts and circumstances to determine whether the public had been left uninformed of opposing viewpoints during the period in question and the burden is on the petitioner to show that the networks had not exercised reasonable judgment in this regard. We feel that the Commission was completely justified in finding in this case that no such showing had been made. . . .

Moreover, even if a right of reply were warranted, we again reiterate that the networks have discretion in the selection of the appropriate spokesmen. Especially relevant in this regard is our statement in *Democratic National Committee*, supra, involving the same petitioner as well as a Presidential address on the issue of the economy:

> Furthermore, they [DNC] assert that as the leading party out of the White House and as the majority party in Congress they would always be an appropriate party to respond. DNC feels it is obligated to inform the nation of the viable options open to it. Should this be DNC's manifest destiny we can find no reason to compel the networks to assist it. Can it be said that others are not equally capable of the task? At times the President speaks to crucial problems to which other groups are far more qualified to speak. DNC and its representatives have no greater claim to expertise in the area of the economy than the National Chamber of Commerce or the president of the New York Stock Exchange, and that is the point; crucial issues must be reasonably aired after consideration of the viewpoints of all significant factions. This is a matter for licensee discretion and not automatic rule because the speaker is the President of the United States. [ ]

Petitioners also vigorously claim that the facts of this case are indistinguishable from those in *Fair Committee.* We are convinced the Commission was correct in ruling to the contrary. . . . The Commission repeatedly underscored the unique facts of that case, mentioning over and over that the President had appeared *five times* on *prime-time* television and radio to deliver *uninterrupted* messages justifying his Indochina policy. In this case there were only two Presidential prime-time broadcasts accompanied by two other *non*-prime-time appearances. Comparison of the total prime-time coverage reveals only 36 minutes in this case as compared with 132 minutes in *Fair Committee.* The Commission declined to "add in" Secretary Connally's press conferences, stating that he "was subject in the three press conferences to the same kind of critical questioning that he would have faced on news interview programs, and his appearances were neither uninterrupted nor in prime time." [ ] In light of the special emphasis placed on the *Presidential* and the *uninterrupted* nature of the addresses involved in *Fair Committee,* we cannot say the Commission was incorrect in this regard.

That such distinctions as these perhaps seem overly refined is a direct consequence of DNC's attempts to convert the "reasonable under the circumstances" rule to a more rigid, mathematical "modified equal-opportunities" doctrine—the very result the Commission was most cautious to avoid in deciding *Fair Committee.* . . . The Commission further expressed its fear that a broad interpretation of its earlier decision would "lead us down a slippery slope with a consequent undesirable diminution of licensee responsibility . . . [since] a continuing series of *ad hoc* rulings by the Commission which necessarily constitute special departure from the general fairness weighing process would inevitably push the Commission further and further into the programming process."

We find the Commission was correct in refusing to venture upon such dangerous waters. . . .

Affirmed.

Notes and Questions

1. Do the facts of *Fair Committee* and this case justify different results?

2. Is the Democratic National Committee being unreasonable in thinking that a response is always proper? That it is the obvious responder?

3. Do the networks seem to be unduly receptive to Presidential requests for time? See N. Minow, J. B. Martin and L. M. Mitchell, Presidential Television (1973).

4. In light of the combination of § 315, *Zapple* and related Fairness Doctrine aspects of political broadcast regulation, are the resolutions justified? Are some of the regulations more appropriate than others? Should they all be repealed and this area handled much as the print media?

5. *Political Editorials.* In a section of the personal attack rules, 47 C.F.R. § 73.123(c), the Commission covered political editorials:

> (c) Where a licensee, in an editorial (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this 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.

To what extent does this resemble the personal attack rule itself? To what extent does it resemble the *Zapple* doctrine?

6. *Ballot Propositions.* In an omitted part of the Fairness Report, the Commission reached the conclusion that such matters as referenda, initiative and recall propositions, bond proposals and constitutional amendments were to be regulated under the general Fairness Doctrine. The area was thought closer to general political discussion not involving elections than it was to the election of individuals to office. Thus, the *Cullman* doctrine requiring the licensee to present contrasting views, by the use of free time if necessary, was applicable. One argument against the *Cullman* doctrine was that some groups might spend their available money on non-broadcast media, wait for the other side to buy broadcast time, and then insist on free time under *Cullman* to counter their adversary. The Commission was not persuaded. First, this concern can always be raised against *Cullman* but the Commission thought it most important that the public have access to contrasting views. On the tactical level, the Commission noted that the Fairness Doctrine does not guarantee equality of exposure of views nor who will be chosen as speakers. Those who rely solely on *Cullman* "have no assurance of obtaining equality by such means." Fairness Report, 48 F.C.C.2d 1, 33, 30 R.R.2d 1261, 1302 (1974).

7. *Nuclear Power Initiative.* In Public Media Center, 59 F.C.C.2d 494, 37 R.R.2d 263 (1976), the Commission had occasion to apply its

Fairness Doctrine to editorial advertising in the context of a ballot issue. In the summer of 1974, several groups in California began trying to collect enough signatures to place an initiative measure on the June, 1976, ballot that would inhibit the construction and operation of nuclear power plants in the state. During the summer, several radio stations ran 60-second spots prepared by Pacific Gas & Electric that favored the development of nuclear power. The complainants alleged that 13 stations had violated the Fairness Doctrine by not programming contrary views. The Commission, with four Commissioners concurring in result only, first concluded that each of six spots involved did address political issues in an "obvious and meaningful" manner. The Commission then concluded that because of the initiative activity and discussions in Congress about nuclear power, the matter was a controversial issue of public importance. Judgments to the contrary by some of the licensees were determined not to be reasonable despite the contention that ascertainment had not revealed the issue:

> The matters cited by a licensee in its ascertainment survey as the problems, needs and interests of the residents of the community which it serves do not necessarily correspond to local, statewide or nationwide controversial issues of public importance. Moreover, not even the most thorough of ascertainment methods would guarantee that the licensee would identify all those issues which are matters of controversy and public importance.

The Commission then turned to the question of whether each of the stations had met its obligations. It rejected the complainants' contention that the only way to meet the burden here was to permit presentation of contrasting views in spot format. The Commission quoted the Fairness Report to the effect that the licensee had "discretion in selecting the manner of coverage, the appropriate spokesmen, and the techniques of production and presentation." But format might be relevant in another way because an imbalance "might be a reflection of the total *amount of time* afforded to each side, of the *frequency* with which each side is presented, of the size of the listening *audience* during the various broadcasts, or of a combination of factors."

The stations varied from those that had presented 160 minutes of pro-nuclear programming and no minutes of anti-nuclear programming to those that had balanced almost equally. In the closest cases, the Commission decided that in presenting three hours of pro-nuclear programming, including 83 of 192 spots in periods of maximum audience potential, KFOG had not acted reasonably in presenting only one hour of anti-nuclear programming in two half-hour discussion formats. In the case of KVON, the Commission was unable to conclude that the licensee had failed to afford a reasonable opportunity for the presentation of contrasting viewpoints when it presented approxi-

mately 90 minutes of pro-nuclear programming and 66 minutes of anti-nuclear programming plus 29 announcements promoting an anti-nuclear program.

The Commission ordered those licensees found not to have acted reasonably to report to the Commission within ten days what steps they proposed to take to meet their obligations. This decision was rendered a few weeks before the election at which the ballot proposition was to be voted upon. A petition for reconsideration is pending. Should a licensee have undertaken to remedy an improper emphasis on one side in 1974 by overemphasizing the other side just before the election two years later?

8. Putting all the pieces together, do you think the Commission has done a good job of handling the fairness problems that arise in connection with political campaigns?

D. PROTECTING THE PUBLIC WELFARE—MORALS, SAFETY AND HEALTH

In this section and the next we consider some of the same issues we considered in a more general context in Chapter IV. Here, our questions will be whether anything specific about the broadcasting medium warrants special treatment. Our main problem will concern regulation of obscenity.

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1. OBSCENITY AND PORNOGRAPHY

The subject of obscenity did not become a problem on radio and television until recently. In the earlier years of these media, the licensees apparently had no practical reason to want to test the limits of permissible communication and were unsure what the Commission might legally do to licensees who stepped over the line.

In the 1934 Act, § 326, the prohibition on censorship, also contained a passage forbidding the use of obscene or indecent speech in broadcasting. In 1948, that ban was removed from § 326 and added to the general criminal law in 18 U.S.C. § 1464:

> Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

Several other sections empower the Commission to impose sanctions for violation of § 1464.

The first serious problems emerged in the 1960's. In one case, a disc jockey was accused by listeners of using language "susceptible of

double meanings with indecent connotations," over several years. In response to the investigation begun by the Commission, the licensee denied any knowledge of the problem. Many witnesses contradicted his claim. The Commission found two bases for denying renewal of the license: lack of candor and the substantive speech.

On appeal, the court affirmed solely on the basis of lack of candor, relying on the WOKO case, p. 551, supra. "We intimate no views on whether the Commission could have denied the applications if Robinson had been truthful." Robinson v. Federal Communications Comm'n, 334 F.2d 534 (D.C.Cir.) certiorari denied 379 U.S. 843 (1964).

In 1964, the Commission considered renewal of stations belonging to the Pacifica Foundation. Five programs had produced complaints: two poets reading their own works; one author reading from his novel; a recording of Edward Albee's "Zoo Story;" and a program "in which eight homosexuals discussed their attitudes and problems." All were late at night except one of the poetry readings. The Commission indicated that it was "not concerned with individual programs" but with whether there had been a pattern of programming inconsistent with the public interest, as in *Palmetto*. Although it found nothing to bar renewal, the Commission discussed the five programs because it would be "useful" to the "industry and the public."

The Commission found three of the programs were well within the licensee's judgment under the public interest standard. The Commission recognized that provocative programming might offend some listeners. To rule such programs off the air, however, would mean that "only the wholly inoffensive, the bland, could gain access to the radio microphone or TV camera." The remedy for offended listeners was to turn off the program. The two poetry readings raised different questions. One did not measure up to the licensee's standards for presentation but it had not been carefully screened because it had come from a reputable source. The other reading, involving 28 poems, was broadcast at 7:15 p.m. because the station's editor admitted he had been lulled by the poet's "rather flat, monotonous voice" and did not catch unidentified "offensive words" in the 19th poem. The errors were isolated and thus caused no renewal problem. Pacifica Foundation, 36 F.C.C. 147, 1 R.R.2d 747 (1964). For a history of Pacifica's struggle in 1964, including the fact that no broadcaster came to its defense, see Barton, The Lingering Legacy of Pacifica: Broadcasters' Freedom of Silence, 53 Journ.Q. 429 (1976).

Another episode involved a taped interview on a noncommercial FM station with Jerry Garcia, leader of a musical group known as the Grateful Dead. Garcia apparently used "various patently offen-

sive words as adjectives, introductory expletives, and as substitutes for 'et cetera.'" The opinion did not give any examples. The Commission imposed a forfeiture of $100 for "indecency" and apparently hoped for a court test of its powers. Eastern Educational Radio (WUHY-FM), 24 F.C.C.2d 408, 18 R.R.2d 860 (1970). The licensee paid the fine and the case was over.

Next came charges of obscenity leveled at "topless radio," midday programs consisting of "call-in talk shows in which masters of ceremonies discuss intimate sexual topics with listeners, usually women." The format quickly became very popular. The Commission responded to complaints by ordering its staff to tape several of the shows and to present a condensed tape of some of the most offensive comments. The next day, Chairman Burch spoke to the National Association of Broadcasters condemning the format. Two weeks later the Commission issued a Notice of Apparent Liability proposing a forfeiture of $2,000 against one licensee. Sonderling Broadcasting Corp. (WGLD-FM), 27 R.R.2d 285 (F.C.C.1973). The most troublesome language was apparently:

> Female Listener: . . . of course I had a few hangups at first about—in regard to this, but you know what we did—I have a craving for peanut butter all that [sic] time so I used to spread this on my husband's privates and after a while, I mean, I didn't even need the peanut butter anymore.
>
> Announcer: (Laughs) Peanut butter, huh?
>
> Listener: Right. Oh, we can try anything—you know—any, any of these women that have called and they have, you know, hangups about this, I mean they should try their favorite —you know like—uh. . . .
>
> Announcer: Whipped cream, marshmallow . . . .

In addition, the host's conversation with a complaining listener was thought to be suffused with "leering innuendo." The Commission thought this program ran afoul of both the "indecency" and "obscenity" standards of § 1464. On the other hand, the Commission disclaimed any intention to ban the discussion of sex entirely:

> We are emphatically not saying that sex *per se* is a forbidden subject on the broadcast medium. We are well aware that sex is a vital human relationship which has concerned humanity over the centuries, and that sex and obscenity are not the same thing. In this area as in others, we recognize the licensee's right to present provocative or unpopular programming which may offend some listeners, Pacifica Foundation, 36 FCC 147, 149 (1964). Second, we note that we are not dealing with works of dramatic or literary art as we were in *Pacifica.* We are rather confronted with the talk or interview show where clearly the in-

> terviewer can readily moderate his handling to the subject matter so as to conform to the basic statutory standards—standards which, as we point out, allow much leeway for provocative material. . . . The standards here are strictly defined by the law: The broadcaster must eschew the "obscene or indecent."

Again the Commission sought a test: "we welcome and urge judicial consideration of our action." Commissioner Johnson dissented on several grounds, including the view that the Commission had no duty to act in these cases and should leave the matter to possible prosecution by Justice Department. Sonderling denied liability but paid the fine. Two citizen groups asked the Commission to reconsider on the grounds that listeners' rights to hear such programs had been disregarded by the Commission's action. The Commission reaffirmed its action. 41 F.C.C.2d 777, 27 R.R.2d 1508 (1973). It indicated that it had based its order "on the pervasive and intrusive nature of broadcast radio, even if children were left completely out of the picture." It went on, however, to point out that children were in the audience in these afternoon programs and there was some evidence that the program was not intended solely for adults. "The obvious intent of this reference to children was to convey the conclusion that this material was unlawful, and that it was even more clearly unlawful when presented to an audience which included children."

The citizen groups appealed but lost, Illinois Citizens Committee for Broadcasting v. Federal Communications Comm'n, 515 F.2d 397 (D.C.Cir. 1975). The court refused to allow the petitioners to make certain procedural arguments that it thought were open only to the licensee itself. On the merits:

> The excerpts cited by the Commission contain repeated and explicit descriptions of the techniques of oral sex. And these are presented, not for educational and scientific purposes, but in a context that was fairly described by the FCC as "titillating and pandering." The principles of Ginzburg v. United States, 383 U.S. 463 (1966) are applicable, for commercial exploitation of interests in titillation is the broadcaster's sole end. It is not a material difference that here the tone is set by the continuity provided by the announcer rather than, as in *Ginzburg*, by the presentation of the material in advertising and sale to solicit an audience. We cannot ignore what the Commission took into account—that the announcer's response to a complaint by an offended listener and his presentation of advertising for auto insurance are suffused with leering innuendo. Moreover, and significantly, "Femme Forum" is broadcast from 10 a.m. to 3 p.m. during daytime hours when the radio audience may include children—perhaps home from school for lunch, or because of staggered school hours or illness. Given this combination of factors,

we do not think that the FCC's evaluation of this material infringes upon rights protected by the First Amendment.

The FCC found Sonderling's broadcasts obscene . . . . . .

Petitioners put it that an administrative agency like the Commission does not furnish the contemporary community lens which supplied the premise for obscenity determinations contemplated in both *Miller* and *Memoirs*. Here, a jury trial was available [19] but was waived by the licensee. . . .

Petitioners object that the Commission's determination was based on a brief condensation of offensive material and did not take into account the broadcast as a whole, as would seem to be required by certain elements of both the *Memoirs* and the *Miller* tests. The Commission's approach is not inappropriate in evaluating a broadcasting program that is episodic in nature—a cluster of individual and typically disconnected commentaries, rather than an integrated presentation. It is commonplace for members of the radio audience to listen only to short snatches of a broadcast, and programs like "Femme Forum" are designed to attract such listeners. . . .

We conclude that, where a radio call-in show during daytime hours broadcasts explicit discussions of ultimate sexual acts in a titillating context, the Commission does not unconstitutionally infringe upon the public's right to listening alternatives when it determines that the broadcast is obscene.

The court explicitly did not rely upon the Commission's argument that it had latitude to hold things "indecent" that are not obscene.

A motion for rehearing en banc was denied over the lengthy dissent of Chief Judge Bazelon. He was much concerned about the ability of the Commission, by "raised eyebrow" and the Chairman's speech, to virtually end a very popular format. He saw this as "flagrant and illegal censorship." He also found four areas of error committed by the panel.

This sets the scene for the most recent case, one that is now making its way through the courts.

19. An action by the United States to recover a statutory penalty is of a common law nature. . . .

PACIFICA FOUNDATION, STATION WBAI (FM)

Federal Communications Commission, 1975.
56 F.C.C.2d 94, 32 R.R.2d 1331.

BY THE COMMISSION: CHAIRMAN WILEY CONCURRING IN THE RESULT; COMMISSIONERS REID AND QUELLO CONCURRING AND ISSUING STATEMENTS; COMMISSIONER ROBINSON CONCURRING AND ISSUING A STATEMENT IN WHICH COMMISSIONER HOOKS JOINS.

1. During the past several years, the Commission and the Congress have been receiving an increasing number of complaints concerning the use of indecent language on the public's airwaves. In 1970, the Commission focused on this problem in Eastern Educational Radio (WUHY-FM), 24 FCC2d 408 (1970) and issued a notice of apparent liability which held "indecent" the use of the words "fuck" and "shit" during a pre-recorded broadcast interview.

2. Since that decision, the problem has not abated and the standards set forth apparently have failed to resolve the issue. Moreover, the Supreme Court in Miller v. California, 413 U.S. 15 (1973) reformulated the definition of obscenity which had provided the basis for our definition of indecency in *WUHY*. Further, *Sonderling Corp.*, [ ] was affirmed sub nom. Illinois Citizens Committee for Broadcasting, et al. v. FCC, [ ], and is the first judicial decision upholding the FCC's conclusion that the probable presence of children in the radio audience is relevant to a determination of obscenity.

In this declaratory order we consider a citizen's complaint about a broadcast which contained many of the words about which the public has complained. We review the applicable legal principles and clarify the standards which will be utilized in considering the public's complaints about the broadcast of "indecent" language. This order does not deal with the somewhat different problem of "obscene" language which was discussed by the Commission in *Sonderling Corp.*, supra.

The Complaint

3. First, we consider the facts which give rise to this review. On December 3, 1973, the Commission received a complaint from a man in New York City stating that in the early afternoon of October 30, 1973, while driving in his car, he heard broadcast by Station WBAI (licensed to the Pacifica Foundation) the words "cocksucker," "fuck," "cunt," and "shit." He stated that "This was supposed to be part of a comedy monologue, that "Any child could have been turning the dial, and tuned into that garbage," and that "Incidentally, my young son was with me when I heard the above. . . ."

4. The cover of the record, which the licensee subsequently identified as having been played in part at approximately 2 p.m. on

October 30, 1973, states that it was recorded live at the Circle Star Theatre, San Carlos, California. . . .

5. . . . The comedian begins by stating that he has been thinking about "the words you couldn't say on the public . . . airwaves . . . the ones you definitely couldn't say. . . ." Thereafter there is a repeated use of the words "shit" and "fuck" in a manner designed to draw laughter from his audience.

Pacifica's Response

6. On December 10, 1973, the complaint was forwarded to WBAI (FM) with a request for its comments.

. . . The licensee stated that "the monologue in question was from the album 'George Carlin, Occupation: FOOLE,' Little David Records": that on October 20 the "Lunchpail" program "consisted of Mr. Gorman's commentary as well as analysis of contemporary society's attitudes toward language," that the subject was also discussed with listeners who called in and that "Mr. Gorman played the George Carlin segment as it keyed into a general discussion of the use of language in our society." The licensee continued as follows:

> The selection from the Carlin album was broadcast towards the end of the program because it was regarded as an incisive satirical view of the subject under discussion. Immediately prior to the broadcast of the monologue, listeners were advised that it included sensitive language which might be regarded as offensive to some; those who might be offended were advised to change the station and return to WBAI in 15 minutes. To our knowledge, [complainant] is the only person who has complained about either the program or the George Carlin monologue.
>
> George Carlin is a significant social satirist of American manners and language in the tradition of Mark Twain and Mort Sahl. Like Twain, Carlin finds his material in our most ordinary habits and language—particularly those "secret" manners and words which, when held before us for the first time, show us new images of ourselves.
>
> . . .
>
> . . .

7. At the outset we recognize that Congress in Section 326 of the Communications Act prohibited the Commission from engaging in censorship or interfering "with the right of free speech by means of radio communications." But the prohibition against the broadcast of "obscene, indecent, or profane language" was originally included in Section 326. Later it was transferred to the criminal code, 18 U.S.C. 1464. Congress has clearly indicated that both the Department of

Justice and the FCC are obliged to enforce section 1464.[3] This declaratory order is not intended to modify our previous decisions recognizing broadcasters' broad discretion in the programming area. For example, in Pacifica Foundation, 36 FCC 147 (1964), licenses were renewed where provocative programming had offended some listeners. Pacifica had, however, taken "into account the nature of the broadcast medium when it scheduled such programming for the late evening hours (after 10 p.m., when the number of children in the listening audience is at a minimum)." 36 FCC at 149. [ ]

8. Congress, the Commission, and the Courts have recognized that the broadcast medium has special qualities which distinguish it from other modes of communication and expression. [ ] As we noted in *WUHY-FM*, supra:

> ". . . Broadcasting is disseminated to the public (Section 3(o) of the Communications Act 47 U.S.C. 153(o)) under circumstances where reception requires no activity of this [purchasing] nature. Thus it comes directly into the home and frequently without any advance warning of its content. Millions daily turn the dial from station to station. While particular stations or programs are oriented to specific audiences, the fact is that by its very nature thousands of others not within the "intended" audience may also see or hear portions of the broadcast. Further, in that audience are very large numbers of children." 24 FCC 2d at 411. (footnotes omitted).

The intrusive nature of broadcasting was also recognized in *Sonderling Broadcasting:*

> "[Broadcasting] is peculiarly a medium designed to be received and sampled by millions in their homes, cars, on outings or even as they walk the streets with transistor radio to the ear, without regard to age, background or degree of sophistication. A person will listen to some musical piece or portion of a talk show and decide to turn the dial to try something else. While many may have loyalty to a particular station or stations, many others engage in this electronic smorgasbord sampling. That, together with its free access to the home, is a unique quality of radio, wholly unlike other media such as print or motion pictures. It takes a deliberate act to purchase and read a book, or seek admission to the theater." 27 RR 2d at 288.

See also, *Illinois Citizens* [ ].

3. Thus Congress has specifically empowered the FCC to (1) revoke a station's license, (2) issue a cease and desist order, or (3) impose a monetary forfeiture for a violation of Section 1464, 47 U.S.C. 312(a), 312(b), 503(b)(1)(E). The FCC can also (4) deny license renewal or (5) grant a short term renewal, 47 U.S.C. 307, 308.

9. In view of these unique qualities, we believe that the broadcast medium is not subject to the same analysis that might be appropriate for other, less intrusive forms of expression. As the Supreme Court pointed out in Burstyn v. Wilson, 343 U.S. 495, 502–503 (1952), "each method [of expression] tends to present its own peculiar problems." And "the mode of dissemination" can be a relevant consideration, particularly when there is a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." Miller v. California, 413 U.S. at 18–19. Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, see Rowan v. Post Office Dept., 397 U.S. 728 (1970); (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special concern to the Commission as well as parents is the first point regarding the use of radio by children.

. . .

11. We believe that patently offensive language, such as that involved in the Carlin broadcast, should be governed by principles which are analogous to those found in cases relating to public nuisance. [ ] Nuisance law generally speaks to *channeling* behavior more than actually prohibiting it. The law of nuisance does not say, for example, that no one shall maintain a pigsty; it simply says that no one shall maintain a pigsty in an inappropriate place, such as a residential neighborhood. In order to avoid the error of overbreadth, it is important to make it explicit whom we are protecting and from what. As previously indicated, the most troublesome part of this problem has to do with the exposure of children to language which most parents regard as inappropriate for them to hear. This parental interest has "a high place in our society." See Wisconsin v. Yoder, 406 U.S. 206, 214 (1972), and cases cited therein. Therefore, the concept of "indecent" is intimately connected with the exposure of children to language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience. Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions, and we believe that such words are indecent within the meaning of the statute and have no place on radio when children are in the audience. In our view, indecent language is distinguished from obscene language in that (1) it lacks the element of

appeal to the prurient interest, WUHY–FM, 24 FCC 2d at 412, and that (2) when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political or scientific value.[6]

12. When the number of children in the audience is reduced to a minimum, for example during the late evening hours, a different standard might conceivably be used. The definition of indecent would remain the same, i. e., language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs. However we would also consider whether the material has serious literary, artistic, political or scientific value, as the licensee claims. Miller v. California, supra.

13. We recognize that Cohen v. California, 403 U.S. 16 (1971) held that an individual could not be punished for walking through a courthouse corridor wearing a jacket on which was written: "Fuck the draft." Significantly, Mr. Justice Harlan also observed in *Cohen* that "government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot totally be barred from the public dialogue." A decent respect for the right of those who want to be "free from unwanted expression in the confines of one's home" (403 U.S. at 22) dictates that if a licensee decides to broadcast under the circumstances specified in paragraph 12, above, he must make substantial and solid efforts to warn unconsenting adults who do not want the type of language broadcast in this case thrust into the sanctuary of their home. Cf. Rowan v. Post Office Dept., 397 U.S. 728, 738 (1970).

CONCLUSION

14. Applying these considerations to the language used in the monologue broadcast by Pacifica's station WBAI, in New York, the Commission concludes that words such as "fuck," "shit," "piss," "motherfucker," "cocksucker," "cunt" and "tit" depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly "indecent" when broadcast on radio or television. These words were broadcast at a time when children were undoubtedly in the audience (i. e., in the early afternoon). Moreover, the pre-recorded language with the words repeated over and over was deliberately broadcast. We therefore hold that the language as broadcast was in-

6. There is ample authority for the proposition that material may be forbidden distribution among children, because it would be obscene as to them, even though the same material would not be obscene as to adults, and, accordingly, could not be forbidden to circulate among them. See Ginsberg v. New York, 390 U.S. 629 (1968). The "indecency" definition proposed herein adapts this idea of "variable obscenity" to the realities of both radio transmission and constitutional law.

decent and prohibited by 18 U.S.C. 1464. Accordingly, the licensee of WBAI-FM could have been the subject of administrative sanctions pursuant to the Communications Act of 1934, as amended. No sanctions will be imposed in connection with this controversy, which has been utilized to clarify the applicable standards. However, this order will be associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress. [ ]

. . .

16. This order is issued not only pursuant to 18 U.S.C. 1464 but also in furtherance of our statutory obligation to promote the larger and more effective use of radio in the public interest, 47 U.S.C. 303(g). It is not intended to stifle robust, free debate on any of the controversial issues confronting our society. That debate can continue unabated. Prohibiting the broadcast of "filthy words" considered indecent particularly when children are in the audience will not force upon the general listening public debates and ideas which are "only fit for children." First, the number of words which fall within the definition of indecent is clearly limited. Second, during the late evening hours such words conceivably might be broadcast, with sufficient warning to unconsenting adults provided the programs in which they are used have serious literary, artistic, political, or scientific value. In this as in other sensitive areas of broadcast regulation the real solution is the exercise of licensee judgment, responsibility, and sensitivity to the community's needs, interests and tastes. [ ] The Commission's failure to set forth its position could lead to widespread use of indecent language on the public's airwaves, a development which would (1) critically impair broadcasting as an effective mode of expression and communication, (2) ignore the rights of unwilling recipients, and (3) ignore the danger of exposure to children. We do not propose to abdicate our responsibility to the public interest.

Accordingly, IT IS ORDERED, that the complaint filed December 3, 1973, against Pacifica Foundation, licensee of Station WBAI, New York, IS GRANTED to the extent indicated above.

CONCURRING STATEMENT OF COMMISSIONER CHARLOTTE T. REID

. . .

While I am particularly shocked that such language was broadcast at a time when children could be expected to be in the audience, I feel constrained to point out that I believe this language to be totally inappropriate for broadcast at any time. In this sense, I think that the Commission's standards do not go far enough. To me, the language used in this case has absolutely no place on the air whether it be 2:00 p.m. or 2:00 a.m.

CONCURRING STATEMENT OF COMMISSIONER JAMES QUELLO

While I concur in the adoption of the document clarifying the Commission's position on the broadcasting of indecent language, I have serious reservations as to the extent of the standard enunciated. I concur in the action only because I recognize the need for an updated standard in light of the Supreme Court's ruling in Miller v. California, 413 U.S. 15 (1973).

I agree wholeheartedly with the conclusion that the words listed in Paragraph 14 ". . . are words which depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly 'indecent' when broadcast on radio or television." However, I depart from the majority in its view that such words are less offensive when children are at a minimum in the audience. Garbage is garbage. And under no stretch of the imagination can I conceive of such words being broadcast in the context of serious literary, artistic, political, or scientific value. Under contemporary community standards anywhere in this country, I believe such words are reprehensive no matter what the broadcast hour.

. . .

CONCURRING STATEMENT OF COMMISSIONER GLEN O. ROBINSON IN WHICH COMMISSIONER BENJAMIN L. HOOKS JOINS

. . .

For obscenity regulation, modern times begin with Roth v. United States, 354 U.S. 467 (1957), which held that whether a work was obscene must turn on "whether to the average person, applying contemporary standards, the dominant theme of the material taken as a whole appeals to a prurient interest." In *Roth*, the Court declined the opportunity to hold that certain kinds of speech relative to the anal or genital taboos were "special" in some sense, and subject to reasonable regulation. Instead, it held that obscene speech was not constitutionally protected at all, and could accordingly be suppressed. This false dichotomy burdens the law of obscenity to this day. By insisting that sexually frank speech belonged to one domain and protected speech to another, the Court made it necessary to decide in case after case the hard question, whether a book was obscene (and thus suppressable) rather than the easy one, whether many people would be offended by it (and thus subject it to reasonable regulation but not suppression). . . .

Succeeding cases showed a marked tendency to confine the obscenity definition so as to narrow the class of books and magazines which could be suppressed by government power. . . . In a Book

Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts, 383 U.S. 413 (1966), the Court was asked to consider the case of a book designed to appeal to a prurient interest in sex, whose language patently exceeded the standards of candor existing in most communities, but which nevertheless possessed considerable artistic and literary merit. The plurality of the Supreme Court held that unless such a work was "utterly without redeeming social value," it could not be held obscene. Miller v. California, 413 U.S. 15 (1973) essentially restated and reiterated the main themes of obscenity doctrine as they have been unfolding since 1957. Its chief modification of what went before is to hold that the government need not prove material utterly bereft of redeeming social value, merely that it is without "serious literary, artistic, political or scientific value." [3] 413 U.S. at 24.

Contemporaneous with the unfolding of obscenity doctrine, a different branch of first amendment doctrine developed, which held in narrow check the right of a citizen to insulate himself from the constitutionally protected speech of others. . . . In Cohen v. California, 403 U.S. 15 (1971), a jacket bearing the legend "Fuck the Draft" was held protected speech.

Thus, one of the consequences of speech being protected by the First Amendment is that people do not have an unlimited right to avoid exposure to it. In this way, the trend in obscenity doctrine toward carving down the amount of material without the protection of the First Amendment, together with the limited insulation people are entitled to receive from protected speech, work together like scissors-blades on the sensibilities of a great many citizens.

II. Policy Considerations

. . .

Broadcast communications are sufficiently different from other forms of communications to justify a degree of regulation not tolerable for other media. A number of possibly relevant differences can be identified: limitations on the radio spectrum which in general terms permit greater government scrutiny of the use to which the electronic media are put; [6] the fact that these media enter the privacy

3. *Miller* also answered a question long vexing to obscenity doctrine: the community standards to be applied in connection with the ascertainment of prurience were those of the *local*, not national, community. See 413 U.S. at 31–33. In connection with broadcasting, the relevant community has special significance. It is safe to assume that the standards of a national community would be applicable to a national broadcast, but we need not consider that issue here, in the context of a local FM radio station.

6. [ ] I am not sure that the condition of spectrum scarcity is pertinent here where the form of regulation is

of the home [7] are two prominent differences. I could not say that these differences *compel*, either as a matter of precedent or principle, a different standard of decency for broadcast than for other communications; however, I think that they may support moderately greater public demands from the former than from the latter.

Accordingly, I join the Commission's decision that we may proscribe "indecent" programming over the broadcast media—but absolutely crucial to my concurrence is the limited context in which this principle operates. Today's decision does carry us one step beyond *Sonderling*, which dealt with "obscene" material. But it is not, I think, a long step beyond. The concern there was similar to the basic concern here. Despite efforts to put the case for obscenity regulation on grounds of its direct influence on sexual (particularly sexually violent) behavior, a consideration which would be absent here, I do not think that the case for governmental intervention of a limited sort can be confined to that fear. The deeper concern about obscenity lies in apprehensions about its subtle, indirect and long-term effects on public attitudes and social mores. So it is with "indecency." While I would not have the government in the business of enforcing morals and good taste, whether in the name of preventing "indecency" or "obscenity," it seems to me legitimate that there be a limited regulation of offensive speech which is purveyed widely, publicly, and indiscriminately in such a manner that it cannot be avoided without significantly inconveniencing people or infringing on their right to choose what they will see and hear. In short, to adopt the Commission's language, I think we can regulate offensive speech to the extent it constitutes a public nuisance.

not directed at securing balance in speech or fuller expression of ideas. Perhaps an argument could be made that the condition of spectrum scarcity does compound the "Gresham's Law" phenomenon which the Commission relied on, in part, in Sonderling Broadcasting Corp., 27 R.R.2d 285 (1973). But I would look on that argument with caution, for it could imply a more ambitious form of program "quality control" than is acceptable. [ ]

7. See Sonderling Broadcasting Corp., 27 R.R.2d 285 (1973). It is not clear, however, which way this consideration cuts. The fact that the communication is received in private lessens the aspect of the offense that goes to public outrage; moreover, people have special rights to receive communications in their own homes even if these might be prohibited in any other context. See Stanley v. Georgia, 394 U.S. 557 (1969). At the same time, however, the intrusion of offensive matter into the home under circumstances where it is not expected and cannot always be monitored by adults is a matter of legitimate concern.

III. The Public Interest in Policing Decency

. . .

Nothing herein is inconsistent with a rejection of any claim to be the "general censor" and guardian of the public morals in regard to broadcast communications. What we assert is a special power to protect the young—or, more precisely, people's views about what sort of material it is proper to expose to the young—a purpose which even hardbitten libertarians do not find entirely uncongenial. Even here there is obviously need for caution, lest in our proper concern for protecting children of impressionable age from language to which they ought not to be exposed, we also undertake to regulate the tastes of adults. I am, however, satisfied that we can take reasonable measures short of censorship to channel programming where, as here, it is not adequately controlled to avoid casual listening by children. The principal means by which this can be achieved is to insist that programming of a kind whose broadcast to children would be thought inappropriate be confined to hours of the evening in which children would not ordinarily be exposed to the material—or at least not without the supervision of a parent. Short of an all-out ban on indecent or offensive programming during daytime hours we can also insist that suitable measures be taken to warn adults that possibly offensive programming is about to be presented. Beyond such modest controls, however, I would not proceed.

. . .

Notes and Questions

1. Pacifica has appealed the decision. The oral argument took place in April, 1976, and is reported in Broadcasting, Apr. 5, 1976, p. 38. Pacifica argued that "indecent" is impermissibly vague and must therefore be construed in the same way as "obscene." One judge observed that the "audience" involved was a special one because Pacifica is noted for its unusual programs. He doubted that "one licensee in a thousand" would present this program. How might that be relevant to the decision? Pacifica's lawyer was asked whether it would be unconstitutional to ban "offensive language" on Saturday-morning television programmed for children. When he responded that children do not come to such words innocently and that they have heard them in their daily lives, the judge asked whether there was a difference "between hearing this in the gutter and through approved institutions." In March, 1977, the court reversed, 2–1.

2. Quoting an earlier decision, the majority notes that it takes a "deliberate act to purchase and read a book or seek admission to the theater." How are radio and television different?

3. Is the "risk" of tuning in an offensive program on radio or television any greater than the risk of encountering offensive language on a person's clothing on the streets, as in Cohen v. California, 403 U.S. 15 (1971)? Or offensive films at an outdoor movie theatre, Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)? If averting your eyes is an adequate remedy in these cases why is turning off the radio or television set not adequate here? Is the fact that one may occur in the home relevant?

4. It is easier to warn viewers that an adult, or possibly offensive program, is being presented when television is involved. In some countries such programs carry a white dot in a corner of the picture so that a viewer can know the nature of the programming instantly. Would this solve our problems so far as television is concerned? Is there a similar technique that can be used for radio? Is it enough that certain stations become known as likely to present certain kinds of material offensive to some? What more could the licensee have done here to warn adult listeners?

5. It has long been agreed that Congress has preempted the matter of obscenity on radio and television—both of which are within "radio communication." Thus a state may not impose its movie censorship scheme on films shown on television.

6. In a clarification sought by the Radio Television News Directors Association (RTNDA), the Commission announced that its decision in the Carlin case was not meant to impinge on the coverage of news events in which offensive speech is sometimes uttered without a chance for editing: "Under these circumstances we believe that it would be inequitable for us to hold a licensee responsible for indecent language." Pacifica Foundation, 59 F.C.C.2d 892, 36 R.R.2d 1008 (1976). What if there is time for editing the dialogue but to do so would change the impact of the event? Can this be handled by an announcer who says "At this point the speaker launched into a stream of obscenities?"

Vice President Nelson Rockefeller used a finger gesture generally considered "obscene" when replying in kind to a heckler during a campaign rally. Most newspapers ran the photograph, but some did not. Would the decision be different for television stations? Are the considerations different for the 6 P.M. and the 11 P.M. news? Does the fact that it was in the course of a live news event make a difference? Would the Commission be likely to find a gesture as objectionable as a word?

7. The standards for cable originated content are unclear. Operators in some states have open access studios that may be used by anyone, with no provision as to whether the operators may censor

or what their liability is if they do not. Thus, one producer of a sexually explicit show over cable in New York complained to the Commission that two operators had banned a segment "featuring a demonstration of male masturbation." He sought revocation of their franchises. Broadcasting, Mar. 17, 1975, p. 43. The question, to be resolved soon one way or another, is how much control a cable system operator should have over the channel that is provided for programs prepared by members of the public. A bill proposed by the Commission in 1976 provided that the cable operator was to have no control over such programming.

8. In 1975, the Commission sent to Congress a Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418, 32 R.R.2d 1367 (1975). In the indecency and obscenity part of the report, the Commission took the position that "direct governmental action is required by statute, and the Commission intends to meet its responsibilities in this area." It released its Pacifica decision at the same time to show how it was handling material that might be suitable for adults but not for children.

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2. SAFETY—VIOLENCE

Although the Surgeon General has issued reports on the relationship between violence and television, and other academic studies have addressed the same issue primarily in connection with children, the Commission has never attempted to regulate the area in any substantive way. It has been asked several times but each time has refused.

In 1972, for example, the Commission was asked to analogize the area to cigarette smoking because of the actions of the Surgeon General in the two areas. George Corey, 37 F.C.C.2d 641, 25 R.R.2d 437 (1972). The complainant sought to have three Boston stations carry a public service notice at appropriate times: "Warning: Viewing of violent television programming by children can be hazardous to their mental health and well being." The Commission rejected the request on two grounds. First, it stated any action should come by rule making rather than moving against a few stations. Second, the Commission rejected the contention that the Fairness Doctrine was applicable to violent programming. The cigarette episode was discussed:

> However, it could not reasonably or logically be concluded that the mere viewing of a person smoking a cigarette during a movie being broadcast on television constitutes a discussion of a controversial issue of public importance thus raising a fairness doctrine obligation. Similarly, we cannot agree that the broadcast of violent episodes during entertainment programs neces-

sarily constitutes the presentation of one side of a controversial issue of public importance. It is simply not an appropriate application of the fairness doctrine to say that an entertainment program—whether it be Shakespeare or an action-adventure show—raises a controversial issue if it contains a violent scene and has a significant audience of children. Were we to adopt your construction that the depiction of a violent scene is a discussion of one side of a controversial issue of public importance, the number of controversial issues presented on entertainment shows would be virtually endless (e.g., a scene with a high-powered car; or one showing a person taking an alcoholic drink or cigarette; depicting women in a soft, feminine or light romantic role). Finally, we note that there are marked differences in the conclusiveness of the hazard established in this area as against cigarette smoking. [ ]

The real thrust of your complaint would appear to be not fairness in the discussion of controversial issues but the elimination of violent TV children's programming because of its effect on children. That issue is being considered particularly by appropriate Congressional committees and agencies such as HEW. [ ] It is a difficult, complex, and sensitive matter. But whatever its resolution, there is no basis for the action along the lines proposed by you.

In its Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418, 32 R.R.2d 1367 (1975), the Commission explained to Congress that the violence area was unlike the obscenity area because of the totally different statutory framework involved. In the absence of any prohibitions on violence in programming, "industry self-regulation is preferable to the adoption of rigid governmental standards." The Commission took this position for two reasons. First, it feared the constitutional questions that would emerge from such an intrusion into program content. Second the judgments concerning the suitability of certain programming for children are "highly subjective." A speech by Chairman Wiley was quoted to the effect that slapstick comedy, an episode in Peter Pan when Captain Hook is eaten by a crocodile, and the poisoning of Snow White by the witch, all raise judgmental questions for which there is no objective standard.

The Commission stated, however, that Chairman Wiley had initiated a series of meetings with network officials to attempt to have certain programming shifted to later periods in the evening. This culminated in the so-called "Family Viewing Time" under which, through the National Association of Broadcasters, programming of a violent or sexually-oriented nature was wholly barred from the 7:00–9:00 p.m. time slots on most television stations.

In Writers Guild of America v. National Association of Broadcasters, 38 R.R.2d 1409 (D.C.Cal.1976), the court found that the Chairman of the Federal Comunications Commission had brought pressure on network executives who in turn persuaded the NAB to adopt the concept of family viewing time. He held that this pressure constituted such government action that the family viewing hour must be judged as Commission action. Yet the Commission had failed to follow the prescribed procedures that an administrative agency must follow when it proposes to adopt regulations. Therefore family viewing time was held invalid, although the judge made it clear that he had no doubt that licensees acting individually in a voluntary manner might properly decide that they wished to present certain types of programming only at certain hours. In another part of the opinion, the judge indicated that those hurt by the improper behavior might be able to recover damages from the networks. Appeals are pending.

One surge of interest has been concentrated on advertisers. A pilot study indicated that ten percent of those surveyed had considered not buying a product because it was advertised on a program they thought excessively violent. The president of a leading advertising agency announced that it counsels clients to consider the negative aspects of placing commercials in violent programs. Editor & Publisher, June 12, 1976, p. 5. Commission Chairman Wiley also suggested that advertisers consider the commercial implications of such programs. See also Broadcasting, June 14, 1976 pp. 32, 42. For a detailed discussion of the impact of television on children, see the five articles collected in 20 J.Broadcasting 1–68 (1976). See also Cater and Strickland, TV Violence and the Child—The Evolution and Fate of the Surgeon General's Report (1975).

Mass Hysteria. Another substantive problem involves programs that frighten the listening public. At 11:00 p.m. on Oct. 30, 1974, a radio station in Rhode Island presented a contemporary version of the famous H. G. Wells' War of the Worlds, that had been presented on that same night in 1938. A meteorite was reported to have fallen in a sparsely populated community killing several people; later "black-eyed, V-shaped mouthed, glistening creatures dripping saliva" were reported to have emerged from what turned out to be a capsule, and other landings were reported. What steps would you expect the licensee to take before presenting such a program—or is it inappropriate to present such material at any time? Telephone calls from frightened, and later from angry, listeners flooded the station, police and other public service departments.

The licensee had taken several steps before the program to inform state public safety officials in the listening area of the station. The state police in turn sent notices to all their stations in the area

alerting them to the program. Approximately once an hour from noon until 10:00 p.m. the licensee broadcast the following promotional announcement: "Tonight at 11:00 p.m., WPRO invites you to listen to a spoof of the 1930's a special Hallowe'en classic presentation. . . ." The last was made about an hour before the program. Three announcements were made during the program—after 47, 48, and 56 minutes. The reason for the timing was said to be that the first 30 to 35 minutes of the show involved what appeared to be a meteor crashing in a remote spot and the arrival of creatures was not reported until 30 minutes into the program.

The Commission told the licensee that it had not met its responsibility to operate in a manner consistent with the public interest. The warnings were inadequate because "it is a well known fact that the radio audience is constantly changing. The only way to assure adequately that the public would not be alarmed in this case would be an introductory statement repeated at frequent intervals throughout the program." One commissioner dissented because intrusion into presentations of drama should be made with "utmost caution" and the licensee's precautions "were not in my opinion unreasonable." Capital Cities Communications, Inc., 54 F.C.C.2d 1035, 34 R.R.2d 1016 (1975).

Would the Commission's suggestions impinge on the dramatic effect sought by the licensee? Is that relevant? Can you think of other ways to meet the Commission's concern? Recall the greater ease of warning an unwilling audience about possibly offensive programs over television as opposed to radio. Is that distinction applicable here?

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3. Protecting Public Health

Earlier we considered several legislative efforts to protect public health and safety that arguably impinged on freedom of speech and press, p. 427, supra. In this section we consider a group of cases in which some branch of government has justified restrictions on broadcast communication in terms of health and safety.

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a. Smoking

Undoubtedly the most prominent example of such regulation is to be found in the extensive concern of Congress and the Commission with the advertising of cigarettes. We have already seen how the Commission brought such advertising within the Fairness Doctrine, p. 607 supra. The effect of that decision was to make time available

for anti-smoking messages, though not in the same numbers as the commercials that sought to encourage smoking. In 1969, Congress entered the picture by banning all cigarette commercials on radio and television (15 U.S.C. § 1335):

> After January 1, 1971, it shall be unlawful to advertise cigarettes on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.

Litigation began on several fronts.

One major case was Larus & Brother Co. v. Federal Communications Comm'n, 447 F.2d 876 (4th Cir. 1971), in which the Tobacco Institute and cigarette manufacturers sought review of a Commission ruling that licensees who broadcast anti-smoking messages were not required by the Fairness Doctrine to present opposing views. The Commission had concluded that in light of recent medical and scientific findings and the Congressional ban on cigarette commercials, licensees might now reasonably conclude that the "detrimental effects of cigarette smoking on health are beyond controversy." The court concluded that the Commission had "articulated with reasonable clarity a rational basis for its change of view." The petitioners argued that the Commission had effectively announced an "official government view" on smoking by refusing to compel pro-smoking commercials and by announcing that it would consider a licensee's treatment of the effects of smoking on health when it appraised a station's overall public service performance at renewal time.

The court rejected the argument that this amounted to censorship in violation of § 326 because licensees were still free to present pro-smoking messages—except to the extent that Congress had forbidden commercial messages. The Commission was leaving that decision to the licensees. Moreover, some aspects of anti-smoking messages might still be found to invoke the Fairness Doctrine—but health danger was not one of them. Also, it was permissible to consider at renewal time whether a licensee carried programs on the dangers of smoking—not because it was a controversial issue, but because one aspect of meeting the public interest is to warn about dangers to health and safety, even if they are obvious and non-controversial. What might the Commission do at renewal time if it found that a licensee had presented several debates on cigarette smoking in which half the speakers argued that there was no health hazard in smoking? Is there a tension between saying that licensees are free to program pro-smoking material if they wish and that they will be judged at renewal time on how they have programmed on matters of health and safety?

The next case involved a direct challenge to the Congressional ban on cigarette commercials.

CAPITAL BROADCASTING CO. v. MITCHELL

United States District Court, District of Columbia, 1971.
333 F.Supp. 582.
Judgment affirmed, 405 U.S. 1000, 92 S.Ct. 1289, 31 L.Ed.2d 472 (1972).

Before WRIGHT, CIRCUIT JUDGE, and GASCH and GREEN, DISTRICT JUDGES.

GASCH, DISTRICT JUDGE.

Petitioners, six corporations which operate radio stations under licenses granted by the Federal Communications Commission, seek to enjoin enforcement of Section 6 of the Public Health Cigarette Smoking Act of 1969 and to have Section 6 declared violative of the First and Fifth Amendments to the Constitution. The National Association of Broadcasters has been permitted to intervene.

. . .

In 1965, in an attempt to alert the general public to the documented dangers of cigarette smoking, Congress enacted legislation requiring a health warning to be placed on all cigarette packages. By 1969 it was evident that more stringent controls would be required and that both the FCC and the FTC were considering independent action. Under such circumstances Congress enacted the Public Health Cigarette Smoking Act of 1969, (hereafter referred to as the Act) which, as pertinent hereto, provides:

> "Sec. 6. After January 1, 1971, it shall be unlawful to advertise cigarettes on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."

Petitioners allege that the ban on advertising imposed by Section 6 prohibits the "dissemination of information with respect to a lawfully sold product . . ." in violation of the First Amendment. It is established that product advertising is less vigorously protected than other forms of speech. [ ] The unique characteristics of electronic communication make it especially subject to regulation in the public interest. National Broadcasting Co. v. United States, 319 U.S. 190, 226–227 (1943); Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1003 (1966). Whether the Act is viewed as an exercise of the Congress' supervisory role over the federal regulatory agencies or as an exercise of its power to regulate interstate commerce, Congress has the power to prohibit the advertising of cigarettes in any media. The validity of other, similar advertising regulations concerning the federal regulatory agencies has been repeatedly upheld whether the agency be the FCC, the FTC, or the SEC. Petitioners do not dispute the existence of such regulatory power, but urge that its exercise in context of the Act is uncon-

stitutional. In that regard it is dispositive that the Act has no substantial effect on the exercise of petitioners' First Amendment rights. Even assuming that loss of revenue from cigarette advertisements affects petitioners with sufficient First Amendment interest, petitioners, themselves, have lost no right to speak—they have only lost an ability to collect revenue from others for broadcasting their commercial messages. [ ] Finding nothing in the Act or its legislative history which precludes a broadcast licensee from airing its own point of view on any aspect of the cigarette smoking question, it is clear that petitioners' speech is not at issue. Thus, contrary to the assertions made by petitioners, Section 6 does not prohibit them from disseminating information about cigarettes, and, therefore, does not conflict with the exercise of their First Amendment rights.

The dissent relies upon Banzhaf v. F.C.C., 405 F.2d 1082 (1968), certiorari denied, 396 U.S. 842 (1969), for the proposition that since cigarette commercials implicitly state a position on a matter of public importance, such ads are placed within the "core protection" of the First Amendment. As we read this decision, with which we are in full accord, it carefully distinguishes between First Amendment protections as such, and the rather limited extent to which product advertising is tangentially regarded as having some limited indicia of such protection. *Banzhaf*, supra, at 1101–02. The fact that cigarette advertising is covered by the FCC's fairness doctrine does not require a finding that it is to be given full First Amendment protection, especially in light of contrary existing authority. . . .

Petitioners' Fifth Amendment contention raises a more direct constitutional question. Petitioners state their objection "is *not* that any ban upon cigarette advertising would violate the due process clause. Rather, it is Congress' attempt, in Section 6 of the Act, to classify media in two categories—those prohibited from carrying cigarette advertisements and those who are not—which contravenes the Fifth Amendment because the distinctions drawn are 'arbitrary and invidious.' " To withstand due process challenge a statutory classification must have a reasonable basis, and if such basis exists, the validity of the statute must be upheld without further inquiry. . . .

Under the above criteria there exists a rational basis for placing a ban on cigarette advertisements on broadcast facilities while allowing such advertisements in print. In 1969 Congress had convincing evidence that the Labeling Act of 1965 had not materially reduced the incidence of cigarette smoking. Substantial evidence showed that the most persuasive advertising was being conducted on radio and television, and that these broadcasts were particularly effective in reaching a very large audience of young people. Thus, Congress knew of the close relationship between cigarette commercials broadcast on the electronic media and their potential influence on young people, and

was no doubt aware that the younger the individual, the greater the reliance on the broadcast message rather than the written word. A pre-school or early elementary school age child can hear and understand a radio commercial or see, hear and understand a television commercial, while at the same time be substantially unaffected by an advertisement printed in a newspaper, magazine or appearing on a billboard.

The fact is that there are significant differences between the electronic media and print. [quoting *Banzhaf*] Moreover, Congress could rationally distinguish radio and television from other media on the basis that the public owns the airwaves and that licensees must operate broadcast facilities in the public interest under the supervision of a federal regulatory agency. Legislation concerning newspapers and magazines must take into account the fact that the printed media are privately owned. See, National Broadcasting Co. v. United States, supra; Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969).

Thus, Congress had information quite sufficient to believe that a proscription covering only the electronic media would be an appropriate response to the problem of cigarette advertising. Petitioners emphasize that much of the revenue formerly allocated to television and radio cigarette advertisements has been diverted to newspapers and magazines. The fact that the Act may create a new and perhaps potentially serious situation in the print media is not sufficient evidence to establish a due process violation. . . .

The petition for injunctive and declaratory relief is, accordingly, denied.

J. SKELLY WRIGHT, CIRCUIT JUDGE (dissenting):

Cigarette smoking and the danger to health which it poses are among the most controversial and important issues before the American public today. Yet Congress, in passing the Public Health Cigarette Smoking Act of 1969, has suppressed the ventilation of these issues on the country's most pervasive communication vehicle—the electronic media. Under the circumstances, in my judgment, no amount of attempted balancing of alleged compelling state interests against freedom of the press can save this Act from constitutional condemnation under the First Amendment. The heavy hand of government has destroyed the scales.

It would be difficult to argue that there are many who mourn for the Marlboro Man or miss the ungrammatical Winston jingles. Most television viewers no doubt agree that cigarette advertising represents the carping hucksterism of Madison Avenue at its very worst. Moreover, overwhelming scientific evidence makes plain that the Salem girl was in fact a seductive merchant of death—that the real

"Marlboro Country" is the graveyard. But the First Amendment does not protect only speech that is healthy or harmless. The Court of Appeals in this circuit has approved the view that "cigarette advertising implicitly states a position on a matter of public controversy." Banzhaf v. F.C.C., 405 F.2d 1082, 1102 (1968), certiorari denied, 396 U.S. 842 (1969). For me, that finding is enough to place such advertising within the core protection of the First Amendment.

I

The *Banzhaf* case, decided three years ago, upheld an FCC determination that, since cigarette advertising was controversial speech on a public issue, the so-called "fairness doctrine" applied to it.[4] Stations carrying cigarette advertising were therefore required to "tell both sides of the story" and present a fair number of anti-smoking messages.

The history of cigarette advertising since *Banzhaf* has been a sad tale of well meaning but misguided paternalism, cynical bargaining and lost opportunity. In the immediate wake of *Banzhaf*, the broadcast media were flooded with exceedingly effective anti-smoking commercials. For the first time in years, the statistics began to show a sustained trend toward lesser cigarette consumption. The *Banzhaf* advertising not only cost the cigarette companies customers, present and potential; it also put the industry in a delicate, paradoxical position. While cigarette advertising is apparently quite effective in inducing brand loyalty, it seems to have little impact on whether people in fact smoke. And after *Banzhaf*, these advertisements triggered the anti-smoking messages which were having a devastating effect on cigarette consumption. Thus the individual tobacco companies could not stop advertising for fear of losing their competitive position; yet for every dollar they spent to advance their product, they forced the airing of more anti-smoking advertisements and hence lost more customers.

It was against this backdrop that the Consumer Subcommittee of the Senate Committee on Commerce met to consider new cigarette legislation. The legislative prohibition against requiring health warnings in cigarette advertisements had just expired, and the Federal Trade Commission had indicated that it might soon require such warnings if not again stopped by Congress. In addition, the FCC was moving toward rule making which would have removed cigarette advertising from the electronic media. Thus Congress had to decide whether to extend the ban on FTC action and institute a similar re-

4. Because some doubt as to the constitutionality of the fairness doctrine existed at that time, the *Banzhaf* court actually rested its decision on the broader "public interest" standard which broadcasters are required to meet. . . .

straint against the FCC or, alternatively, to allow the regulatory agencies to move forcefully against cigarette advertisements.

The context in which this decision had to be made shifted dramatically when a representative of the cigarette industry suggested that the subcommittee draft legislation permitting the companies to remove their advertisements from the air.[10] In retrospect, it is hard to see why this announcement was thought surprising. The *Banzhaf* ruling had clearly made electronic media advertising a losing proposition for the industry, and a voluntary withdrawal would have saved the companies approximately $250,000,000 in advertising costs, relieved political pressure for FTC action, and removed most anti-smoking messages from the air.

. . .

Of course, the fact that the legislation in question may be a product of skillful lobbying or of pressures brought by narrow private interests, or may have been passed by Congress to favor a particular industry, does not necessarily affect its constitutionality. [ ] But when the "inevitable effect" of the legislation is the production of an unconstitutional result, the statute cannot be allowed to stand. [ ] The legislative history related above shows that the effect of this legislation was to cut off debate on the value of cigarettes just when *Banzhaf* had made such a debate a real possibility. The theory of free speech is grounded on the belief that people will make the right choice if presented with all points of view on a controversial issue. See Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 881 (1963); A. Meiklejohn, Political Freedom 26–28 (1960). When *Banzhaf* opened the electronic media to different points of view on the desirability of cigarette smoking, this theory was dramatically vindicated. Once viewers saw both sides of the story, they began to stop or cut down on smoking in ever increasing numbers. Indeed, it was presumably the very success of the *Banzhaf* doctrine in allowing people to make an informed choice that frightened the cigarette industry into calling on Congress to silence the debate.

II

This is not an ordinary "free speech" case. It involves expression which is ostensibly apolitical, advocating a particularly noxious habit through a medium which the Government has traditionally regulated more extensively than other modes of communication. But the unconventional aspects of the problem should not distract us from the basic First Amendment principles involved. Any statute which sup-

10. See Senate Hearing at 78 (testimony of Mr. Cullman). The cigarette companies requested an antitrust exemption so they could reach an agreement among themselves not to advertise on the electronic media without fear of prosecution for restraint of trade.

presses speech over any medium for any purpose begins with a presumption against its validity. If the Government is able to come forward with constitutionally valid reasons why this presumption should be overcome, then of course the statute will be allowed to stand. But where, as here, the reasons offered are inconsistent with the purposes of the First Amendment, it becomes the duty of the courts to invalidate the statute.

Thus it may be true, as the Government argues, that the special characteristics of the electronic media justify greater governmental regulation than would be permitted for the print media. See National Broadcasting Co. v. United States, 319 U.S. 190 (1943). But such regulation is constitutionally justified only because it serves to apportion access to the media fairly. . . .

. . .

Thus the Government fails to meet its burden by simply asserting broad regulatory power over the broadcast media. If the statutory ban on cigarette advertising is to withstand constitutional scrutiny, there must be a further showing that either the advertising is not speech within the meaning of the First Amendment or it creates a clear and present danger of such substantial magnitude that governmental suppression is justified.[25] While the Government in fact makes both of these arguments, I find neither of them persuasive in the context of this case.

Although the status of commercial or "product" advertising under the First Amendment has not been finally resolved, it must be conceded that some cases seem to accord it lesser protection than political or artistic speech. Indeed, as the court in *Banzhaf* stated: "As a rule, [product advertising] does not affect the political process, does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self-expression." Commentators too have argued that product advertising is generally unrelated to the

25. The majority suggests that the statute can be upheld because "petitioners [the broadcasters], themselves, have lost no right to speak—they have only lost an ability to collect revenue from others for broadcasting their commercial messages." But this argument misconceives the nature of the issues involved. As Mr. Justice White stated in Red Lion Broadcasting Co. v. F.C.C.:

"'. . . It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.'" . . .

values which the First Amendment was designed to preserve, and that broad state regulation should therefore be permitted.

These arguments are no doubt persuasive when applied to most of the activities of Madison Avenue. But it does not follow from their general validity that the words "product advertising" are a magical incantation which, when piously uttered, will automatically decide cases without the benefit of further thought. Thus when commercial speech has involved matters of public controversy,[31] or artistic expression,[32] or deeply held personal beliefs, the courts have not hesitated to accord it full First Amendment protection.

In my view, this circuit's decisions in *Banzhaf* and Friends of the Earth v. F.C.C. implicitly recognize this special status which certain forms of product advertising enjoy. Both *Banzhaf* and *Friends of the Earth* suggest that the fairness doctrine is not relevant to normal commercial messages. Yet the doctrine was applied in the case of cigarette and automobile advertisements because they, unlike ordinary commercial speech, were controversial statements on important public issues. It can hardly be contended that cigarette commercials are "controversial speech" for purposes of the First Amendment based fairness doctrine, yet mere "product advertising" for purposes of the First Amendment.[36] . . .

. . .

Of course, it is true that the courts have on occasion recognized a narrow exception to these general First Amendment principles. Where otherwise protected speech can be shown to present a "clear and present danger" of a severe evil which the state has a right to prevent, suppression of that speech has on occasion been permitted. The argument is made here that the state has an overwhelming interest in the preservation of the health of its citizens and that cigarette advertising poses a clear and present danger to this interest.

Although this argument is superficially attractive, it cannot withstand close scrutiny. The clear and present danger test has al-

31. See, e.g., New York Times Co. v. Sullivan [ ].

32. See, e.g., Smith v. California [ ].

36. It might be argued that the Public Health Cigarette Smoking Act bars only product advertising and not the sort of general argument about the desirability of cigarette smoking which the First Amendment would protect. But such an argument ignores the full force of the *Banzhaf* decision. The *Banzhaf* court did not rely on general "political" messages favoring smoking to trigger the fairness doctrine. Rather, it found that the product advertising itself "implicitly states a position on a matter of public controversy." 405 F.2d at 1102. Moreover, the *Banzhaf* court conceded that "the anti-cigarette broadcasts required by the Commission's ruling may include uninformative propaganda as well as hard information." 405 F.2d at 1090 n. 25. The First Amendment does not permit the Government to restrict one side of a controversy to "hard information" while allowing the other side to utilize "uninformative progaganda" as well.

ways been more or less confined to cases where the state has asserted an overriding interest in its own preservation or in the maintenance of public order. While it cannot be denied that public health is also a vital area of state concern, it is different from the state interest in security in one crucial respect. Whereas there are always innocent victims in riots and revolutions, the only person directly harmed by smoking cigarettes is the person who decides to smoke them. The state can stop speech in order to protect the innocent bystander, but it cannot impose silence merely because it fears that people will be convinced by what they hear and thereby harm themselves. As cases like Stanley v. Georgia and Griswold v. Connecticut [44] make clear, the state has no interest at all in what people read, see, hear or think in the privacy of their own home or in front of their own television set. At the very core of the First Amendment is the notion that people are capable of making up their own minds about what is good for them and that they can think their own thoughts so long as they do not in some manner interfere with the rights of others.

III

This opinion is not intended as a Magna Carta for Madison Avenue. In my view, Congress retains broad power to deal with the evils of cigarette advertising. It can force the removal of deceptive claims, require manufacturers to couple their advertisements with a clear statement of the hazardous nature of their product, and provide for reply time to be awarded to anti-cigarette groups. But the one thing which Congress may not do is cut off debate altogether.

The only interest which might conceivably justify such a total ban is the state's interest in preventing people from being convinced by what they hear—the very sort of paternalistic interest which the First Amendment precludes the state from asserting. Even if this interest were sufficient in the purely commercial context, the *Banzhaf* decision makes clear that cigarette messages are not ordinary product advertising but rather speech on a controversial issue of public importance—*viz.*, the desirability of cigarette smoking. The Government simply cannot have it both ways. Either this is controversial speech in the public arena or it is not. If it is such speech, then Section 6 of the Public Health Cigarette Smoking Act is unconstitutional; if it is not, then *Banzhaf* was wrongly decided. Although I respect the opinion of my colleagues in this case, my own view is that the *Banzhaf* decision was correct and that this law is unconstitutional.[45] I come to that position not only because *stare decisis* dictates it,

44. 381 U.S. 479 (1965).

45. The recent case of Larus & Brother Co., Inc. v. F.C.C., 447 F.2d 876 (4th Cir. 1971) is not opposed to this view. . . . What *Larus & Brother Co.* actually demonstrates is that the Public Health Cigarette Smoking Act

but also because I think that when people are given both sides of the cigarette controversy, they will make the correct decision. That, after all, is what the First Amendment is all about. And our too brief experience with the *Banzhaf* doctrine shows that the theory works in practice.

I respectfully dissent.

Notes and Questions

1. Since this case was decided by a three-judge district court, direct appeal lay to the Supreme Court. The plaintiffs filed such an appeal. Instead of setting the case for argument, the Court issued the order "Judgment affirmed." Justices Douglas and Brennan would have set the case for argument. Justice Powell took no part in this decision. 405 U.S. 1000 (1972).

2. Under the rationale of the majority, could Congress have banned non-commercial comments on radio and television that were favorable to cigarette smoking? Could Congress have banned all discussion of cigarette smoking on the air?

3. Could Congress have banned cigarette advertisements in the print media as well? Does the majority suggest that because broadcasting is more effective than the print media it may therefore be regulated more easily?

4. Has Congress "cut off debate altogether" as the dissent asserts?

5. One recent subject of concern has related to the use of commercials on children's television. Efforts to eliminate all sponsorship on programs were rejected by the Commission. Action for Children's Television, 50 F.C.C.2d 1, 31 R.R.2d 1228 (1974). An appeal was argued in September, 1976. Action for Children's Television v. Federal Communications Comm'n (D.C.Cir. No. 74–2006). The Commission did, however, conclude that broadcasters should maintain a clear separation between programming and advertising and that the "host selling" practice was inconsistent with broadcasters' obligations to operate in the public interest. A rule of the National Association of Broadcasters prohibiting the "host selling" practice in children's programming was recently upheld against an attack that alleged that NAB members' compliance with the provision was a violation of anti-

of 1969 has so succeeded in suppressing ventilation of the cigarette smoking controversy on radio and television that the controversy has disappeared from the electronic media. Thus while the functioning of the First Amendment as to this controversy has been frustrated on the nation's most pervasive information outlets, the controversy itself has in no sense ended. Rather, it has merely been shifted to other communications media where the fairness doctrine is not applicable and cigarette foes have no right of reply. [ ]

trust law. American Federation of Television and Radio Artists v. National Association of Broadcasters, 407 F.Supp. 900 (S.D.N.Y. 1976). See also Children's Programming, 53 F.C.C.2d 161, 33 R.R.2d 1511 (1975) (amending renewal form to require information about advertising practices on programs designed for children). For several articles on the effect of television commercials on children, see Symposium, How TV Sells Children, 27 J.Communication 100 (1977).

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b. Drugs

YALE BROADCASTING CO. v. FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals, District of Columbia Circuit, 1973.
478 F.2d 594.
Certiorari denied, 414 U.S. 914, 94 S.Ct. 211, 38 L.Ed.2d 152 (1973).

Before DANAHER, SENIOR CIRCUIT JUDGE, and ROBINSON and WILKEY, CIRCUIT JUDGES.

WILKEY, CIRCUIT JUDGE:

The source of this controversy is a Notice issued by the Federal Communications Commission regarding "drug oriented" music allegedly played by some radio stations. This Notice and a subsequent Order, the stated purposes of which were to remind broadcasters of a pre-existing duty, required licensees to have knowledge of the content of their programming and on the basis of this knowledge to evaluate the desirability of broadcasting music dealing with drug use. Appellant, a radio station licensee, argues first that the Notice and the Order are an unconstitutional infringement of its First Amendment right to free speech. . . .

. . .

Despite all its attempts to assuage broadcasters' fears, the Commission realized that if an Order can be misunderstood, it will be misunderstood—at least by some licensees. To remove any excuse for misunderstanding, the Commission specified examples of how a broadcaster could obtain the requisite knowledge. A licensee could fulfill its obligation through (1) pre-screening by a responsible station employee, (2) monitoring selections while they were being played, or (3) considering and responding to complaints made by members of the public. The Order made clear that these procedures were merely suggestions, and were not to be regarded as either absolute require-

ments or the exclusive means for fulfilling a station's public interest obligation.

Having made clear our understanding of what the Commission has done, we now take up appellant's arguments seriatim.

III. An Unconstitutional Burden on Freedom of Speech

Appellant's first argument is that the Commission's action imposes an unconstitutional burden on a broadcaster's freedom of speech. This contention rests primarily on the Supreme Court's opinion in Smith v. California,[12] in which a bookseller was convicted of possession and selling obscene literature. The Supreme Court reversed the conviction. Although the State had a legitimate purpose in seeking to ban the distribution of obscene materials, it could not accomplish this goal by placing on the bookseller the procedural burden of examining every book in his store. To make a bookseller criminally liable for all the books sold would necessarily "tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature . . . ."

Appellant compares its own situation to that of the bookseller in *Smith* and argues that the Order imposes an unconstitutional burden on a broadcaster's freedom of speech. The two situations are easily distinguishable.

Most obviously, a radio station can only broadcast for a finite period of twenty-four hours each day; at any one time a bookstore may contain thousands of hours' worth of readable material. Even if the Commission had ordered that stations pre-screen all materials broadcast, the burden would not be nearly so great as the burden imposed on the bookseller in *Smith*. As it is, broadcasters are not even required to pre-screen their maximum of twenty-four hours of daily programming. Broadcasters have specifically been told that they may gain "knowledge" of what they broadcast in other ways.

A more subtle but no less compelling answer to appellant's argument rests upon *why* knowledge of drug oriented music is required by the Commission. In *Smith*, knowledge was imputed to the purveyor in order that a criminal sanction might be imposed and the dissemination halted. Here the goal is to assure the broadcaster has adequate knowledge. . . .

We say that the licensee must have *knowledge* of what it is broadcasting; the precise *understanding* which may be required of the licensee is only that which is reasonable. No radio licensee faces any realistic possibility of a penalty for misinterpreting the lyrics it has chosen or permitted to be broadcast. If the lyrics are completely

12. 361 U.S. 147 (1959).

obscure, the station is not put on notice that it is in fact broadcasting material which would encourage drug abuse. If the lyrics are meaningless, incoherent, the same conclusion follows. The argument of the appellant licensee, that so many of these lyrics are obscure and ambiguous, really is a circumstance available to some degree in his defense for permitting their broadcast, at least until their meaning is clarified. Some lyrics or sounds are virtually unintelligible. To the extent they are completely meaningless gibberish and approach the equivalent of machinery operating or the din of traffic, they, of course, do not communicate with respect to drugs or anything else, and are not within the ambit of the Commission's order. Speech is an expression of sound or visual symbols which is intelligible to some other human beings. At some point along the scale of human intelligibility the sounds produced may slide over from characteristics of free speech, which should be protected, to those of noise pollution, which the Commission has ample authority to abate.[15]

We not only think appellant's argument invalid, we express our astonishment that the licensee would argue that before the broadcast it has no knowledge, and cannot be required to have any knowledge, of material it puts out over the airwaves. We can understand that the individual radio licensees would not be expected to know in advance the content or the quality of a network program, or a free flowing panel discussion of public issues, or other audience participation program, and certainly not a political broadcast. But with reference to the broadcast of that which is frequently termed "canned music," we think the Commission may require that the purveyors of this to the public make a reasonable effort to know what is in the "can." No producer of pork and beans is allowed to put out on a grocery shelf a can without knowing what is in it and standing back of both its content and quality. The Commission is not required to allow radio licensees, being freely granted the use of limited air channels, to spew out to the listening public canned music, whose content and quality before broadcast is totally unknown.

Supposedly a radio licensee is performing a public service—that is the raison d'etre of the license. If the licensee does not have specific knowledge of what it is broadcasting, how can it claim to be operating in the public interest? Far from constituting any threat to freedom of speech of the licensee, we conclude that for the Commission to have been less insistent on licensees discharging their obligations would have verged on an evasion of the Commission's own responsibilities.

By the expression of the above views we have no desire whatsoever to express a value judgment on different types of music, poet-

15. Cf. Noise Control Act of 1972, Pub. L. No. 92-574, 86 Stat. 1234 (1972).

ry, sound, instrumentation, etc., which may appeal to different classes of our most diverse public. "De gustibus non est disputandum." But what we are saying is that whatever the style, whatever the expression put out over the air by the radio station, for the licensee to claim that it has no responsibility to evaluate its product is for the radio station to abnegate completely what we had always considered its responsibility as a licensee. All in all, and quite unintentionally, the appellant-licensee in its free speech argument here has told us a great deal about quality in this particular medium of our culture.

. . .

For the reasons given above, the action of the Federal Communications Commission is

Affirmed.

Notes and Questions

1. A motion for a rehearing en banc was denied over the objection of Chief Judge Bazelon, who commented that

> . . . the Order restated its basic threat: "the broadcaster could jeopardize his license by failing to exercise licensee responsibility in this area." As we have recognized, "licensee responsibility" is a nebulous concept. It could be taken to mean—as the panel opinion takes it—only that "a broadcaster must 'know' what it is broadcasting." On the other hand, in light of the earlier Notice, and in light of the renewed warnings in the Order about the dangers of "drug-oriented" popular songs, broadcasters might have concluded that "responsibility" meant "prohibition".
>
> . . .
>
> This case presents several other questions of considerable significance: Is the popular song a constitutionally protected form of speech?[23] Do the particular songs at which these directives were aimed have a demonstrable connection with illegal activities? If so, is the proper remedy to "discourage or eliminate" the playing of such songs? Can the FCC assert regulatory authority over material that could not constitutionally be regulated in the printed media?[25]

23. Popular songs might be considered mere entertainment, or even noise pollution. Yale Broadcasting Co. v. FCC, at 598, 599. On the other hand, historians and sociologists have noted that the popular song has been an important medium of political, moral, and aesthetic expression in American life. [ ]

25. *See* Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16 (1972) (Chief Judge Bazelon, dissenting) (application of the Fairness Doctrine). Unlike the "Fairness Doctrine" cases, there can be no assertion here that the chilling effect is incidental to providing access to the media for viewpoints that would contribute to a fuller debate on public issues. The question is thus presented whether the rationale of the "Fairness Doctrine", or any other realities of the electronic media, warrant intrusion on broadcasters' free speech rights in this case.

Clearly, the impact of the Commission's order is ripe for judicial review. And, on that review, it would be well to heed Lord Devlin's recent warning: [26]

> If freedom of the press . . . [or freedom of speech] perishes, it will not be by sudden death. . . . It will be a long time dying from a debilitating disease caused by a series of erosive measures, each of which, if examined singly, would have a good deal to be said for it.

2. The Supreme Court denied certiorari, 414 U.S. 914 (1973). Justice Brennan would have granted the writ and set the case for argument. Justice Douglas dissented along the lines sketched by Chief Judge Bazelon. He noted that the Commission majority apparently had intended to ban drug-related lyrics from the air and that at a Congressional hearing the Chairman testified that if a licensee were playing songs that the Commission thought promoted the use of "hard drugs," "I know what I would do, I would probably vote to take the license away." Even though drug lyrics might not cause great concern if banned, "next year it may apply to comedy programs, and the following year to news broadcasts." He concluded that

> The Government cannot, consistent with the First Amendment, require a broadcaster to censor its music any more than it can require a newspaper to censor the stories of its reporters. Under our system the Government is not to decide what messages, spoken or in music, are of the proper "social value" to reach the people.

Is the press analogy sound?

Justice Douglas and Chief Judge Bazelon are concerned about what has been called regulation by "raised eyebrow." This would presumably apply also to actions such as that of the Chairman of the Commission, who sought successfully to "persuade" the networks, and through them the NAB Television Code, to adopt the concept of "family viewing time." It was this aspect of the Chairman's behavior that the judge in the "family viewing" case found to be improper government coercion. See p. 653, supra.

3. Could Congress ban pro-drug broadcasts—whether of songs or of normal speech? Are your views here consistent with your views about Congressional power to ban cigarette commercials?

4. Could Congress ban pro-drug messages in the print media?

26. Quoted in remarks by Richard S. Salant, to the Boston Univ. School of Public Broadcasting, Boston, Mass. April 28, 1971.

5. Do the cigarette and drug episodes indicate whether the Commission has the power to order that "violent" and "sexually explicit" programs not be presented before 9:00 p. m.? Has Congress?

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4. Miscellaneous Constraints

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a. Lottery Information

Another specific substantive limitation has been 18 U.S.C. § 1304, prohibiting broadcast of "any advertisement of or information concerning any lottery . . . ." What is the basis for this statute? As with the specific obscenity statute, the Commission has taken the view that it has responsibility for enforcement. This has been bolstered by the provisions in the Communications Act that provide for revocation of license and for forfeitures against those who violate § 1304: §§ 312(a)(6), 312(b), 503(b)(1)(E).

When states began running their own lotteries, new questions arose concerning the ban on lottery information. After an early case that somewhat limited the scope of § 1304, New York State Broadcasters Ass'n v. United States, 414 F.2d 990 (2d Cir. 1969), the issue came to a head in New Jersey. During three consecutive news broadcasts each Thursday, the day of the drawing in the state lottery, a licensee wanted to announce: "The winning state lottery number drawn today is . . . ." The Commission, in a declaratory ruling concluded that such a statement would violate § 1304, even though it was presented as a news item. A main argument was that this was "news" only to those who held tickets. Experience had shown that the lottery's telephone lines were greatly overloaded on Thursdays as people called to learn the winning number. On a typical Thursday, there were 2,750,000 ticket-holders. On appeal, the court, sitting en banc, unanimously reversed the Commission's ban on such broadcasts. New Jersey State Lottery Comm'n v. United States, 491 F.2d 219 (3d Cir. 1974). The court concluded that the Commission had misconstrued § 1304 by interpreting it to ban "news." Although the information here was of transitory value, the court noted that on Thursdays more people in New Jersey care about this information than care about any given stock market quotation. Thus, the size of the interested group could not be the test of news. Broadcasters should be free to decide what is news and what news will serve the public unless their decision is beyond the realm of reason. The court was also influenced by the no-censorship language of § 326, which reinforced its view that § 1304 should be limited to advertising and information meant to make a particular lottery more attractive to participants.

The government's petition for certiorari was granted to resolve the apparent conflict between the decisions of the Second and Third Circuits. After argument, but before decision, Congress passed a statute providing that § 1304 shall not apply to "an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of State law . . . broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery." 18 U.S.C. § 1307(a)(2). On the government's motion, the Court, over a dissent by Justice Douglas, vacated the judgment of the Third Circuit and remanded for its consideration of whether the case had become moot. United States v. New Jersey State Lottery Comm'n, 420 U.S. 371 (1975).

On remand, the court noted that states adjacent to New Jersey (and to intervenor New Hampshire) did not have state lotteries, so that broadcasters in those states were not permitted by § 1307 to broadcast information about the New Jersey (or New Hampshire) lottery. The concern about limited dissemination of "news" still existed and the case was not moot. The court reaffirmed its earlier decision rejecting the Commission's interpretation of § 1304. The result is reported in New Jersey State Lottery Comm'n v. United States, 519 F.2d 1398 (3d Cir. 1975). The opinion is reported in 34 R.R.2d 825 (1975).

Could a statute constitutionally ban the type of statement the licensee wanted to make?

The only other significant case in this area involved whether so-called "give-away" programs on radio and television ran afoul of § 1304 as lotteries. The Supreme Court construed the statute narrowly and held that requiring contestants to listen to the program did not constitute a "valuable consideration." Thus, the Commission had no basis for prohibiting the programs. Federal Communications Comm'n v. American Broadcasting Co., 347 U.S. 284 (1954).

Newpapers and Lotteries. Newspapers containing lottery information have been barred from the mails under 39 U.S.C. §.3005. In 1975, at the time of the addition to § 1307, Congress also added § 3005(d), permitting mailing of newspapers of general circulation containing lottery information if the state in which the paper was published ran a lottery. Should this be extended to newspapers published in adjoining states, as in the case of broadcasting? A bill to make the newspaper exemption parallel to that for broadcasting was introduced in 1975, but did not become law.

Contests. The stations themselves, however, are permitted to run their own contests so long as they are not fraudulent, are not broadcast during rating periods to increase the figures ("hypoing"), and do not disturb public safety. (In this connection recall the auto-

mobile accident that resulted from a broadcaster's contest that rewarded the first person to reach a mobile disc jockey, p. 441, supra.) The Commission has rejected an effort to ban contests that involve no skill, such as those in which listeners tune in to know how much money is in the jackpot in case they are telephoned. The complaint was that this type of contest "bribed" listeners and tended to force other stations to compete by imitation rather than by making improvements in programming. The Commission refused to act because it was not convinced that the problem required attention or that it was empowered to deal with such a situation. Broadcast of Station Contests, 37 R.R.2d 260 (F.C.C.1976). Does this kind of situation warrant action? Under what authority? Legislation has been introduced to treat newspapers the same way as broadcasters.

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b. Sports Blackouts

In 1973, Congress passed a statute to resolve the clamor raised by the refusal of professional football teams to permit televising of a home game that was being televised to other parts of the country (47 U.S.C. § 331). It provided that professional sports telecasts could not be barred if all the tickets had been sold 72 hours before game time, and spelled out the conditions under which the rights to telecast could be made available. The statute expired by its own terms in 1975. A permanent anti-blackout statute was blocked in 1976, but the National Football League agreed to follow the expired statute.

The statute is defended as a trade-off for the granting to professional sports of an antitrust exemption to permit league pooling of game telecast rights. See S.Repts.No. 93–347 (1973) and No. 94–510 (1975). Does that justify content control?

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c. The NAB Codes

Much program content is indirectly controlled by the terms of the Television and Radio Codes promulgated by the National Association of Broadcasters, a broadcast industry organization. As of March 1, 1976, 2,785 broadcasters subscribed to the Radio Code and 438 stations subscribed to the Television Code. The numbers are understated because they exclude affiliates of the three major networks who do not independently subscribe to the codes although the networks do. The rules, which have gone through periodic revisions, call upon stations to program in conformity with the language of the Code. The potential legal problems that emerge from such an arrangement are suggested in the following case.

MARK v. FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals, First Circuit, 1972.
468 F.2d 266.

Before COFFIN, CHIEF JUDGE, MCENTEE, CIRCUIT JUDGE, and HAMLEY, SENIOR CIRCUIT JUDGE.

COFFIN, CHIEF JUDGE.

This petition to review a final decision of the Federal Communications Commission (the Commission), under 28 U.S.C. § 2342(1), challenges the Commission's refusal to order intervenor, the National Broadcasting Company, Inc. (NBC), a television station licensee, to abandon its policy of excluding from nonnews programs material presented for the purpose of fostering belief in astrology. Since NBC's policy in this particular is to adhere to the Television Code (the Code) of the National Association of Broadcasters (the NAB), petitioner also seeks review of the Commission's refusal to issue a declaratory ruling that Television Code Section IV-21 [1] and identical provision in the Radio Code may not be adopted by licensees as their own policy.

Petitioner's involvement with NBC and the Commission stemmed from her efforts to gain publicity for her book, "Astrology For The Aquarian Age", published by Simon & Schuster, in July, 1970. Her theme is that "Astrology is the science of time . . . the synchronization of astronomical time with biological time", or "the study of Nature's clock—a clock of such gigantic proportions that few people have the imagination to comprehend its scope." . . .

Petitioner alleged that her agent's request that petitioner be invited to appear on NBC's *Tonight Show* was refused. A subsequent request for clarification of policy was answered by NBC which stated that program material on astrology was "unacceptable when presented for the purpose of fostering belief in the subject". Subsequent unsuccessful efforts by petitioner culminated in the filing of the Complaint and Request for Declaratory Ruling. The complaint charged that a flat ban on the advocacy of astrology violated both the First Amendment and the "public interest" standard of the Communications Act. . . .

The Commission's response, echoed by the licensee, was that the record did not indicate that NBC acted unreasonably in refusing to invite petitioner to be a guest on any of its talk shows, and that the

1. The relevant code section of "IV. General Program Standards" reads:

"21. Program material pertaining to fortune-telling, occultism, astrology, phrenology, palm-reading, numerology, mind-reading, or character-reading, is unacceptable when presented for the purpose of fostering belief in these subjects."

Commission lacked authority to require changes in the Code, or to affect a licensee's membership in a private association. The Commission noted that in any event there was no evidence that membership in the NAB had resulted in a violation of the First Amendment, the Communications Act, or any Commission rule or policy. NBC contended that its acts did not amount to "state action" which would subject it to compliance with the First Amendment.

Considering the lack of information before the Commission, it is difficult to understand its apparent certainty of belief that it is powerless to protect against possible abuses resulting from broadcaster involvement with the NAB. However, even if we should find in addition that the actions of the licensee are clothed with "state action", or for other reasons that the First Amendment applies to a broadcaster, nevertheless it cannot be seriously contended, in light of the limited number of broadcast frequencies available, that general guidelines reflecting programming priorities may not reasonably be adopted. The Communications Act's requirement that stations operate in the "public interest" furnishes the framework within which the First Amendment would apply, such that activities or policies of a broadcaster, if valid under the Act, would normally also meet the constitutional standard. National Broadcasting Co. v. United States, 319 U.S. 190, 227 (1943). We therefore view petitioner's allegations within the context of the Communications Act.

The claim that NBC's flat ban on programs which "are presented for the purpose of fostering belief" in astrology is essentially one of overbreadth in a non-criminal context. Thus some sort of showing should be made that a refusal to consider programming which falls within the ban would contravene the "public interest". Petitioner has failed to present even a prima facie case that the ban extends to such programming. . . .

On the record before us, we affirm.

Notes and Questions

1. Would appellant have fared differently if the licensee had argued that its own standards dictated not presenting Mark?

2. The ban on astrology was but one of many in force at the time. For example, the 12th edition of the Code (1967) contained many restrictions in its general program standards: "Racial or nationality types shall not be shown on television in such a manner as to ridicule the race or nationality"; "Attacks on religion and religious faiths are not allowed . . . . The office of minister, priest, or rabbi shall not be presented in such a manner as to ridicule or impair its dignity"; "The presentation of cruelty, greed and selfishness as worthy motivations is to be avoided"; "Suicide as an acceptable solution for

human problems is prohibited"; "Illicit sex relations are not treated as commendable," and "Drunkenness should never be presented as desirable or prevalent."

By the 18th edition of June, 1975, much had changed. "Special sensitivity is necessary in the use of material relating to sex, race, color, age, creed, religious functionaries or rites, or national or ethnic derivation." Also, "The use of liquor and the depiction of smoking in program content shall be de-emphasized." The *Mark* provision stated that "Program material pertaining to . . . astrology . . . is unacceptable if it encourages people to regard such fields as providing commonly accepted appraisals of life." How might such a provision have operated in *Mark*?

3. In the family viewing time case, p. 653, supra, the judge showed great concern about the power of the NAB as compared to that of the individual licensees. For example, all television members of the NAB had to subscribe to the Television Code. When this controversial provision was adopted, several members left the NAB in protest. The result in the family viewing time case led the NAB to drop the requirement so that each station could make its own decisions. Television Digest, Jan. 31, 1977, p. 1. For a discussion of the NAB Codes before the recent cases, see Helffrich, The Radio and Television Codes and the Public Interest, 14 J.Broadcasting 267 (1970).

4. What about an argument that the licensee's actions themselves involve state action without any reference to the NAB? Recall the BEM-DNC case at p. 599, supra, in which two Justices took that view, three rejected it, and three avoided the issue. The Commission has adhered to its view that action by a licensee does not involve state action in rejecting a reporter's claim that he was discharged because his stories angered advertisers. The Commission first rejected a claim that the licensee could not interfere with the reporter's constitutional right to access to the air because of substantive content. Licensee action was not "governmental action" and did not bring into play the First and Fifth Amendments. On a second point, the Commission concluded that its investigation did not show that the licensee had subordinated the public interest to private interest. Michael D. Bramble, 58 F.C.C.2d 565, 36 R.R.2d 845 (1976).

E. NONCOMMERCIAL BROADCASTING

Virtually all of our attention so far has been devoted to commercial broadcasting. Most of the litigation and regulation has involved commercial broadcasters and, in terms of viewers, commercial broad-

casting is the preeminent part of the picture. But it is not the only part. AM broadcasting developed too quickly for the Commission to be able to consider reserving spots for noncommercial educational stations. In allocating FM and television, however, the Commission was able to plan in advance and reserved certain spots for educational broadcasters. These are usually operated by academic institutions, by governmental groups or by groups organized by private citizens. A station run by a sectarian academic institution may be eligible for a reserved educational spot in the community in which the school is located. If an organization's central purpose is religious it is not eligible for a reserved channel.

1. PUBLIC BROADCASTING

The development of public broadcasting and several questions it raises, are considered in the following case.

ACCURACY IN MEDIA, INC. v. FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals, District of Columbia Circuit, 1975.
521 F.2d 288.
Certiorari denied, 425 U.S. 934, 96 S.Ct. 1664, 48 L.Ed.2d 175 (1976).

Before BAZELON, CHIEF JUDGE, LEVENTHAL, CIRCUIT JUDGE and WEIGEL, UNITED STATES DISTRICT JUDGE for the Northern District of California.

BAZELON, CHIEF JUDGE.

Accuracy in Media, Inc. (AIM) filed two complaints with the FCC against the Public Broadcasting Service (PBS) concerning two programs distributed by PBS to its member stations. AIM alleged that the programs, dealing with sex education and the American system of criminal justice, were not a balanced or objective presentation of each subject and requested the FCC to order PBS to rectify the situation. The legal basis for AIM's complaints was the Fairness Doctrine and 47 U.S.C. § 396(g)(1)(A) (1970). On its initial hearing of the matter, the FCC concluded that the PBS had not violated the Fairness Doctrine and invited comments from interested parties on its authority to enforce whatever standard of program regulation was contained in § 396(g)(1)(A). AIM does not seek review of the Commission's decision on the Fairness Doctrine issue.

Section 396(g)(1)(A) is part of the Public Broadcasting Act of 1967, an act which created the Corporation for Public Broadcasting (CPB) and authorized it to fund various programming activities of

local, non-commercial broadcasting licensees. Section 396(g)(1)(A) qualifies that authorization in the following language:

> In order to achieve the objectives and to carry out the purposes of this subpart, as set out in subsection (a) of this section, the Corporation is authorized to—
>
> > (A) facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial educational television or radio broadcast stations, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature. . . .

AIM contends that since the above-mentioned PBS programs were funded by the CPB, pursuant to this authorization, the programs must contain "strict adherence to objectivity and balance", a requirement AIM contends is more stringent than the standard of balance and fairness in overall programming contained in the Fairness Doctrine. AIM alleges that the two relevant programs did not meet this more stringent standard of objectivity and balance.

After consideration of the comments received on the matter, invited in its preliminary decision discussed above, the Commission concluded that it had no jurisdiction to enforce the mandate of § 396(g)(1)(A) against CPB. . . .

I. *The Organization of Public Broadcasting in the United States*

Resolution of the issues raised by AIM's petition requires an understanding of the operation of the public broadcasting system. There are three tiers to this operation, each reflecting a different scheme of governmental regulation. The basic level is comprised of the local, noncommercial broadcasting stations that are licensed by the FCC and, with a few exceptions, subject to the same regulations as commercial licenses. Through the efforts of former Commissioner Frieda Hennock, the FCC has reserved exclusive space in its allocation of frequencies for such noncommercial broadcasters. Other than this specific reservation, noncommercial licenses are still subject to the same renewal process and potential challenges as their commercial counterparts.

Such was the state of the public broadcasting system until the passage of the Educational Television Facilities Act in 1962. The Act added the element of government funding to public broadcasting by establishing a capital grant program for noncommercial facilities. This second level of the system was reorganized and expanded by the Public Broadcasting Act of 1967 which created the Corporation for

Public Broadcasting (CPB). The Corporation, the product of a study made by the Carnegie Commission on Educational Television, was established as a funding mechanism for virtually all activities of noncommercial broadcasting. In setting up this nonprofit, private corporation, the Act specifically prohibited CPB from engaging in any form of "communication by wire or radio."

The third level of the public broadcasting system was added in 1970 when CPB and a group of noncommercial licensees formed the Public Broadcasting Service (PBS) and National Public Radio. The Public Broadcasting Service operates as the distributive arm of the public television system. As a nonprofit membership corporation, it distributes national programming to approximately 150 educational licensees via common carrier facilities. This interconnection service is funded by the Corporation (CPB) under a contract with PBS; in addition, much of the programming carried by PBS is either wholly or partially funded by CPB. National Public Radio provides similar services for noncommercial radio. In 1974, CPB and the member licensees of PBS agreed upon a station program cooperative plan [14] to insure local control and origination of noncommercial programming funded by CPB. Though PBS is the national coordinator under this scheme, it is not a "network" in the commercial broadcasting sense, and does not engage in "communication by wire or radio," except to the extent that it contracts for interconnection services.

II. *FCC Jurisdiction Over the Corporation for Public Broadcasting*

With the structure of the public broadcasting system in view, we turn to AIM's contention that the FCC should enforce the mandate of § 396(g)(1)(A) against the CPB. Since the Section is clearly directed to the Corporation and its programming activities, we have no doubt that the Corporation must respect the mandate of the Section. However, we conclude that nothing in the language and legislative history of the Federal Communications Act or the Public Broadcasting Act of 1967 authorizes the FCC to enforce that mandate against the CPB.

14. The Station Program Cooperative (SPC) is a unique concept in program selection and financing for public television stations. Though the idea of public television as a "fourth network" had been proposed at various times, the 1974 plan reversed this trend toward centralization. Under the SPC, certain programming will be produced only if the individual local stations decide together to fund the production. The local licensees will be financed through the CPB and other sources; the funding of specific programs will be by a 4 to 5 ratio (station funds to national cooperative funds). The aim of this cooperative is to reinforce the existing licensee responsibility for programming discretion. Through this plan the local stations will eventually assume the responsibility for support of the cooperative and the Corporation will concentrate on new programming development. [ ]

Section 398 of the Communications Act expresses the clear intent of Congress that there shall be no direct jurisdiction of the FCC over the Corporation. That section states that nothing in the 1962 or 1967 Acts "shall be deemed (1) to amend any other provision of, or requirement under this Act; or (2) to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision or control over educational television or radio broadcasting, or over the Corporation or any of its grantees or contractors . . . ." Since the FCC is obviously an "agency . . . of the United States" and since any enforcement of § 396(g)(1)(A) would necessarily entail "supervision" of the Corporation, the plain words of subsection (2) preclude FCC jurisdiction. . . .

Congress desired to establish a program funding agency which would be free from governmental influence or control in its operations. Yet, the lawmakers feared that such complete autonomy might lead to biases and abuses of its own. The unique position of the Corporation is the synthesis of these competing influences. Reference to the legislative history of the 1967 Act shows a deep concern that governmental regulation or control over the Corporation might turn the CPB into a Government spokesman. Congress thus sought to insulate CPB by removing its "programming activity from governmental supervision." . . .

. . .

Petitioner's reliance upon FCC jurisdiction over cable television franchises to support its jurisdictional claim is misplaced. Jurisdiction over CATV was expressly predicated upon a finding that the transmission of video and aural signals via the cable was "interstate . . . communication by wire or radio." [22] Further, assertions of "jurisdiction" over networks are really no more than claims of expansive authority over the owned or affiliated individual licensees. In no case has the FCC taken direct jurisdiction over a network; in any event, CPB cannot be considered a network. In view of these prevailing limits, we will not presume that Congress meant by § 396(g)(1)(A) to radically alter the jurisdictional base of the FCC absent a clear statement to that effect.

AIM maintains that this view of FCC jurisdiction to enforce § 396(g)(1)(A) renders the Section nugatory and hence ignores the Congressional sentiment that biases and abuses within the public broadcasting system should be controlled. We do not view our holding on the FCC's jurisdiction as having that effect. Rather, we take notice of the carefully balanced framework designed by Congress for the control of CPB activities.

22. United States v. Southwestern Cable Co., 392 U.S. 157, 168 (1968). . . .

The Corporation was established as nonprofit and non-political in nature and is prohibited from owning or operating "any television or radio broadcast station, system or network, community antenna system, or interconnection, or production facility." Numerous statutory safeguards were created to insure against partisan abuses.[28] Ultimately, Congress may show its disapproval of any activity of the Corporation through the appropriation process.[29] This supervision of CPB through its funding is buttressed by an annual reporting requirement.[30] Through these statutory requirements and control over the "purse-strings," Congress reserved for itself the oversight responsibility for the Corporation.

A further element of this carefully balanced framework of regulation is the accountability of the local noncommercial licensees under established FCC practice, including the Fairness Doctrine in particular. This existing system of accountability was clearly recognized in the 1967 legislative debates as a crucial check on the power of the CPB. . . .

. . .

The framework of regulation of the Corporation for Public Broadcasting we have described—maximum freedom from interference with programming coupled with existing public accountability requirements—is sensitive to the delicate constitutional balance between the First Amendment rights of the broadcast journalist and the concerns of the viewing public struck in Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973). There the Supreme Court warned that "only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters" will governmental interference with broadcast journalism be allowed. The Court on the basis of this rule rejected a right of access to broadcast air time greater than that mandated by the Fairness Doctrine as constituting too great a "risk of an enlargement of Government control over the content of broadcast discussion of public issues."

It is certainly arguable that FCC application of the standard—whatever that standard may be—of § 396(g)(1)(A) could "risk [an]

28. Other statutory checks on the Corporation include: restricting the Board membership to no more than eight out of fifteen members from the same political party, § 396(c)(1). The composition of the Board was an important issue during debate and the decision to make the Board bi-partisan was a significant addition to the original Carnegie Commission proposal. The Act also requires that the CPB's accounts be audited annually by an independent accountant, § 396(*l*)(1)(A), and *may* be audited by the General Accounting Office, § 396(*l*)(2)(A).

29. Section 396(k) assures that most of the CPB's operating budget be derived through the Congressional appropriation process.

30. 47 U.S.C. § 396(i) (1970).

enlargement of Government control over the content of broadcast discussion of public issues" in the following two ways: whereas the existing Fairness Doctrine requires only that the presentation of a controversial issue of public importance be balanced in *overall* programming, § 396(g)(1)(A) might be argued to require balance of controversial issues within each individual program. Administration of such a standard would certainly require a more active role by the FCC in oversight of programming. Furthermore, whereas the FCC has at present carefully avoided anything but the most limited inquiry into the factual accuracy of programming, § 396(g)(1)(A) by use of the term "objective" could be read to expand that inquiry and thereby expand FCC oversight of programming. Both of these potential enlargements of government control of programming, whether directed against the CPB, PBS or individual noncommercial licensees,[40] threaten to upset the constitutional balance struck in *CBS*. We will not presume that Congress meant to thrust upon us the substantial constitutional questions such a result would raise. We thus construe § 396(g)(1)(A) and the scheme of regulation for public broadcasting as a whole to avoid such questions.

. . . We hold today only that the FCC has no function in this scheme of accountability established by § 396(g)(1)(A) and the 1967 Act in general other than that assigned to it by the Fairness Doctrine. Therefore, we deny the petition for review and affirm the Commission's decision rejecting jurisdiction over the Corporation for Public Broadcasting.

So Ordered.

Notes and Questions

1. What is the difference between the Fairness Doctrine and AIM's reading of § 396(g)(1)(A)? Why does the court think that one would call for more Commission intervention in programming than the other?

2. The court suggests that, although thought of by many as a "fourth network," PBS does not properly fit such a description. Why not?

3. Since many of these stations are run by state and local governments, which also provide some of the financing, an additional set of problems has emerged with regard to the power of the state to im-

40. Although § 396(g)(1)(A) by its terms is directed only to the Corporation, the question has arisen whether it may be applied against individual noncommercial licensees, given existing FCC jurisdiction over them, the fact the 1967 Act as amended imposes burdens on them not applicable to their commercial counterparts, [ ] and the Commission's power under the "public interest" standard to enforce provisions of the Communications Act and general law against licensees. [ ] . . .

pose restrictions more stringent than those imposed by Congress. In State of Maine v. University of Maine, 266 A.2d 863 (Me.1970), the state-run educational television system was partially financed from state funds. A statute ordered that no facilities "supported in whole or in part by state funds shall be used directly or indirectly for the promotion, advertisement or advancement of any political candidate . . . or for the purpose of advocating or opposing any specific program, existing or proposed, of governmental action which shall include, but shall not be limited to, constitutional amendments, tax referendums or bond issues."

The court concluded that the limitations ran counter to federal demands that a licensee operating in the public interest may not flatly ban all such programming. The role of state funding gave the state no added power in this area. Although the state "has a valid surviving power to protect its citizens in matters involving their health and safety or to protect them from fraud and deception, it has no such valid interest in protecting them from the dissemination of ideas as to which they may be called upon to make an informed choice."

4. Another troublesome question in the 1967 Act involves § 399: "No noncommercial educational broadcast station may engage in editorializing or may support or oppose any candidate for political office." What arguments might be made against such a provision? What arguments to sustain it?

5. Can it be argued that § 399 bars only the management of the station from editorializing, as opposed to a newscaster, for example? The Commission has interpreted § 399 to ban editorializing only by "licensees, their management or those speaking on their behalf for the propagation of the licensee's own views on public issues." The Commission permits employees of noncommercial educational stations to express views on public issues "in their capacity as individuals and on the same basis as other advocates, provided the surrounding facts and circumstances do not indicate that such views are represented or intended as the official opinion of the licensee or its management." Accuracy in Media, 45 F.C.C.2d 297 (1973).

6. Despite the ruling in the AIM case, the Commission retains several controls over public noncommercial broadcasters. The primary power is to be found in the licensing process. Recall the denial of renewal to the eight Alabama stations, p. 564, supra. A fundamental dispute over the proper role of educational stations emerged when WNET in New York was challenged on its application for renewal: Commissioner Hooks dissented from the approval on the ground that the station was programming for a very small elite minority and essentially neglecting the needs of larger groups in the community who

would benefit from language, vocational, and remedial programs. Elite programming is defended on the ground that the noncommercial stations do not get enough money from public sources and must solicit funds from their communities. It is thought that a station that presents culturally high-level programs for the wealthier segments of the community will have better success at raising the funds necessary to keep the station going. Is this a problem? How might the situation be changed?

7. The role of public broadcasters during election campaigns has recently come under scrutiny. In 1972 guidelines, the Commission had stated that noncommercial broadcasters were obligated under § 312(a)(7) to provide candidates for federal office with "reasonable access" to state their views. Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 34 F.C.C.2d 510, 538, 23 R.R.2d 1901, 1920 (1972). Although educational stations generally provided coverage of campaigns they did so in debates or interviews controlled by the stations. But "reasonable access" under § 312(a)(1) has generally been understood to mean that the candidate can control the format.

In 1976, an incumbent senator demanded time on several noncommercial stations in New York State. The Commission ordered the stations to provide some time but did not require them to carry the five-minute commercial spots that the candidate had submitted. The stations could control segment duration but not content. N.Y. Times, Oct. 28, 1976, p. 79.

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2. Religious Broadcasting

As noted earlier, religious institutions may be eligible for reserved educational channels. The test used by the Commission to decide whether an institution is eligible for a reserved spot is "whether the primary thrust is educational, albeit with a religious aspect to the educational activity. Recognizing that some overlap in purposes is, or can be, involved, we look to the application as a whole to determine which is the essential purpose and which is incidental." Bible Moravian Church, Inc., 28 F.C.C.2d 1, 21 R.R.2d 492 (1971) (rejecting an application for a reserved educational spot).

Some have argued that religious programming provides too narrow a base to justify the allocation of a license. An effort to persuade the Commission of this failed in 1975. Multiple and Religious Ownership of Educational Stations, 54 F.C.C.2d 941, 34 R.R.2d 1217 (1975). Two persons requested a "freeze" on all grants of reserved educational FM and television channels to religious institutions pending a study of their value. The Commission thought this would vio-

late its obligation of "neutrality" toward sectarian applicants. The Commission concluded that no new policies were needed and decided to continue ad hoc enforcement of its existing policies, such as the Fairness Doctrine and "the principle that a broadcast station may not be used solely to promote the personal or partisan objectives of the broadcaster."

In its early days of reallocating frequencies when there were no spots reserved for educational broadcasting, the Radio Commission had occasion to consider the value of a station emphasizing religious programming. It decided that such programming was usually aimed at too narrow a base of listeners and this "discriminated against" the rest of the listeners. "In rare cases it is possible to combine a general public-service station and a high-class religious station in a division of time which will approximate a well-rounded program. In other cases religious stations must accept part time on inferior channels or daylight assignments . . . ." Great Lakes Broadcasting Co., 3 F.R.C.Ann.Rep. 32 (1929), modified on other grounds, 37 F.2d 993 (D.C.Cir.) certiorari dismissed, 281 U.S. 706 (1930). As the spectrum has expanded, religious broadcasting has gained a more secure footing.

Religious institutions that do not meet the educational qualifications are able to apply for other spots as noncommercial licensees. In such instances, the rules applicable to other broadcasters are applicable to religious broadcasters as well. The Commission has made one major exception in allowing a religious broadcaster to consider an applicant's religion for employment, but only as to "those persons hired to espouse a particular religious philosophy over the air."

A licensee's insistence that it was entitled to make religion a qualification of employment for all its staff members was rejected in King's Garden, Inc. v. Federal Communications Comm'n, 498 F.2d 51 (D.C.Cir.) certiorari denied 419 U.S. 996 (1974): "A religious sect has no constitutional right to convert a licensed communications franchise into a church. A religious group, like any other, may buy and operate a licensed radio or television station. [ ] But, like any other group, a religious sect takes its franchise 'burdened by enforceable public obligations.' [ ]"

In this connection, the Commission has ruled that matters of religious dispute do not raise controversial issues of public importance under the Fairness Doctrine. The Broadcast Bureau summarized the Commission's view in Davey Johnson, 54 F.C.C.2d 923, 34 R.R.2d 939 (1975), involving a complainant who wished to respond to the "preachers of christianity" who had appeared on a particular station. The licensee denied the request. The Bureau first indicated that the complainant had no personal right to respond in any event and then

turned to the applicability of the Fairness Doctrine: "The Commission knows of no substantial question in this country concerning the merits of religion and it does not hold that the fairness doctrine is applicable to the broadcast of church services, devotions, prayers, religious music or other material of this nature. However, some religious programs often do include vigorous expression of views on genuinely controversial issues." In such cases the Doctrine would apply. Is this consistent with current approaches to other aspects of the Fairness Doctrine? Should it apply to both religious broadcasters and general stations that present only a few religious programs on Sunday mornings?

*

APPENDIX A

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The

Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sunday excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.

SECTION 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II.

SECTION 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate. to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION 4. The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have

original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV.

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannnot be convened) against domestic Violence.

ARTICLE V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be

proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.*

* * *

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

AMENDMENT I[1791].

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II[1791].

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III[1791].

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV[1791].

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V[1791].

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI[1791].

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VII[1791].

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII[1791].

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX[1791].

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X[1791].

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI[1798].

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XII[1804].

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT XIII[1865].

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV[1868].

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV[1870].

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI[1913].

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

AMENDMENT XVII[1913].

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

AMENDMENT XVIII[1919].

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XIX[1920].

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XX[1933].

SECTION 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SECTION 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

SECTION 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

SECTION 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

SECTION 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SECTION 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

AMENDMENT XXI[1933].

SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XXII[1951].

SECTION 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

AMENDMENT XXIII[1961].

SECTION 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXIV[1964].

SECTION 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXV[1967].

SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

SECTION 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

SECTION 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

SECTION 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

AMENDMENT XXVI[1971].

SECTION 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXVII [Proposed].

SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

SECTION 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

SECTION 3. This amendment shall take effect two years after the date of ratification.

APPENDIX B

COMMUNICATIONS ACT OF 1934

48 Stat. 1064 (1934), as amended, 47 U.S.C.A. § 151 et seq.

TITLE I—GENERAL PROVISIONS

PURPOSES OF ACT; CREATION OF FEDERAL COMMUNICATIONS COMMISSION

Sec. 1. [47 U.S.C.A. § 151.]

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

. . .

TITLE III—PROVISIONS RELATING TO RADIO

PART I—GENERAL PROVISIONS

LICENSE FOR RADIO COMMUNICATION OR TRANSMISSION OF ENERGY

Sec. 301. [47 U.S.C.A. § 301.]

It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or

signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or district; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

. . .

GENERAL POWERS OF THE COMMISSION

Sec. 303. [47 U.S.C.A. § 303.]

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall:

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the frequencies, authorized power, or in the times of

operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

. . .

(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) has viclated any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

. . .

(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning. . . .

. . .

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

(s) Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public.

. . .

ALLOCATION OF FACILITIES; TERM OF LICENSES

Sec. 307. [47 U.S.C.A. § 307.]

(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

. . .

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. . . . [T]he Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action.

(e) No renewal of an existing station license in the broadcast or the common carrier services shall be granted more than thirty days prior to the expiration of the original license.

APPLICATIONS FOR LICENSES . . .

Sec. 308. [47 U.S.C.A. § 308.]

. . .

(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the

stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. . . .

. . .

ACTION UPON APPLICATIONS; FORM OF AND CONDITIONS ATTACHED TO LICENSES

Sec. 309. [47 U.S.C.A. § 309.]

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

. . .

(d)(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing . . . The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a). . . .

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e).

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest

of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. . . .

(f) When an application subject to subsection (b) has been filed, the Commission, notwithstanding the requirements of such subsection, may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring emergency operations in the public interest and that delay in the institution of such emergency operations would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such emergency operations for a period not exceeding ninety days, and upon making like findings may extend such temporary authorization for one additional period not to exceed ninety days. When any such grant of a temporary authorization is made, the Commission shall give expeditious treatment to any timely filed petition to deny such application and to any petition for rehearing of such grant filed under section 405.

(g) The Commission is authorized to adopt reasonable classifications of applications and amendments in order to effectuate the purposes of this section.

(h) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein; (2) neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act; (3) every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 of this Act.*

LIMITATION ON HOLDING AND TRANSFER OF LICENSES

Sec. 310. [47 U.S.C.A. § 310.]

(a) The station license required hereby shall not be granted to or held by any foreign government or representative thereof.

(b) No broadcast or common carrier . . . license shall be granted to or held by—

(1) Any alien or the representative of any alien;

* [Section 606 grants substantial powers to the President to utilize communications facilities during wartime or a national emergency.]

(2) Any corporation organized under the laws of any foreign government;

. . .

(d) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

SPECIAL REQUIREMENTS WITH RESPECT TO CERTAIN APPLICATIONS IN THE BROADCASTING SERVICE

Sec. 311. [47 U.S.C.A. § 311.]

. . .

(c)(1) If there are pending before the Commission two or more applications for a permit for construction of a broadcasting station, only one of which can be granted, it shall be unlawful, without approval of the Commission, for the applicants or any of them to effectuate an agreement whereby one or more of such applicants withdraws his or their application or applications.

(2) The request for Commission approval in any such case shall be made in writing jointly by all the parties to the agreement. Such request shall contain or be accompanied by full information with respect to the agreement, set forth in such detail, form, and manner as the Commission shall by rule require.

(3) The Commission shall approve the agreement only if it determines that the agreement is consistent with the public interest, convenience, or necessity. If the agreement does not contemplate a merger, but contemplates the making of any direct or indirect payment to any party thereto in consideration of his withdrawal of his application, the Commission may determine the agreement to be consistent with the public interest, convenience, or necessity only if the amount or value of such payment, as determined by the Commission, is not in excess of the aggregate amount determined by the Commission to have been legitimately and prudently expended and

to be expended by such applicant in connection with preparing, filing, and advocating the granting of his application.

. . .

ADMINISTRATIVE SANCTIONS

Sec. 312. [47 U.S.C.A. § 312.]

(a) The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;

(6) for violation of section 1304, 1343, or 1464 of title 18 of the United States Code; * or

* [These provisions read as follows:

§ 1304. Broadcasting lottery information.

Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense.

§ 1343. Fraud by wire, radio, or television.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

§ 1464. Broadcasting obscene language.

Whoever utters any obscene, indecent, or profane language by means of radio

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause [at a hearing] why an order of revocation or a cease and desist order should not be issued. . . .

(d) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

. . .

APPLICATION OF ANTITRUST LAWS; REFUSAL OF LICENSES AND PERMITS IN CERTAIN CASES

Sec. 313. [47 U.S.C.A. § 313.]

(a) All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Com-

communications shall be fined not more than $10,000 or imprisoned not more than two years, or both.

§ 1307. State-conducted lotteries.

(a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of State law—

(1) contained in a newspaper published in that State, or

(2) broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery. . . .]

mission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however*, That such licensee shall have the same right of appeal or review, as is provided by law in respect of other decrees and judgments of said court.

(b) The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under this section.

. . .

FACILITIES FOR CANDIDATES FOR PUBLIC OFFICE

Sec. 315. [47 U.S.C.A. § 315.]

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) Bona fide newscast,

(2) Bona fide news interview,

(3) Bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) On-the-spot coverage of bona fide news events (included but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable

opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcast station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed—

(1) During the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) At any other time, the charges made for comparable use of such station by other users thereof.

(c) For the purposes of this section:

(1) The term "broadcasting station" includes a community antenna television system.

(2) The terms "licensee" and "station licensee" when used with respect to a community antenna television system, mean the operator of such system.

(d) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

MODIFICATION BY COMMISSION OF CONSTRUCTION PERMITS OR LICENSES

Sec. 316. [47 U.S.C.A. § 316.]

(a) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested, why such order of modification should not issue . . .

(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

ANNOUNCEMENT WITH RESPECT TO CERTAIN MATTER BROADCAST

Sec. 317. [47 U.S.C.A. § 317.]

(a)(1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: *Provided*, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

. . .

FALSE DISTRESS SIGNALS; REBROADCASTING . . .

Sec. 325. [47 U.S.C.A. § 325.]

(a) No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signal of distress, or communication relating thereto, nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station.

. . .

CENSORSHIP . . .

Sec. 326. [47 U.S.C.A. § 326.]

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

PROHIBITION AGAINST SHIPMENT OF CERTAIN TELEVISION RECEIVERS

Sec. 330. [47 U.S.C.A. § 330.]

(a) No person shall ship in interstate commerce, or import from any foreign country into the United States, for sale or resale to the public, apparatus described in paragraph (s) of section 303 unless it complies with rules prescribed by the Commission pursuant to the authority granted by that paragraph: *Provided*, That this section shall not apply to carriers transporting such apparatus without trading in it.

TITLE V—PENAL PROVISIONS—FORFEITURES

Sec. 503. [47 U.S.C.A. § 503.] . . .

(b)(1) Any licensee or permittee of a broadcast station who—

(A) willfully or repeatedly fails to operate such station substantially as set forth in his license or permit,

(B) willfully or repeatedly fails to observe any of the provisions of this Act or of any rule or regulation of the Commission prescribed under authority of this Act or under authority of any treaty ratified by the United States,

(C) fails to observe any final cease and desist order issued by the Commission,

(D) violates section 317(c) or section 509(a)(4) of this Act, or

(E) violates section 1304, 1343, or 1464 of title 18 of the United States Code,

shall forfeit to the United States a sum not to exceed $1,000. Each day during which such violation occurs shall constitute a separate offense. Such forfeiture shall be in addition to any other penalty provided by this Act.

(2) No forfeiture liability under paragraph (1) of this subsection (b) shall attach unless a written notice of apparent liability shall have been issued by the Commission and such notice has been received by the licensee or permittee or the Commission shall have sent such notice by registered or certified mail to the last known address of the licensee or permittee. A licensee or permittee so notified shall be granted an opportunity to show in writing, within such reasonable period as the Commission shall by regulations prescribe, why he should not be held liable. . . .

(3) No forfeiture liability under paragraph (1) of this subsection (b) shall attach for any violation occurring more than one year prior to the date of issuance of the notice of apparent liability and in no event shall the forfeiture imposed for the acts or omissions set forth in any notice of apparent liability exceed $10,000.

PROVISIONS RELATING TO FORFEITURES

Sec. 504. [47 U.S.C.A. § 504.]

(a) The forfeitures provided for in this Act . . . shall be recoverable in a civil suit in the name of the United States . . . *Provided*, That any suit for the recovery of a forfeiture imposed pursuant to the provisions of this Act shall be a trial de novo . . .

(b) The forfeitures imposed by . . . [section] 503(b) . . . of this Act shall be subject to remission or mitigation by the Commission, upon application therefor, under such regulations and methods of ascertaining the facts as may seem to it advisable . . .

. . .

PROHIBITED PRACTICES IN CASE OF CONTESTS OF INTELLECTUAL KNOWLEDGE, INTELLECTUAL SKILL OR CHANCE

Sec. 509. [47 U.S.C.A. § 509.]

(a) It shall be unlawful for any person, with intent to deceive the listening or viewing public—

(1) To supply to any contestant in a purportedly bona fide contest of intellectual knowledge or intellectual skill any special and secret assistance whereby the outcome of such contest will be in whole or in part prearranged or predetermined.

(2) By means of persuasion, bribery, intimidation, or otherwise, to induce or cause any contestant in a purportedly bona fide contest of intellectual knowledge or intellectual skill to refrain in any manner from using or displaying his knowledge or skill in such contest, whereby the outcome thereof will be in whole or in part prearranged or predetermined.

. . .

CODE OF ETHICS

APPENDIX C

CODE OF ETHICS

THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI

(Adopted by the national convention, Nov. 16, 1973)

The Society of Professional Journalists, Sigma Delta Chi, believes the duty of journalists is to serve truth.

We believe the agencies of mass communication are carriers of public discussion and information, acting on their Constitutional mandate and freedom to learn and report their facts.

We believe in public enlightenment as the forerunner of justice, and in our Constitutional role to seek the truth as part of the public's right to know the truth.

We believe those responsibilities carry obligations that require journalists to perform with intelligence, objectivity, accuracy, and fairness.

To these ends, we declare acceptance of the standards of practice here set forth:

RESPONSIBILITY: The public's right to know of events of public importance and interest is the overriding mission of the mass media. The purpose of distributing news and enlightened opinion is to serve the general welfare. Journalists who use their professional status as representatives of the public for selfish or other unworthy motives violate a high trust.

FREEDOM OF THE PRESS: Freedom of the press is to be guarded as an inalienable right of people in a free society. It carries with it the freedom and the responsibility to discuss, question, and challenge actions and utterances of our government and of our public and private institutions. Journalists uphold the right to speak unpopular opinions and the privilege to agree with the majority.

ETHICS: Journalists must be free of obligations to any interest other than the public's right to know.

1. Gifts, favors, free travel, special treatment or privileges can compromise the integrity of journalists and their employers. Nothing of value should be accepted.

2. Secondary employment, political involvement, holding public office, and service in community organizations should be avoided if it compromises the integrity of journalists and their employers.

Journalists and their employers should conduct their personal lives in a manner which protects them from conflict of interest, real or apparent. Their responsibilities to the public are paramount. That is the nature of their profession.

3. So-called news communications from private sources should not be published or broadcast without substantiation of their claims to news value.

4. Journalists will seek news that serves the public interest, despite the obstacles. They will make constant efforts to assure that the public's business is conducted in public and that public records are open to public inspection.

5. Journalists acknowledge the newsman's ethic of protecting confidential sources of information.

ACCURACY AND OBJECTIVITY: Good faith with the public is the foundation of all worthy journalism.

1. Truth is our ultimate goal.

2. Objectivity in reporting the news is another goal which serves as the mark of an experienced professional. It is a standard of performance toward which we strive. We honor those who achieve it.

3. There is no excuse for inaccuracies or lack of thoroughness.

4. Newspaper headlines should be fully warranted by the contents of the articles they accompany. Photographs and telecasts should give an accurate picture of an event and not highlight a minor incident out of context.

5. Sound practice makes clear distinction between news reports and expressions of opinion. News reports should be free of opinion or bias and represent all sides of an issue.

6. Partisanship in editorial comment which knowingly departs from the truth violates the spirit of American journalism.

7. Journalists recognize their responsibility for offering informed analysis, comment, and editorial opinion on public events and issues. They accept the obligation to present such material by individuals whose competence, experience, and judgment qualify them for it.

8. Special articles or presentations devoted to advocacy or the writer's own conclusions and interpretations should be labeled as such.

FAIR PLAY: Journalists at all times will show respect for the dignity, privacy, rights, and well-being of people encountered in the course of gathering and presenting the news.

1. The news media should not communicate unofficial charges affecting reputation or moral character without giving the accused a chance to reply.

2. The news media must guard against invading a person's right to privacy.

3. The media should not pander to morbid curiosity about details of vice and crime.

4. It is the duty of news media to make prompt and complete correction of their errors.

5. Journalists should be accountable to the public for their reports and the public should be encouraged to voice its grievances against the media. Open dialogue with our readers, viewers, and listeners should be fostered.

PLEDGE: Journalists should actively censure and try to prevent violations of these standards, and they should encourage their observance by all newspeople. Adherence to this code of ethics is intended to preserve the bond of mutual trust and respect between American journalists and the American people.

FEDERAL COMMUNICATIONS COMMISSION

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