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LDRC Libel Defense Resource Center

LIBELLETTER

Reporting Developments Through December 23, 1998

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In re Dow Jones: Post-Gonzales Subpoena Upheld

No Privilege for Reporter's Notes

LDRC has been hearing about the fall-out from *Gonzales v. NBC*, 155 F.3d 618 (2d Cir. 1998), the recent Second Circuit decision holding that "there is no journalistic privilege for nonconfidential information." 155 F.3d at 626. Stark evidence of its impact, and the potential it holds for havoc, is found in the decision issued on December 16th in the Southern District of New York upholding a third-party subpoena against Dow Jones for reporter's notes. *In re Application of Dow Jones & Company, Inc. To Quash a Subpoena Duces Tecum*, 98 Misc. 8-85 (PKL) That the underlying litigation is pending in a Boston federal district court, that the reporter who could authenticate the notes resides in and works out of Boston, and that the party issuing the subpoena was clearly forum shopping in New York for a post-*Gonzales* ruling it knew it could not get from the First Circuit, suggests the potentially breathtaking consequences of *Gonzales*.

At Issue Statements to Reuters

The underlying litigation is a federal securities class action -- *In re: Centennial Technologies Securities Litigation* -- and at issue, among other matters, are certain statements by the then-acting chief executive officer, Lawrence Ramaekers, allegedly made to and reported by Reuters. Dow Jones reported statements by Centennial's spokesperson, Cheryl Byrne, that were efforts to try to correct statements attributed by Reuters to Ramaekers -- statements about which plaintiffs complain.

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No, Bob Hawley, This Is Not Good-bye At All!

We all owe profound thanks to Bob Hawley for his extraordinary service to LDRC first as a member of the LDRC Executive Committee and then as its Chair. Bob came on to the Executive Committee in 1992 when LDRC decided to re-organize its management with the creation of an Executive Committee and the hiring of an executive director. When then-Chair of LDRC, Harry Johnson, asked Bob to head what was euphemistically known as the "transition committee" -- a committee primarily of one -- Harry chose one of those rare individuals who through dedication, intelligence, common sense, a sense of perspective, and a sense of humor actually makes organizations work. And, importantly, he really cares about LDRC and its ability to grow and provide the services that will help this community preserve and defend First Amendment rights.

Bob has been willing to give the time and his abilities to LDRC. He has been remarkably unselfish and unpretentious in his efforts, willing to assume tasks large and small that he felt were necessary to LDRC's prosperity and success. His service on the Executive Committee will be missed.

But all is not lost. Bob is going to co-chair the development of an "international law afternoon" at the NAA/NAB/LDRC Conference next September, a program that he initiated and produced for the last Conference. He is going to remain as a co-chair of the LDRC International Law Committee. And goodness knows what other projects we will ask Bob to undertake in the future, because LDRC needs Bob's good counsel, his experience and his skills. We are all very grateful to him for his past service and look forward to working with him long and often in the future.

Thank you, Bob.

-- Sandy Baron

In re Dow Jones: Post-Gonzales Subpoena

(Continued from page 1)

Ramaekers has not been deposed in the Massachusetts litigation and has not denied or questioned the accuracy of the quotations attributed to him by Dow Jones. (In contast, Ramaekers has specifically challenged certain of the Reuters quotations in an affidavit submitted in opposition to Dow Jones' motion to quash.)

Although Byrne had been deposed, she testified that she was quoted accurately by Dow Jones. Thus nothing in the record reflected any dispute about the accuracy of the Ramaekers or Byrne quotations published by Dow Jones or supported any contention that the reporter's notes were necessary to resolve any dispute about what had been published.

Gonzales: No First Amendment Privilege

Citing *Gonzales*, Federal District Court Judge Peter K. Leisure rejected any claim by Dow Jones to a First Amendment privilege for what was admittedly nonconfidential material. He rejected efforts to distinguish the videotape outtakes of eyewitness events at issue in *Gonzales* from reporters notes, he rejected as supported by "no evidence" the assertion that relationships between the press and its sources would suffer in the absence of a privilege for nonconfidential material, and he rejected Dow Jones suggestion that he wait on his decision until the Second Circuit had an opportunity to rule on the *in banc* petition pending in *Gonzales*.

And No Common Law Privilege

Judge Leisure also refused to recognize a privilege under federal common law. First noting that dictum in a footnote in *Gonzales* suggested that the Second Circuit had already rejected such a privilege, he found that Dow Jones had presented neither evidence nor persuasive argument that would overcome the general disposition against creating common law testimonial privileges. Dow Jones, the court said, did not sufficiently describe how the absence of the privilege would interfere with sources and newsgathering.

And while Dow Jones had presented affidavits in support of its argument that the absence of privilege would result in enormous burdens from third-party subpoenas on news organizations -- something NBC, unaware that the court in *Gonzales* would find necessary, had not submitted -- Judge Leisure found that the "administrative difficulty of responding to subpoenas cannot trump

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In re Dow Jones: Post-Gonzales Subpoena

(Continued from page 2)

the overarching goal of both the Federal Rules of Evidence and the discovery provisions of the Federal Rules of Civil Procedure --- the search for evidence, and thus truth." Slip Op. at 11.

> "The Court declines to deem the expense and inconvenience of responding to third-party subpoenas 'a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" Slip Op. at 12.

Protected Only Under Federal Rules

Instead, Judge Leisure says, reporters must rely on the provisions in the Federal Rules that authorize district court judges to protect witnesses from burdensome, cumulative or irrelevant discovery requests. He then proceeded to reject Dow Jones' arguments that the request here met those criteria and should be quashed. That the party issuing the subpoena was engaged in forum shopping by seeking the notes through Dow Jones in New York, knowing that it would have to subpoena the reporter to authenticate them in Boston, was of no moment to Judge Leisure. That was the party's problem. And complying with two, instead of one subpoena, was not overly burdensome to Dow Jones, he found.

As for relevance to the underlying litigation, the court seems to suggest that (1) there may have been statements made to Dow Jones directly that were relevant to the underlying litigation, although it would appear that Dow Jones was primarily reporting on the aftermath of statements initially reported by Reuters and (2) the notes may provide "context for whatever news stories" are ultimately put into evidence by the plaintiffs in the underlying litigation and "may shed light on whether the published statements were misstatements or perhaps just misquotations." Slip Op. at 18. The Court did not address Dow Jones' argument that the Rule 26 relevance of the notes was tenuous and speculative because (1) Ramaekers has not challenged the accuracy or context of any quotations Dow Jones attributed to him and (2) Byrne affimatively admitted in her deposition that she was quoted accurately by Dow Jones.

The Court also did not address Dow Jones' contention that Rule 26 requires the Court to consider the unique interests of the press in weighing the "burden" of a subpoena against the relevance of the subpoenaed informaton.

Dow Jones was represented by Gibson Dunn & Crutcher in New York.

Thank You, Laura Handman

On my own behalf and on behalf of all of the members of LDRC, I want to thank Laura Handman for her invaluable service on the Executive Committee of the Defense Counsel Section, culminating in her term as President of the DCS this past year.

Laura is easily one of the most creative, most dedicated officers that this organization has ever known. She brought to her LDRC leadership the knowledge and experience gained from an extensive practice in media and First Amendment law, great wisdom and common sense. She has helped mold the policies and projects of this organization in her four years of service on the DCS Executive Committee and her voice has, and will remain, a highly respected one within this organization. She also contributed substantially to the delicious "Roundtable" atmosphere of the monthly DCS Executive Committee meetings.

We are not losing Laura's leadership, to be sure. She will remain active as President Emeritus on the Executive Committee for one more year. She will be active in the planning and presentation of the NAA/NAB/LDRC Conference next September. And LDRC will continue, always, to turn to her for leadership and activism in the future.

Thank you, Laura, for all that you have contributed to LDRC's success. We are deeply appreciative for your service and look forward to continuing to work with you in the future.

- - Sandy Baron

Reporter-turned-Schoolteacher Sentenced to Jail for Contempt for Refusal to Identify Sources to California Grand Jury

Former reporter (now school teacher) John Rezendes-Herrick has been held in contempt by a California trial court and sentenced to five days in jail and a $500 fine for his refusal to disclose to a local grand jury confidential source(s) for a series of news reports. *In re Special Grand Jury,* San Bernardino County Misc. 917. The sentence has been stayed pending appeal.

Prosecutors are relying on *Miller v. Superior Court*, 66 Cal.App.4th (1998), currently pending before the California Supreme Court, and its finding that the People's right to due process and truth-in-evidence in a criminal case can overcome California's shield law

Dispute Over Story Never Written

Mr. Rezendes-Herrick, now a seventh-grade social studies teacher, was a reporter with the Inland Valley Daily Bulletin in Ontario, California when he wrote a series of articles about a landfill plan that became the subject of a San Bernardino County grand jury investigation. The series, which was written over a period of two years between 1995-97, followed the dispute between the opponent of the landfill plan, Cadiz, and Rail Cycle, which was a joint venture between the Santa Fe Railroad and Waste Management, Inc. The target of the grand jury investigation was Waste Management, Inc. and its employees, the largest waste-removal firm in the country. The allegations against Waste Management included charges of stock fraud, wiretapping, and illegal use of trade secrets. The grand jury returned a 23-count indictment in October of this year against the firm.

The contempt citation arose out of Mr. Rezendes-Herrick's refusal to answer questions about the identity of the source(s) for his story. According to Rezendes-Herrick's attorney, James J. Manning, Jr. of Reid & Hellyer in Riverside, California, the District Attorney, seeking to prove a conspiracy, took the position that the source(s) allegedly supplied Rezendes-Herrick with tips about Cadiz in the hope that Rezendes-Herrick would write negative articles about Cadiz, thereby driving down Cadiz's stock price and inhibiting Cadiz's ability to oppose the landfill plan. Cadiz was an agricultural company engaged in commercial agricultural operations within five miles of the proposed landfill and anticipated ground and water pollution should the landfill plan be confirmed. No such article was written, but the District Attorney has taken the position that under the California Penal Code *any* overt act is sufficient to prove conspiracy. Rezendes-Herrick was not charged with conspiracy.

Miller v. Superior Court Cited

Rezendes-Herrick invoked California's shield law. Prosecutors rebutted the argument with the argument that won the day in *Miller v. Superior Court*, 66 Cal.App.4th (1998). In that case, KOVR-TV news director Ellen Miller was ordered to produce outtakes of an interview with a prison inmate accused of murdering his cellmate. *See LDRC LibelLetter,* October 1998 at 4. The California Supreme Court granted Miller's petition for review of the adjudication of contempt on November 24.

Judge J. Michael Welch of the Superior Court granted Rezendes-Herrick a stay pending appeal, giving Herrick's attorney ten days after the receipt of the trial transcripts to file a petition for writ of mandate. Once the petition was filed, the stay was extended automatically for an indefinite period until further court order. Attorney Manning told LDRC that Judge Welch indicated that after the appellate process was completed, if the order of contempt was not overturned, Mr. Herrick would be given the opportunity to purge himself of the contempt citation by answering questions with regard to the identity of his source. Mr. Manning believes that the outcome in the *Miller* case will be dispositive on Herrick-Rezendes' appeal.

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REPORTER'S PRIVILEGE: The Year In Review 1998

By Jeremy Feigelson and Ellen Paltiel

Reviewing 1998 in reporter's privilege law feels a little like compiling a "Ten Best Movies" list in a year when Hollywood has released nothing but bad slasher movies. Courts narrowed the legal scope of the privilege and rejected its application in numerous factual circumstances, with Florida's adoption of a shield statute standing out as perhaps the brightest light in a dark year.

Compelled Disclosure of Non-confidential Outtakes

Topping all critics' list of the most troubling decisions has to be the Second Circuit's holding in *Gonzales v. National Broadcasting Company, Inc.*, 155 F.3d 618 (2d Cir. 1998), that journalists enjoy no qualified privilege to resist discovery of nonconfidential materials acquired during newsgathering.

The Second Circuit affirmed the district court's order, arising out of a third party subpoena in a civil rights action, granting in part the parties' motions to compel NBC to produce unedited outtakes of a "Dateline" investigation into allegedly racially motivated traffic stops by the defendant, a Louisiana deputy sheriff. The lower court, despite its ruling that the First Amendment privilege was overcome in these circumstances, at least acknowledged as a legal matter that NBC had a privilege. The Second Circuit, however, declared that the reporter's privilege is limited to confidential materials -- in the process, distinguishing or reinterpreting a long line of cases in the Circuit that seemed to clearly recognize a privilege for nonconfidential materials as well.

A broad range of *amici* are supporting NBC's efforts to get the decision reversed. Absent reversal, press interests may find some hope in the *Gonzales* court's statement that NBC had failed to make a record supporting the proposition that subpoenas impose undue burdens on the press. The statement was unfair under the circumstances -- why should NBC have been forced to muster facts to establish the legal applicability of the privilege when it was thought to be well-settled? But the statement suggests that future litigants might be able to make the necessary record and get the privilege recognized in particular factual settings. *[Editor Note: But see in Re Dow Jones reported on page 1 where that argument, and evidence, was tried and failed.]*

The Fifth Circuit also refused to recognize a qualified privilege to withhold nonconfidential outtakes, reversing the Eastern District of Louisiana in *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998). Both the arson defendant and the prosecutor subpoenaed from a television station a videotaped interview with the defendant and related outtakes. The Fifth Circuit held that because the matter was criminal and that confidentiality is "critical to the establishment of a privilege," disclosure should be compelled.

Non-Confidential Materials in Criminal Cases

Branzburg as the basis for *rejecting* the recognition of a privilege to refuse to give evidence in a criminal case, in contrast to the long line of cases holding that Justice Powell effectively spoke for the Court in his concurrence noting the constitutional interest in protecting the press against discovery. Indiana took this view in a pair of cases decided the same day:

In *WTHR-TV v. Cline*, 693 N.E.2d 1 (Ind. 1998), the state's Supreme Court held that neither the First Amendment nor Article I, Section 9 of the Indiana Constitution provided a privilege against compelled

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REPORTER'S PRIVILEGE

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disclosure of non-confidential interview outtakes. Indiana's Shield Law, mentioned once in a footnote, was construed to protect journalists from disclosure of confidential sources only. After television reporters obtained, without the knowledge of her court-appointed attorney, a nonconfidential interview with a juvenile accused of murder, the defense attorney successfully subpoenaed the outtakes as well as the broadcast segments of the interview. The subpoena was quashed with respect to all the other materials it requested, on the grounds that, with respect to those materials, it failed to meet Indiana Trial Rules standards of specificity and "potential materiality." The court stated that the interview tapes were identified specifically, however, and were likely to prove material to the juvenile's defense. The court stated that its decision did not address whether a privilege of any kind would exist with regard to reporter's notes or other records not at issue in this case.

In *WTHR-TV v. Milam*, 690 N.E.2d 1174 (Ind. 1998), a subpoena was issued by the murder defendant, who requested *in camera* review of the station's outtakes to determine whether they contained any relevant or exculpatory information. Again basing its opinion on application of the Indiana Rules of Trial Procedure, the Indiana Supreme Court concluded that defendant's subpoena failed because she did not offer "a theory of 'potential materiality'" for the information she sought from the station. The court's analysis under the Rules of Trial Procedure kept it from reaching the station's First Amendment claims.

For the first time, a California appellate court held that the press interests protected by California's shield law could yield to the interests of the prosecution in a criminal trial. *Miller v. Superior Court*, 77 Cal. Rptr. 2d 827, 66 Cal. App. 4th 334 (3d Dist. 1998). The California Supreme Court has agreed to review the decision. The court cited both the People's federal constitutional due process right to the preservation of public safety, and the comparable right that is vested in the People under the California constitution.

A prosecutor subpoenaed a nonparty television station, seeking outtakes of its jailhouse interview with a murder defendant. The station was found in contempt when it refused to comply with a court order to produce its outtakes. The Court of Appeal applied a balancing test formerly used only when weighing the rights of a criminal *defendant* against those of the press. It was held that the prosecution had made the required threshold showing that there was a "reasonable possibility" that the unpublished information would "materially assist" the prosecution's case. The court then found that the station was obliged to disclose the unpublished information because the information (1) was neither confidential nor sensitive, (2) was important for the prosecution -- the unpublished statements may have been confessions, admissions, indicative of awareness of guilt, or relevant to a psychiatric defense, and (3) could not be obtained from alternative sources.

The Good News: Two New Shield Laws, The Sixth Amendment

After years of unsuccessful efforts, Florida has a shield law. Fla. Stat. § 90.5015 (1998). The new statute protects "professional" journalists, defined as those who (1) are regularly engaged in newsgathering (collecting, photographing, writing, editing, etc.) or publishing activities, and (2) obtained the information sought while working as salaried employees of, or independent contractors for, a newspaper, news journal, news agency, press association, wire service, radio or television station, network, or news magazine. Book authors and others not included in the statute's definition of professional journalists are not given any new protection by the legislation. The

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REPORTER'S PRIVILEGE

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statute gives a professional journalist a qualified privilege not to disclose information obtained while actively gathering news. Under the statute, "news" means information of public concern relating to local, statewide, national, or worldwide issues or events.

The privilege "applies only to information or eyewitness observations obtained within the normal scope of employment and does not apply to physical evidence, eyewitness observations, or visual or audio recording of crimes." Overcoming the privilege requires a clear and specific showing that: (1) the information is relevant and material "to unresolved issues that have been raised in the proceeding"; (2) the information cannot be obtained from alternative sources; and (3) there is a compelling interest requiring disclosure. Only that portion of the information which satisfies the three-part test may be ordered disclosed, and such an order must be supported by clear and specific findings made after a hearing.

Minnesota's shield law, Minn. Stat. § 595.023-595.025 (1996), was amended effective April 7, 1998. Free Flow of Information Act, 1998 Minn. Sess. Law Serv. Ch. 357 (S.F. 1480). The amendment protects unpublished information acquired by journalists, effectively overturning the decision of the Minnesota Supreme Court in *State v. Turner*, 550 N.W.2d 622 (Minn. 1996). Information is protected under the amended statute "whether or not it would tend to identify the person or means through which the information was obtained."

In defamation actions, a qualified privilege still applies but in other civil cases the privilege is now absolute. In criminal cases, there is a three-part test under which the party seeking to compel disclosure must show by clear and convincing evidence (1) that the specific information sought is clearly relevant to a criminal violation, (2) that the information cannot be obtained by alternative means or remedies, and (3) that there is a compelling and overriding interest requiring the disclosure of the information where the disclosure is necessary to prevent injustice. Once the three-part test is met in felony and gross misdemeanor cases, a court can compel disclosure of confidential sources as well as unpublished information. In misdemeanor cases the court can only compel disclosure of unpublished information that would not tend to identify the source of the information or the means through which it was obtained.

Coleman v. Texas, 966 S.W.2d 525 (Tex. Crim. App. 1998) (*en banc*) suggests that there may be some room to maneuver under the Sixth Amendment even in circumstances where the privilege does not apply. A murder defendant subpoenaed reporters on the theory that they could communicate to the jury the atmosphere of defendant's gang neighborhood, claiming this would help illuminate the defendant's state of mind. The *Coleman* Court dismissed the reporters' First Amendment privilege claim in a footnote, stating that "[n]o such privilege exists."

The Court held, however, that under the Sixth Amendment, only testimony that would be both material and favorable to the defense could be compelled. Because the defendant made no plausible showing of materiality or favorability, the reporters were not compelled to testify. The Court's withdrawn opinion had incorrectly made it the reporters' burden to prove that their testimony would not be material and favorable.

Courts Consider Who Can Claim The Privilege

News on the issue of who can claim the privilege was mixed.

The federal district court in *Builders Ass'n of Greater Chicago v. Cook County*, No. 96 C 1121, 1998 U.S. Dist. LEXIS 2991 (E.D. Ill. Mar. 10, 1998) broadened the class of persons eligible to assert the privilege. Plaintiffs brought a reverse discrimination suit to challenge the constitutionality of a county

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REPORTER'S PRIVILEGE

ordinance which had relied on a study by the Chicago Urban League. Plaintiffs sought to subpoena the Urban League's documents pertaining to the study because they wanted to demonstrate that the study methodology was flawed. The Urban League, a non-party political advocacy organization, argued that disclosure of its surveys and interview notes would violate the confidentiality promised to study participants and would interfere with future research on the subject.

The court held that the Urban League was an information gatherer because it intended at the inception of the information-gathering process to disseminate its findings to the public. The privilege was not limited to members of the institutionalized press, because the informative function "is also performed by lecturers, political pollsters, novelists, academic researchers and dramatists."

In *Anti-Defamation League of B'nai B'rith v. Superior Court*, 79 Cal. Rptr. 2d 597, 67 Cal. App. 4th 1072 (1st Dist. 1998), a California appellate court upheld a lower court's ruling that the ADL, which publishes magazines and newsletters, was a journalist protected by the qualified journalist's privilege as established in California's case law.

As this article went to press, the First Circuit put some coal in Bill Gates's stocking (or took away his dreidel, if you like) in the form of a decision rejecting Microsoft's effort to obtain unpublished notes and tapes of two professors who wrote a book about the company's battles with Netscape. The professors argued that their understandings of confidentiality with their sources should be respected, and the court agreed: "Just as a journalist, stripped of sources, would write fewer, less incisive articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses. Such similarities of concern and function militate in favor of a similar level of protection for journalists and academic researchers." Microsoft thus cannot obtain the source material for use in its defense of the government's antitrust suit. *In re: Cusumano*, __ F.3d __, No. 98-2133, 1998 WL 852858 (1st Cir. Dec. 15, 1998).

Less favorable, and perhaps more directly of concern to the working press, was the Third Circuit's ruling in *In re: Mark Madden (Titan Sports Inc. v. Turner Broadcasting Systems, Inc.)*, 26 Med. L. Rptr. 2014 (3d Cir. 1998). A district court in Pennsylvania held that a commentator for a "900-number" hotline qualified as a journalist for purposes of the federal reporter's privilege. The Third Circuit reversed, significantly narrowing the class of persons able to claim the journalist's privilege by holding that in order to claim protection a person must (1) be engaged in investigative reporting, (2) gather news, and (3) possess the intent at the inception of the news gathering to disseminate the news to the public.

The Third Circuit wrote that the purpose of the privilege is not solely to protect newspaper or television reporters but to protect the activity of investigative reporting. The court described the 900-number commentator's contribution, however, as "little more than creative fiction," meant to entertain or advertise and not based upon any investigation. The panel drew a line between fact and fiction on the premise that fiction writers may "view facts selectively, change the emphasis or chronology of events or even fill in factual gaps with fictitious events."

The media and its advocates look forward to a happier 1999.

Jeremy Feigelson and Ellen Paltiel are associates at Debevoise & Plimpton in New York.

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CLAIMS FOR NEGLIGENT AND RECKLESS EMPLOYMENT OF CONTROVERSIAL BROADCASTER "MANCOW" REJECTED

Novel Non-Libel Claims Stalled

By Jay Ward Brown

The Illinois Supreme Court has ruled that a radio station cannot be held liable for negligently or recklessly employing a broadcaster with a reputation for outrageous – but not defamatory – on-air stunts who thereafter made allegedly defamatory statements about the plaintiff. *Van Horne v. Muller*, No. 85063 (Ill. Dec. 3, 1998). In so doing, the court rejected a novel theory of liability that, it noted, might well have chilled the hiring of controversial broadcasters, columnists and other journalists.

The Run-In

WRCX, owned by Evergreen Media Corporation (now Chancellor Media Company), hired Matthew "Mancow" Muller away from a San Francisco station to host its morning radio program in Chicago. Muller had a well-known reputation for engaging in on-air stunts, often at the expense of the dignity of the objects of his humor. In his prior position, Muller apparently had, for example, made remarks about overweight individuals, obstructed access to the San Francisco Bay Bridge, and on "Alzheimer's Awareness Day," had broadcast tasteless remarks about elderly residents of a California nursing home. Van Horne alleged that Muller continued to engage in such stunts while employed by WRCX.

Former Chicago Bears football star and radio personality Keith Van Horne became the target of Muller's barbs on "Mancow's Morning Madhouse" on November 11, 1994. According to the complaint, Muller told his radio audience that he had encountered fellow Evergreen employee Van Horne at the station and that Van Horne had attacked him. Muller allegedly broadcast that Van Horne was "out of control," "psychotic," and dangerous. Muller's newscaster sidekick, Irma Blanco, engaged in dialogue with Muller about the purported incident and included an item about it in her news reports.

Van Horne sued Muller, Blanco, the station and Evergreen for defamation. In addition, in a novel twist, he asserted that WRCX and Evergreen had been either negligent or reckless when they hired, retained, and supervised Muller. According to Van Horne, media organizations have a duty to exercise care in the hiring, retention and supervision of personnel who "will not recklessly or intentionally cause harm" to members of the public through their broadcasts or publications. Because Muller had previously broadcast "outrageous, irresponsible and reckless" remarks, WRCX should have known he was likely to do so again and it should have refused to hire him, Van Horne contended. Significantly, Van Horne did not claim that Muller had a history of defaming people.

Initial Dismissal Reversed

In the trial court, defendants argued, among other things, that Illinois had never recognized a cause of action for negligent or reckless hiring, retention or supervision in the absence of an allegation of physical injury. The judge agreed, and dismissed the negligent and reckless employment claims, then certified an interlocutory appeal.

On January 30, 1998, the Illinois Appellate Court reversed. Although noting that all previous Illinois cases alleging this cause of action had involved a physical injury, the court ruled that physical harm was not a prerequisite to such a claim. The Appellate Court also rejected the broadcasters' First Amendment argument that permitting such a cause of action to reach media organizations would chill the dissemination of controversial speech.

The Illinois Supreme Court granted review. In their briefs, citing *Hustler Magazine v. Falwell* and its progeny, defendants and *amici* argued that the First Amendment bars Van Horne from making an "end run" around its strictures by pleading a claim for reputational damage under the guise of an employment tort. In addition, they argued that the First Amendment prohibits a court from injecting itself into the editorial process by determining, *post hoc*, whether a particular broadcaster or journalist was "fit" to be hired for the purpose of disseminating speech to the public. Finally,

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CONTROVERSIAL BROADCASTER "MANCOW"

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defendants and *amici* pointed out the absence of a nexus between the alleged prior "bad acts" of Muller and the reputational harm claimed by Van Horne.

Illinois Supreme Court Reflects Constitutional Concerns

On December 3, the Illinois Supreme Court reversed the Appellate Court, focusing in its opinion largely on the absence of a nexus between Muller's alleged past conduct and Van Horne's claim for injury by defamation. Even if Muller did defame Van Horne, the court said, the fact that his previous broadcasts had been controversial did not mean that WRCX should have known that he was likely to commit actionable defamation. As the court explained, under Illinois law, an employer may be held liable for negligent or reckless hiring, retention or supervision if an employee had a *particular* unfitness for the position that made him a danger to others, the employer knew or should have known of this unfitness, and the unfitness actually caused injury to someone. Because Van Horne did not claim that Muller had a history of defaming people, there was no reason for the station to think he was likely to do so in the future.

The court emphasized that engaging in controversial or even "outrageous" speech is not the same as committing actionable defamation:

> [W]e . . . find that recognition of this cause of action where the employee had previously engaged only in 'outrageous,' but nondefamatory, conduct or speech would run afoul of first amendment principles. The most obvious impact of this rule would be on media employers. Plaintiff's theory would thus hold a media employer liable for its decision to hire or retain a broadcaster simply because that broadcaster was a controversial figure, the reasoning being that such controversial figures are 'likely' to engage in defamatory speech. Such a holding would have an inevitable chilling effect on free speech, as media employers would be reluctant to hire controversial broadcasters or reporters.

In so ruling, the Illinois Supreme Court acknowledged that the Constitution required it to construe the plaintiff's cause of action narrowly: "[W]e employ a narrow interpretation of th[e nexus] requirement because of the first amendment concerns which arise when liability is predicated on speech."

More specifically, the court observed, although the law must protect an individual's interest in vindicating his or her reputation, it must "also allow the first amendment guarantees the '"breathing space" essential to their fruitful exercise.'" (Quoting *Chapski v. Copley Press*, 92 Ill. 2d 344, 351-52 (1982) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). "Imposing liability for negligent hiring or retention under these circumstances would not grant the first amendment guarantees sufficient 'breathing space,'" the court concluded. By the same token, the court noted that "[w]hether [it] would ever recognize a cause of action for negligent hiring or retention based on an employee's defamatory statements is not decided in this case" because it could dispose of the appeal on the ground that plaintiff failed to demonstrate a nexus between the alleged past conduct and the harm of which he complained.

As for Van Horne's defamation claims, the counts against Muller and his employer based on Muller's own statements were not at issue on appeal. The trial judge had dismissed Van Horne's claims against Blanco on the grounds that he had not sufficiently alleged that she independently made defamatory statements about him, or that she had participated in statements made by Muller. The Appellate Court reversed and was, in turn, affirmed by the Supreme Court, which ruled that the complaint sufficiently alleged defamatory statements made or endorsed by Blanco. Consequently, Van Horne's defamation claims against all defendants will proceed.

Jay Ward Brown is associated with the Washington, D.C. firm of Levine Sullivan & Koch, L.L.P. The firm represented a group of media organizations as amici before the Illinois Supreme Court in Van Horne v. Muller.

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New York Panel Allows Trespass Claim Against Undercover Report

A panel of New York's Appellate Division will allow a claim for civil trespass to go forward against CBS News in connection with an undercover report which exposed questionable billing practices by a medical doctor, but limited the remedies to plaintiff in the case. *Shiffman v. Empire Blue Cross and Blue Shield and CBS, Inc., et al.*, Slip Opinion (App.Div.1st Dep't December 15, 1998) *See LDRC LibelLetter*, September 1998 at p.17. The court, rejected plaintiff's claims for punitive damages and for damages beyond those to his possessory interest in the property, in this case, limiting plaintiff to nominal damages.

The case arose out of June 20, 1996 report by 48 HOURS for which a CBS reporter, using a false insurance card provided by Empire Blue Cross, made an appointment and consulted with Dr. Shiffman about plastic surgery. The consultation was taped with a hidden camera. Dr. Shiffman also agreed to an on-camera interview with the reporter. The news report noted that Dr. Shiffman had agreed to repay Empire Blue Cross an undisclosed amount with respect to surgeries going back over a six-year period.

Constitutional and Consent Defenses Rejected

The appellate court agreed with the trial court's dismissal of defendants' First Amendment defenses -- "State and Federal constitutional free speech guarantees...confer no privilege for trespass." At p.3. It agreed as well with the trial court's holding that consent, express or implied, to enter a premises when obtained by misrepresentation or fraud is invalid and could not serve as a defense to a trespass claim. The court cited the *Restatement (Second) of Torts* § 330 as support for this point, a matter that could cause further problems on this issue in the future.

And while plaintiff sought damages that resulted from the broadcast of the material obtained while the reporter was in his offices, the Appellate Division, like the trial court, only recognized plaintiff's actual damages to his possessory interest in the property of his private medical offices, noting that plaintiff had failed to allege any such actual harm. Again, like the trial court, the appellate panel allowed the trespass claim to go forward on the basis of nominal damages which are "always presumed from a trespass."

The appellate court rejected, however, plaintiff's claim for punitive damages on the grounds that there was no evidence that the alleged trespass was motivated by common law malice.

The trial court opinion was one paragraph. The Appellate Division decision is two pages. Neither engages in extensive analysis or reasoning. In the end, however, while plaintiff is entitled to go forward seeking nominal damages for the nondisruptive entry onto his private property, he is limited to those damages associated with his possessory interest and in the absence of proof of common law malice, is barred from obtaining punitive damages.

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Discrimination Testers Sued for Fraud Reminiscent of Food Lion

K & J Management, Inc., manager of Guardian Security Services, has asserted common law fraud claims against The Legal Assistance Foundation of Chicago("LAFC") and two employment discrimination testers in the wake of the dismissal of a federal lawsuit brought by LAFC and the testers against Guardian for discriminatory hiring practices. The fraud lawsuit was filed in Illinois state court and is captioned *K & J Management v. Kyra Kyles and Lolita Pierce et al.*, No. 38L 012726 (Ill. Cir. Ct. Nov. 4, 1998).

The complaint brought by Guardian alleged that "neither [tester] had an interest in a receptionist position and would have refused any offer of employment made by [Guardian] in response to their applications. *Complaint* ¶27 at 6. Guardian also alleged that statements made by [the testers] in their resumes, employment applications and employment interviews were false and made "with the intent of deceiving and defrauding [Guardian] and to induce [Guardian] to process and review their applications for employment." *Complaint* ¶31 at 7. Guardian asserted that it was induced to waste time and resources interviewing and processing these applicants. *Complaint* ¶32 at 7. Guardian further alleged damage to its good will and reputation "by having to defend against a manufactured lawsuit with no basis in fact or law." *Complaint* ¶36 at 8.

Because of the obvious similarity to the claims beings made in the *Food Lion* case, and in other recent suits brought by subjects of undercover investigative reporting, and because the media has itself on ocassion made the analogy between certain undercover reporting practices and those of discrimination testers, the media and the media bar are going to want to follow the progress of these lawsuits.

The Alleged "Fraud"

In the summer of 1995, the Legal Assistance Foundation of Chicago ("LAFC") sent out two pairs of testers, an African American woman and a white woman, to test for discriminatory hiring practices by employers seeking to fill entry-level positions where a college degree was not required. Guardian Security Services ("Guardian"), which is managed by K & J Management, had been targeted through a resume mailing system used by LAFC which weighted the resumes in favor of minority applicants. When the white applicants, but not the minority applicants were called for an interviews, LAFC followed up by sending out pairs of testers.

According to LAFC, in two instances, lesser qualified white applicants were offered the position of receptionist at Guardian over African-American applicants. In each instance, LAFC asserted, the less qualified white applicant and not the African-American applicant was given a typing test, met the vice president who made the hiring decision and offered the job on the spot. And in each, when the African American applicant called to follow up on her application, she was told that no decison had been made.

LAFC and the testers filed suit in federal district court in Illinois, alleging that Guardian engaged in discriminatory practices. Guardian filed a counter-claim, alleging fraud on the part of the testers. Federal District Court Judge Suzanne B. Conlon, determining that the testers did not have standing to sue because there was no injury (the testers did not really want the job and suffered no harm), dismissed the lawsuit, and with the federal claims, the common law fraud claim brought by Guardian. When LAFC appealed the decision, Guardian filed the fraud claim in state court.

Water Tower Surgicenter, another company that LAFC has sued in federal court for similar practices, also filed a counter-claim of fraud against the testers.

While testers have generally been recognized for the past twenty-five years to have standing in claims brought under Title VIII (the "Fair Housing Act"), the EEOC did not promulgate an agency ruling on tester standing in Title VII actions until 1990. As LAFC and *amici* in the Seventh Circuit appeal argue, "[t]esters have played a critical role in exposing and challenging discrimination for four decades." Appellate Brief at 10. The EEOC issued a Guidance Notice in 1996 indicating that testers do have standing to bring suit under Title VII and may challenge any discrimination that they were subjected to during the testing period. *See* EEOC Notice, No. 915.062 (Nov. 20, 1990).

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California Courts Enter TROs Barring Network's Exclusion From Campaign Events

By Steven M. Perry and Terry B. Sanchez

On November 2, 1998, the National Assn. of Broadcast Employees & Technicians ("NABET") staged a one-day, unannounced walkout against ABC. ABC's contract with NABET expired in March 1997, and the two sides have been unable since then to reach a new agreement. When NABET refused to agree to give ABC advance notice of future walkouts, ABC locked out its 2,200 NABET-represented employees on Tuesday, November 3, 1998 (The NLRB subsequently rejected NABET's claim that the lockout was an unfair labor practice.)

California Election Day

November 3 was Election Day. In California, two of the most closely watched contests involved Lt. Governor Gray Davis' campaign for Governor and Senator Barbara Boxer's run for re-election to the United States Senate. ABC and two of its owned and operated stations, KABC-TV and KGO-TV, planned to provide live coverage of the election night campaign activities of both candidates, using management personnel and temporary hires to replace the NABET workers.

As is customary, both Davis and Boxer had rented a large ballroom at a major hotel for their election night activities and had invited numerous media organizations to attend. Around midday on the 3rd, ABC's crews began to set up their equipment in the Biltmore Hotel in downtown Los Angeles (the site of Davis' election night activities) and the Fairmont Hotel in downtown San Francisco (the site of Boxer's election night activities). At around 1:00 p.m., however, senior Davis campaign officials informed ABC that it would be barred from using any non-NABET crews to cover the election night activities at the Biltmore.

Emergency Hearing in L.A.

Counsel for ABC then prepared and filed a complaint against Davis pursuant to 42 U.S.C. § 1983 that asserted in essence that Davis could not, without violating the First Amendment, invite the media generally into a function for the purpose of having his messages about important public issues disseminated to the public and then attempt to exclude only ABC from covering that story. ABC also prepared a request for a TRO and a short supporting brief.

Federal Judge Christina Snyder agreed to conduct an emergency telephonic hearing at 6:15 p.m. on the evening of the 3rd with counsel for ABC and for the Davis campaign. At the close of the hearing, Judge Snyder entered the TRO that ABC had requested, which barred Davis from: (1) prohibiting ABC from providing live video and audio coverage of Davis' election night activities "on an equal basis with the other networks such as NBC and CBS," and (2) threatening prosecution and/or arrest for alleged trespass in connection with such coverage. (A copy of the TRO and supporting papers is on file with LDRC.) Davis campaign officials complied with the TRO.

And in San Francisco

Meanwhile, in San Francisco, Boxer campaign officials excluded KABC-TV and KGO-TV crews from the Fairmont ballroom just a few minutes before each station's 6:00 p.m. newscast. ABC had not filed an action against Boxer earlier in the day because campaign officials had assured ABC that it would have full access to Boxer's election night activities. Armed with a copy of Judge Snyder's order against Davis, ABC was able to persuade Boxer representatives at around 8:30 p.m. to allow the KABC-TV and KGO-TV crews back into the ballroom to set up for their 10:00 p.m. broadcasts.

In light of the Boxer campaign's prior reversal of position, ABC proceeded to prepare a complaint and TRO papers for possible use if campaign officials decided to try to exclude the KABC and KGO crews again.

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California Courts Enter TROs

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Rather than a § 1983 claim, the draft complaint against Boxer stated a *Bivens* claim because of Boxer's position as a United States Senator. (A copy of the Boxer papers is also on file with LDRC.) In fact, at around 9:50 p.m., campaign officials told those crews to break down their sets and leave. When the crews (and ABC counsel) refused, campaign officials summoned the police.

ABC counsel immediately contacted the Federal duty judge, Fern Smith, at her home and requested an emergency telephonic hearing on its TRO request (which, along with the complaint, had not yet been filed). Judge Smith agreed, and at approximately 10:05 p.m., held a short telephonic hearing with ABC counsel and Boxer's campaign manager. Judge Smith than orally ordered Boxer to provide ABC with equal access to the election night activities and to halt all effort to exclude (or cause the arrest of) the ABC crews. The complaint and TRO papers were then driven to Judge Smith's home, where she signed the TRO.

New York Precedent

There is precedent for this somewhat remarkable series of events. In 1977, ABC and NABET were engaged in a labor dispute, and the two candidates for the Democratic nomination for Mayor of New York City each barred ABC from using non-NABET crews to cover their election night activities. After a district judge refused to enter a TRO against Messrs. Koch and Cuomo, the Second Circuit reversed and ordered the entry of such an order. In a transcribed oral opinion that was subsequently published at 570 F.2d 1080, Judge Gurfein rejected the candidates' claims that their election night festivities were private and that attendance could be limited as the candidates saw fit:

> We think that once the press is invited, including the media operating by means of instantaneous picture broadcast, there is a dedication of those premises to public communications use.
>
> If choice were allowed for discrimination in a public event of this magnitude . . . the danger would be that those of the media who are in opposition or who the candidate thinks are not treating him fairly would be excluded. And thus we think it is the public which would lose.
>
> * * *
>
> We thus conclude that the First Amendment rights of ABC and of its viewing public would be impaired by their exclusion from the campaign activities and that this exclusion under the threat of arrest is unconstitutional and should be the subject of a federal injunction.

American Broadcasting Companies Inc. v. Cuomo, 580 F.2d 1080, 1083 (2d Cir. 1977).

Judges Snyder and Smith agreed with the Second Circuit's analysis in entering the TROs sought against Davis and Boxer.

After the entry of the TRO's, both suits were voluntarily dismissed by ABC without prejudice.

Steven M. Perry and Terry B. Sanchez are with LDRC member firm Munger, Tolles & Olson LLP, which represented ABC in connection with this matter, along with Henry Hoberman, ABC Vice President, Litigation and Employment Practices, Marc Sandman, ABC Vice-President, Labor Relations, West Coast, Jeff Frost, ABC General Attorney, and other in-house counsel for ABC.

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Prior Restraint Averted in New York Murder Trial

By Wesley Powell

Last month, in rural Allegany County, New York, *The Patriot and Free Press*, a local weekly newspaper with a circulation of just 5,000 subscribers, scored a victory for the First Amendment. The *Patriot* prevailed in reversing a prior restraint that had been entered by a county court judge in anticipation of a pre-trial hearing.

The order at issue would have prohibited the publication of certain facts that were expected to be disclosed during a pre-trial hearing in a gruesome murder case. In early November, the defendant's counsel, concerned with his client's ability to get a fair trial, moved to close the suppression hearing. Judge Wayne A. Feeman, Jr. of the Allegany County Court invited representatives of the press to make submissions in opposition to that motion. At the request of the New York Press Association, Rogers & Wells LLP agreed to represent *The Patriot and Free Press* on a *pro bono* basis and submitted a petition on its behalf. Although three other newspapers, including the *Buffalo News* were specifically named in the defendant's motion, only the *Patriot* made a submission in opposition to it.

Allowed to Attend But Not Report

Without conducting a factual hearing on the papers before him, Judge Feeman issued an Order on November 19, 1998 that allowed the press to attend the hearing but prohibited them from reporting on the contents of an alleged confession that was the subject of the hearing. The following day, Friday, November 20, Rogers & Wells (with assistance from Nixon, Hargrave as local counsel), requested that Judge Feeman reconsider his order, as a direct violation of the First Amendment, or in the alternative, that he delay the suppression hearing pending a review of the order by the Appellate Division. The same day, Judge Feeman denied that request. On Monday, November 23, the day before the suppression hearing, The *Patriot* filed with the Appellate Division, Fourth Department an emergency Article 78 Petition and an Order to Show Cause why Judge Feeman's Order should not be vacated and the suppression hearing stayed.

Appellate Judge Brokers Compromise

The Hon. Donald Wisner of the Fourth Department received the petition and promptly scheduled a telephone conference with the interested parties for the next morning - the day of the scheduled suppression hearing. Recognizing that the November 19 Order was a prior restraint on the press, Judge Wisner stated that he would sign the Order to Show Cause if the parties could not resolve the matter.

Judge Wisner encouraged Judge Feeman, who participated in the conference, to lift the restraint on press reporting and to instruct the attorneys conducting the hearing not to discuss the content of the confession. Because discussion of the content of an alleged confession is generally unnecessary in a suppression hearing -- which focused on the propriety of how the statements were gathered -- the defendant's fair trial rights, Judge Wisner noted, could be guarded by the Court without restricting the First Amendment rights of the press.

Judge Feeman than agreed to vacate any restriction on the reporting of information disclosed at the hearing. The parties agreed that the hearing would go forward, and if it became necessary during the course of the hearing to reveal the contents of the alleged confession, Judge Feeman would adjourn the hearing. In that event Judge Wisner indicated he would sign the *Patriot's* Order to Show Cause and stay the matter until such time as the merits of the Article 78 Petition could be heard in the Appellate Division.

The suppression hearing took place as scheduled on November 24, lasting over two hours. The District Attorney of Allegany County called three witnesses and carefully took the court through the process by which Perry's alleged confession was gathered. As a result of the quick action, *The Patriot and Free Press* was in attendance and freely reported on all events as they transpired.

Wesley Powell is with the firm Rogers & Wells LLP in New York.

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Florida Proposes Banning Live Coverage of Hostage Situations

Tampa Media Agreement Proposed

By Gregg Thomas and Jim Lake

Florida Senator Ginny Brown-Waite (R-Brooksville) has introduced legislation that would make live news coverage of hostage situations a felony. In addition, several law-enforcement agencies in the Tampa area have proposed an agreement with the local media to limit live coverage. Both actions stem from a May 1998 hostage situation where it was alleged that the media thwarted law-enforcement activity by phoning the suspect at the gas station where the hostage was being held. It is alleged that law-enforcement officials could not reach the suspect to negotiate with him.

Florida Senate Bill S. 166

The proposed law would ban the knowing "broadcast or telecast to the public" of "any type of live audio transmission or live video transmission that records or depicts the tactical law enforcement operations, including, but not limited to, deployment of law enforcement personnel and equipment, until the tactical operations are completed."

The term "tactical law enforcement operation" is not defined.

The bill's sponsors cite a May 1998 hostage situation at a gas station near Tampa. In that case, according to the sponsors, "helicopters from local television stations circled the scene and broadcast live coverage that indicated to the suspect the location of law enforcement personnel."

Opponents of the bill point out that police can easily cut off a hostage taker's access to television by disconnecting electricity.

Because such less restrictive measures would prevent the harm this bill is claimed to remedy, the proposed law is overbroad and unconstitutional, says David Bralow, counsel to the Florida Society of Newspaper Editors.

"If the First Amendment means anything, it means police can't control whether and when the media broadcast information in their possession," Bralow says. He predicts the bill (if enacted) will face a strong challenge from Florida's news media.

The bill also would criminalize communicating with any person directly involved in tactical law enforcement operations or incident, excluding law enforcement personnel.

That provision, sponsors say, was prompted by media telephone calls to the gas station that was the scene of the May 1998 incident. A radio station and a newspaper attempted to contact the hostage-taker, Hank Earl Carr. The radio station reached Carr by telephone and broadcast a brief interview. The bill's sponsors say this use of telephone lines interfered with police attempts to contact the hostage-taker.

Opponents say police can prevent such calls by asking the telephone company to block them.

The bill would allow such calls or live broadcasts if police on the scene give express permission.

The proposed legislation is needed, according to the bill's supporting language, "to address the offense of interfering with law enforcement operations and to impose severe penalties for any such offense in order to prevent further tragedy."

The May 1998 incident ended without injury to police or to the hostage, who was released. Carr, who had killed three police officers before taking the hostage captive, took his own life.

The bill, S.166, was prefiled in the Florida State Senate on December 1, 1998. If approved, it would become effective July 1, 1999. The text of the bill can be found at:

www.leg.state.fl.us./senate/members/ s10 / index. html >.

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Florida Proposes Banning Live Coverage of Hostage Situations

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The Tampa Media Agreement

In addition to legislative action, law-enforcement agencies in the Tampa area proposed this fall a "Cooperative Agreement" with media limiting live coverage of emergency law enforcement operations. Under that agreement, the news media would refrain from live coverage of police locations and tactics and would not report hostages' names or employment. Also, media helicopters would be kept at a distance. In exchange, "when practical," police would allow one media representative a close-up view of the scene, so events can be videotaped for later reporting.

The agreement further provides that parties will "meet, initially quarterly, to discuss pertinent issues and exchange information. . . . It is the intention of all parties that this increased knowledge will result in greater understanding of the issues facing both the media and law enforcement, and thus better serve the public interests."

Law enforcement and media representatives met in early December to discuss the proposal. ABC's Tampa affiliate, WFTS, and cable station Bay News 9 signed the agreement, but another television station and two newspapers refused to do so.

"How the individual media react to and cover events such as these must remain under their control," said Dan Bradley, news director at NBC affiliate WFLA-TV, explaining his station's decision not to sign the agreement. "Each hostage situation or police incident will be different. Public scrutiny and viewers' reactions--not pre-existing rules--should guide media coverage," said Bradley.

Gregg Thomas and Jim Lake represent WFLA-TV and are with the firm Holland & Knight LLP in Tampa, FL.

Nevada Court Holds A Party Recording of Telephone Call Violates Wiretap Law

In a contorted reading of Nevada's wiretap statute, the Nevada Supreme Court has ruled that the recording of one's own telephone conversation constitutes an "interception" in violation of the act. *Lane v. Allstate Ins. Co.*, 114 Nev. Adv. Op. No. 125 (Dec. 8, 1998). The ruling effectively renders Nevada's wiretap statute a two-party consent statute.

Randy Lane is a former employee of the Allstate Insurance Company. He filed suit against Allstate for wrongful termination under the Age Discrimination in Employment Act, and also alleged, among other things, breach of contract and intentional infliction of emotional distress under Nevada state law. Allstate filed a motion to dismiss, alleging that Lane, apparently in an attempt to garner evidence that would be difficult or impossible to obtain otherwise, illegally tape-recorded over 700 telephone conversations with two of the Allstate officials named in the complaint and over 180 potential witnesses. The Nevada district court interpreted the wiretap statute to require two-party consent for taping purposes and therefore suppressed Lane's tapes, all evidence obtained from the tapes, and disallowed testimony by the witnesses who were parties to the conversations. The court then dismissed Lane's complaint with prejudice and granted Allstate's motion for sanctions. Lane appealed the district court's interpretation of the wiretap statute.

The Wiretap Statute

The relevant statute, NRS 200.620, reads in pertinent part: "Except as otherwise provided . . . it is unlawful for *any person* to intercept or attempt to intercept any wire communication unless: (a) The interception or attempted interception is made with the prior consent of one of the parties to the communciation; and (b) An emergency exists and it is impractical to obtain a court order . . . before the interception . . . ." (emphasis added). The statute requires judicial pre-approval or rat-

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Nevada Court Holds A Party Recording of Telephone Call Violates Wiretap Law

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The Nevada Supreme court interpreted "any person" to include an individual who is a party to a telephone call. In doing so, the court compared NRS 200.620 with NRS 200.650, a provision which prohibits intrusion by listening device into private conversations. The court focused on the language in NRS 200.650 which authorizes intrusion if one of the parties to the conversation consents: "unless authorized to do so by one of the persons engaging in the conversation." The Nevada Supreme court reasoned that if the Nevada legislature had wanted to include a one-party provision in the "interception" statute, it could have done so.

The court also pointed to the failure of the Nevada legislature to adopt either the "one-party consent" provison in the federal wiretap statute or an amendment which would have allowed for one-party consent recording when the recording was done by law enforcement officials. Under the court's analysis, Lane was found to have intercepted his own conversation.

In a telling afterthought, however, the court recanted a bit. Commenting on the dissention within the court, Justice Maupin wrote "based upon our inability to reach agreement on a proper interpretation of NRS 200.620, it would be unfair to conclude that, although Lane's conduct was intentional and, as we have now determined illegal, Lane intended to violate state law." *Id.* The recantation proved unhelpful, however, because while the court reversed the district court and remanded the case, allowing Lane's claim to proceed, Lane was not allowed to use any of the evidence that would prove his claim.

"Only a Third Person can Intercept an Attempted Forward Pass" - - A Dissent

In a strong and clear dissent, Chief Justice Springer proved to be the voice of reason for the court. Applying common sense and the plain meaning of the word "intercept", Justice Springer disagreed that Lane had violated the statute:

> Only a third person can *intercept* a communication, just as only a third person can intercept an attempted forward pass between a passer and a receiver. . . . There can be no doubt about the "common understanding" of the word "intercept"; and, under this understanding, it is idle to argue that when two people are talking to each other, one could be "intercepting" the conversation of the other. I think that no one would disagree about the general meaning of "intercept"; and it seems odd to me that this court would give the word an entirely different meaning when it is applied to two people engaged in "wire communication," that is to say, a telephone conversation.

Id. (emphasis in the original).

Justices Shearing and Young dissented on the issue of whether Lane intended to violate the law but voted to affirm the dismissal. Justice Rose also dissented, finding that "person" within the context of the NRS 200.620 should be interpreted to mean only "public officials and law enforcement personnel, and not to private citizens such as Lane." *Id.*

Amend the Law?

It is possible that the Nevada legislature will attempt to clarify the law when it convenes in February. The question of what consent is required to tape phone calls in Nevada attracted widespread attention last June when the contents of secretly recorded phone conversations with congressional candidate Shelley Berkley were made public. The recordings revealed Berkley advising her then-employer to do favors for county commissioners in order to get regulatory approvals from the commission. Berkley claimed that the phone calls were illegally recorded because the recorder did not obtain her consent. Although Berkley won election to Congress, the scandal has, at least temporarily, politicized the issue of recording phone calls in Nevada.

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Illinois Adopts Right of Publicity Law

Provides for Descendability of 50 Years

By Richard J. O'Brien & Cheryl L. Meier

For actions accruing after January 1, 1999, Illinois' right of publicity law will now be governed by statute. The Illinois General Assembly recently passed a "right of publicity" law that limits the unauthorized, commercial use of another person's identity, and provides for the first time under Illinois law for a right of descendability. *See* the Right of Publicity Act, 1998 Ill. Legis. Serv. P.A. 90-747 (H.B. 1422) (to be codified at 765 Ill. Comp. Stat. § 1075/1 *et seq.*) (the "Act"). The law provides broad exemptions for press, entertainment and publishing activities, and for any promotional materials, commercials or advertising about an exempted use.

Although courts have recognized a common law right of publicity in Illinois, the contours of the doctrine were largely undefined. With passage of the Act, Illinois joins some fifteen other states that protect the right by statute in an attempt to guide consistent application of the right. The Act, which will take effect on January 1, 1999, marks an important new development that will impact media decisions to use another person's identity in commercial settings, such as advertisements or promotional material, without prior consent.

The Act defines a person's right of publicity as the right to control the use of one's own "identity" for "commercial purposes", and includes the following major provisions:

1. Identity. The Act defines "identity" as any characteristic that a reasonable viewer or listener identifies with that person, including, but not limited to, his name, signature, photo, image, likeness, and voice. None of these characteristics are further defined in the Act.

2. Prohibited Uses. The Act prohibits the unauthorized use of another person's identity for "commercial purposes" only, which the Act defines as the public use of the identity on or in connection with the sale, advertising, or promotion of goods and services, or for the purpose of fundraising.

3. Permitted Uses. Not all unauthorized uses of a person's identity are prohibited, however. For example, the Act specifically allows the use of another person's identity in non-commercial activities such as news, public affairs or sports broadcasts. Attempts to portray, describe or impersonate a person in live performance, fine art, plays, books, music, printed or broadcast media, film, or other audio, visual or audio-visual work, are also permitted, so long as they do not in and of themselves constitute a commercial advertisement for goods or services. Advertisements or commercials for such uses are also permitted.

4. Transferability and Descendability. The right of publicity is freely transferrable by written instrument, including wills and trusts. If a person dies without providing for transfer of the right, the right automatically passes by operation of the state's intestacy statute. However, the right descends only to the decedent's spouse, parents, children, or grandchildren. Therefore, if a person dies without transferring his or her right of publicity and the person has no living spouse, parents, children or grandchildren, the right terminates. The Act also provides that the right of publicity survives a person's death for fifty years, thus allowing for post-mortem enforcement of the right by a transferee or heir.

5. Remedies. Violators of the Act are liable for the greater of either: (i) the profits derived from the unauthorized use, actual damages, or both; or (ii) $1,000. To establish profits, a plaintiff must prove that portion of gross revenue attributable to the unauthorized use of his or her identity. The Act offers no guidance, how-

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Illinois Adopts Right of Publicity Law

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ever, on calculation of the statutory damages option. Punitive damages for willful violations and injunctive relief are also available under the Act.

The Act is meant to supplant the common law right of publicity, but will not affect other rights and remedies, including the common law right of privacy. However, the Act may not be retroactively applied; actions for alleged violations of the right that occurred prior to January 1, 1999, and parties seeking to enforce the right of publicity of individuals who died prior to January 1, 1999, may only proceed under the common law.

Richard J. O'Brien & Cheryl L. Meier are attorneys with the Chicago office of the law firm of Sidley & Austin.

NAB AND RTNDA ASK D.C. CIRCUIT TO END PERSONAL ATTACK AND POLITICAL EDITORIAL RULES

On December 1st, the National Association of Broadcasters ("NAB") and the Radio-Television News Directors Association ("RTNDA") asked the United States Court of Appeals for the District of Columbia to order the Federal Communications Commission to repeal its personal attack and political editorial rules. These rules, initially put in place over thirty years ago, were to implement the policies of the fairness doctrine. The fairness doctrine was repealed over ten years ago, but the Commission allowed these two vestiges of that rule to remain. Both NAB and RTNDA have been involved in rulemakings before the Commission since the early 1980's in which they have sought repeal of the personal attack and political editorializing rules.

While the tortured history of the challenges to the fairness doctrine and these two appending rules is not worth reciting here -- but is recited in the NAB/RTNDA brief in the D.C. Circuit -- the issue arrives at the Court of Appeals after the FCC, in its last round, found itself locked in a two-two split on whether the rules should be (or even constitutionally, could be) retained. The fifth Commissioner, Chairman William Kennard, had to recuse himself because of his earlier involvement in the challenges to the rules when he was on the staff of the NAB. The two broadcast associations challenge the rules as violating the First Amendment, as well as being arbitrary, capricious, an abuse of discretion and in violation of the Administrative Procedures Act.

The personal attack rule requires that when an attack is made on the honesty, character, integrity or like personal qualities of an individual during a broadcast of views on a controversial issue of public importance, the broadcaster must notify the person or group attacked and provide a reasonable opportunity to respond. The political editorial rule requires that when a broadcast licensee endorses (or opposes) a qualified candidate for office, the broadcaster must provide any qualified candidates not endorsed notice and an opportunity to respond. While there are exceptions and qualifications to the application of these rules, they have served to inhibit broadcasters for decades.

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"Ambulance Chaser With Interest Only in Slam Dunk Cases" Held Non-Actionable Opinion

By Laura R. Handman and Carolyn K. Foley

Calling it a "close call," Southern District Judge Denny Chin last week dismissed a defamation claim brought against the American Association of University Women ("AAUW") and the AAUW Legal Advocacy Fund ("LAF") based on a statement describing the plaintiff, an attorney specializing in employment discrimination, as an "ambulance chaser" with interest only in "slam dunk cases." *Flamm v. American Association of University Women,* 98 Civ. 0151 (DC) (S.D.N.Y. Dec. 10, 1998) Although he found the description susceptible of defamatory meaning, Judge Chin reasoned that "it was not intended to be, and cannot reasonably be construed as, a statement of objective fact. Rather, no matter how distasteful, it was clearly an expression of opinion protected by the First Amendment and the New York state constitution."

A Negative Directory Listing

The defamatory statement at issue had appeared in a "Network Directory" produced by (LAF). The Directory listed attorneys who had agreed to participate in LAF's attorney referral service. The Directory included approximately 275 Network participants, of which plaintiff was one. Each listing contained the participant's address, telephone number, and, in some cases, a few sentences describing the participant's background, affiliations, area of practice, and any fees for consultation.

As Judge Chin described it, however, plaintiff's listing in the 1997 directory "was different." The entry for plaintiff, whose name is Leonard Flamm, read:

> Mr. Flamm handles sex discrimination cases in the area of pay equity, harassment and promotion. *Note: At least one plaintiff has described Flamm as an "ambulance chaser" with interest only in "slam dunk cases."*

(emphasis original).

This additional information, intended for internal use only, was included inadvertently. Mr. Flamm complained that the listing was "irresponsibly false, libelous *per se* and recklessly defamatory."

Clear Fact/Opinion Analysis

In rejecting the plaintiff's claim, Judge Chin found, applying the three step analysis laid out in *Brian v. Richardson,* 637 N.Y.S.2d 347, 350-51 (N.Y. 1995), that the statement was not a statement of fact, but rather one of non-actionable opinion. The decision is notable for its very clear analysis and application of the fact/opinion distinction to language that gives offense, particularly to lawyers, and, depending on context, can have a factual meaning.

In analyzing the first factor -- whether the statement had a precise and readily understood meaning -- Judge Chin rejected plaintiff's argument that the term "ambulance chaser," as used here, accused plaintiff of unethical or illegal practices. Judge Chin held that in the context of the Directory, the phrase "ambulance chaser" was not being used in a literal sense and, when coupled with the phrase "with interest only in 'slam dunk cases,' [simply did] not have a precise and readily understood meaning." Instead, as the Court noted, the combined phrases suggested that Mr. Flamm rejected cases, not chased after them as would generally be connoted by the term "ambulance chaser."

Turning to the second factor -- whether the statement is capable of being proven false -- Judge Chin found that the statement was pure opinion, the subjective reaction of one person, which did not lend itself to being proven true or false. In making this determination, Judge Chin commented, "I cannot envision conducting a trial . . . where the parties try to prove or disprove whether [each of the hundreds of cases Mr. Flamm claims to have handled] was a 'slam dunk.'"

Turning to the third factor, Judge Chin noted that

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"Ambulance Chaser With Interest Only in Slam Dunk Cases"

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even if the statement had a precise meaning and was capable of being proven false, the context of the statement as a whole made clear that the statement "was the subjective reaction of one person to Flamm and not a statement of objective facts regarding Flamm's legal ethics or competence as a lawyer." This conclusion rested on Judge Chin's findings that: (1) nothing in the listing suggested that the negative comments were assertions of fact; (2) a reasonable reader would not think it likely that defendants would have included Flamm in the directory if the statement were a factual one; and (3) the statement was set apart from the rest of the listing by italics and quotation marks and attributed to a plaintiff who had been referred to Flamm.

Finally, Judge Chin noted that, in context, the statement does not imply any undisclosed facts, whether about Mr. Flamm's method of pursuing clients, or about his legal ability. Rather, "the only reasonable impression that emerges from the statement is, as defendants urge, that 'Flamm abruptly declined to represent or give advice to one potential plaintiff and that plaintiff was upset, frustrated or annoyed by the encounter.'"

Mr. Flamm has told *The New York Times*, that he intends to pursue his "'slam dunk' appeal."

Laura R. Handman and Carolyn K. Foley of Davis Wright Tremaine LLP represented The American Association of University Women and the AAUW Legal Advocacy Fund. Michael T. Walsh and Maura Lee of Walsh & Sheehan also participated in the defense.

Texas Lawmaker Files Bill to Repeal State's "Veggie Libel" Law

Texas State Representative Ruth Jones McClendon introduced a bill in the Texas legislature, H.B. 126, to repeal the state's food disparagement law. The law makes actionable the dissemination of *false information that "states or implies that a perishable food product is not safe for consumption by the public."* Tex. Code Ann. §96.001 (1997).

McClendon said the Oprah Winfrey trial opened her eyes about the law's effect on free speech. "We already have libel protections on the books," she said, adding "We don't need special laws for vegetables." *See* E. Allen, *Bill filed opposing 'veggie libel' law*, San Antonio Express-News, Dec. 18, 1998. The bill will be taken up in 1999 and McClendon may have an uphill fight. The San Antonio Express-News article notes that in 1995 the veggie libel bill passed in the Texas House by a vote of 124 to 13; and in the Texas Senate, 29 to 2. *Id.*

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Marla Trump's Publicist Held to be Libel-Proof in Connecticut Court

The United States District Court for the District of Connecticut applied the libel proof and incremental harm doctrines in refusing to reverse a grant of summary judgment to The Globe, Star and The National Enquirer in the libel suits brought by Charles Jones. Mr. Jones was the former publicist for Marla Trump who admitted to, among other things, a sexual relationship with Ms. Trump's stolen shoes. *Jones v. The Globe et al*, Civ. No. 3:94: CV01468 (AVC) (D.Conn. Nov. 23, 1998)

Jones had sought to have summary judgment in his libel suits reversed when his criminal conviction for burglary and other charges related to his theft of Mrs. Trump's possessions was reversed on constitutional grounds. The court effectively found that much that was alleged to be defamatory was substantially true; leaving for dispute only statements that could not themselves cause him any meaningful additional injury to his reputation.

Facts Made for the Tabloids

Charles Jones, employed as Mrs. Trump's publicist for several years prior to 1992, was arrested in connection with his unlawful entry into Trump's apartment. A grand jury indicted him, charging him with burglary, criminal possession of stolen property, and criminal possession of a weapon. Jones stole numerous personal items from Mrs. Trump, including several pairs of shoes.

Globe International, The National Enquirer and Star published articles on Jones' arrest. The thrust of the articles was that Jones had stolen, among other things, Mrs. Trump's shoes, to which he admitted having a physical attraction, that the stolen items were found in Jones' office and that a videotape had captured Jones entering Mrs. Trump's apartment without her consent.

Mrs. Trump testified that her shoes were found behind a radiator cover and behind filing cabinets. At Jones' criminal trial, he denied entering the Trump's apartment with criminal intent. He also denied stealing Mrs. Trump's shoes. He did, however, testify to having a sexual attraction to the "imprints on the insides of women's shoes, boots and sneakers" and "[w]hen asked whether he had a physical sexual relationship with Trump's shoes, Jones answered affirmatively." *Id.* at 4.

Jones was convicted on February 15, 1994 of burglary, possession of stolen property and criminal possession of a weapon. In July of that same year, Jones filed three separate libel lawsuits against *Globe, The National Enquirer and Star.* Summary judgment was granted in favor of the defendants on September 26, 1995.

The criminal conviction, however, was overturned on September 19, 1996 when the U.S. District Court for the Southern District of New York determined that Jones' constitutional rights were violated during his criminal trial when he was ordered "not to consult with counsel during an overnight recess." *Id.* at 6. The Second Circuit affirmed that decision. Jones then filed a motion for relief from judgment under Federal Rules of Civil Procedure 60(b)(5).

Statements Still Were Substantially True

The district court framed the issue as "whether the libel, as published, would have a different effect on the reader than the pleaded truth would have produced." *Jones.* at 8. The court found that Jones had admitted in his testimony in the initial criminal trial most of the statements at issue, including the statement that he had a physical sexual relationship with Marla Trump's shoes. The remaining statements at issue were found to be nonactionable under either the "libel-proof plaintiff" or "incremental harm" doctrine. These statements included references to Jones "'stuffing several pairs of pricey, size 6 ½ Charles Jourdan shoes into his bag', 'sniffing a shoe and licking it', possessing 'dozens of bras and silk panties', and the statement that 'underwear was stuffed into air ducts'." *Id.* at 12. None of these statements, the court held, added a significant "sting" to what had already been testified to and reported on. On that basis, the court determined that "[t]he reversal of Jones' conviction does not establish that the remaining statements in the defendants' articles caused further meaningful injury." *Id.* at 13

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The Quality of Care in Nursing Homes is a Matter of Public Concern

By Laura Stapleton

Finding that the statements in an ABC News *20/20* report were either opinion, privileged or simply not defamatory, a Fort Worth Court of Appeals affirmed summary judgment for defendants with respect to their report on the quality of care in nursing homes in *Texas*. *Brewer v. CapitalCities/ABC, Inc.*, No. 2-97-189-CV (Ct. App. 2d Dist.Oct. 15, 1998). Among the findings: stating in the news report that the plaintiff declined to be interviewed was not defamatory.

Victims of Greed

The report entitled "Victims of Greed" aired in October 25, 1991 and concerned abuse, neglect and improper or inadequate care in Texas nursing homes. The report began with hidden camera footage showing patient abuse and neglect inside two different nursing homes. Don Leonard Brewer, an owner of several nursing homes in Texas, who also happened to be a member of the Texas Board of Health at the time the story was investigated, sued ABC and several others for libel and conspiracy to commit libel, after the *20/20* commentator mentioned that Brewer faced possible criminal liability for buying and selling nursing homes while on the Board of Health, that three of his homes had appeared on the TDH "worse case" list, and that he had recently resigned from the Board of health and left the state.

The plaintiff specifically complained of the statements alleging (1) he was responsible for patient abuse, (2) he engaged in "profiteering," (3) he fled the state of Texas to avoid fines and criminal liability, and (4) he declined to be interviewed. The trial court granted summary judgment in favor of the defendants, and Brewer appealed.

The appellate court affirmed the summary judgment and explained first that the profiteering statement was merely ABC's presentation of its opinion and was not a statement of fact. Based on the facts given in the report, the Court determined viewers could easily decide for themselves the validity of ABC's opinion that "the most likely reason" for the deficient care was profiteering.

Next, the Court determined that the statement concerning Brewer declining to be interviewed was not defamatory. The Court relied on *Chapin v. Greve*, 787 F. Supp. 557 (E.D. Va. 1992, aff'd sub. nom. *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1993) where the court dismissed the libel suit for failure to state a claim and stated:

> Refusing to answer reporters questions is commonplace and certainly cannot reasonably be said to tarnish one's reputation. People in the public eye do it all the time. There is nothing odious or disgraceful about it.

The Court then addressed the issue concerning privilege and concluded that the report was factually consistent with the underlying documents ABC relied upon from the Texas Department of Health, including reports of abuse, neglect and other violations. The court found that evidence concerning such occurrences clearly demonstrated that the report was a reasonable and fair comment on the official proceedings of the Texas Department of Health and of matters that were of a public concern and, as such, were privileged under Texas Civil Practice & Remedies Code s.73.002(b)(2)

Laura Stapleton is with Jackson Walker, L.L.P. in Austin, the firm that represented defendants in this matter.

And a Recent "Of and Concerning" Decision:

Plaintiff claimed a brief shot in a documentary of his face as it appeared on a billboard advertising his business would have led viewers to confuse him with his former partner. The partner, portrayed in the documentary as both elusive and dangerous, was in the same line of business as plaintiff. The court found that the documentary, taken as a whole, would not support plaintiff's claim of confusion. *Alszeh v. Home Box Office*, (Cal. Ct. App. Nov. 24, 1998) (No. BC141154).

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GLOBE WINS FEES UNDER CALIFORNIA SLAPP STATUTE

Court Says Statute Should Have Broad Application

A California Court of Appeals has affirmed a lower court's ruling granting a Special Motion to Strike under the California Anti-SLAPP statute to Defendant-Globe Communications in a libel suit brought by Brian "Kato" Kaelin. The Court also awarded the defendant costs incurred during the appeal. The libel claim revolved around an October 1995 story printed in the Globe which contained a friend of Kaelin's account on a KNBC talk show. The friend claimed that Kaelin had confided to him that he had helped O.J. Simpson cover up evidence of murder. Kaelin chose not to sue KNBC, but only the defendant. *Kaelin v. Globe Communications Corporation*, No. B116789 (Cal. App. Ct., 2nd Dist. November 10, 1998).

In the lower court, the Globe's motion to strike, filed under Cal. Code Civ. Proc. § 425.16, was the only response to Kaelin's allegations. At oral argument, Kaelin was granted limited discovery under the provision but the defendant renewed the motion after discovery and it was granted by the court. The trial court awarded the Globe fees and costs of $23,929.95 pursuant to the statute which allows for the recovery of attorney's fees and costs after a special motion to strike has been granted. Kaelin's appeal did not dispute the granting of the SLAPP motion, but claimed that there was an error in the awarding of fees and costs for items he asserted that were not related to the § 425.16 motion.

The Court of Appeals in its ruling first stated that unless there had been some kind of abuse of discretion by the trial court then fees awarded under § 425.16 (c) should stand. "The matter of reasonableness of attorney's fees is within the sound discretion of the trial judge." *Church of Scientology v. Wollersheim*, 42 Cal.App.4th 628, 659 (1996).

The Court found, moreover, that the fees and costs incurred by the defendant were directly related to the § 425.16 motion or to discovery demanded by Kaelin under the SLAPP statute provisions and related to the motion.

The Court also rejected the plaintiff's argument that the statute should be subject to narrow interpretation. The Court found instead that a broad application of § 425.16 was more in keeping with the legislative history of the provision which expressed the need to make defendants whole and deter frivolous suits.

Jewell Judge Acts to Speed Appeal on Confidential Source Issue

On December 15, 1998, an Atlanta trial court dismissed The *Atlanta Journal-Constitution's* direct appeal of the court's April 1998 order requiring identification of the confidential law enforcement sources behind the Journal-Constitution's accurate report that Richard Jewell had become the focus of the Centennial Olympic Park bombing investigation. *Jewell v. The Atlanta Journal-Constitution*, filed January 28, 1997. However, the court indicated that the dismissal was designed to facilitate, not to prevent, immediate appellate review of the issue.

It is unclear under Georgia law whether a discovery order alone is immediately appealable. However, issues raised by the discovery order are clearly appealable under Georgia law if the order is followed by a formal finding of contempt. The trial court's latest ruling indicates that the trial court intends to enter such a contempt order here in order to ensure appellate jurisdiction over the confidential source controversy but the timing is uncertain..

The *Atlanta Journal-Constitution* is represented by Peter Canfield of Dow, Lohnes & Albertson in Atlanta, GA.

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Pornographic Spammer Hit With Treble Damages By AOL

By Jon L. Praed

The Internet community recently won a decisive summary judgment victory against spammers in a lawsuit filed by America Online in federal court in the Eastern District of Virginia. The decision is the latest in a rapidly growing series in which spammers have been held liable for sending unsolicited commercial advertisements via e-mail. The Eastern District of Virginia decision is significant because it established liability under six separate causes of action, and resulted in the award of treble damages against a pornographic spam company and its individual shareholder-officers. *America Online, Inc. v. LCGM, et al.*, No. 98-102-A (E.D. Va.) (memorandum opinion filed Nov. 9, 1998).

Millions of Messages

The primary defendant in the case, LCGM, Inc. (dba Live Cover Girls & More) was a Detroit-based company that operated dozens of pornographic Internet web sites featuring live nude models. LCGM indiscriminately advertised its web sites directly to AOL members through millions of unsolicited e-mail messages. In addition to being unsolicited in nature, LCGM's messages also used fraudulent header information to disguise the true source of the e-mails in hopes of avoiding detection by AOL and to make it more difficult for AOL's members to complain. In particular, LCGM falsely used AOL's domain address "aol.com" in its headers in hopes of fooling AOL members into thinking the messages originated from within AOL's system. Over the course of more than seven months, LCGM transmitted over 92 million e-mail ads to AOL's members.

After repeated written warnings failed to stop LCGM's illegal advertising, AOL filed suit in the Eastern District of Virginia. AOL's suit alleged numerous claims, including: multiple violations of two computer crime statutes -- the Federal Computer Fraud & Abuse Act (18 U.S.C. § 1030) and Virginia's Computer Crimes Act (Va. Code § 18.2-152); federal trademark claims based on false designation of origin and trademark dilution under the Lanham Act (15 U.S.C. § 1125); and Virginia common law claims of trespass to chattels and conspiracy. AOL's complaint sought compensatory and exemplary damages, attorneys fees and injunctive relief. Importantly, AOL also named as defendants the two persons who owned and managed LCGM -- Francis Sharrak and James Drakos -- alleging these individuals could be held personally liable for the actions of the corporation they owned and managed.

In an effort to avoid civil liability, and out of fear of criminal prosecution, all of the defendants refused to cooperate in discovery (the individual defendants went so far as to take the Fifth in response to deposition questions asking about their home addresses). As a result of these and other discovery abuses, the Court initially imposed monetary sanctions against the defendants (and their counsel), and eventually entered an order barring the defendants from opposing AOL's claims or presenting defenses. Thus, armed only with evidence obtained internally, third-party evidence and limited admissions from the defendants, AOL moved for summary judgment on all claims.

Spam is Illegal

In a memorandum opinion authored by Judge Gerald B. Lee, the Court granted summary judgment on all of AOL's claims, excepting only the conspiracy claim. The Court's straightforward opinion clearly confirms what only a handful of prior courts have decided -- spam is illegal under a number of legal theories, including under federal and state criminal statutes. *See, e.g., CompuServe*

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Pornographic Spammer Hit With Treble Damages By AOL

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Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015 (S.D. Ohio 1997) (entering preliminary injunction against spammer on grounds plaintiff was likely to prevail on trespass claim); *America Online, Inc. v. IMS*, No. 98-11-A (E.D. Va. Oct. 29, 1998) (granting summary judgment for AOL against spammer under Lanham Act and trespass to chattels claims) (full opinion is available online at http://lw.bna.com/#1117).

Even more importantly, by finding the individual defendants liable along with the corporate defendants, the opinion extends the war on spam by holding that spammers cannot easily insulate themselves from personal liability simply by incorporating. While the Court has not yet entered a written damages award, a damages hearing was held before Eastern District of Virginia Chief Judge Claude M. Hilton following the entry of summary judgment. At the end of that hearing, the Court, in an oral ruling from the bench, awarded AOL treble damages totaling $215,280, plus attorneys' fees and costs of suit, and entered a permanent injunction against all defendants.

Jon L. Praed is with the firm Latham & Watkins, Washington, DC, which represented AOL in this matter.

Copyright Terms Extended by "Bono Act"

By David Goldberg and Robert J. Bernstein

The most sweeping change in the Copyright laws enacted by the last Congress is Title I of S. 505, the "Sonny Bono Copyright Term Extension Act," which extends the term of copyright protection from life of the author plus fifty years to life-plus-seventy years, or, for pre-1978 works, from 75 years to 95 years. In addition, works made for hire are now protected for 95 years from publication or 120 years from creation, rather than 75 years from publication or 100 years from creation, as provided under prior law. The extra 20 years of protection brings U.S. law into line with European standards, and will be available to all works still in their initial or renewal term of copyright as of October 27, 1998, the effective date of the amendments.[1] Works which have already fallen into the public domain are thus not revived by the new legislation.

The Sonny Bono Act does not simply add 20 years to every date in the existing Copyright Act, however. For example, the 35-year termination window under § 203 [Termination of transfers and licenses granted by the author] remains unchanged; authors can still terminate grants of a transfer or license of copyright, or any right under copyright, executed after January 1, 1978 within a five-year period starting at the end of the 35th year after the grant was made.[2]

Similarly, works which were unpublished and unregistered as of January 1, 1978, and formerly entitled to protection until at least 2002, are not entitled to guaranteed protection until 2022, as might be expected. The copyright in these works will still expire at the end of 2002, unless the works are published before that time. The optional additional protection available for such works, if published before the end of 2002, is extended, however, from 2027 to 2047. Owners of unregistered, unpublished pre-1978 works by long-deceased authors should thus have a powerful

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Copyright Terms Extended by "Bono Act"

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incentive to publish prior to the end of 2002, because they will gain up to 45 years of additional protection.

The Sonny Bono Act also changes the way in which authors and their heirs can terminate certain pre-1978 transfers of renewal rights under § 304 of the Copyright Act. Under prior law, § 304(c)(3) allowed authors or their heirs to terminate any previous grant of renewal rights during a five year period at the beginning of the so-called "extended renewal term," *i.e.* , the last 19 years of the work's 75-year copyright. That provision remains in effect, for works which have not yet reached the 56th year of their copyright term. Thus, if a grant is terminated at that point, the author or his successor recaptures the last 39 years of the term.

In addition to providing for a possible recapture of up to 39 years for certain works, the new law will give other authors a second bite of the termination apple, because it allows them to take advantage of the new termination rules even if their termination rights had lapsed under the old law. Under prior § 304(c), if the termination rights were not exercised between years 57 and 61, the ownership of the extended renewal term could not thereafter be disturbed. Thus, if renewal rights in a work dating from 1936 or earlier had not already been terminated, the owner of the renewal could safely enjoy the remaining few years of the term and the author's estate was left with nothing.

Under the Sonny Bono Act, that same author's estate can now simply wait until the end of the 75th year of the term, and recapture the work for the last 20 years of its new 95-year term. As with the original § 304(c), the intent of the new provision is to ensure that any windfall resulting from term extension should go first to authors, and not simply be handed to the owner of the existing renewal rights.[3]

David Goldberg and Robert J. Bernstein are with the firm Cowan Liebowitz & Latman, P.C. in New York. This article was first published in the New York Law Journal.

Endnotes

1 See § 102(d)(1)(B) ("Any copyright still in its renewal term at the time that the Sonny Bono Copyright Term Extension Act becomes effective shall have a copyright term of 95 years from the date copyright was originally secured"). Title I of S. 505, the Sonny Bono Act, relating to term extension, took effect immediately upon enactment. See § 106 ("This title and the amendments made by this title shall take effect of the date of the enactment of this Act"). Title II of S. 505, the Fairness in Music Licensing Act of 1998, will not go into effect until January. The Act provides at § 207 that those amendments "shall take effect 90 days after the date of the enactment of this Act."

2. The only change to existing 17 U.S.C. § 203 is the addition of a news subsection (a)(2)(D), which provides that an author's "executor, administrator, personal representative, or trustee" shall own the author's termination interest if the author is not survived by a spouse, children or grandchildren.

3. Even the author's windfall is not unconditional, however, because libraries, archives and non-profit educational institutions are given greater latitude in using copyrighted works during the last 20 years of the extended term. If a work is not obtainable at a reasonable price, and not "subject to normal commercial exploitation," libraries, archives and no-profit educational institutions may reproduce, distribute, display and perform the work for purposed of scholarship, research or preservation. Sonny Bono Act, § 104.

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London Firm Taking Defamation Cases on Contingency Basis

In what may lead to a significant increase in libel claims against the media in England, the London-based solicitors firm of Peter Carter-Ruck and Partners has instituted conditional fee arrangements, commonly known in England as "no win no fee plans," in defamation cases. According to partner Ruth Collard, the firm has already taken on libel cases that might otherwise not have been brought. Competitive pressure may lead other London solicitors to follow suit.

Peter-Carter Ruck's conditional fee arrangement is slightly different than American-style contingency fees. Their defamation client pays solicitors fees only if he or she wins; in which case legal fees can be recovered from the losing party. The client does pay court fees and disbursements, which can include a barrister's fees, up front. Some barristers, though, are also offering their services on a no win no fee basis. If a client loses, he or she is still obligated to pay the defendant's legal fees. Peter Carter-Ruck is negotiating with insurance companies to provide a plaintiff's policy for this event. If a plaintiff wins, in addition to getting its legal fees Peter Carter-Ruck takes a "success fee" -- 25% of the damages awarded.

Conditional fee arrangements have been allowed in personal injury cases for about two years in the UK. New regulations effective July 1998 extended their use to other civil cases. Peter Carter-Ruck is the first firm to offer such arrangement in defamation cases.

The new plan raises interesting questions and potential conflicts in English defamation litigation. For example: How will a win be defined? What if the plaintiff wants to settle for a retraction or apology after some litigation has taken place? The immediate impact, though, may be a predicted increase in suits. An English legal magazine said the "move is set to re-ignite the defamation industry that has been suffering a slowdown since the Court of Appeal cracked down on the lottery-sized libel awards of the early 1980s and 1990s." C. Fogerty, *Carter-Ruck launches no win-no fee plan*, The Lawyer (Dec. 12, 1998).

UK Television Company Fined £2 Million For Airing Faked Documentary

The UK's Independent Television Commission levied its largest fine ever against a broadcaster, fining Central Television £2 million for broadcasting a documentary on drug smuggling that turned out to be faked. The documentary, entitled "The Connection," purported to show drug smugglers operating between Colombia and Britain. It aired in the UK in October 1996, went on to win several awards, and was even excerpted on *60 Minutes*.

The Guardian newspaper first reported that portions of the documentary were staged in May 1998. An investigation by Central Television's parent company, Carlton, concluded this month that crucial elements of the documentary were staged or untrue. These included scenes of a so-called "mule" swallowing heroin capsules, an interview with a leader of the drug cartel and a Colombian police raid. The heroin capsules were mints, and the interview and police raid were staged.

The internal inquiry criticized the producer of the documentary, who claimed he did not know that Colombian sources were fake; and Carlton executives for failing to question the documentary's credibility with sufficient vigor. The inquiry concluded that Carlton had not set out to mislead viewers.

On December 18, 1998, the Independent Television Commission announced the fine and its opinion that the breaches of its program code were so grave it considered shortening Central Television's broadcast license. The size of the fine also reflected the scale of the program's ambition and the consequent degree of viewer deception. On December 13, after the release of the internal report by Carlton, *60 Minutes* issued a rare on-air apology for broadcasting portions of the documentary.

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Thanks to Peter Canfield, Guylyn Cummins, Bob Raskopf and Dick Rassel

On behalf of LDRC, we want to thank Peter Canfield, Dow Lohnes, Atlanta; Guylyn Cummins, Gray Cary Ware & Freidenrich, San Diego; Bob Raskopf, White & Case, New York; and Dick Rassel, Butzel Long, Detroit, each of whom is stepping down from the chairmanship of an LDRC/DCS committee. **Peter Canfield** previously served on the LDRC Executive Committee and, from that post, was asked to head up the initial LibelLetter Committee charged with helping to create the ***LDRC LibelLetter***. In that role, not to mention more generally his role as Executive Committee member, Peter's service to LDRC has been nothing short of invaluable. Fortunately for LDRC, Peter has agreed to take on the co-chairmanship of the Conference Planning Committee -- the group that is already planning the 1999 NAA/NAB/LDRC Conference for next September.

Guylyn Cummins served as the chair-extraordinaire of the Expert Witness Committee for five years. In that time period, this incredible *engine-that-always-could* of a committee produced materials for *in limine* motions, an analysis of the proposed amendments to the Federal Rules regarding experts, and an increase in the Expert Witness Bank of literally dozens and dozens of individuals. Guylyn has recently volunteered to serve as Vice-Chair of the Trial Techniques Committee.

Bob Raskopf chaired the Jury Instruction Committee for what was also an immensely productive five years. The Committee produced Model Jury Instructions and Voir Dire Questions, and worked with LDRC staff in creating a Jury Instruction Bank Index. The Committee helped collect and catalogue numerous sets of instructions. All of these materials, like the expert witness materials, are regularly called for and used by LDRC members.

Dick Rassel chaired the Tort Reform Committee for an equally lengthy tenure and his committee was also extremely productive. In addition to annual reports on tort reform efforts across the nation, the Committee jumped in where needed to assist in specific tort reform efforts. The most recent was LDRC's support of a bill in the Senate that would limit punitive damages in libel and privacy cases, among other causes of action. That bill did not pass this last term, but we understand that it likely will be introduced again next term.

One other change in the chairs: **Lee Levine**, Levine Sullivan & Koch, L.L.P., Washington D.C., who has so ably chaired the New Legal Developments Committee, has agreed to chair a new committee, still in development, on legislative matters. Under Lee's chairmanship, however, the New Legal Developments Committee has regularly provided LDRC with ideas and with information about new cases and legislative matters. They have worked with LDRC in the creation, drafting and editing of the fourth quarter **LDRC Bulletin**, which annually focuses on new developments, both in 1998 and in 1999.

Thanks to all, whose efforts represent the very best of what LDRC can and should be all about. We will look forward to continuing to work with each of them on future projects.

PLEASE SEND IN DIRECTORY CORRECTIONS FOR 1999 DCS DIRECTORY

LDRC will soon begin preparing the 1999 DCS Directory. We would appreciate receiving all changes by January 22, 1999. Although some firms have already submitted their changes, we request that they be resent for verification. Changes include: firm name, address, phone numbers, branch offices, etc. This year we ask that all e-mail address for firm representatives be submitted as well. Additionally, Chairs of each DCS committee should send in their finalized list of committee members for 1999. Thank you for your help.

Please send all changes/additions to:
Melinda Griggs, LDRC, 404 Park Ave. South,
16th Floor, New York, NY 10016
or fax to (212) 689-3315.

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LDRC Sixteenth Annual Dinner Program
Journalism and The Civil Rights Movement -- Newsgathering Under Fire
November 11, 1998

TRANSCRIPT

Tribute to Robert Hawley

MS. BARON: I want to welcome you to LDRC's Annual Dinner. And it is really fabulous to see you all here. This dinner is really a great gathering of the First Amendment clan, a group of publishers, journalists, lawyers, friends who care about the state of the First Amendment and its unique impact on publishing and public speech. I really want to thank you for coming here tonight and for your support of LDRC throughout the year.

I think it's fair to say that this is a group with rare passions for their profession. And if speaking is part of it, this evening is certainly a testament to that. It's good to see you all enjoying each other's company. And this dinner allows an all too infrequent opportunity for all of us to get together and share not only a drink or two, but I think some ideas.

Certainly our evening tonight, we believe, will offer the opportunity to recall moments of great social activism and some great journalism, as well.

I want to introduce Bob Hawley of The Hearst Corporation, Chair of LDRC for the last year. Bob's about to retire from that post, succeeded by Ken Vittor of McGraw-Hill.

Now, for those of you who have worked with Bob Hawley, you know that he's a man of uncommon common sense, humor and intelligence. But Bob is also a uniquely committed doer and has given incredible attention to LDRC, in his post, first, as a member of the Executive Committee and then as its chair.

As a result, I can say that Bob has participated in some notable LDRC successes in the years we've worked together, successes I think can readily include the introduction of the second volume of the LDRC 50-State Survey on Media Privacy and Related Law, and the development now of a new Employment Libel and Privacy Law survey, successful Virginia conferences -- the next one, by the way, is in 1999. I hope you're all putting it on your calendar -- and projects into the international law area, with conferences in Moscow, with their emerging press and bar, and more recently the conference LDRC sponsored in London on English, American and European libel and privacy issues.

Were there any low points during Bob's tenure? No. Well, if you will, I'll share with you maybe one. LDRC's regular efforts to find better office space are becoming almost legendary. But I do recall when Bob and I failed to convince then chair Harry Johnston to let us move the LDRC offices to adjoin the dance studio at City Center. Well, all right, along with cheap space came the thud, thud, thud, thud of dancers leaping, and the ever-present and excruciating rhythmical music that brought musician Johnston to his aesthetic knees.

Bob and I thought we had found space with unique charm. Harry thought he was dealing with Mickey Rooney and Judy Garland clones threatening to put his show in a barn.

I will miss Bob's presence on the Executive Committee and his forays with me into local real estate. A small token, Robert; "With gratitude and appreciation to Robert Hawley in recognition of your years of service and contributions to LDRC and for the common sense, good humor and wisdom you brought to the office of chair."

MS. BARON: And if you would join me in expressing our appreciation.

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MR. HAWLEY: I'm one of the people who have helped plan this evening. And what just happened was not on any schedule that I saw.

I do have some remarks to introduce the evening, but I do want to say a couple of things. The wonderful miracle of service is that you get so much more out of it than you put in. I've been with LDRC now six years, the last three as Chair of the Executive Committee. And as part of that, I have had the opportunity working with all of you and many others to help change the face of media law, something that I could not have possibly done otherwise.

I want to express my thanks to all of you for allowing me the opportunity to do that. In particular I want to say thank you to Sandy Baron. Harry and I hired her several years ago back when we had an Executive Director model for the organization, but we did not have an Executive Director. Sandy, in a moment of unguarded candor, once referred to her leadership style as an exercise in Tom Sawyerism. Those of us who have worked with her know that that's all too true. But I've enjoyed all of it. She's made my job a piece of cake ever since we hired her. Thank you.

The Evening's Introduction

MR. HAWLEY: Tonight's program is titled "Journalism and the Civil Rights Movement: Newsgathering Under Fire." And we who practice media law can be proud of the common heritage of the law of libel and the Civil Rights Movement, a line that connects both directly to *New York Times v. Sullivan.*

That decision arose at the bitter height of the campaign for civil rights in the South. On March 29, 1960, *The New York Times* published an advertisement to raise money for an organization of civil rights advocates. The ad was called "Heed Their Rising Voices," and referred in part to demonstrations in Montgomery, Alabama, and to the repressive counter-measures taken by local authorities.

The plaintiff, the Commissioner of Public Affairs for the City of Montgomery, sued for libel and was awarded $500,000, the entire amount that he had asked for. By 1964, when the case reached the Supreme Court, a second half million dollar libel verdict against *The New York Times*, based on the same advertisement, had been awarded to another Montgomery city commissioner. There were eleven other libel suits by local and state officials pending against *The Times*, and many similar libel suits against other members of the press.

As Anthony Lewis points out in his book about the case, *Make No Law: The Sullivan Case and the First Amendment,* the civil rights conflict threatened the very existence of *The New York Times.* It threatened the right of the press to report on tense social issues and the right of the public to be informed about them.

At this dinner six years ago, LDRC established the William J. Brennan, Jr. Defense of Freedom Award and honored Justice Brennan by presenting the first award to him in celebration of his historic opinion. Speaking at that dinner, Andrew Young said, "There wouldn't have been a *New York Times* case if there hadn't been a Civil Rights Movement demanding that the world heed our voices. And as an oppressed community, struggling to find non-violent ways to bring about some expression of justice in this country, I don't know that we could have been successful without *Sullivan.*"

In fact, that case established the security of the press to report what was actually going on in the South, which was essential to the conduct of non-violent demonstrations.

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This year marks the 35th anniversary of the death of the Reverend Martin Luther King, Jr. Next year will mark the 30th anniversary of the Civil Rights Act and of *New York Times v. Sullivan.* Not a day goes by when those who report, edit and publish, and the lawyers who advise and defend them, do not rely upon the fundamental First Amendment principles laid out in *New York Times v. Sullivan.*

We believe that it is appropriate for LDRC to reflect on the journalism and the movement that led to that landmark decision. Indeed, we believe it honors the memory of Justice Brennan and the spirit of the William J. Brennan, Jr. Defense of Freedom Award, to consider the great social movement and contemporary reporting that bore that decision.

Tonight we propose to dedicate this year's William J. Brennan, Jr. Defense of Freedom Award, which was established to honor those whose actions have advanced the cause of freedom of expression, to the many journalists, photojournalists, cameramen, sound men, editors, publishers and others in our community whose efforts gave honest voice to the truly heroic men and women who sacrificed so much -- some, even their lives.

Finally, this evening would not be possible without the willingness of our guests to join us. I would like to thank at this point Congressman John Lewis, Karl Fleming, Reuven Frank, Jack Nelson, Vernon Jarrett, and Terry Adamson for their gracious acceptance of our invitations. I'd like to thank Media/Professional Insurance for the cocktail party that we just enjoyed. And now please enjoy your dinners and we'll see you a little bit later. Thank you.

An Introduction of Congressman John Lewis by Terry Adamson, Moderator

MR. ADAMSON: Ladies and gentlemen, if I could have your attention.

My name is Terry Adamson, and it's truly my honor to try to be a moderator of this program tonight. I sort of nicknamed it, myself, Legends and Heroes, because truly the players that are going to be on this podium tonight have been, for me, long time legends and heroes.

My task is to do something that I've really wanted to do all my life, which is to introduce to this particular group John Lewis.

Before I do that, there are a couple of things that I would like to do. First is, about six years ago we did the first Brennan Award and presented it to Justice Brennan, which was a grand event and a worthy event. It was the night after the Presidential election '92. And one of the things that we said that night was, there was probably great anticipation among many of us to the possibility, the judicial plums that might be available.

And I would be remiss if I failed tonight to pay tribute to one of our own, who has now been a judge for ten days on the Second Circuit Court of Appeals, and that's Bob Sack.

The second thing I want to do is, a lot was said about Sandy Baron by Bob Hawley. And I'd like to say something, too. Sandy has exuded this program. She has been passionate about this program. She has read, I think, everything that there is to read about not only our speaker, but the Civil Rights Movement generally. Her enthusiasm has the Tom Sawyer effect. It's infectious. All of us caught it in many respects, and this wonderful publication at each of your tables, which includes the marvelous pictures and excerpts from John Lewis's biography, his personal memoir, was put together by Sandy and her staff. And they all deserve, I think, a great hand for that passion and that commitment and that service.

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MR. ADAMSON: It's not often that one has the opportunity to actually introduce a living saint. Which John Lewis was declared by Time magazine in 1975. That's a hell of an act to have to live up to. John has.

I'm proud that John has been my personal friend since 1969. And he has been an inspiration. He exudes integrity and beliefs and commitment and public service.

Let me just tell you a little bit about John very briefly. Quiet apart from the biographical things. Other than this, I promise you, the biographies are going to be one liners for the rest of these people. That's one reason we put them in the books, so you can just read them and we can dispense with that. But I do want to tell you a few things about John other than the things that are in the formal biography.

I benefit greatly, and this is a plug, one of the great books that's ever been written is John Lewis's personal memoir, "Walking With the Wind," which was published this year and I'm sure is on sale. And it's done extraordinarily well and been extraordinarily well reviewed.

John was born in very rural, very rural -- that's not just rural, that's very rural -- Troy County, Troy, Alabama, near Troy, Alabama, which is somewhere within 30 or 40 miles of Montgomery, in a place called Carter's Quarters, on a small farm his father bought when he was about five years old. His parents were sharecroppers. Small house. John says in his book that he thinks by the time he was six years old he'd probably seen two white people. One was the rural mail carrier and one was a teacher.

But he read. I'm going to tell this, John. You asked me -- John said he would have to talk about this if I told it, but I have to tell it. One of the great stories in this book, which goes on for pages.

John loved the chickens that he had to keep up with around the house. They were his pets. It's tough making a pet of a chicken, because they end up like they did tonight on the dinner table. And that can be kind of traumatic.

John always wanted to be a preacher. And he was a great preacher to the chickens. He preached to them and preached to them and preached to them. He preached at their funerals. He preached at their baptisms. And he learned obviously awfully well.

His parents instilled in him the value of learning. He took his school and his studies very, very seriously, that which was available to him. He was 15 years old when Emmett Till, a 14-year old boy from Chicago, was lynched with barbed wire in Money, Mississippi. He read about it in the black press.

A few months later, Rosa Parks, in nearby Montgomery, refused to give up her seat. And a movement began. The Montgomery bus boycott, which went on for over a year, and was successful.

He knew he was going to be turned down, but he applied for a library card at the public library when he was 16.

In 1957, when Little Rock was exploding and Eisenhower was sending in the 82nd Airborne, John went to college at American Baptist Theological Seminary in Nashville, Tennessee. He was 17 years old. He was right off the farm. David Halberstam in his book, "The Children," called John the most countrified of them all. And those students, schooled by the lessons of Montgomery and schooled by the violence and brutality of Emmett Till, schooled by so much else, decided to take serious action in their own community of Nashville. And thus began the sit-in movement when John was 19, 20, 21 years old. He spent his 21st birthday in jail, arrested. It was a dramatic, powerful, moving time.

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Now, for the conclusion of my introduction of John, I'm going to call on the best introduction of all, which was a documentary. I'll tell you first about a documentary that was shown on NBC, a White Paper on the sit-in that was broadcast in December of 1960. The sit-ins began in February. They were successful. Those were remarkable times. This was a remarkable documentary. I watched it a couple times over the last week or two. And we've pulled out just five minutes of it. Not even five minutes, I think, which we are going to use. I was going to let the panel talk about. I hope they still will. But I think it probably serves to introduce John Lewis better than any words I could say.

So if we could go to that videotape

[VIDEOTAPE: NBC White Paper: The Sit-Ins]

MR. ADAMSON: This was powerful television. In Andy Young's memoirs, which were recently published as well -- I'm sure it's for sale -- Andy was of course one of our speakers six years ago in helping us pay tribute to Justice Brennan. Andy and his wife, Jean, were living in New York at the time, working for the Council of Churches. They watched this program in December of 1960 and said, they both said to each other, Andy and Jean to each other, "We've got to go home back to Georgia. That's where the impact is," and did. And that's when he joined Dr. King.

John went on and was in the center of so many events after the Nashville sit-ins, starting with the Freedom Rides the next year. And of course coming to a culmination, which we'll see something more of later, in 1965 with Bloody Sunday in Selma, Alabama.

It's a great pleasure where the intersection of so many confluences -- policy, law, commitment, religion, civil rights, the media, government, policy -- come together through a remarkable decade of our history, 1954 through 1965. We're going to talk about it tonight.

It's a great honor to have one of the leading participants of the period, a living saint, John Lewis.

Congressman John Lewis

MR. LEWIS: Thank you, Terry. Thank you very much for that wonderful introduction. I appreciate it, my friend, my brother. I'm just afraid that the introduction may be much longer than what I have to say. But thank you so much.

Terry, you know, I wish you had been down in Georgia a few weeks ago just before the election and showed this little piece and said those same words over and over again. Maybe I would have won by a much larger margin than 79 percent of the vote. But thank you so much. You've been a friend, you've been a brother for so many years.

I'm delighted, very happy and very pleased to be here tonight. To be invited to be here at this dinner is so moving. And so I want to thank all of you for inviting me.

Terry said in the introduction, and I hadn't planned to do this, but since he did it I have to do it, that I grew up not in a big city like New York or Buffalo or Los Angeles or Washington or Atlanta or Selma or Birmingham. That I grew up on a farm about 50 miles from Montgomery near a place called Troy in southeast Alabama. And he told you that my father was a sharecropper, a tenant farmer.

He also told you that in 1944 when I was four years old, and I do remember when I was four, that my father had saved $300 and with the $300 he bought 110 acres of land. And on this land we

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raised a lot of cotton, a lot of corn, and we raised a lot of peanuts.

Now, if you come and visit my Washington Congressional office or stop in Atlanta and visit the office there, the first thing the staff will offer you will be some peanuts, because we raise a lot of peanuts in Georgia. I don't want you to go back to Georgia and tell the peanut commission that I don't eat too many of those peanuts because I ate so many when I was growing up.

The next thing they will offer you will be a Coca-Cola, because Atlanta is the home of Coca-Cola. But on this farm we also raised a lot of hogs, a lot of cows and a lot of chickens. And I noticed we had some chicken here tonight. It was my responsibility to care for the chickens. I fell in love with raising chickens like no one else could raise chickens. It was my calling, it was my mission, it was my duty, it was my sacred responsibility to care for these chickens.

Now, I know as journalists, as lawyers, as members of the bar, members of the bench, you're very smart. You know how to write great stories, file great articles, great stories. You know how to prepare briefs and make great rulings. But you don't know anything about raising chickens.

Let me tell you what I had to do as a young boy growing up in rural Alabama during the Forties and the Fifties. I had to take the fresh eggs, mark them with a pencil, place them under the sitting hen and wait for three long weeks for the little chicks to hatch.

Now, some of you may say, "But, John, why did you mark those fresh eggs with a pencil before you placed them under the sitting hen?"

Well, from time to time another hen would get on that same nest and there would be some more eggs. You had to be able to tell the fresh eggs from the eggs that were already under the sitting hen.

When these little chicks were hatched, I would cheat on these sitting hens. I would take these little chicks and give them to another hen. I'd put them in a box with a lantern. Get some more fresh eggs, mark them with a pencil, place them under the sitting hen and encourage the sitting hen to sit on the nest another three weeks. I kept on cheating on these sitting hens.

It was not the right thing to do. It was not the moral thing to do. It was not the liberal thing to do. It was not the most progressive thing to do. It was not the legal thing to do. But I kept on cheating on these sitting hens. It was not even the most non-violent thing to do.

I was never quite able to save $18.98 to order the most inexpensive hatcher from the Sears & Roebuck store in Atlanta, so I kept on cheating on these sitting hens.

Terry is right. I grew up wanting to be a minister. I wanted to preach the gospel. So with the help of my brothers and sisters and my first cousins, we would gather all our chickens together like you are gathered here tonight, in the chicken house, or in the chicken yard. And I would talk to these chickens. And when I look back on this, some of these chickens would bow their heads. Some would shake their heads. They never quite said amen. But I'm convinced that some of these chickens that I preached to in the Forties and the Fifties tended to listen to me better than most of my colleagues listen to me today in the Congress. At least these chickens were a little more productive.

Journalists: The Sympathetic Referees

The William J. Brennan, Jr. Defense of Freedom Award pays tribute to one of the finest Supreme Court justices of our time. Justice Brennan knew our struggle for freedom so well when he wrote his famous opinion in *New York Times v. Sullivan.* That decision protected our right to speak freely and criticize public officials and public policy.

Defending our right to free speech, Justice Brennan wrote that the debate on public issues

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should be uninhibited, robust and wide open. In other words, how can we speak freely if we are fearful of retribution? Here in words from the highest court in the land a defender of freedom spoke, a fighter for the First Amendment.

Without the First Amendment, our great strides toward freedom would have been hindered, if not stopped. Above all else, the First Amendment protects the wee, small voice of the minority against the mighty roar and power of the majority.

I have in my own life spoken up when I knew I would be shouted down. I could do so without blinking because the First Amendment was our shepherd. It guided us and led the way.

So it is fitting, appropriate and proper and in the spirit of Justice Brennan's commitment to principles, that the Defense of Freedom Award goes to an honor roll of journalists: photo journalists, cameramen, sound men, editors, publishers, and others in the media who told the story of the civil rights movement to the rest of the world.

I join you tonight in tribute to those men and women who used their cameras, their pens, their pads and their tape recorders to report on the Civil Rights Movement to this nation and around the world. When we experienced violence we knew so clearly who the enemy was.

Covering the Civil Rights Movement in the South was not unlike covering a war between nations. There were two armies fighting for high stakes. There was hatred; there was danger. There was violence and there was even death.

Whether the story was in Birmingham at the bombed 16th Street Baptist church, or during the beating of Freedom Riders in Montgomery, or in Philadelphia, Mississippi, where three young men were killed during Freedom Summer, or at the Edmund Pettus Bridge on Bloody Sunday, where a dozen marchers were beaten, journalists were there in the trenches with us. Because you were there covering the story, America saw a nation they did not recognize. They saw an America hobbled by the customs and laws of segregation and by those willing to protect segregation by any means, even murder or the bombing of innocent children.

I've often said during the past few years, without your dedication to exposing the truth the Civil Rights Movement would have been like a bird without wings, a choir without a song. Your story brought the Civil Rights Movement into American living rooms, and into the barber shops, the beauty shops, and most importantly into the hearts and minds of those who believe in a better nation. With television, American people could see first-hand the sit-in movement in Nashville. They saw the sit-in movement catch on in Atlanta, in Birmingham, and throughout the South. They could see the movement sweeping through the South like wildfire.

From newspapers, the American people could read Dr. King's letter from the Birmingham jail. With a single, powerful picture, the American people would know that the Freedom Riders were not safe on a Greyhound bus in Anniston, Alabama.

Without your hard work, our struggle would have been an unseen war. Our enemy would have won.

I've often said that journalists during those years were not just passive bystanders. Many put their bodies and their lives on the line. They stood with us against violent acts by police authority in the South. If you had a pen, a pad or a camera, a microphone, you were in the line of fire.

There is much talk in our nation today about principles above politics. The Civil Rights Movement was all about principle. It was so clearly about putting this country on the right side of history. Many of you here tonight know my story. When I was arrested in Nashville the first time in 1960 for sitting down at a lunch counter, I felt liberated and free. I'd been told over and over again

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by my mother, my father, my grandparents, my great-grandparents, "Don't get in trouble. Don't get in trouble with the law." But somehow in some way I was greatly influenced by the law, the Bill of Rights, the Declaration of Independence.

I knew then as clearly as I know now that non-violent social action could reshape the values of our society. That was the sole force of the Civil Rights Movement. Faced with bigotry and intolerance, we responded with love. Beat us, spit on us, put lighted cigarettes out in our hair or down our backs. We would not strike back. Faced with police dogs, bull whips and billy clubs, we responded with passive resistance. We believed that we could truly change the nation by embracing laws rather than hatred. Our work in the movement was nothing less than a non-violent revolution under the rule of law.

Without a free press, more men and women would have disappeared. Surely my own fate would have been different. And without free speech there would have been no Civil Rights Movement. We in the movement were not the only ones to stand on principle. It seems so clear to me tonight that today the Halberstams, the Karl Flemings, the Reuven Franks, the Vernon Jarretts, the Jack Nelsons, the Claude Sittons, the countless number of cameramen, reporters, editors and others, it is so clear to me that they were all caught by the passion of our plea for a better and a good America.

They in turn gave America, gave this nation and gave the world community a report from the front line.

Let me make one thing very clear. Whenever people are fighting the good fight, whenever ordinary people have the courage to say no, to take a stand against injustice, the First Amendment of our Constitution is there to protect and guarantee the right to fight.

As Martin Luther King, Jr. said in his letter from the Birmingham jail "Injustice anywhere is a threat to justice everywhere."

In 1964, my old organization, better known as the Student Non-Violent Coordinating Committee, SNCC, organized something called the Mississippi Freedom Summer project. In Mississippi back in 1964, in 1965, that state had a black voting age population of more than 450,000, and only about 16,000 blacks were registered to vote. People had to pass a so-called literacy test, interpret some section of the Constitution of Mississippi or the U.S. Constitution. There were black men and women, lawyers, doctors, teachers, being told that they could not read or write well enough. They failed this so-called literacy test.

We brought more than 1,000 young people -- teachers, lawyers, doctors and ministers -- to Mississippi, to educate black citizens on the right to vote. And with these volunteers came the media. Reporters came from all over the nation. Reporters like Claude Sitton of *The New York Times*, Karl Fleming with *Newsweek*, and print photographers like Charles Moore tried to remain objective in their coverage. They became, in my estimation, sympathetic to the movement. They knew we were sincere and determined. They knew that we would not give up until every victory was won. They knew that our lives were in danger and that we were willing to make the ultimate sacrifice.

It was an extraordinary partnership. They were there to play their role and do their job. We needed the media and the media wanted to tell the world about what was happening in the Mississippi delta or in the black belt of Alabama. Every day a reporter would travel with us. They would see people singing and praying about freedom. They would visit places where people live in shacks with no indoor plumbing.

I knew these reporters were visibly moved. They had to be moved because they were human

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beings. I remember a man by the name of Lawrence Pierce, a cameraman with CBS. He could have played it safe. He chose to go after the truth and tell the American people what was happening in places like Mississippi or Selma or Birmingham. He went to Selma with us and he was there sending back footage for Walter Cronkite broadcasts. And each night the world would see and hear our stories. This was true for all journalists who covered the movement. They became referees in the struggle for civil rights.

"We Went to Selma"

MR. LEWIS: They were sympathetic referees because they were touched and moved by the story of thousands of Southern blacks denied the right to vote.

Just think about it. In 1964, in 1965, we didn't have a fax machine. We didn't have a Web site. We didn't have CNN. We did it the old-fashioned way, by word of mouth, by telegram, over the telephone. And we needed the media to tell the story, to convey our message. The American people needed to know the truth. And when told the truth, American public opinion forced the Federal government to respond.

We went to Selma. Why did we go to Selma? After Martin Luther King, Jr., had received the Nobel Peace Prize in December of 1964, he came back to the country and had a meeting with President Johnson. And said, "Mr. President, we need a strong voting rights act."

And President Johnson told Dr. King, "We don't have the votes in the Congress. We don't have the votes in the Congress to get a voting rights act through the Congress."

Dr. Martin Luther King, Jr., came back to Atlanta, met with us, and said we will go to Selma. In Selma, Alabama, only 2.1 percent of blacks of voting age were registered to vote. In Selma you had a sheriff who was a very big man who wore a gun on one side, a nightstick on the other side, and he carried an electric cattle prodder in his hand and he didn't use it on cows. He wore a button that said, "Never." Never to voter registration, never to integration.

It was my day to exercise my Constitutional right, to lead a group of people to the Dallas County courthouse on January the 18th, 1965, just to get inside of the courthouse door, to get up the steps, to try to take the so-called literacy test. You could only attempt to take the so-called literacy test on the first and third Mondays of each month.

This man was named Sheriff Clark. He said to me, "John Lewis, you're an outside agitator. You're the lowest form of humanity" At that time I had all of my hair and I was a few pounds lighter.

I looked him straight in the eye and I said, "Sheriff, I may be an agitator, but I'm not an outsider. I grew up only 90 miles from here and we're going to stay here until these people are allowed to register and vote."

And he said, "You're under arrest." And he took me to jail with a few other people.

A few days later Martin Luther King, Jr. and Reverend Abernathy came to Selma and they mobilized the city of Selma in such a fashion that more than 3,000 people were arrested. We filled the jails of Selma.

A few days later in a little town called Marion, Alabama, the home town of Mrs. Martin Luther King, Jr., Mrs. Ralph Abernathy, the late Mrs. Andrew Young, a young man was leading a march and he was shot in the stomach by a state trooper. Because of what happened to him, we said we would march from Selma to Montgomery. We were exercising our Constitutional right, the right to protest, the right to dissent, the right to petition our government, the right of assembly, the right to speak.

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We lined up in twos as we conducted a non-violent workshop. Started walking through the streets of Selma, coming towards Edmund Pettus Bridge. Crossing the Alabama River. A young man by the name of Hosea Williams was leading the march from SCLC. I was walking with him from the Student Non-Violent Coordinating Committee.

We get to the bridge. Hosea Williams said, "John, can you swim?" All the water in the Alabama River down below. And I said no. And I said, "Hosea, can you swim?" And he said no.

I said, "Well, too much water. We're not going to jump. We're not going backward. We're going forward." And we continued to walk. We came to the apex of the bridge, we saw a sea of blue. Alabama state troopers. And behind the troopers you saw Sheriff Clark and members of his posse.

We continued to walk and we got within hearing distance of the state troopers. A man identified himself and said, "I am Major John Cloud of the Alabama State Troopers. This is an unlawful march and it will not be allowed to continue. I give you three minutes to disperse and return to your church."

In less than a minute and a half, he said, "Troopers, advance." And they came toward us, beating us with night sticks, bullwhips, trampling us with horses. I was hit in the head by a state trooper with a night stick, and had a concussion at the bridge. That Sunday became known as Bloody Sunday.

But people saw what had happened in Selma. When they saw all the film footage of Lawrence Pierce, when they saw the photographs, when they read the stories, there was a sense of righteous indignation. People didn't like it. President Johnson eight days later spoke to a joint session of the Congress and in that speech President Johnson started off that night by saying, "I speak tonight for the dignity of man and for the destiny of democracy."

He went on to say, "At times, history and fate meet in a single place to shape man's turning point in the unending search for freedom. So it was at Lexington and at Concord. So it was a century ago at Appomattox. And so it was last week in Selma, Alabama."

And in that speech over and over again, President Johnson said, "And we shall overcome."

I was sitting next to Dr. King that evening and we watched by way of television President Johnson speak. Tears came down his face and he said, "We will make it from Selma to Montgomery, and the voting rights act will be passed."

And he was right. The Congress passed the Voting Rights Act, President Johnson signed it into law on August 6, 1965. It was like a drama. Members of the media, members of the Movement, we all were there working together to make our nation a better place, to create the beloved community, to create an interracial democracy.

We Must Defend This American House

But many years ago, long before the Movement, long before I got involved in the Civil Rights Movement, I tell a story in my book, "Walking With the Wind," about growing up outside of Troy, Alabama, and visiting the home of an aunt of mine. This aunt lived in what we called a shotgun house. Most U.S. lawyers and journalists, you wouldn't know what a shotgun house is. A shotgun house is a house where you can throw bricks through the front door and it would come out the back door, or fire a gun through the front door and the bullet would come out the back door. But she lived in a shotgun house that had a tin roof.

We were out in the yard playing, sisters and brothers and a few of my first cousins, about 12

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or 15 of us. And this unbelievable storm, strong winds blowing, the thunder rolling, lightning flashing. And she suggested that we all should come into this house. And we all went in. She suggested that we should hold hands. My aunt was terrified. She started crying. She thought this house was going to blow away, and we all started crying.

When one corner of the old house appeared to be lifting from its foundation, we would walk to this corner, trying to hold down this house with our bodies. When the other side of the house appeared to be lifting from its foundation, we would walk to that side, trying to hold down this house with our bodies. So we were walking with the wind.

I say to you tonight, members of the bar, members of the media, the storms may come. The wind may blow. The thunder may roll. The lighting may flash. And the rain may beat on this old house we call America. But we must never, ever leave the house. We must stand up and defend the Bill of Rights. We must stand up and defend the First Amendment. We must never, ever leave the house.

Justice Brennan stayed in the house. You must not run from the house. Those who will limit or hinder this freedom are the thunder and the rain beating down on this house. So in a real sense we must create one house, one family. The American house, the American family.

I said in recent days that just maybe we all came to this great land in different ships, but we're all in the same boat now. We're all in the same boat. So we have an obligation, we have a mission, we have a mandate to do what we can to save this old house. We must do it.

If someone had told me when I was preaching to those chickens, if someone had told me when I was sitting in, getting arrested, going to jail forty times, being beaten, left lying unconscious at the Greyhound bus station in 1961, if someone had told me when I had a concussion on that bridge in Selma, that one day I would be standing here as a member of Congress, I would have said, "You're crazy. You're out of your mind. You don't know what you're talking about." But because of the Constitution, because of the First Amendment, we had to fight for our civil liberties in order to fight for our civil rights.

So we must never, ever leave the house. So I suggest tonight that all of us must walk with the wind and let the spirit of history be our guide. Thank you very much.

The Panel

MR. ADAMSON: This is a hard act to follow.

Let me ask if the panelists might come join us, and I'm very pleased to report that John Lewis has agreed to join us and participate in this discussion, which is what it is billed and what it will be.

And as I said, we're not going to go through the introductions. All we're going to do is perhaps in the nature of a question, we will highlight some of the perspectives, just to remind you who some of our participants are. All of them, of course, were mentioned by John in his remarks.

Vernon Jarrett spent 30 years as reporter for the *Chicago Defender* before he became a columnist for the *Chicago Tribune* and a television personality in Chicago. And Vernon, why don't we focus tonight on the movement, as we popularly use the term, roughly the term beginning with *Brown* or Rosa Parks, Montgomery, and the period thereafter. There surely was a struggle for racial equality prior to that time. Could you speak on that?

MR. JARRETT: I was interested in your statement that when you were a little boy there's no way that you would ever imagine being in Congress. The lines of race were so sharp and

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distinct when I was coming up that I didn't even think of working for a newspaper like the *Chicago Tribune* or the *Sun-Times*. My whole life was committed to being with the black press.

And one reason I had that commitment was because thanks to the black press I was educated about what was right and what was wrong and what I had coming to me. Long before the white newspapers discovered my humanity, the black press was telling me that maybe I was even superior. Sometimes you have to go to extremes in order to get over a simple fact.

Were it not for the preparation of the black frame of mind that produced this gentleman here, there never would have been a Civil Rights Movement. We would have accepted our status.

Since the year 1827, March the 16th, the date of the publication of the first black newspaper in New York City, there was this advocacy type of journalism that had no other purpose than to advocate. The people who started those publications were mostly educated people. As a matter of fact, *Freedom's Voice*, *Freedom's Journal*, the first black publication in New York that I'm referring to, had on its staff probably the first, one of the first black men to ever finish college. They were so committed to just telling the truth and pleading our own cause -- as a matter of fact, that first black publication had in its banner across the top, "No Longer Shall Others Speak for Us."

Because we discovered something. That even our friends sometimes were not precise in telling the truth about who we were. That even some of our most passionate defenders, even some of the abolitionists of that period, still were tainted by a thing called racism. So we chose to choose and plead our own cause.

Now, let me tell you something. The impact of television on what happened to you, John, at that Edmund Pettus Bridge helped turn the tide. But before that there was a photograph in *Jet* magazine, one of the few surviving powerful black publications, that showed Emmett Till after he had been discovered in that river, a 14-year old boy. That photograph would have not been published by any white publication because of a fear that it would have stirred up too much violence.

MR. ADAMSON: 1955.

MR. JARRETT: '55, the same, preceding Rosa Parks, which is December 1 and December 5.

Let's keep in mind that there had been three lynchings that same year. Of course, the Montgomery bus boycott movement upstaged all of that, because of the incipient success that we could see brewing in it. But there had been three lynchings. Lynchings occurred so frequently that in some instances they weren't even published, except in the black newspapers.

The black newspapers continued to hammer away, over and over again, on what we were being denied. If we had listened to most of the white journals, we would have been never born. We never got married. We never graduated from college. There were no black lawyers, no black PhD's. We hardly existed unless you were some kindly, warm, loving Uncle Tom who died and people had to mourn you. We didn't even die. The whole country would be just flooded with black people, if you would listen to the major mainstream media.

But thanks to the *Chicago Defender*, the *Pittsburgh Courier*, the *Afro-American*, the *New York Amsterdam News*, the *Daily World* in Georgia, the *Houston Informer*, the *Norfolk Journal* and *Guide*, the *Afro-American* of Baltimore, and many others, I was inspired as a kid. I'm a Southerner, too. I grew up in the South in a small town that had maybe a population of 9,000. They say 12, but it's nine. And only two black people had flush toilets. Mine was not one of them. I used to go across

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the street to play with this woman's toilet until she told her grandson to keep me at home. I was always concerned about how that whirl got in the toilet, and I just kept flushing it over and over.

My circumstances, similar to yours, maybe worse, John, there were only two black folk who had a radio until Joe Louis fought Max Schmeling the last time. That's when everybody, Philco sold radios to black people right and left.

But we always awaited that weekly *Chicago Defender* and the *Pittsburgh Courier.*

MR. ADAMSON: I want to ask you a question about that. There was, there were clearly confrontations that took place --

MR. JARRETT: All the time.

MR. ADAMSON: -- prior to Rosa Parks, prior to, quote, the movement. Where was the white press in covering that?

MR. JARRETT: The white press had individuals. Frank -- where is he? There had been people like you throughout the history, but you didn't own the newspapers. That was the problem. You were just on them. We had people like one of the finest writers ever, in Arkansas.

MR. NELSON: Harry Ashmore.

MR. JARRETT: Harry Ashmore. Tragically, we didn't memorialize him enough. We've always had individuals. But by and large the white publications were going to defend the status quo. Just as you had white individuals prior to the Civil War who were against slavery. But you had to make a choice: whether you were going to stay there or go somewhere else and shout your provocative anti-slavery attitudes. So it was left almost entirely to black publications to come up with the steady, constant revelation of what was happening racially, and also what was happening of a positive nature.

You see, that one picture helped do a trick that prepared us for Rosa Parks. The white media were not the first to really come out in full swing about the successful implications of the Montgomery bus boycott, which to me was a telltale movement.

When black folk, 40,000, went on a boycott for 381 days, brought to its knees a bus company owned and operated from Chicago, incidentally, and at the same time established their own transportation system, which was a startling achievement. And that's what inspired people like you, John, I suspect, to figure that you really had a chance.

Now, when I said I never had a dream about working on a major publication, it was because of a climate that said, "Boy, you don't have a chance. Forget about it."

MR. NELSON: I think Vernon's exactly right that the white press didn't pay any attention to what was going on, particularly with regards to injustices against blacks in the South, until you had the Civil Rights Movement really get moving. And when it got moving in the Montgomery bus boycott and the Civil Rights Movement generally in the South, some of the major papers did start, and I have to say led by *The New York Times. The New York Times* really covered

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it more than anybody else. And the news magazines began to cover it. And if I do say so, *The Los Angeles Times* came into it about the middle of, early 1960's.

But the fact was that the white press not only didn't pay any attention to it, but in many respects the white press looked at it and thought it was "stirring up trouble in their communities."

I was an investigative reporter on the *Atlanta Constitution* before I went to work for *The Los Angeles Times* in 1965. And the managing editor of -- my background, of course, was investigative reporting -- and he did not want me to cover civil rights because he thought that it would ruin my sources with the law enforcement officers.

And I have to say that he was right about that. Unfortunately, I look back at that and I'm sorry that I didn't get involved earlier than I did in covering the Civil Rights Movement. But when the managing editor said, "This will kill your sources with the law enforcement agencies if you cover civil rights," I understood what he was talking about.

The minute I went to work *for The Los Angeles Times*, I started covering civil rights in the South. And I always regretted not having covered it earlier, because I have to say that of every reporter on a national newspaper or a newspaper that covered civil rights in the South that I know anything about, that's been considered the highlight of their career, without any question.

Karl Fleming and I were down at Old Miss in 1987. We had a big three-day seminar down there, reporters who covered civil rights in the South. And I think out of all of them there, they all agreed that nothing they ever covered -- and I've covered every major scandal, from Watergate to Whitewater, and every president for the past 25 years -- and nothing equals having covered the Civil Rights Movement, because we were in the middle of something where we saw, we really saw society changing before our eyes. I mean, it was history in the making, without any question.

MR. ADAMSON: Karl.

MR. FLEMING: Hi. My name is Karl and I am a recovering journalist.

First of all, let me say what an honor it is to be in the presence at any time with John Lewis. You know, the old journalist, H.L. Mencken, had the following rule. He said the only way to look at a politician is down. John is the exception to that rule. I admire him vastly. I have seen his head bloodied, but never bowed, except in prayer.

You know, it's a wonderful thing that John started off preaching to the chickens and 50 years later he's on the floor of Congress. The bad news is the extent to which the quality of his audience has degenerated.

I think it was one of the genius qualities of Martin Luther King, Jr. that he was probably, perhaps the first major media manipulator of the television era. John said something about reporters being moved when he was talking. I remember the hundreds and hundreds and hundreds of so-called mass meetings in these tiny little churches throughout the South and my sitting there watching these black people come in their little Sunday suits and the little ladies come with nickels and dimes tied up in their little handkerchiefs, and remember being so moved. And at times the tears just poured down my cheeks, and I tell you the truth, I still do not hear "We Shall Overcome" without tearing up.

And it is true that we fought valiantly to be objective. But to say that we were not moved deeply by the sense of the injustice and outrage that was going on would be an untruth.

But anyway, Martin Luther King, Jr. was first, I think, he came to Albany to help the Albany

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movement, but they had an extremely clever police chief named Larry Pritchett, who didn't beat up anybody. He was quite an urbane guy and he just marched people to jail. And then Vernon Jordan who was with the NAACP Inc. Fund would have to come down and bail them out. So it just cost an enormous amount of money. And every night Martin Luther King, Jr. would go to the Shiloh Baptist Church and crank them up and the next morning they'd march off 600 strong and be promptly arrested. But since Larry Pritchett was such an adroit police chief, nothing happened.

And I think Martin Luther King, Jr. learned a great lesson from that, because the next great thing was Birmingham and Kelly Ingram Park, where he chose his enemy quite cleverly, and that was the police chief of Birmingham, this outrageous guy named Bull Connor, who had one eye and talked like this, saying, "Bring those FBI's down here and they ain't going to do nothing but interview a few of my dogs."

But he was a brutal man and then Sheriff Jim Clark was sure to appear with his posse, and an equally brutal man named Colonel Al Lingo, who was the head of the Alabama Highway Patrol, and Martin Luther King, Jr. and his lieutenants cleverly decided to march out of the 16th Street Baptist Church -- another story I covered, by the way -- where the three little girls, four little girls were dynamited to death. And he knew that there would be a confrontation.

And, in fact, when the police chief loosed the dogs upon the people and the fire hoses and the resultant pictures on national television and on the cover of *Life* magazine, that was really the first major consciousness raising that had happened across the land. And it was one of the events that really provoked the national media to start coming down.

When the kids in Philadelphia were killed in 1964, my constant traveling companion was the aforementioned Claude Sitton. He was with *The New York Times*, I was with *Newsweek*, and we were not really competing, so we traveled together lots of times for aid and comfort, because it was quite dangerous, but in no measure as dangerous as what happened to black people. But we were tailed constantly by pickup trucks with whiplash antennas, with the White Citizens Council and the Klan and the deer rifles on the back of the trucks. And often we'd come into towns and check in at the motel and the phone would ring and it would be the police chief saying, "What are you guys doing in town?"

And so it was -- we were in Philadelphia. We were the first reporters on the scene and it became quite apparent that the kids were missing. We went down to --

MR. JARRETT: Philadelphia, Mississippi.

MR. FLEMING: Philadelphia, Mississippi. We went down to the courthouse and saw Sheriff Rainey and his deputy, Cecil Price, and the guilt was all over them. They denied it, of course, and said that the kids had been arrested and taken to jail. They dutifully carried us over to the jailer, who said, yes, he'd held the kids for a while but then he released them. And the sheriff said they had taken them out to the outskirts of town and turned them loose. And we knew that was a lie.

And we came back the next day and again talked to the sheriff and his deputy. And this time, when we came out into the courthouse rotunda, there was a huge mob of angry redneck white guys, who immediately backed us into a corner. And there was a huge guy, sort of the spokesperson, and he said pretty much as follows: "If it weren't for you goddamn Jew communist nigger-loving

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agitating reporters down here stirring up all this trouble, we wouldn't be having this trouble down here. And if you sonsofbitches don't get out of this goddamn town right now, you're going to end, you're going to die."

So we extricated ourselves from that slowly and walked out of the courthouse. And it was a typical Southern courthouse: one story, square building. And I looked across and I saw a place called Turner Hardware Store. And I remembered that Claude had told me that the managing editor, the then managing editor of *The New York Times* was a guy named Turner Catledge, who came from Mississippi. And Claude had told me that Turner Catledge had told him he had a cousin in this town.

So we went over to this hardware store and we walked in and Claude said, "Mr. Turner, I'm Claude Sitton of *The New York Times* and this is Mr. Fleming from *Newsweek*. And Turner Catledge said if we got down here and ever got into trouble, come look you up. You might be able to help us out." He said, "We're both Southern boys. Mr. Fleming is from North Carolina. I'm from Georgia. We're just reporters down here doing our job. We're not trying to stir up any trouble. These three kids are missing. We're just reporters. And this mob has set upon us. They've threatened to kill us."

This guy's looking on in this taciturn manner. And finally Claude finished and this guy looked at him and he said, "Well, Mr. Sitton. If you and Mr. Fleming are out there on the ground and this mob had you down on the ground, kicking the living daylights out of you, I wouldn't participate in that." He said, "On the other hand, I wouldn't lift one goddamn finger to help you nigger-loving Jew communist sonsofbitches, and my advice to you is get the hell out of this town right now or you're going to be killed."

So we walked outside and I said, "Claude, it's a good thing you've got some influence in this town. We'd be in big damn trouble here."

So we went back to the motel, and sure enough I looked out the window a few minutes later, and there sat a car with all four of its doors open, four guys sitting in it, passing around a quart fruit jar of moonshine whiskey with two shotguns in view.

So I went out to parlay with them for a few minutes and it became quite evident this was not a good idea. So we immediately got in our cars and drove off to Meridian, and we did not spend any more nights in that town.

And that, by the way, I'm going on at some length, if you have not seen it in the flesh, you have seen this notebook. And Philadelphia, Mississippi was the birth place of the reporter's notebook, and my minor claim to fame is that I am the co-inventor of this notebook. Because we all used to carry these big square secretarial type things. And Claude and I decided that if we would order some that would fit into the coat pocket or into your back pocket we might not be spotted.

So we dutifully wrote off to an outfit in Richmond, Virginia and ordered these notebooks, and the rest is history. Except it didn't do a damn bit of good, because we got these notebooks and we went off to the J.C. Penney store, we bought some dungarees, we took them back to the motel, and we bleached them out, and we put them on and we went back up to the town square, and we'd been there about five minutes and we heard this shout saying, "There are them nigger-loving reporters. Git 'em!"

So John is quite correct. It was not an easy life. But to echo what Jack said, it was the most moving experience of my life and I am so grateful to have had a minor part in it. And I love John Lewis.

MR. ADAMSON: Let's bring in television just a minute. And obviously television

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is a sequential event. I heard this former print guy here turned later television broadcaster write, he said that television was one of the things that probably led to greater coverage by print reporters, by the process of it.

Reuven Frank actually started as a newspaper man, turned television man. Long-time executive producer of *Huntley-Brinkley*. Long-time producer even before that, John Cameron Swayze's *Camel Caravan*, and later president of NBC News.

What is the most significant, earliest significant television coverage that you recall, Reuven?

MR. FRANK: Well, it's hard to say because there was so much of it. But it seems to me that what we're missing is a little bit -- a lot of things had to happen. But one of the things that had to happen to make all this possible was the invention of television.

Everything you talk about -- I'm not talking about individual stories, some of which television missed -- was made possible by the way it was transmitted. It's different to see what happened on the Pettus Bridge than to read about it.

MR. JARRETT: Absolutely. I agree.

MR. FRANK: And I'm not saying that it's anything that I or anybody else in television did, either by reflex or by purpose. It was the very simple existence of television. And I might suggest to you that that has now changed. That was a short period, that was a short window. Because you had not only television but you had a kind of monopoly by three networks, and they all tended to show the same thing. Different in detail, perhaps, but we all covered civil rights. We all covered civil rights because we thought it was news.

Now you have, I don't know, 100 news sources on the television tube and you add the Internet and on and on and on. So that the sense of national experience is no longer available.

I hate to say this, but I truly believe that if the "I have a dream" speech were to take place next weekend, it would play only on all-news cable. And the networks would say, "Well, we're going to put it on all-news cable. We own it. And we don't have to do it."

And that time, say from 1950 to 1975, when television was that kind of influence in American life, has now passed us. And whatever the Civil Rights Revolution accomplished, which was not all its aims, was made possible by the presence of television, just the physical presence of television, and the fact that nobody censored us out.

Vernon was talking about how things were covered in Chicago. When I started in television, stories about race problems and race troubles were not new to me, because I came to television from a newspaper in Newark, New Jersey, where things used to happen. And they were covered by the newspaper. Nobody hid anything. I don't think anybody played it up. But when I started working on a program that featured John Cameron Swayze before he went into the watch business and was, in fact, the first of the television news stars, although he's kind of lost to memory now, if we had any story that involved racial confrontation of any kind, even the most quiet kind, the Chicago station would not carry it.

The Chicago stations, I think there were five at the time, had a deal with the Mayor's office not to cover these matters. They couldn't stop us from covering it, so we put it on the Swayze program, but I was bound to call the Chicago stations, saying, "We've got a story about such-and-such and such-and-such." We covered racial trouble in Chicago that the NBC-owned

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station in Chicago didn't cover.

And I said, it would be from about two minutes in to about three and a half minutes in and then we're going back to something else. And they would cover it with something else. They'd wait for it and they'd have a little story of their own to cover.

It seemed a little odd to me, but I was just a kid from Newark. What did I know. I said, that's the way it is, kid. You just do it. And I did it.

This expanded to where we were covering just about everything, as I say, because it was news. Now, I was never, I never saw a sit-in. I never saw anybody being beaten except on film. I was the guy who sent people. And I was the guy they'd call in and say, "We have this great story," and I'd say, "I have a bigger story from Berlin, and you're going to have to take less time." You know, I made those terrible decisions.

But there was a commitment to cover the news and this was news as it unfolded, as has been pointed out, beginning with the Montgomery bus boycott. That kind of uncorked it.

A lot of things happened before the Montgomery bus boycott, and some of them did make their way onto the air. I looked up some records the other day, and we had stuff. But it became a running story with Montgomery, and I don't think it ever stopped.

MR. ADAMSON: To what extent do you think that the violence, the fact that the movement itself seemed so virtuous and the enemy seemed so stupid, had to do with the increasing amount of the coverage as the violence itself increased?

MR. FRANK: Oh, I don't know. It's really not so surprising that the enemy was stupid. If you look at the situation, they were necessarily stupid.

I remember one time, a little later than the time we're talking about, when Rap Brown was working in Maryland. And a Congressman said "He's always having his press conferences in time for the 6 o'clock news." And the AP or somebody called me and said, "What do you have to say to that?"

And I said, "Well, when would you have your press conferences?"

And, you know, these people make no sense when they're up against it. But there was a mention in the program of a cameraman I knew quite well, the late Maurice Levy, Mo Levy, who was kind of a plain guy from Dallas who had no commitment one way or the other. When he got onto the story, nothing could stop him. And whether he was committed to the cause or to the journalism, I can't say. But he was in there to the point where he exposed himself to the degree where they took his camera and beat him with it.

News people tend to be like that. And 24 hours later wonder what was in their mind that they let themselves be put in that. But while it's there, when the adrenalin's going and they're conditioned to the story, you really can't tear them off it.

MR. LEWIS: When we arrived in Montgomery on May 20, 1961, during the Freedom Ride, the first violence was not directed toward the Freedom Riders. It was toward members of the media. If you had a camera, and during those days the guys didn't have a mini-cam. They had to use big things on their shoulders. And you saw the guys from NBC or CBS, from *Time*, wherever, with their cameras, their pads, and everything was taken from them. They wanted to destroy all evidence.

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So they beat the press first. Then they turned on us.

MR. FRANK: First they wanted to destroy the record.

MR. JARRETT: Oh, yes.

MR. ADAMSON: John, I've heard you quote Dr. King in his book that he wrote right after Birmingham in 1963, "Why We Can't Wait." And he said, "The brutality with which officials would have quelled the black individual became impotent when it could not be pursued with stealth and remain unobserved. It was caught in gigantic circling spotlights. It was imprisoned in a luminous glare revealing the naked truth to the whole world," which I think is one of Dr. King's many very profound statements.

MR. LEWIS: Well, there's a great scene out of Selma where, as some of you will remember C.T. Vivian who was in SCLC at the time. He told Sheriff Clark and some of the guys, "If you're going to beat us, beat us while the cameras are running. Let the world see it. Don't beat us in the dark or some wayside alley. But let the world see it."

And I think the American people saw the contrast: these innocent people engaging in the philosophy, following the philosophy and the discipline of non-violence. Even during the sit-ins, these students sitting in, well-dressed, orderly, waiting to be served, and then a group of people come up and beat them, put lighted cigarettes out in their hair, down their back, and you arrest the students but you don't arrest the people that beat them. And the American people saw the contrast.

And television had the power, the ability and the capacity to make it available. It helped to bring what I call the dirt and the filth from under the American rug so we can see it and deal with it.

MR. NELSON: Well, John, there's not much question about it, that both the beating of the civil rights demonstrators in Birmingham and the television coverage of that resulted in the '64 Civil Rights Act and the Edmund Pettus Bridge beating, where you had a fractured skull, caused the 1965 Voting Rights Act to pass.

MR. ADAMSON: I think it's a good time to seque to a piece of tape that lasts two minutes, which I think says a lot. And it's just on that point. And then we'll continue the discussion.

Can we roll that tape?

MR. ADAMSON: On March 6, when Bloody Sunday occurred, John, you wrote about this in your book. That night, ABC was having an extremely heavily promoted program, Stanley Kramer's "Judgment at Nuremburg." At 9:30 that night they broke in with scenes of what happened in Selma at 4:30 that afternoon on Pettus Bridge. And it was quite an interesting comparison, as you wrote in the book, between what had taken place in Nazi Germany and what was taking place that afternoon in Selma, Alabama.

Karl?

MR. FLEMING: I just remembered something about Jim Clark, who, I must say, was the most brutal person I ever ran across in working the Civil Rights Movement. He finally, by the

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way, went to federal prison for smuggling marijuana.

Anyway, one night in Birmingham he put a shotgun in my stomach. And he said, "You sonofabitch, I'd just as soon shoot you as not."

I said, "What's the matter, Sheriff?"

He said, "You quoted me in that damn *Newsweek* saying `ain't.'" He said, "I ain't ever said `ain't.'"

Anyway, the cameras were a target, including the still cameras. And since in my comings and goings as a newspaper reporter in Alabama and Mississippi we were completely unable to get any local photographer to take pictures, including the Associated Press photographers, by the way. So I learned to use the camera and *Newsweek* bought me a couple of Nikons and I took a huge lot of pictures.

And once I remember in Greenwood, when people were trying to register to vote, I was with Claude Sitton in my usual fashion and I had my camera and I started to get out of the car. There was an angry white mob assembled on the lawn and Claude said, "Karl, don't take the camera out of the car."

And I said, "Claude, I've got to get my damn pictures." So I took the camera out and I had no longer hit the sidewalk when one of these guys confronted me. He said, "Where you going with that damn camera?"

And I said, "Well, I'm going to take some pictures."

He said, "We going to use that damn camera strap as a noose."

And I said, "I think I'm going to put this camera back in the car," which I did.

MR. JARRETT: Let me go back to your statement, Brother Reuven, about Martin Luther King's "I have a dream" speech not having made major news the way it did when he made it.

MR. FRANK: No, no, no. That's not what I said. What I said was, there were three networks at that time. They all carried it. You now have maybe 100 outlets. The networks might or might not carry it. They might put it on all-news cable. That's a wonderful way of washing their hands. And/or, if they carried it, people no longer -- we're now into another generation. There's nobody alive who doesn't remember when there was no television except me. And so a sense of having to watch no longer exists.

So it would have been just as it is now in the newspapers. You may think that's a big story. A guy reading at home or on the subway can skip it. You don't know if he's skipping it or not. You watch it on television, you watch it or you turn it off.

MR. JARRETT: I agree. And I think before we give television too much credit, television had to be pushed into doing what it did. I think my own history in television is interesting enough.

In Chicago, the TV stations and, prior to TV, the radio stations and the publishers had an agreement to keep down as low as they possibly could any confrontations between blacks and whites.

I was almost killed in 1947 at Airport Homes. You never heard of it. The major newspapers hardly carried the Airport Homes incident. The worst violence I ever saw was not when I lived in the South, but in Chicago. Nobody ever spit on me. Nobody ever covered my back with spit as a journalist or anything else, except on the southwest side of Chicago in 1947 and 1948. I couldn't

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believe it. I never heard a chant out loud saying, "Niggers go home. Niggers go home." A chant of 300 people organized by northern political activists, some in the party that most of us have to vote for now, or else vote for nobody: the Democratic Party.

The interesting thing about me entering TV. I'm in TV because of the fear of violence at Martin Luther King Jr.'s funeral, at what his funeral might provoke. On the date of his funeral, ABC, like the other stations there, decided to have some blacks of some note on the air talking about, for the first time, carrying out Martin Luther King Jr.'s dream. All of a sudden, his dream of non-violence became primary.

They had a disk jockey named Warner Saunders and they went over on the west side and grabbed a kid named Warner -- not Warner Saunders. The disk jockey was named Daddy-O Dailey. You may have some familiarity with that name. And they got Warner Saunders out of the Boys Club on the west side of Chicago. And they sat there all during the funeral. You know the funeral went on forever because they had two funerals, one at the church and one at the campus of Moorhouse College. And in between they had Billy Eckstein come in and talk about the virtues of non-violence. They had Big Joe Williams, no longer singing about Kansas City Blues, but he was talking about non-violence. And they had a young man named Ramsey Lewis, the pianist, all day long.

And guess what the title of the show was? They were in a hurry. "Stop." That was the name of the show. In other words, you black folks stop and think before you come downtown with the violence.

And then they decided to make it permanent, because the same mayor's commission of human relations that had kept the city quiet -- at least the white media quiet about all of the conflicts on the southwest side of Chicago when two black war veterans were awarded rental space in two public housing developments on Chicago's southwest -- that's what the riots were about. Then they decided that "Maybe we better have some black shows."

And I met with Dick O'Leary -- I hope he's in here today -- back 30 years ago in a meeting, and thanks to a disk jockey named Daddy-O Dailey, he says, "I'm not going to be on a show that does not have a black producer." And I remember Richard O'Leary, the general manager of Channel 7 in Chicago, saying, "But we don't know any black producers."

And Daddy-O says, "Well, where did you get the producers you got in TV today? 'Cause TV is not all that old."

He said, "We got them out of radio."

He says, "Well, I got the man here. Here's the man. He built me up." I didn't know all that much about him. He said, "This man is a real pro producer." And that's how I got into television.

MR. ADAMSON: Let me interrupt you there. Jack?

MR. NELSON: Well, I was going to ask Reuven Frank, I think Vernon makes a good point about some of the television maybe having been dragged into covering civil rights. On the other hand, when you did cover civil rights, you met resistance, didn't you, from a number of particularly Southern stations? Some of them canceled out, didn't they, the Huntley-Brinkley Show?

MR. FRANK: Oh, yes. The *Huntley-Brinkley Report* was a very sensitive thing and Huntley and I had done, *Huntley-Brinkley Report* started the end of October '56, and we had already done a show every Sunday for about a year. And we had a bad reputation down South. We were

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known as the Nigger Broadcasting Company. And a lot of Southern stations didn't clear us.

MR. NELSON: Right.

MR. FRANK: For about, oh, a little over a year, and sometime around October '57 we had what you rarely see any more, a sponsor. That is, one advertiser bought out the whole show. Texaco. And all of a sudden all of these Southern stations came back because they wanted a little piece of that. But for a while I was sure that we were gong to be canceled because we had no ratings and no clearance.

MR. FLEMING: Reuven, wasn't "Bonanza" one of your shows?

MR. FRANK: "Bonanza" was on NBC. I had nothing to do with that department.

MR. FLEMING: Well, I understand that, but "Bonanza" was a hugely high rated entertainment show. And I remember the station in Jackson canceled "Bonanza" and wouldn't show it because of their civil rights, this running civil rights story.

As to the black media, a black reporter in the South would have been looked upon as a novelty not unlike a Martian coming to earth. There was one, a little guy named Larry Still, who worked for *Jet* magazine, who came to Birmingham. But other than that, they didn't venture into the South, whether or not it was because of the lack of funding --

MR. JARRETT: They were very incognito.

MR. FLEMING: I'm sure that's true.

MR. JARRETT: Many of them were sending messages every day.

MR. FLEMING: Many of them didn't dare show their faces. But I remember as late as 1965, by which time I had been transferred out to be the *Newsweek* bureau chief in Los Angeles, just in time for the enormous granddaddy of all urban riots, the Watts riots, in which 33 people were killed, *The Los Angeles Times* did not have a single black reporter. In fact, they had to go recruit a guy out of the advertising department who was there as an advertising trainee, to try to go down and get some reporting down.

And by this time, by the way, Martin Luther King's message of non-violence had not translated well in the north, if you remember, John. And I remember right in the middle of the Watts riots King came out and he spoke in a hall. It was a building shared by SNCC and the Urban League. And he spoke to this crowd and he said in that beautiful voice of his, "What we need is love. What we need is love."

And some young black guy behind me said, "Shit. We don't need no love. We need jobs."

So by that time it had taken on an entirely different turn.

MR. JARRETT: Remember, people were listening to Malcolm X, too.

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MR. FLEMING: Oh, yes. And also the young urban blacks were not, had not been raised in this religious tradition out of the black churches. So they were much more not inclined to listen to that and they were much more ready to do battle and, as you say, to listen to Malcolm X.

MR. FRANK: One thing, if I may, Vernon, I don't claim credit for television. The important thing about television is that it existed as a machine. The guy who claims credit is the guy who invented the machine. But transmitting this information through television had a different effect. It changed the world. Not because of anything I did.

MR. JARRETT: It made the newspapers try to be halfway honest.

MR. NELSON: If the TV cameras weren't there when something happened in the Civil Rights Movement in the South, it might as well not have happened. And I remember a specific instance where about three people were arrested in one town and television cameras happened to be there. And it got a little bit of attention, but there were about 45 people in another town who were arrested and people were beat up, and the TV cameras weren't there. And so it got practically nothing except a little mention in the paper.

MR. LEWIS: Without television, without the media, things could have been much, much worse. I think the media, the spotlight of the media had maybe a chilling effect upon some of the violence on some of the opposition after a while.

MR. NELSON: The state troopers and the sheriff's deputies used to cover up their badges to keep the cameras from getting it.

MR. LEWIS: On the other hand, I remember as a student when we saw something happening, say in Birmingham, read something in the *Nashville Tennessean*, or we would get it and place it up on bulletin board, and say, "If they can do it in Birmingham, we can do it in Nashville."

So the media did help carry the message, carry the movement, really to other places.

MR. ADAMSON: John, How aware were you of the *Sullivan* case? From the time the ad ran in 1960 to the trial in 1962 to the Alabama Supreme Court?

MR. LEWIS: Well, being a native of Alabama, I became very much aware of the case. And we kept up with what was happening.

MR. FLEMING: Can I make one more remark about this television issue? I loved your analogy about it being a kind of war. And I well remember the agony that Bob Moses personally went through when we were all up at the University of Miami in Oxford, Ohio, and there was this training session about training these white kids to go down to Mississippi and help in the Mississippi Freedom Summer. And Bob Moses, another saint of the Civil Rights Movement, by the way, had to make this agonizing decision to send these white kids to Mississippi, knowing full well that it was very, very likely that some of them would be killed. But on the other hand, like a general, knowing that if that did happen it would bring huge massive media attention, which it did, and led to

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big, big, big changes.

MR. JARRETT: You know, I think we've got to get a little more history of America into this.

MR. ADAMSON: But don't go too long, because we've got one minute.

MR. JARRETT: You see, we ignored so much that was happening. I'm looking at a statement now by Senator Pitchfork Ben Tillman that he made on the Senate floor in the year 1900 and it didn't disturb a lot of people. He's referring to how they handle black people in South Carolina. He says, "We have done our best. We have scratched our heads to find out how we could eliminate the last one of them. We have stuffed ballot boxes, we shot them. We are not ashamed."

Now, if that isn't a genocidal speech, I'm not sitting here. But who got disturbed about it except the black newspapers? We reached a point that you could just tolerate anything anybody said. If not, get out and agitate on their behalf. Much of the lynchings that took place in the South were abetted by the headlines and articles in the media. "Big burly Negro accused of attacking so-and-so and so-and-so." The way they could describe you. And it would make you sympathize with the people who did the lynching, even to the point that Theodore Roosevelt once told a black group -- he's the President -- that he understood the problems they were having. But one thing you got to do is teach the people not to go around attacking white women. You know, that sort of statement.

MR. ADAMSON: Let's do try to bring this to a close, and I think if you don't mind, John, I might ask you to give the last word. Just pretend we're a bunch of chickens.

MR. LEWIS: Well, the instance of the movement, and I think the media played a major role in trying to get the word over. We were not out to destroy the country or not out to destroy individuals. We were out to create a sense of community. Dr. King spoke of the beloved community, to create a truly interracial democracy.

We were out to bring people together. And I think that was the power of this movement. And there was a group of people who really, truly believe in the philosophy and in the discipline of non-violence. You have pockets of those people still around today. And there's still people working, doing things with very little attention from the media. There's still people who really believe that somehow and some way in America we can lay down the burden of race and we can move into the 21st century as more of a sense of community, a sense of family, and that's still the dream, still the hope, longing and aspiration that so many people that came through the movement. And I still believe that.

I'm very hopeful, very optimistic about the future. I just think in America right now too many of us are too quiet. We need to make a little noise. People in the media need to make a little noise, and those of us in public life need to make a little noise. Lawyers need to make a little noise. And we need to push and create this sense of community in America.

I don't think we have any choice but to create the beloved community, but to create a truly interracial democracy. I believe that. I believe that and I think that's the direction we must go as a nation, and as a people.

And without the First Amendment, we wouldn't be able, we wouldn't be any place. We wouldn't be there.

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I think -- when I think about it and look back at what happened, how it happened, we're more than lucky as a nation and as a people. We're very blessed that we had the protection of the Constitution, we had the First Amendment, and I really believe it was our shepherd, it was our shield, it was our guide, it was our protector.

MR. ADAMSON: Will you join me in thanking this wonderful panel. And thank you for being a very patient audience. Thank you.

MS. BARON: Yes, I was going to say the same thing. Thank you on behalf of LDRC. Thanks, all of you. Particularly thank our panelists. Thank you all for coming. Good night.