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LIBELLETTER

Reporting Developments Through November 26, 1999

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LDRC ANNUAL DINNER *November 10, 1999*

A TRIBUTE TO FLOYD ABRAMS AND PROVOCATIVE VIEWS OF *SULLIVAN*'S PAST AND FUTURE

Thank you to all who attended the LDRC Annual Dinner, held on November 10, 1999. Thank you as well to Media/Professional Insurance and Scottsdale Insurance Company for their sponsorship of the cocktail reception which preceded it. With well over 450 of LDRC members and guests gathered, the event was festive, albeit with a bite. The speakers for the evening gave critical and provocative views of the past and future of *Sullivan*. A transcript of the proceeding is included with this *LibelLetter*.

This year's dinner celebrated the remarkable achievements of Floyd Abrams, who was presented with the *William J. Brennan, Jr. Defense of Freedom Award*. The event was punctuated with the comments of speakers Nina Totenberg, Jeff Greenfield, and Harold Evans, who both honored Mr. Abrams and

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LDRC Annual Dinner: *A Tribute to Floyd Abrams*

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reflected on the future of *New York Times v. Sullivan* as the century turns.

After dinner, LDRC Executive Director Sandra Baron welcomed the LDRC membership to the event and described Floyd Abrams's contributions to the cause of freedom of expression, most recently his court battle with Mayor Giuliani over the denial of funding to the Brooklyn Museum of Art. She then introduced the other theme of the dinner, "*Sullivan* in the Year 2000: Will It — Should It — Survive?"

Kenneth M. Vittor, Executive Vice President and General Counsel of the McGraw-Hill Companies and Chair of the Board of LDRC, prefaced the speakers' remarks by citing some historical commentary about *Sullivan*, and noted that *Sullivan* proponents today worry about a backlash among the judiciary against strong protection of the media. He also explained the connection between the evening's themes:

> We thought the best way to honor Floyd Abrams and the First Amendment values he so eloquently articulates was to discuss, hopefully provocatively, the dilemmas and current changes posed by the *Sullivan* case. Floyd's willingness throughout the course of his illustrious career to question conventional wisdom surrounding First Amendment issues, to demand more of the press than it frequently demands of itself, has inspired us to reexamine the *Sullivan* case, and to ask of *Sullivan* in the Year 2000, will it, should it survive?

Harold Evans was the first speaker. He began by expressing his long-time admiration of Floyd Abrams, whom he dubbed "Flying Angel," whose moral support and insights he relied upon while working in Britain, where laws allowing for prior restraint of the press are particularly severe. Asserting that he felt decidedly uneasy about *Sullivan*'s legacy, he recalled that as a journalist and editor of the *Times* in London, he managed to print a great deal of inflammatory material though the onus of proof was very burdensome. His ambivalence toward the *Sullivan* actual malice standard stems from its increasing application to celebrity plaintiffs. As Mr. Evans lamented:

> *Sullivan* here seems to have afforded the most protection, if you will, the most license, to the trivia cops, to the trashers, the casual character assassins on the Internet and the supermarket sheets. Investigative journalism has not observably flourished because of *Sullivan*.

Next at the podium was Nina Totenberg, the legal affairs correspondent for National Public Radio. She also first expressed her appreciation of the evening's honoree, who once defended her against a congressional subpoena after she broke the Anita Hill story. In the remainder of her remarks, she focused on the Supreme Court's view of the press. Her opinion was,

> They hate us. Much like the rest of the American public, they hate us. And I have to say, sometimes with good reason. Fortunately for us, they do think a good deal of the First Amendment.

She commented on the contextual relativism in the current Court's treatment of media cases. The court may strike a Son of Sam Law and yet allow claims that intimidate newsgathering to go forward, Ms. Totenberg observed, citing CNN in *Berger v. Hanlon*, whose appeal it declined to review while holding that the law enforcement defendants might have qualified immunity. In her closing, she expanded on Harold Evans's point:

> If over time, the protections of *Sullivan* are eroded, I feel constrained to observe that there are some in our profession, and I do not mean just tabloid journalists, who bear some responsibility. Maybe even some of us in this

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LDRC Annual Dinner: *A Tribute to Floyd Abrams*

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room. It seems to me that freed from the onus of pre-*Sullivan* type libel suits, we have gotten awfully sloppy in our thinking and our use of language.

Jeff Greenfield, senior news analyst for CNN, followed. He stated of Floyd Abrams, "Floyd understands the press and it's failings, even as he resolutely defends us sometimes from the consequences of our own acts. And I think it's that approach, that clear-eyed approach, that we could use a lot more of in the press."

Mr. Greenfield made the point that other forces besides the threat of litigation, such as corporate tenacity, laziness and focus groups on audience preferences, chill journalism. And he asserted that even "*Sullivan* still maintains that some speech should be chilled. Some speech is unworthy of protection." Libel suits may be justifiable as the only remedy to inhibit the malicious — to prevent there being a day when public people are legally helpless in the face of deliberate or reckless falsehoods.

He closed in stating:

> Seventy years ago, nearly, in a line that used to be quoted all the time and maybe it's a sign of the times that it isn't quoted nearly so much, Judge Learned Hand gave a then once famous speech on the spirit of liberty. And what he said that most resonated was, "the spirit of liberty is the spirit that is not too sure it is right." And I think it's a test we in the press ought to remember, and not just about those we cover, but about ourselves.

Dan Abrams, NBC News correspondent and former legal journalist for Court TV, and Floyd Abrams's son, presented his father with the William J. Brennan, Jr. Defense of Freedom Award. He joked about his father's youthful conservatism regarding First Amendment issues, but ended with anecdotes proving the elder Mr. Abrams's sincere commitment to his work on behalf of the press — and his extraordinary success as a father.

Floyd Abrams's speech in acceptance of the award continued the prevailing tone of the evening: the need for a more considered, responsible press, both for the public's sake and for its own. Suggesting that truth is an important goal, and one at which the press is particularly adept, but not the only one, the evening's honoree urged the press to reevaluate its priorities. As he stated:

> [T]elling the truth and exposing those who don't, are not the only virtues. There are others. One of the many others is a sense of balance and perspective and ability to assess just how important a particular truth or lie is, and that virtue, I suspect, is often just as lacking in newsrooms as it is in law offices.

As for the fate of *Sullivan*, Mr. Abrams very eloquently characterized the case as

> sort of a wondrous gift to the press from a loving uncle who is no longer alive. In his place in the family comes a new not-at-all avuncular figure who is not at all loving and, in fact, not at all admiring of press behavior. The new uncle has it within his power to take the gift back.

He suggested that the press could preserve its interest in this gift by learning to "behave a bit better, to show anew that the gift is deserved and that it will be used, not alone for private benefit, but for public good."

Thank you to all those who attended the *LDRC Annual Dinner* and *DCS Breakfast*. We look forward to seeing you all next year on November 8 and November 9, 2000.

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Statute of Limitations for Newspaper Defendants Runs From Initial Internet Publication

By Blaine Kinrey

Breaking new ground for newspapers that have online editions, an Arizona state court judge on October 25, 1999, held that the statute of limitations for defamation allegedly arising from an article that appears in both the Internet and print editions of a newspaper begins to run upon the publication date of the newspaper's Internet edition, even if the print edition was not published until the following day. As far as counsel for *The Kansas City Star* defendants in the case are aware, the Arizona decision is the first of its kind in the country. *Simon v. Arizona Board of Regents, et al.*, No. C-332140, Minute Entry (Ariz. Superior Court Oct. 25, 1999).

Basics of the Case

On March 22, 1999, former University of Arizona basketball star Miles Simon sued *The Kansas City Star*, the Arizona Board of Regents, and other related defendants in part because *The Kansas City Star* had obtained Simon's grades and published them in a front-page article. The story was the last in a six-part series titled "Money Games: Inside the NCAA," concerning the influence of money on NCAA sports.

The article ran in the print edition of *The Kansas City Star* dated October 10, 1997, and Simon originally filed the action in California on October 13, 1998. In both California and Arizona, the statute of limitations for defamation is one year, and had the statute of limitations begun to run on October 10, 1997, Simon's filing on October 13, 1998, would have been timely because October 10, 1998, fell on a Saturday and October 12, 1998, was Columbus Day.

An identical version of the story, however, was posted on *The Kansas City Star*'s Web site (<http://www.kcstar.com>) no later than 10:30 p.m. Arizona time (Mountain Standard Time) October 9, 1997.

The Kansas City Star defendants reasoned in a motion to dismiss and/or for summary judgment that Simon's claims for defamation and defamation per se were time-barred because he had failed to file in California within one year of Internet publication.

On October 25, 1999, Judge Villarreal of the Arizona Superior Court for Pima County dismissed the case entirely, adopting the defendants' arguments in part and addressing *The Kansas City Star* defendants' statute of limitations argument in a three-part analysis.

Arizona Court Defines "Publication" as a Matter of First Impression

Judge Villarreal acknowledged that the statute of limitations for defamation in Arizona begins to run upon "publication." *See Lim v. Superior Court*, 126 Ariz. 481, 482, 616 P.2d 941, 942 (Ariz. App. 1980); A.R.S. § 12-541. Arizona, though, had yet to define what constitutes "publication" for purposes of determining when the one-year statute of limitations for defamation begins to run.

Judge Villarreal noted, however, that Arizona has adopted the Uniform Single Publication Act and that Arizona courts could look to other jurisdictions that have adopted the Act to determine what constitutes "publication." A.R.S. § 12-651. The Court recognized that California, New Mexico, and Kentucky all define "publication" for purposes of the running of the statute of limitations for defamation as the "first general distribution." *See Strick v. Superior Court for the County of Los Angeles*, 143 Cal. App. 3d 916, 922 (Cal. App. 1983); *Printron, Inc. v. McGraw-Hill, Inc.*, 35 F. Supp. 2d 1325, 1326 (D.N.M. 1998); *Ratliff v. Farm Progress Cos., Inc.*, 20 Media L. Rep. 1480, 1483 (E.D. Ky. 1992). The court implicitly concluded that the "first general distribution" rule should apply in Arizona.

Time Zones Do Matter

Although *The Kansas City Star* posted the Simon

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Internet Publication Starts Statute of Limitations

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story on its Web site at or around 12:30 a.m. Missouri time (Central Daylight Time) October 10, 1997, the time in Arizona at posting was approximately 10:30 p.m. October 9, 1997. Relying on the Southern District of California's decision in *Papenthien v. Papenthien*, 16 F. Supp. 2d 1235, 1239 (S.D. Cal. 1998), *The Kansas City Star* defendants argued that the time zone of the forum should control. Judge Villarreal agreed.

The Judge noted that the article, upon posting on the Internet, "was available to virtually an unlimited number of Internet users worldwide" by 10:30 p.m. Arizona time October 9, 1997. Judge Villarreal also noted that *The Kansas City Star* defendants had demonstrated that there were at least five visits to *The Kansas City Star* Web site from computer servers in Arizona between 10:30 p.m. and midnight October 9, 1997.

Internet and Print Publications are "Single Integrated Publication"

After reasoning that publication occurs in Arizona upon the first general distribution of alleged defamatory material and that the time zone of the forum should control, Judge Villarreal concluded that the statute of limitations for the alleged defamation in the Simon article began to run on October 9, 1997.

Although Judge Villarreal never used the term "single integrated publication," his holding implicitly recognized that the statute of limitations for the online edition and the print edition began to run at the same time — October 9, 1997. Thus, Simon had until October 9, 1998, to file his lawsuit in California. Simon didn't file until October 13, 1998, four days after the limitations period had expired. Judge Villarreal, therefore, dismissed the counts for defamation and defamation per se against all defendants.

Dismissal of Other Counts

Judge Villarreal rejected *The Kansas City Star* defendants' argument that the one-year statute of limitations for defamation should apply to Simon's other four claims against those defendants because the claims were derivative of the defamation claims. The Court held that because Arizona recognized intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, and negligence per se as torts separate from defamation, those torts should also have their own statutes of limitations. *See Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 783 P.2d 791 (1989).

Nevertheless, Judge Villarreal found that *The Kansas City Star* defendants were entitled to judgment as a matter of law on the other four counts.

- With respect to intentional infliction of emotional distress, the Court held that Simon had failed to allege outrageous conduct to support a such a claim. *Mintz v. Bell Atlantic Sys. Leasing Int'l, Inc.*, 183 Ariz. 550, 905 P.2d 559, 563 (Ariz. App. 1995); *Midas Muffler Shop v. Ellison*, 133 Ariz. 194, 198, 650 P.2d 496, 500 (Ariz. App. 1982). As *The Kansas City Star* defendants argued, reporting the truth — Simon's grades — about a matter of legitimate public concern — the effect of money on NCAA sports — could hardly be deemed to be outrageous conduct.
- In addition, Judge Villarreal held Simon had failed to plead physical injury to support a claim for negligent infliction of emotional distress. *See Monaco v. HealthPartners of Southern Arizona*, 1999 WL 445671 at *3 (Ariz. App. 1999); *Gau v. Smitty's Super Valu*, 183 Ariz. 107, 110, 901 P.2d 445, 454 (Ariz. App. 1995).
- And with respect to negligence and negligence per se, Judge Villarreal appears to have held that the Arizona Board of Regents defendants did not breach a duty by failing to prevent the alleged isolated release of Simon's grades by an employee acting outside the scope of his or her employment. Moreover, with respect to negligence per se based on

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Media Defendants Score Victory Against Former Basketball Star

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violation of a standard embodied in the Family Educational Rights and Privacy Act ("FERPA"), the Court held that FERPA requires a pattern of conduct, and a single incident does not amount to a pattern. Because the Arizona Board of Regents defendants' alleged actions were not negligent or negligent per se, the actions of *The Kansas City Star* defendants in receiving Simon's grades and then publishing them likewise were not negligent or negligent per se, according to Judge Villarreal.

Significant Points of Law

On at least five points, Judge Villarreal's October 25, 1999, Minute Entry strikes new ground in Arizona or nationwide.

Judge Villarreal recognized that Arizona would follow the "first general distribution" theory of "publication" to determine when the statute of limitations begins to run for defamation.

Judge Villarreal recognized that Arizona would follow California precedent that the time zone of the forum controls when a statute of limitations begins to run.

Judge Villarreal implicitly recognized that an Internet edition and print edition of a newspaper are a "single integrated publication" for purposes of the running of the statute of limitations for defamation.

Judge Villarreal held that publication of a student's grades alone cannot be sufficiently outrageous to give rise to liability for intentional infliction of emotional distress.

Judge Villarreal recognized that a single, isolated release of a student's grades by a university and subsequent publication of that information in a newspaper do not give rise to liability for negligence per se based on violation of a standard embodied in FERPA.

Blaine Kinrey is with Lathrop & Gage L.C. and represented The Kansas City Star defendants in this matter.

Brown & Williamson Attacks Disney for Release of "The Insider"

Brown & Williamson Tobacco Corporation has launched a full-out public relations attack against Touchstone Pictures, the Walt Disney Company, and most specifically, the recent film entitled "The Insider." The film is based on an article appearing in *Vanity Fair* which chronicled "60 Minutes" producer Lowell Bergman's quest to obtain and then air the statements of Jeffrey Wigand, a former Brown & Williamson research executive, about the inside practices and knowledge of the tobacco company.

Now, after a great deal of inside information on the tobacco industry has come out in widespread litigation, Brown & Williamson objects particlularly vehemently to two scenes in the film: one in which Wigand finds a bullet in his mailbox while his wife opens a threatening e-mail message, and one in which he is followed by a stranger. The film includes a disclaimer, appearing before the closing credits, that some of the events depicted are fictionalized. Particularly, it notes that the source of the threats was never discovered.

However, Brown & Williamson has complained that the disclaimer is inadequate. The company web site contains several postings disparaging the film for its innacuracy, including statements from Mike Wallace taken from other publications, in which he primarily complains about how his character is represented by actor Christopher Plummer. There is also a "warning," in the fashion of the Surgeon General's warning on cigarettes packages, stating "Viewing this movie may be hazardous to the truth."

Furthermore, B & W took out a full-page advertisement in the *Wall Street Journal* defending itself from what the company evidently views as a libelous assault on its integrity. Company spokesman Mark Smith has indicated that a lawsuit is indeed under consideration, and the tobacco giant appears to be taking preliminary steps in that regard. Since the film opened in cinemas nationwide, B & W has handed out fliers to filmgoers requesting that they participate in a phone-in viewer response survey.

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California App: Statements on Book Covers - - Even Ones From Book Contents - - Are Commercial Speech

By R. Bruce Rich and Benjamin E. Marks

On October 27, 1999, a California appellate court held that the information on the covers of books and in advertisements for the books, even when quoting directly from the editorial content of the book itself, is commercial speech. As a result, the court found that the First Amendment does not protect publishers from regulation under California's Unfair Trade Practice Act if they reprint factual statements from the contents of a book on the book's cover or in other promotional materials where those statements prove to be false or misleading. *See Keimer v. Buena Vista Books, Inc., et al.*, 89 Cal. Rptr. 2d 781 (Ct. App. 1999). The stunning decision would result in entirely different rules and standards being applied to the same words depending upon their placement inside or outside the book jacket.

In *Keimer*, the court considered a lawsuit brought by Russell Keimer against the publishers of several books and the producers of a videotape and his claims that materials promoting the books and the videotape violated the false advertising and unfair competition provisions of California's Unfair Trade Practices Act. Reversing a trial court order, the appellate court determined that Keimer's claims stated viable causes of action under California law and remanded the case for further proceedings.

The Beardstown Ladies' Remarkable Investments

The complaint arose from a series of allegedly false performance claims made by a group of retired women from Beardstown, Illinois, known as "The Beardstown Ladies," who had been investing as a club since 1983. The Beardstown Ladies received considerable media attention in the early 1990s as a result of their appealing combination of financial savvy and small-town charm. They appeared on dozens of television programs, were featured in scores of magazine and newspaper articles, and were named the "Investment Club of the Year" from 1991 through 1996 by the National Association of Investors Corporation.

The remarkable investment returns they claimed, including a 59.5% return for 1991 and a ten-year average return of 23.4%, were higher than the increase in the Standard & Poor's Index and the average return achieved by mutual funds and professional money managers. Beginning in 1994, the Beardstown Ladies wrote a series of entertaining books providing advice on investing and personal finance, and they appeared on a videotape. The books and videotape contained their performance claims, including "23.4% annual return" and "59.5% return in 1991," as well as statements about their performance relative to the average performance of professional money managers. These claims were reprinted by their publishers on the covers of the books and the videotape.

Mistaken Calculations on the Return

As it turns out, the Beardstown Ladies, due to a clerical error, had miscalculated their annual average return. Their actual return on investment was significantly lower than their claimed return for the ten-year period. The Beardstown Ladies issued a press release acknowledging their mistake, and, shortly thereafter, Keimer, on behalf of the general public, sued the publishers of the Beardstown Ladies' books and videotape.

Keimer alleged that the publishers used statements regarding investment performance as the primary basis for advertising and marketing the books and videotape to the public and that the publishers knew or should have known that the statements were false, misleading, and likely to deceive the public. Asserting claims for false advertising and unfair business practices, he sought disgorgement of the publishers' profits from the sale of the books and the videotape and an injunction preventing the publishers from using the allegedly false statements in advertising. His complaint did not contain any claims against the Beardstown Ladies.

Publisher Demurred

The publishers demurred, contending that if a book's

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Book Cover Statements Are Commercial Speech

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content is noncommercial and therefore entitled to First Amendment protection, then material taken from that content and used to promote the book is also entitled to full First Amendment protection. Noting that the First Amendment prevents the imposition of a duty to investigate the accuracy of the books' contents, the publishers argued that merely reprinting excerpts from the books on the covers cannot create such a duty to guarantee the accuracy of the facts contained therein. The trial court sustained the demurrers, but the appellate court reversed, finding that the challenged statements were commercial speech and therefore subject to regulation under California's Unfair Trade Practices Act.

Book Covers Designed to Sell

Considering the nature of the promotional materials, the appellate court first noted that, given the preliminary stage of the proceedings, its determination could begin and end with the factual allegations of the complaint, which asserted that the statements were core commercial speech. The court added that "merely looking at the judicially noticed book and videotape covers can also lead to the commonsense conclusion that the book and videotape covers were designed with a single purpose in mind, to sell the books. In other words, they appear to propose a commercial transaction."

Continuing its analysis of the nature of the challenged statements, the court considered the factors set forth by the Supreme Court in *Bolger v. Youngs Drug Products Corp.*, 473 U.S. 60 (1983) for determining the nature of speech when it is not obvious. Finding that the book and videotape covers were advertisements, that the covers referred to a specific product, and that the publishers' only motivation for publishing the books must have been economic, the court concluded that the statements on the book covers were core commercial speech.

Accepting as true the appellant's allegations that the statements were false and misleading, and noting that commercial speech may be prohibited if it is misleading, the court held that the appellant had stated viable causes of action under California's Unfair Trade Practices Act.

Same Speech, Two Standards

The respondents had argued against distinguishing between the contents of the books and the materials promoting them, relying upon a series of cases, such as *Lane v. Random House, Inc.*, 985 F. Supp. 141 (D.D.C. 1985), *Page v. Something Weird Video*, 960 F. Supp. 1438 (C.D. Cal. 1996), and *National Life Insurance Co. v. Phillips Publishing, Inc.*, 793 F. Supp. 627 (D. Md. 1992), in which advertisements and promotional materials related to an underlying speech product were regarded as incidental to the publication itself and granted the same level of constitutional protection.

The court claimed that these cases were distinguishable insofar as they "either involved advertising statements which were true, or were opinion or 'rhetorical hyperbole' and thus were not verifiably false or misleading, as were the investment figures here; or they involved infringement on rights which are less zealously protected than the right of consumers to be free from false advertising."

The appellate court decision thus creates a stark legal divide between the treatment accorded speech that appears between the pages of a book itself (entitled to the highest level of constitutional protection) and the treatment accorded that same speech when it appears on the book's cover (entitled only to the limited protections of the commercial speech doctrine). In appearing to establish that publishers whose works are distributed in California are under a duty to investigate the accuracy of "verifiably false or misleading" statements that appear on a book's cover or in advertisements, even if such statements are excerpted from the contents of the book itself, the decision invites a contraction of promotional references to the content of published works, to the public's detriment. For national publishers, the decision is likely to have significant consequences well beyond California's borders.

The respondents intend to appeal the decision to California's Supreme Court.

R. Bruce Rich is a partner and Benjamin E. Marks is an associate at Weil, Gotshal & Manges LLP in New York. Weil, Gotshal & Manges LLP filed an amicus brief on behalf of the Association of American Publishers, Inc. in support of the respondents.

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Kentucky Supreme Court Affirms Dismissal of Political Advertisement Suit

By Jon Fleischaker

Middlesboro, Kentucky, is a small city in Southeastern Kentucky which takes its politics very seriously. Elections are often hotly contested, especially for local offices. In the world of rough and tumble politics, Middlesboro takes a back seat to no one.

"Frog" Files Suit

In 1993, the two term mayor of Middlesboro, Troy "Frog" Welch, was seeking re-election. Less than a week before the election, supporters of his opponent placed a full page ad in the local newspaper. The ad consisted of three sections. The central and largest section consisted of 22 headlines and excerpts from articles written and published during the eight years of Welch's administration. Since the ad was for his opponent, it focused on the less flattering and unsavory occurrences which had occurred during this eight-year period, including an alleged physical assault by the mayor against a councilman and allegations of misconduct investigated by the Kentucky State Police. The top and bottom sections of the advertisement contained editorial statements of the type normally seen in elections, including an assertion that the city was broke as a result of Welch's administration, and an assertion the city had "squandered" money during the same period of time.

Much of the central section of of the ad came from back issues of The Daily News, the Middlesboro Newspaper owned by American Publishing Company of Kentucky. A newspaper employee helped those placing the ad to find the archival headlines he needed for the ad and with preparation of the layout. The newspaper's publisher glanced over the ad before it was published.

Predictably, Welch lost the election and 364 days later (and one week before the next election in which Welch was running for the city council) he filed suit against the newspaper and the two individuals who had paid for and run the advertisement in question. The lawsuit made claims of defamation and false light invasion of privacy, and alleged damages for loss of reputation and the loss of the election. Despite these allegations during discovery, Welch could not name one person who thought less of him as a result of the article, nor could he name one person who changed his or her vote because of the advertisement. The publisher, and newspaper employees, all testified, predictably, that they thought the assertions made in the advertisement were true and in any event, they certainly did not have any reason to believe them to be false. The publisher also testified that he is Welch's first cousin and had voted for Welch in the election.

The primary argument of Welch was that the newspaper had an obligation to investigate the allegations prior to publication, especially the allegations made in the editorial part of the advertisement. Welch also argued that the fact that the newspaper arguably violated its own guidelines with regard to publishing "new" allegations within one week of the election tended to show actual malice. The trial court granted the newspaper and the individual defendants summary judgment and the Kentucky Court of Appeals affirmed that summary judgment in an unpublished opinion, relying on the fact that there was no evidence of actual malice. Normally, that would have been the end of the case, but the Kentucky Supreme Court granted a motion for discretionary review, which raised serious concerns about how that court would view the actual malice standard.

Kentucky Supreme Court Grants Review

The court put an end to those fears when it published its opinion on October 21, an opinion that reaffirmed the court's commitment to basic First

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Kentucky Sup. Ct. Affirms Dismissal of Political Advertisement Suit

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Amendment principles. *Welch v. American Publishing Co., et al.* No. 98-SC-0010-DG (Ky. S. Ct. Oct. 21, 1999) The court cited *New York Times v. Sullivan,* both for the proposition "that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," as well as for the proposition that a newspaper's failure to investigate the accuracy of statements in a political ad prior to publication cannot support a finding of actual malice. The court distinguished a political ad from an investigative story which would be the creation of the newspaper's own employees, and as to which the failure to investigate while not sufficient by itself could possibly be evidence of actual malice. The court found as well that the alleged failure to abide by the one week deadline for raising new campaign issues prior to an election could not support a finding of actual malice.

Importance of Summary Judgment Emphasized

The court went even further, however, when it stressed the importance of the use of summary judgment in litigation involving First Amendment issues. "Courts should take precautions to avoid the chilling affect on free speech that defamation lawsuits create." In doing so, the court took a step back from a prior decision which had been widely read in Kentucky to limit the availability of the summary judgment procedure in state court.

The court could have stopped there, but it also decided to speak to some of the alleged defamatory statements, which it found to be protected opinion. Citing *Milkovich v. Lorain Journal Co.*, the court found "that although many of the allegedly defamatory statements that Welch complains of are disparaging, they are not so definite or precise as to be branded as false." Directly speaking to the allegation that the city is "broke" and that "Frog has squandered one and a half million dollars," the court specifically found that "this type of generalized rhetoric bandied about in a political campaign is not the language upon which a defamation lawsuit should be based, but instead is political opinion solidly protected by the First Amendment."

Prior to this decision, we had seen an increase in Kentucky in lawsuits brought by defeated politicians arising out of political editorials as well as political advertisements. This decision should go a long way toward reversing that trend.

Jon Fleischaker is with the firm Dinsmore & Shohl LLP, Louisville, Kentucky.

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Summary Judgment Affirmed for Newspaper in Reporter's Defamation and Wrongful Termination Lawsuit

By John Carne, Kathy Banke, and Steven Boranian

Providing guidance on several issues of interest to newspapers and other media entities, the First Appellate District of the California Court of Appeal has affirmed summary judgment in favor of a newspaper that fired a reporter for "inaccurate and misleading" reporting. The newspaper also retracted the reports. The reporter sued for wrongful termination and libel, claiming that the newspaper's retraction was defamatory.

Retraction Defamed Reporter?

Eisenberg v. Alameda Newspapers, Inc., 74 Cal. App. 4th 1359, 88 Cal. Rptr. 2d 802 (1999), arose out of reporter Ira Eisenberg's reporting on a luxury housing development in Pleasanton, California. In 1994, Mr. Eisenberg wrote two articles for a local newspaper, the *Tri-Valley Herald*, accusing Pleasanton city officials and the developer's representative of corruption and "influence peddling." Among other things, Mr. Eisenberg quoted a source as saying that the city's planning director had "greased the skids" for the developer's representative in gaining approval for the controversial housing development.

The developer's representative, however, took notice of the articles and demanded that the *Herald* print a retraction. California Civil Code Section 48a makes a retraction demand a prerequisite to recovering general and exemplary damages in a media defamation lawsuit. And media defendants can avoid exposure to such damages by publishing a retraction in compliance with the statute's guidelines. The *Herald*'s editors investigated and determined that Mr. Eisenberg could not substantiate the claimed defamatory statements. So they promptly fired Mr. Eisenberg and printed a retraction stating, among other things, that "[a]rticles published May 8 and May 15 in the Tri-Valley Herald contained inaccurate and misleading information."

Although the retraction did not identify Mr. Eisenberg by name, he sued the *Herald*'s owners and editors, claiming that the retraction defamed him and that the *Herald* had wrongfully terminated his employment.

The Absolute Litigation Privilege

The appellate court affirmed summary judgment for the defendants on the defamation claim on the ground that the statements in the retraction were not defamatory, *i.e.*, they were either true or non-actionable opinions. Along the way, however, the court became the first to consider whether a retraction, published under a statutory retraction scheme, is a privileged communication under California's absolute litigation privilege, California Civil Code Section 47(b).

Under that statute, any communication (1) that is made in a judicial or quasi-judicial proceedings (2) by litigants or other participants authorized by law (3) to achieve the objects of the litigation and (4) that has some connection or logical relation to the action cannot form the basis for tort liability. *See Silberg v. Anderson*, 50 Cal. 3d 205, 212, 786 P.2d 365, 368-69 (1990). Communications that meet these criteria are absolutely privileged, including communications made in advance of *anticipated* judicial proceedings. *See Rubin v. Green*, 4 Cal. 4th 1187, 1193-94 (1993).

California's absolute privilege is comparable to the "judicial proceeding" privilege set forth in the *Restatement (Second) of Torts*, §§ 586 to 588, as well as to common-law judicial proceeding privileges available in many states. *E.g.*, *Missick v. Big V Supermarkets, Inc.*, 495 N.Y.S.2d 994, 997 (N.Y. App. Div. 1985); *Soter v. Christoforacos*, 202 N.E.2d 846, 850 (Ill. Ct. App. 1964). The rationale is that the orderly administration of justice requires

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Cal. Appellate Ct. Affirms Summary Judgment In Defamation/Wrongful Termination Lawsuit

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that parties, lawyers, witnesses, etc., be able to speak openly and without fear of retaliatory lawsuits.

Because California's retraction statute makes a retraction demand a prerequisite to a civil defamation lawsuit and a retraction, in turn, defines and limits the plaintiff's recoverable damages (publication of a retraction precludes the recovery of general and exemplary damages), the *Herald* argued that its retraction was a prelitigation communication within the litigation privilege. The appellate court was unwilling to rule as a matter of law that newspaper retractions are always privileged.

In analyzing the issue, the court considered the retraction a statement made in advance of anticipated litigation, akin to a settlement demand letter, but held that the privilege will apply to a prelitigation communication only if "litigation was not a mere possibility on the horizon, but was actually proposed, seriously and in good faith." 88 Cal. Rptr. 2d at 818.

As the court explained, the "mere possibility or subjective anticipation" of litigation is insufficient to invoke the absolute privilege. There must be proof of "some actual verbalization of the danger that a given controversy may turn into a lawsuit." And although an actual "threat" of litigation is not required, there must be "a serious, good faith proposal" of litigation. The contemplated litigation must also be imminent. *Id.*

The *Herald* had not introduced the quantum of evidence now required under the court's analysis. For example, the *Herald* had not submitted declarations by the developer's representative that he fully intended to file a lawsuit if a retraction was not forthcoming. Nor did the *Herald* submit a declaration by its editor that he believed the developer's representative intended imminently to pursue litigation. The evidence showed that the *Herald* intended to protect itself from potential damages and avoid litigation with the developer's representative. But it remained an open question whether "at the time of the retraction, imminent litigation was seriously proposed and actually contemplated in good faith and under serious consideration as a means of obtaining access to the courts for the purpose of resolving the dispute." *Id.* at 819-20.

Because, the court affirmed summary judgment on the defamation claim on other grounds, it did not remand the case for resolution of this question. *Id.* at 820. But, the case does leave open the possibility that a retraction, made in response to a prelitigation retraction demand, could be a privileged communication. As the court framed the issue, whether the privilege applies will depend on whether one of the parties seriously and in good faith has proposed imminent litigation.

The First Amendment

The California court also joined other jurisdictions in its treatment of a news reporter's employment rights in light of the First Amendment. Mr. Eisenberg claimed that the *Herald* violated his First Amendment free speech rights by firing him because of what he wrote. After all, he was a news reporter writing about government activities, which invokes core protections embodied in our Constitution.

The California court rejected Mr. Eisenberg's argument, affirming that, when it comes to published newspaper reports, First Amendment free speech rights reside with the publisher, not with the reporter. The court became the first California court to hold that the First Amendment does not protect a news reporter's right to employment.

Relying on U.S. Supreme Court precedent and cases from Massachusetts and Pennsylvania, the California court observed that "courts have long held that the right to control the content of a privately published newspaper rests entirely with the newspaper's publisher. The First Amendment

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protects the newspaper itself, and grants it a virtually unfettered right to choose what to print and what not to." *Id.* at 827.

It followed therefore that the First Amendment did not prevent the *Herald* from firing Mr. Eisenberg because of his reporting. Mr. Eisenberg was an at-will employee — as new reporters typically are — and as the court succinctly put it,

> Although a news reporter obviously has First Amendment rights as well, those rights do not guarantee employment. [citations omitted] Thus, it was the *Herald*'s right to set and enforce its own standards for acceptable and responsible reporting. . . . Although Mr. Eisenberg has a First Amendment right to express his own views, he does not have a right to publish them in the *Herald* against its wishes.

Id. at 827. The opinion is a strong affirmation of private publishers' control over the content of their publications.

John Carne is a director at Crosby, Heafey, Roach & May Professional Corporation in Oakland, California. Kathy Banke is the managing director of Crosby, Heafey's Oakland office. Steven Boranian is an associate in the firm, and all were involved in the representation of Alameda Newspapers, Inc. in this matter.

LDRC would like to thank Fall intern — Jeff Storey, Cardozo Law School, Class of 2001 — for his contributions to this month's *LibelLetter*.

Irreverent Remarks Made in the Context of a "Ribald" Shock Radio Talk Show Are Protected Rhetorical Hyperbole or Pure Opinion

By Anthony M. Bongiorno

On November 9, 1999, the Supreme Court of the State of New York, Appellate Division, First Department, affirmed the dismissal of a defamation action arising from an "Imus in the Morning" program, during which Imus and his co-hosts made irreverent and caustic remarks about the plaintiff — quips such as "skank," "dingbat," and you can "find her name on any men's room wall." *Hobbs v. Imus*, 1999 N.Y. App. Div. Lexis 11375, No. 2255 (A.D. 1 Dept. Nov. 9, 1999).

The action arose from an "Imus in the Morning" program on January 7, 1997, during which Imus and his co-hosts reacted to a December 5, 1996 cease and desist letter plaintiff Marilyn Hobbs sent to Imus' book publisher, Simon & Schuster, on behalf of her employer, Chrysler Corporation. The letter charged Imus with "misuse" of the Jeep trademark in his novel, *God's Other Son*, demanded that Simon & Schuster reply in writing within 15 days, and asked that the letter be passed along to Imus. Ms. Hobbs' letter pointed out that "Jeep" is a federally-protected trademark owned by Chrysler and that the word "jeep" should "never be used as a generic word."

Introducing his remarks, Imus stated that "we'll be addressing this stupid letter that [plaintiff] wrote Simon and Schuster." Imus read the letter on the air, as well as the "offending excerpt" from his book, to explain to his audience the manner in which "jeep" was used:

> "'Ranger Ross'" — this is apparently a scene in a forest, where Billy had sex with the bears or something — "'Ranger Ross waved us through the gate and relocked it, fired up his jeep'" . . . "'and starting jouncing off down the road with Elroy close behind.'". . . . "'He turned

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Irreverent Remarks Are Protected Rhetorical Hyperbole or Pure Opinion

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back toward his jeep'" — lower case "j" . . . .

Imus remarked that "we thought it might be interesting to look up [in the dictionary] . . . to see if . . .jeep was a generic term. . . ." He then read to his audience two definitions for "jeep" — "one, a generic term, and two, capital J-e-e-p, trademark identification for the Grand Cherokee and the other Jeeps the they make . . . ." Imus and his co-hosts then discussed that fact that the term "jeep generically describes a 'small, durable, general purpose motor vehicle, which has been in existence since World War II.'"

After disclosing those facts, Imus queried whether Ms. Hobbs' efforts on behalf of Chrysler were misguided, stating that she should "stop wasting [ ] Chrysler Corporation's time and stop annoying me." Spirited bantering then occurred among Imus and his co-hosts, who called plaintiff a "dingbat," "hag," "skank," and accused her of making a "knucklehead assertion." One of them jokingly quipped that "you can find her number in any men's room."

Quips Such as "Skank," "Dingbat," "You Can Find Her Name on Any Men's Room Wall"

Ms. Hobbs subsequently sued for defamation, alleging that defendants' remarks were defamatory *per se* as they supposedly accused her of being unchaste and incompetent. Defendants, who included Don Imus, WFAN-Radio and CBS Corporation, moved to dismiss, arguing that the context of the statements, the surrounding circumstances, and the inherent absurdity of the words used should have signaled to the audience that their remarks were not to be reasonably understood to be literally true.

In support of their motion, defendants submitted a tape of the "Imus in the Morning" program at issue, to assist the court in understanding the tenor of the remarks and to educate the court about the nature of "Imus in the Morning." We argued that "Imus in the Morning" attracts an audience that is accustomed to and expects to hear Imus' hyperbole and irreverent wit. The program obviously is not a news show, but a live talk show driven by the personality of Imus, who seeks to amuse, enlighten and entertain his listeners with his provocative commentary, satire and interviews. Against that backdrop, defendants argued that the remarks were protected either as "rhetorical hyperbole" or pure opinion.

As an alternative basis for dismissal, as to the category of remarks that supposedly questioned Ms. Hobbs' competence — "stupid," "dingbat," "knucklehead" — defendants argued that New York's "single instance" rule precluded recovery. In particular, at most, the speakers accused Ms. Hobbs of ignorance or mistake on a single occasion only and were not accusing her of general ignorance or lack of skill when she wrote the December 5 letter. Because no special damages were pleaded, the single instance rule precluded any recovery based on those words.

The lower court did not reach the single instance rule defense, but ultimately agreed that the challenged statements were protected opinion or hyperbole.

On appeal, the First Department agreed with this conclusion, ruling that, when considered in the context of the "ribald" shock radio show in which they were made, it is clear that "the complained of statements would not have been taken by reasonable listeners as factual pronouncements but simply as instances in which the defendant radio hosts had expressed their views over the air in the crude and hyperbolic manner that has, over the years, become their verbal stock in trade." The court added that, because Imus recited the facts upon which his opinions were based, this was not a case involving actionable "mixed opinion."

Anthony M. Bongiorno is Assistant General Counsel of Litigation for CBS Corporation and the attorney of record in Hobbs v. Imus.

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Court Finds Op-Ed Columns Constitute Opinion Libel Suit Against Russian-Language Newspaper Dismissed

In mid-October, a New York City trial court granted a motion to dismiss a columnist's libel suit against the publisher of the Russian-language daily newspaper, *Novoye Russkoye Slovo* (NRS), and two contributors to the paper. *Navrozov v. Novoye Russkoye Slovo Publishing Corp.*, N.Y.L.J. Oct. 13, 1999, at 26. The claim arose from columns that the two individual defendants, Boris Gart and George Vainer (at the time NRS's editor-in-chief), contributed as sardonic responses to columns by the plaintiff, Lev Navrozov. Navrozov, a prolific and vehemently anti-Soviet writer and lecturer, alleged that the pieces conveyed the defamatory representation that Navrozov was actually an agent of the KGB.

As a "context," placement in the op-ed section was distinguishable from "merely labeling a statement to be Opinion."

Columns and Response

Navrozov, whom the Soviet newspaper *Pravda* once dubbed "the No. 1 anti-Soviet man in the West," wrote two columns for NRS which appeared in late 1995 and early 1996. Both expressed his negative views of the Soviet Union. In response, the defendants printed three columns, each of which contained passages citing certain statements made by Navrozov himself, and extrapolating them to imply their "suspicions" that Navrozov actually had a cordial relationship with the KGB.

In dismissing the suit for failure to state a cause of action, New York County Supreme Court Justice Martin relied on New York case law delineating the field of protected opinion. Citing *Gross v. New York Times Company*, 82 N.Y.2d 146, the court observed that one factor in distinguishing opinion from factual assertions is "whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal to readers or listeners that what is being read or heard is likely to be opinion rather than fact." The court found that the context of the columns' publication in the op-ed pages of a newspaper would indicate to reasonable people that the statements made therein were not "assertions of fact offered for their accuracy; rather, they were expressions of opinion." As a "context," placement in the op-ed section was distinguishable from "merely labeling a statement to be opinion."

The court also noted that the newspaper's editorial board had prefaced each of the subject columns by identifying its author as an opponent of Navrozov. Furthermore, according to the court, the tone of the columns itself, which was mocking, satirical, and hyperbolic, indicated the intention of the authors to voice their opinions, not to present facts. Any notion that Navrozov was a KGB agent would be gleaned from the authors' speculative extrapolation of Navrozov's own statements.

Here, the court held that "[e]xtrapolation is by definition a matter of opinion, not fact. . . . [T]he readers of the subject articles are taunted and challenged, but not told what actually happened." In fact, the defendants did not purport to know "what actually happened" themselves. In this regard, the court drew a comparison to the Oliver Stone film "J.F.K.," which, based on known facts surrounding the assassination of President Kennedy, speculated upon an underlying conspiracy.

Yiddish Paper Has Different Result

In contrast, in an opinion issued the day before

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Court Finds Op-Ed Columns Constitute Opinion

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Navrozov, the New York Appellate Division, Second Department reinstated a defamation suit against a Jewish congregation whose Executive Board wrote an article complaining about the plaintiff's business practices. *Brach v. Congregation Yetev Lev D'Satmar, Inc.*, No. 8036D (A.D. 2 Dept. October 12, 1999) The Yiddish newspaper in which the article appeared is also a defendant.

The case arose out of dispute between plaintiff Nachman Brach and the religious group over claims to the Brooklyn lot on which the group's synagogue sits, which the congregation claims Brach purchased through less than honorable methods. When Brach refused to have the dispute adjudicated in rabbinical court, and successfully litigated it in New York Supreme Court, the group published the article, which contained language to the effect that "Brach had won that action 'by lies and deceit,' and 'declare[d] publicly' that 'Nachman Brach is a robber.'" Brach brought a libel suit against the Congregation, its Executive Board, the newspaper *Der Yid*, and several individuals.

The trial court dismissed the claim, finding the statements to constitute opinion. The Appellate Division reversed, holding that "the statements complained of imply that 'the speaker knows certain facts, unknown to his audience, which supports [sic] his opinion and are detrimental to the person about whom he is speaking'" (citing New York case law). Therefore, the court held, the statements constituted "mixed opinion," which is capable of defamatory meaning under New York law. Unlike the *Navrazov* case, the *Brach* court did not quote extensively from the subject article, nor did it examine the statements in the context of the article as a whole.

Ken Norwick of Norwick & Schad in New York City represented the defendants in the *Navrazov* case.

Convicted Murderer Agrees to Lifetime Gag

Aaron McKinney has lost his right to free speech and the public its right to information about a controversial criminal case as part of the deal that spared McKinney from execution for the murder of gay University of Wyoming college student Matthew Sheppard.

The agreement under which McKinney was sentenced to life in prison includes unprecedented provision that he will never talk to the press about *State v. McKinney*. Editor & Publisher magazine reported that the agreement also bars almost anyone else connected with the murder case from ever discussing it.

Prosecutor Cal Rerucha told the press that Shepard's family insisted on the gag order. Rerucha said he and the Shepards were tired of hearing defense claims that Shepard had made advances to McKinney. McKinney also agreed not to appeal his conviction for beating Shepard to death. An accomplice, Russell Henderson, was previously convicted and is serving two life terms.

Concern about this gag order barring legitimate news reporting, and scholarship, has been expressed from a number of quarters.

It was unclear what, if any, repercussions would follow if McKinney broke his silence.

Any developments you think other LDRC members should know about?

Call us, or send us and email, or a note.

Libel Defense Resource Center, Inc.
404 Park Avenue South, 16th Floor
New York, NY 10016

Phone: 212.889.2306 Fax: 212.689.3315
Email: ldrc@ldrc.com

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D.C. Circuit Orders FOIA Disclosure of Wiretapped Recordings Played at Trial

In an opinion entered October 26, the United States Court of Appeals for the District of Columbia Circuit ordered the FBI to turn over, pursuant to a Freedom of Information Act request, recordings of conversations used as evidence in court. *Cottone v. Reno*, No. 98-5497 (D.C.Cir. Oct. 26, 1999). The holding indicates that though such recordings might essentially fall into a FOIA exemption, once entered into evidence and identified in trial transcripts, they are as a matter of law contained in a permanent public record and therefore subject to disclosure.

The case originated in Salvatore Cottone's trial for drug and racketeering offenses, where the prosecution played in open court audio recordings of wiretapped telephone conversations and face-to-face conversations between Cottone and undercover agents. Rather than transcribe the content of the recordings into the trial transcripts, the court reporter cross-referenced them, identifying specifically the date and time of each conversation referenced, along with the identification number of the tape on which it was recorded.

After he was convicted on more than 14 criminal charges, Cottone requested copies of the recordings pursuant to FOIA. The FBI provided him only with heavily redacted versions of two tapes, claiming that the remaining tapes, and the remaining portions of the tapes surrendered, were protected from disclosure under FOIA Exemptions 3 and 7(C), respectively. Exemption 3 protects information "specifically exempted from disclosure" under another statute, such as Title III of the Omnibus Crime Control and Safe Streets Act of 1968, pursuant to which the FBI obtained the recordings. Exemption 7(C) exempts from FOIA requirements records or information compiled for law enforcement purposes whose disclosure "could reasonably be expected to constitute an unwarranted invasion of privacy."

Cottone brought suit in the U.S. District Court for the District of Columbia, demanding disclosure of the other recordings he had requested. The district court granted summary judgment to the government, finding that those tapes denied altogether fit squarely into the Exemption 3 protection, and that Cottone had not met his burden of proof to show that the tapes had entered the public domain. It failed to address Cottone's opposition to the FBI's redaction of the remaining tapes, allegedly pursuant to Exemption 7(C). (Cottone argued that the redacted portions could not harm any privacy interests, as those whose voices were recorded on the tapes either had consented to disclosure or were deceased.)

The D.C. Circuit reversed on the Exemption 3 issue. It noted two competing propositions underlying the FOIA exception: (1) Title III recordings are exempt from disclosure; and (2) "materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record" (citing *Niagara Mohawk Power Corp. v. United States Dep't of Energy*, 169 F.3d 16 (D.C. Cir. 1999)). The burden is on the requester to show that the requested materials are within the public domain.

In an earlier case, *Davis v. United States Dep't of Justice*, 968 F.2d 1276 (D.C. Cir. 1992), the Court of Appeals found that a FOIA requester had failed to show that certain requested recordings were contained in a permanent public record, though selections from them had been played in open court. Distinguishing the present case from *Davis*, the court noted that in the latter, no record existed as to which *particular* recordings were presented as evidence. Instead, the requester could only provide the government's "play list," from which certain recordings had been selected.

In contrast, the transcripts from Cottone's trial referenced the specific conversations used as evidence. The court held this record sufficient to show that those recordings had entered the public domain and were subject to FOIA disclosure. Though the transcripts did not contain a verbatim hard copy of

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D.C. Cir. Orders FOIA Disclosure of Recordings

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the recordings, the court held, "here it would be an empty formalism to insist that Cottone produce a hard-copy, verbatim transcription of the audio tapes to prove which tapes were played at trial when he has already produced a certified transcript from his trial that indicates precisely which tapes were, in fact, played."

The court remanded the question of whether the redacted portions of the tapes that the FBI had given Cottone were protected under Exemption 7(C) of FOIA, an issue that the district court's opinion failed to address. The Court of Appeals, citing *Campbell v. United States Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1999), held that in order to invoke a FOIA exemption, the FBI must provide specific, detailed information showing that the materials do indeed fit into the exempted category. It advised the district court, on remand, to order the FBI to prepare a *Vaughn* index (a detailed affidavit describing the materials requested and articulating the government's justifications for nondisclosure, which allows a judge to determine the validity of the justifications *in camera*. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974)).

Unsuccessful Candidate Has No Claim for Alleged Lack of Newspaper Coverage

By John Borger and Eric Jorstad

An unsuccessful political candidate has no right to sue a newspaper which did not give him as much attention and coverage as he thought he should receive, the Minnesota Court of Appeals held in an unpublished decision filed November 23, 1999. *Savior v. Humphrey, et. al.*, No. C5-99-900 (Minn. Ct. App. Nov. 23, 1999).

Ole Savior ran unsuccessfully for governor of Minnesota in the 1998 elections. On Nov. 2, 1998 – the day before election day – he filed a complaint for damages under the Minnesota Fair Campaign Practices Act against Timothy J. McGuire, editor of the *Star Tribune*. He alleged that the newspaper deliberately did not state his views "to the voters of Minnesota" in candidate guides or news coverage because it favored another candidate (then-state attorney general Hubert Humphrey III, who lost a three-way race to Reform Party candidate Jesse Ventura). Savior also sued Humphrey, but later agreed to dismiss him.

The district court dismissed the claim against the press and denied Savior's request to amend his complaint. The Court of Appeals, without hearing oral argument, affirmed those decisions.

Following *Derus v. Higgins*, 555 N.W.2d 515 (Minn. 1996), the court first held that the Fair Campaign Practices Act does not provide a private cause of action for damages for unsuccessful political candidates.

The court also rejected Savior's claim that the lack of newspaper attention violated his First Amendment right to free speech. Citing *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974), the court held that the "First Amendment protects the editorial choice of the Star Tribune to limit coverage of appellant's candidacy."

Finally, the appellate court held that the district court properly denied Savior's motion to amend his complaint to add a claim for defamation, because the amendment would be futile. Defamation requires that the defendant make a false and defamatory statement about the plaintiff, the court explained, and in this case "the best [the plaintiff] can establish is that the Star Tribune said nothing about him."

John Borger and Eric Jorstad, partners at Faegre & Benson LLP in Minneapolis, represented Star Tribune editor Timothy McGuire in this lawsuit.

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California Supreme Court Raises Shield Against Prosecutorial Subpoenas

By Charity Kenyon

A unanimous California Supreme Court handed down the much anticipated decision in *Miller v. Superior Court* on November 1, 1999, reversing the first appellate decision in the state allowing prosecutors to pierce the state's constitutional shield. 21 Cal. 4th 883 (1999).

The court answered a question of potential prosecutorial rights it had left open a decade ago in *Delaney v. Superior Court*, 50 Cal.3d 785 (1990). *Delaney* had announced a balancing test to be applied when criminal defendants assert a federal constitutional right of access to unpublished information and had declined to decide whether a prosecutor might have similar rights. The court also put to rest the argument that the people's "right to due process of law" enacted by the voters in 1990 as a constitutional amendment could justify holding a newsperson in contempt for refusing to surrender unpublished information.

> *The court states that the general provision of rights to prosecutors did not override specific, preexisting evidentiary privileges or rights of the press.*

A Jailhouse Interview

The District Attorney of San Joaquin County had subpoenaed in April 1996 the entire audio and videotape of a jailhouse interview of Anthony Lee DeSoto, who awaits trial for the murder of his cellmate in March 1996. A Sacramento television reporter sought the interview after learning that DeSoto had confessed to sheriff's investigators (on videotape). KOVR-TV, owned by Sinclair Broadcast Group, broadcast portions of the interview including DeSoto's further confession to the reporter.

Seizing on the suggestion in *Delaney* that the prosecutor has state constitutional rights to evidence of sufficient weight to be "balanced" against the press' constitutional shield rights, the court denied KOVR's motion to quash. Applying the *Delaney* test, the court found the balance to favor the prosecutor because the voluntary interview was not "confidential" or "sensitive." Ellen Miller, the station's news director and custodian of records, on refusing to turn over the outtakes, was held in contempt, sentenced to jail and ordered to pay a fine in the amount of the district attorney's fees in pursuing enforcement of its subpoena.

The trial court stayed the sentence pending review by the court of appeal, which in turn affirmed the trial court's judgment. The supreme court granted review and further stayed enforcement of the contempt order. All of the significant news media organizations in the state, lead by the California Newspaper Publishers Association and California First Amendment Coalition, joined in submitting an amicus brief.

Press Remains Protected

The California Supreme Court decision was authored by Stanley Mosk, the court's most senior justice and the author of a concurring opinion in *Delaney*. While California's shield law is uniquely structured not as a privilege but as an immunity from contempt, the *Miller* decision will be useful to practitioners who want citable material about the importance of a shield, even when the material sought is nonconfidential.

Justice Mosk cited *O'Neill v. Oakgrove Constr.*, 71 N.Y.2d 521, 526 (1988), *Matter of Woodhaven Lumber*, 589 A.2d 135, 143; (N.J. 1995) and *United States v. Cuthbertson*, 630 F.2d 139, 147, (3d Cir. 1980) to support the proposition that the autonomy of the press is threatened as much by prosecutors as by any other litigants who

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Cal. Sup. Ct. Raises Shield Against Subpoenas

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seek out the press because they publicly identify themselves as possessing a great deal of information. Further, the court reasoned

> the fact that assertion of an immunity may lead to the inability of the prosecution to gain access to all the evidence it desires does not mean that a prosecutor's right to due process is violated, any more than the assertion of established evidentiary privileges against the prosecution would be a violation.

Disavowing its contrary suggestion in *Delaney*, the supreme court held that held that there is no conflict between the shield law and the subsequently enacted people's right to due process of law and, accordingly, no need to engage in the balancing of test prescribed in *Delaney*. The court states that the general provision of rights to prosecutors did not override specific, preexisting evidentiary privileges or rights of the press.

The court held that the absolute immunity embodied in the shield law only yields to a conflicting federal, or perhaps, state constitutional right. Since the prosecutor has no such rights, the Supreme Court directed the court of appeal to issue the peremptory writ of prohibition. In so doing, it resolved a problem of its own creation that had plagued the California news media since the *Delaney* decision.

The question yet to be resolved is, just what is the "people's" constitutional right of due process? At least we know this uniquely California right is not a chink in the absolute reporter's shield.

Charity Kenyon is with Riegels, Campos & Kenyon LLP, San Francisco and represented the media in this matter.

Info Broker Convicted of Using Pretenses to Get Private Info

A Cautionary Tale for Information Gatherers

A New York information broker used "trickery and ruse" to obtain the private bank, brokerage and credit account information of Massachusetts consumers, which he then sold to two asset search firms, a Massachusetts Superior Court Judge ruled after a week-long trial.

Superior Court Judge Gordon Doerfer, in an October 12 decision, ordered Peter Easton and his company, Source One Associates, of Poughquag, N.Y. to pay $500,000 in civil penalties and prohibited them from obtaining and selling private financial data in Massachusetts. In addition, the defendants must pay attorney's fees and court costs.

Judge Doerfer found that Easton and Source One violated the state's consumer protection, financial privacy and fair credit reporting laws. The state Attorney General's office sued Easton and Source One in February 1998.

Easton denied that he and his company had done anything illegal, but Doerfer noted that the defense called no witnesses at the trial that lasted from September 13 through September 20. In contrast, he said that the state offered numerous witnesses and thousands of documents. Among the documents introduced was a deposition in which Easton took the Fifth Amendment in response to all material questions, the judge added.

Doerfer concluded that Source One used its privileges as a member of the credit reporting agency, Equifax, to get the names of banks or other institutions where consumers on whom he had been asked to obtain information had accounts. He would then call the banks and ferret out information by pretending to be the customer or a bank employee, the judge held.

"From all the evidence, I find that it is more likely than not that the only way that information brokers can obtain private financial information from banks is through the use of deception and trickery, including impersonation of account holders."

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Boston Globe Reporter Ordered to Disclose Confidential Sources to Physician

A Boston trial court has ordered *Boston Globe* reporter Richard Knox to disclose confidential sources he used in a series of articles about the death of his former colleague Betsy Lehman from a chemotherapy overdose she received while undergoing treatment for breast cancer at the Dana-Farber Cancer Institute. *Ayash v. Dana-Farber Cancer Institute et al.*, No. 96-565-E (Suffolk County Super. Ct. Feb. 26, 1999).

The court found that disclosure of the sources would be necessary for the plaintiff physician, Lois Ayash, to succeed in her claims for intentional interference with advantageous business relations and infliction of emotional distress against Knox and the *Boston Globe*, and for employment-related injuries against DFCI. The decision did not address the source issue with respect to the plaintiff's libel claims.

The suit arose from Knox's investigative reports about the events leading up to Lehman's death. Citing internal documents from DFCI personnel files provided by confidential sources, as well as other information provided by those sources, Knox indicated that Dr. Ayash had played a role in Lehman's treatment and was the subject of official complaints. Ayash claimed that some of the statements were libelous and that Knox's newsgathering methods, along with DFCI employees' alleged cooperation with him, supported her other claims.

Initial Order to Disclose Reversed

The trial court ordered the disclosure of 24 confidential sources. When the defendants refused, a fine was imposed for contempt of court, which order was stayed pending appellate review of the disclosure order. *See LDRC LibelLetter*, November 1998 at 32. Earlier this year, the Massachusetts Appeals Court vacated the disclosure order as it pertained to the libel claims.

Massachusetts, which does not recognize a constitutional privilege for confidential sources, imposes a threshold requirement on one wishing to avoid disclosure to show real potential damage to the free flow of information. The court found that the defendants had met this requirement, as the investigation of Lehman's death was ongoing and it was likely that Knox would continue to report on it. 46 Mass. App. Ct. 384, 706 N.E.2d 316; *LDRC LibelLetter*, March 1999 at 7. The second part of the common-law test is a balancing of the public interest in evidence against the public interest in the free flow of information. Here, as two of the sources of the allegedly libelous statements were not confidential and the remaining source was identified by the plaintiff herself, the evidentiary interest with regard to the sources of the allegedly libelous statements was negligible. 46 Mass. App. Ct. 384, 706 N.E.2d 316. *See* 1999 Mass. App. LEXIS 244 *9, *LDRC LibelLetter*, March 1999 at 7.

The Appeals Court remanded to the trial court the question of whether disclosure of additional sources was necessary for the plaintiff's libel claims or for her other claims against the defendants, questions the trial court had not directly addressed in its disclosure order. In part, Ayash claims that some of the documents on which Knox's reports were based were confidential personnel records to which he never should have had access.

While not further addressing the libel issue, in its latest opinion the trial court found that disclosure of the sources, who provided Knox with internal peer review documents and information that Ayash was the subject of a complaint in the Board of Registration of Medicine, were critical to the plaintiff's claims against Knox and the *Globe* for intentional and negligent infliction of emotional distress, and against the DFCI for breach of contract, breach of the implied covenant of good faith and fair dealing, and invasion of privacy.

Following Massachusetts case law, the court weighed the plaintiff's need for disclosuré against the public interest in the free flow of information. The court noted that Ayash could not show "extreme and

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Boston Globe Reporter Ordered to Disclose Confidential Sources

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outrageous behavior," a necessary element for emotional distress claims under Massachusetts law, on the part of the reporter without evidence of "the methods and circumstances by which he obtained and revealed these documents." Likewise, the court found that

> [w]hether the DFCI breached the requirements of its own by-laws regarding confidentiality, whether the DFCI breached the implied covenant of good faith and fair dealing by turning over highly confidential material, and whether the DFCI invaded Ayash's privacy by releasing to the press a document which, until that point, was medical peer review material, all depend on whether the source(s) was a DFCI agent or employee.

Furthermore, according to the court, Ayash had exhausted other avenues of discovering this information through depositions and discovery requests. Therefore, the balance tipped in favor of disclosure and against the public interest in the free flow of information. The court's actual holding, though limited to the circumstances of the case, does seem to carry possible broader significance if applied elsewhere: "Where, as here, it appears that the source(s) sought to be protected by the Globe defendants may well have made an improper and unlawful disclosure of that information, the balancing test tips *against* the continued confidentiality of that/those source(s)." The opinion does not articulate a standard of likelihood of misconduct required for this rule to apply.

Jonathan Albano, a partner in the Boston law firm of Bingham Dana LLP and an LDRC member, is counsel to the *Boston Globe* and Richard Knox in this matter.

In preparation for the LDRC 2000 Report on Trials and Damages (to be published January 31, 2000), LDRC is collecting information on trials and appeals in media cases.

If you have recently been involved in or know of any trial — or appeal of a trial result — please contact:

John Maltbie
LDRC Staff Attorney
404 Park Avenue South
16th Floor
New York, NY 10016

212.889.2306

or via e-mail

jmaltbie@ldrc.com

The LDRC Report on Trials and Damages, which reports on the results of nearly twenty years of media libel, privacy and related litigation, is a key resource for media attorneys and in-house counsel.

The Report provides a statistical analysis of jury and bench awards in media libel, privacy and related law trials.

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Fractured Eleventh Circuit Reinstates Copyright Infringement Suit Over "I Have A Dream" Speech

By Landis C. Best

On November 5, 1999, the Eleventh Circuit Court of Appeals in a 2-1 ruling reversed a decision of the District Court granting summary judgment to CBS Broadcasting Inc. regarding a copyright infringement suit brought by the Estate of Martin Luther King, Jr., Inc., over the "I Have a Dream" speech. Slip Op. No. 98-9079. The panel was sharply divided, with the two judges who comprised the majority, Chief Judge Anderson and Senior District Judge Cook from the Eastern District of Michigan, disagreeing over their respective reasons for their rulings. In dissent, Senior Judge Roney stated that he would have affirmed the grant of summary judgment to CBS for the reasons expressed in the opinion of the District Court. *Estate of Martin Luther King, Jr., Inc. v. CBS Inc.*, 13 F. Supp. 2d. 1347 (N.D. Ga. 1998) (O'Kelley, J.).

At issue in the appeal was CBS's defense that, under the 1909 Copyright Act, Dr. King forfeited copyright protection and injected the speech into the public domain given the circumstances surrounding the delivery of the speech at the March on Washington on August 28, 1963. In reversing, the Eleventh Circuit made clear that CBS could still succeed on its forfeiture defense at the trial level given certain fact issues in dispute, and further noted that it, like the District Court, was not ruling upon other defenses raised by CBS — such as fair use, the First Amendment, and implied license.

Background

On August 28, 1963, Dr. Martin Luther King, Jr., delivered a speech from the steps of the Lincoln Memorial that is enshrined as one of the most important speeches in American history. The "I Have a Dream" speech was the culmination of the March on Washington for Jobs and Freedom, in which over 200,000 people marched on Washington to petition the federal government for improvements in civil rights. Several civil rights groups organized the March on Washington, including the Southern Christian Leadership Conference ("SCLC"), Dr. King's organization.

From the start, the civil rights organizations sought and encouraged press coverage of the event in order to spread their message. CBS in particular provided extensive live coverage of the March and of the speeches of the day, including "I Have a Dream." It filmed and broadcast the speech to a nationwide and worldwide television and radio audience in the tens of millions, and provided the pool coverage for the other national networks. Many other representatives of the press covered and recorded the event.

Dr. King provided an advance copy of the speech to the press, and it was copied and put in a press kit in the press tent. There was no notice of copyright on the advance text. About a month after delivering the speech, Dr. King applied for and received statutory copyright under the Copyright Act of 1909. Shortly thereafter, he successfully obtained a preliminary injunction against companies that had produced and sold records containing the speech. *King v. Mister Maestro, Inc.*, 224 F. Supp. 101 (S.D.N.Y. 1963).

Thirty Years of Use

During the next 30 years, CBS used its footage of the speech for news reports and special programming without protest from Dr. King or his heirs. In 1994, CBS produced in conjunction with the Arts & Entertainment Network a series of historical documentaries entitled "20th Century with Mike Wallace." One of the documentaries focused on the March on Washington and Dr. King's role in the civil rights movement, in which CBS used its own historic film footage of the March including approximately 60% of the speech.

The Estate of Martin Luther King, Jr., Inc., sued CBS for copyright infringement. CBS raised several defenses, including that Dr. King had failed to secure federal copyright protection in 1963 and that the speech had therefore entered the public domain. Under the

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governing 1909 Copyright Act, a creative work entered the public domain if it was "published" (a legal term of art) without observing certain statutory requirements, including providing a notice of copyright.

District Court Finds Publication

The District Court found that, given all of the circumstances surrounding the March on Washington, Dr. King had "published" the speech so as to inject it into the public domain. The District Court based its ruling on several factors, including:

(1) "the March organizers were aware of and encouraged the press' coverage of the March;"

(2) "the press was invited to attend and film the day's events;"

(3) "Dr. King provided the press with an Advance text of his speech to enable them to film and broadcast the events more easily;"

(4) the press was never given "express limitations regarding who could film the event or the extent to which their footage could be used;" and

(5) "there is no indication that any [prohibitions on reproduction] were made or implied." *King*, 13 F. Supp. 2d at 1352-53.

The District Court concluded: "as one of the most public and most widely disseminated speeches in history, [the speech] could be the poster child for general publications." *Id* at 1353. In so ruling, the District Court distinguished the situation at hand from a mere performance which, under the case law, was held not to constitute "publication." Instead the District Court found that the general rule regarding performances was inapposite given the opportunities for unlimited reproduction of the speech that were attendant at the March. *Id.*

The Court of Appeals Decisions

The Eleventh Circuit reversed the District Court in a 2-1 decision. Senior Judge Roney dissented for the reasons expressed in the District Court's opinion. The two judges who comprised the majority disagreed as to theory.

Chief Judge Anderson ruled that the circumstances of the delivery of the speech amounted to only a "limited" publication, *i.e.*, that the speech was communicated to a select group for a narrow purpose. Under the case law, a limited publication did not trigger the requirements of the 1909 Copyright Act and did not inject a work into the public domain. In particular, the Chief Judge agreed with the 1963 ruling from the Southern District of New York in *Mister Maestro* that the distribution of the speech to the press amounted to only a limited publication for the limited purpose of contemporaneous news coverage. The Chief Judge also cited the general rule that performance does not constitute "publication" and, although recognizing the principle that lack of restraint on third-party copying could lead to forfeiture of copyright, declined to apply the principle of third-party copying to the case.

Senior District Judge Cook rejected application of the limited publication doctrine, calling it a "legal fiction," and noted that the *Mister Maestro* decision, which was based upon the doctrine of limited publication, has been generally criticized by copyright scholars. Instead, Judge Cook announced a novel theory based upon the medium of the creative work in question in which works of display are subject to different legal principles than works of performance. According to Judge Cook, works of display (such as a painting) could be forfeited into the public domain because of a lack of restrictions on copying by third parties; however, performed works (such as the speech) could only be published in circumstances where a tangible copy of the work was distributed with the authority of the copyright proprietor. Thus, Judge Cook believed that the circumstances in which the speech was delivered were irrelevant to the question of publication absent evidence of the distribution of a

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tangible copy of the speech to the public.

The Impact of the Court of Appeals Decision

The appeal raises profound questions regarding the meaning of "publication" under the 1909 Copyright Act. Although a new Copyright Act was enacted in 1976, it provides no protection for works that entered the public domain prior to its effective date. Thus, the question of what constitutes "publication" remains one of vital importance. Four federal judges have examined this question in the context of the historic March on Washington. Two of the judges concluded that the speech had been published, while the other two disagreed with this conclusion, but disagreed as to rationale. Given the divergence of opinion, CBS is filing an application for rehearing *en banc.*

If the case nevertheless proceeds to the District Court, many issues remain open. For one thing, the panel majority noted two pieces of potentially case dispositive evidence in favor of CBS on the issue of forfeiture that they did not consider because material facts were in dispute.

First, Dr. King's organization, the SCLC, published a newsletter in September 1963 that contained a copy of the speech in its entirety without copyright notice. The SCLC Newsletter was widely distributed to the public. The Estate, however, claimed that the SCLC printed the speech without Dr. King's authorization. Second, CBS argued below that the advance text of the speech was made available to the press and public alike. The Estate disputed that the advance text was made available to the public.

In addition to these factual issues, CBS's further legal defenses have yet to be ruled upon by the District Court. These defenses include that CBS's conduct in using its footage of the speech in the context of a historical documentary is protected by the fair use doctrine and the First Amendment.

Landis C. Best is an associate with Cahill, Gordon & Reindel, and worked with Floyd Abrams in representing CBS in this matter.

Digital Boundaries Of Fair Use: Court Rejects Fair Use Defense In Internet Copyright Case

By Rex S. Heinke and Heather L. Wayland

On November 8, 1999, a United States District Court Judge in Los Angeles, California issued a tentative order in favor of the Los Angeles Times, The Washington Post Company, and Washingtonpost.Newsweek Interactive Company, holding that a website's ongoing republication of thousands of copyrighted full-text articles from the *Los Angeles Times* and *The Washington Post* is not protected by the fair use doctrine or the First Amendment.

An Archive of Copyrighted Articles

At the heart of the case is a website called "*Free Republic,*" operated by a professional website designer in Fresno, California. Since its creation in approximately September 1996, the *Free Republic* website has grown to attract as many as 100,000 hits per day, and between 25 and 50 million page views each month. To attract these visitors, *Free Republic* offers an ever-growing library of copyrighted news articles systematically copied from other websites (by defendants and their registered users), as well as an interactive forum in which registered users are permitted to post comments under the full-text articles.

The defendants admit that the *Free Republic* archives have grown to include at least 5,000 copyrighted articles from the websites operated by the *Los Angeles Times* and *The Washington Post.* The majority of these articles were posted on *Free Republic* within hours of their original publication on *latimes.com* and *washingtonpost.com.*

Each of the parties brought cross-motions for partial summary judgment on fair use. In a detailed 28-page tentative opinion distributed before oral argument on November 8, 1999, U.S. District Court Judge Margaret M. Morrow granted the newspapers' summary judgment motion on fair use, and denied the defendants' cross-motion. The opinion contains a careful analysis of the four fair use factors, and concludes that all but the second factor favors the newspapers. The parties anticipate that the Court will issue a final order that essentially tracks

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Digital Boundaries Of Fair Use

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this preliminary order.

Fair Use Factors Favor Plaintiffs

The opinion begins its analysis by identifying four non-exclusive factors to be considered in determining whether a defendants' copying is a fair use: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." These factors are codified at 17 U.S.C. Section107.

With respect to the first fair use factor, Judge Morrow observed that "[t]here is nothing transformative about copying the entirety or portions of a work verbatim." She also explained how the defendants stand to profit from exploitation of the copyrighted material without paying the customary price:

> The undisputed evidence reveals that Free Republic is currently a for-profit company. It also demonstrates that Free Republic solicits donations from visitors to the website who wish to support its mission and operations. . . . Since the general purpose of the site is to provide a forum where individuals can discuss current events and media coverage of them, posting copies of plaintiffs' articles assists in attracting viewers to the site. This in turn enhances defendants' ability to solicit donations and generates goodwill for their operation and [defendants'] other operations.

Based on this evidence and additional evidence regarding links on *Free Republic* to third-party websites that also solicited donations and offered *Free Republic*-related merchandise, the Court agreed that the first fair use factor favored the newspapers.

On the second fair use factor, Judge Morrow agreed with the defendants that the copied news stories were predominantly informational, as opposed to fictional or predominantly creative. Accordingly, she concluded that this factor weighed in favor of *Free Republic*.

With respect to the third fair use factor, the Court stated that *Free Republic* was republishing thousands of entire articles, and rejected the defendants' argument that the amount being copied was not the whole work because each article is only a fraction of the entire newspaper. The Court also rejected defendants' argument that full-text copying was necessary for discussion purposes. A hyperlink, plaintiffs argued, would serve the same purpose.

Finally, the Court agreed with the newspapers that "an adverse effect on the potential market for the articles has been demonstrated, and the fourth factor weighs against a finding of fair use." The court continued to state that, "[t]his is particularly true when one considers the impact that widespread copying of this type would have on plaintiffs' ability to sell and license their articles."

First Amendment Defense Rejected

The Court also held that the defendants had no First Amendment defense:

> [D]efendants have failed to show that copying entire news articles is essential to convey the opinions and criticisms of visitors to their site. [For example,] visitors' critiques could be attached to a summary of the article, or Free Republic could provide a link to the Times and Post websites where the article could be found. While defendants and users of freerepublic.com might find these options less ideal than being able to copy entire news articles verbatim, their speech is in no way restricted by denying them the ability to infringe on plaintiffs' exclusive rights in the copyrighted news articles.

The Court also explained that copyright law only protected the newspapers' expression, and did not extend to information and ideas.

The decision is a major victory for newspapers and other content producers who publish on the Internet. Assuming this ruling becomes final, the defendants have indicated that they intend to appeal.

Rex S. Heinke and Heather L. Wayland are attorneys for plaintiffs. They are with the law firm of Greines, Martin, Stein & Richland LLP in Beverly Hills, California.

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House of Lords Affirms Ground-breaking Qualified Privilege Decision

By Katherine Rimell

English libel law, long recognised as affording greater weight to the rights of the plaintiff at the expense of those of the defendant, has recently experienced a significant shift in emphasis in favour of freedom of expression. This is the result of the judgement of the House of Lords delivered on October 28, 1999 in the libel action brought by the former Prime Minister of Ireland, Albert Reynolds, against *The Sunday Times* which built on and refined an earlier decision of the Court of Appeal in the same case. *Reynolds -v- Times Newspapers Ltd. & Ors.* It endorsed the Court of Appeal's ground-breaking decision in July 1998 that the defence of qualified privilege in English libel actions may be available to protect publication of information on matters of public importance by the media to the public at large. *See LibelLetter* August 1998 at 11. The House of Lords has in effect created a public interest defence which may shield honest mistakes made in the course of responsible journalism.

Times Article Reported on Fall of Irish Government

The Sunday Times' article reported on the fall of the Irish coalition government and Mr. Reynolds' resignation as Prime Minister in November 1994. The article alleged he had lied to the Irish Parliament and to his coalition colleagues. After a six week trial in the High Court in London the jury returned a verdict for Mr. Reynolds finding the article to be untrue but awarded him zero damages (the award later being increased to one penny by the judge). It found that the journalist and the editor had not been motivated by malice, such as ill will, in writing and publishing the allegations.

In the Court of Appeal, Mr Reynolds won a retrial on the basis of inadequacies in the judge's summing up. *The Sunday Times'* appeal against the judge's decision that qualified privilege could not apply to publications to the world at large was dismissed on the facts. However, the Court of Appeal made some important statements about the ambit of the defence in its judgement which Lord Steyn, in the House of Lords, described as "a development of English law in favour of freedom of expression."

Qualified Privilege in English Law

The English defence of qualified privilege protects statements of fact which subsequently turn out to be untrue where there is a legal, social or moral duty on the maker of the statement to make it and a corresponding interest in the recipient of the statement in its content. It can only be defeated if the other side can prove malice in the legal sense, namely that the maker did not care whether or not it was true or made it with some underhand motive. Prior to the ambit of the defence being considered by the Court of Appeal and the House of Lords in the *Reynolds* case, it was not recognised as applying to statements published by the media to the general public, except in cases of extreme emergency.

The Sunday Times argued both in the Court of Appeal and in the House of Lords that the defence of qualified privilege should apply to "political speech" namely information about the way in which politicians and other public officials performed their public functions. It was asking the courts to recognise a new category of information protected by qualified privilege in the absence of malice. This came to be referred to as the "generic privilege" argument.

Court of Appeal Decision

In its judgement delivered in July 1998, the Court of Appeal explicitly recognised that reports by the media to the public at large on matters of public interest may be protected by qualified

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privilege. The Court said that it had no doubt that the interests of a modern democracy were best served by an ample flow of information to the public about, and by vigorous public discussion of, matters relating to the public life of the community and those who take part in it. In its view this covered such topics as the conduct of government and public administration but also the governance of public bodies, institutions and companies which give rise to a public interest in disclosure. The Court stated that as it was the task of the news media to inform the public and engage in public discussion of matters of public interest so it was to be recognised as its duty in the sense of the qualified privilege test. As to the public's interest in receiving information, there was no doubt in the Court's mind that it extended to the receipt of information on matters of public interest to the community. This was a much more liberal interpretation of the ambit of the duty and interest tests which the Court saw as being applicable beyond the sphere of politics and government.

The Court of Appeal went on to identify a third test which it termed "the circumstantial test" that had to be applied when deciding whether or not a statement should be protected by qualified privilege. It said this involved considering whether the nature, status and source of the material and the circumstances of publication were such that the publication should in the public interest be protected in the absence of proof of express malice. It concluded that whilst *The Sunday Times* article met the duty and interest test, it did not satisfy the circumstantial test and dismissed the newspaper's appeal.

House of Lords Decision

The House of Lords decided by a 3-2 majority that the qualified privilege defence did not apply to the facts of Mr Reynolds' libel action but endorsed what it described as the Court of Appeal's "valuable and forward-looking analysis of the common law." It too explicitly recognised the radical element of the Court of Appeal's judgement, namely that the press has a duty to inform the public of matters of public interest and the public has a right so to be informed and that this meant that publication to the world at large on matters of legitimate public concern can be protected by qualified privilege.

In the leading judgment of the House of Lords, Lord Nicholls rejected the Court of Appeal's controversial concept of a separate circumstantial test. He went on to explain, however, that the factors the Court of Appeal had identified as relevant for the circumstantial test are in fact to be taken into account in determining whether the duty-interest test is satisfied or as he preferred to say "whether the public was entitled to know the particular information." He said the "the right to know test" could not be carried out in isolation from those factors and without regard to them.

Courts Rejects "Political Information" as Separate Basis of Privilege

After reviewing the solutions in the area of political information adopted in other common law countries including the U.S., Lord Nicholls concluded that English law should not develop "political information" as a new subject matter category of qualified privilege. He stated that the English common law solution is for the Court to have regard to all circumstances when deciding whether the publication of particular material was privileged because of its value to the public. He pointed out that "this solution has the merit of elasticity . . . this principle can be applied appropriately to the particular circumstances of individual cases and their infinite variety. It can be applied appropriately to all information published by a newspaper whatever its source or origin." He went on to state:

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> it would be unsound in principle to distinguish political discussion from discussion of other matters of serious public concern. The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. This elasticity enables the Court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern.

Court Detailed Factors to Consider

Lord Nicholls set out an illustrative list of matters that might be taken into account when deciding whether a report on a matter of public interest should attract qualified privilege. They include the seriousness of the allegation, the nature, source and status of the information, the steps taken to verify it, the urgency of the matter and whether the articles contained the gist of the plaintiff's side of the story.

Whilst they are clearly intended to protect the individual's right to reputation, Lord Nicholls also recognised the pressures under which the media operates. Importantly, he specifically stated that a newspaper's unwillingness to disclose the identity of its sources should not weigh against it. He added that it should be always remembered "that journalists act without the benefit of the clear light of hindsight." He stressed that:

> above all the Court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The Court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubt should be resolved in favour of publication.

Lord Nicholls' judgment was endorsed by Lord Cooke and Lord Hobhouse. In commenting on his view that the suggested defence of qualified privilege should not be confined to political information alone Lord Cooke noted:

> there are other public figures who exercise great practical power over the lives of people or great influence in the formation of public opinion or as role models. Such power or influence may indeed exceed that of most politicians. The rights and interests of citizens and democracies are not restricted to the casting of votes. Matters other than those pertaining to government and politics may be just as important in the community; and they may have a stronger claim to be free of restraints on freedom of expression.

Dissenting Judges Would Have Allowed Times to Present New Evidence

In their dissenting judgments in favour of *The Sunday Times*, both Lord Steyn and Lord Hope also rejected the circumstantial test and the generic privilege for political speech. Lord Steyn said that the traditional twofold test of duty and interest was flexible enough to embrace, depending on the occasion and the particular circumstances, qualified privilege in respect of political speech published at large. He was content to accept that the principle should be "that the occasion must be one in respect of which it can be fairly said that it is in the public interest that the information should be published." He commented that "what is in the public interest is a well-known and serviceable concept." He thought that such an approach complies with the requirement of legal certainty and that in practice the issue would have to be determined on the whole of the evidence.

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House of Lords Affirms Ground-breaking Qualified Privilege Decision

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Lord Hope commented that "developments in regard to recognition and the fundamental right of free speech . . . have re-enforced the arguments in favour of the wider availability of the qualified privilege to those who publish material to the general public on matters of general public interest." Both he and Lord Steyn thought that since the law of qualified privilege had been developed in a way that was not foreseen at the time of the trial of the libel action it would be unfair not to allow *The Sunday Times* to adduce new evidence at the retrial going to the defence of qualified privilege.

Impact of the Decision

The attraction of *The Sunday Times'* argument for a new category of privileged material was that it would introduce certainty into this area of English libel law. The category would have been, however, a relatively narrow one, relating to the activities of politicians and public officials.

In favouring a case by case assessment of whether particular information meets the "right to know test" the House of Lords' judgement may leave the media uncertain as to whether particular material will be afforded the protection of qualified privilege. It does, however, allow the media to argue that the defence applies in a much wider category of cases, namely to any material that is of legitimate public concern, not just to political information. The practical reality is that it will usually be fairly easy to identify material that falls into this category and Lord Nicholls' judgement provides guidance to journalists which should enable them to take steps to ensure that their pre-publication investigations and conduct meet the test.

The media will have to come to terms with the prospect of a judge deciding whether a publication meets the duty and interest test on the basis of tests such as those itemised by Lord Nicholls. However, as he observed, "the common law does not seek to set a higher standard than that of responsible journalism, a standard the media themselves espouse." In practice the British media should find that by following that standard the defence will be afforded to them.

English judges will also have to perform the balancing act between the right to freedom of expression and the right to reputation in these public interest cases and pay greater regard to the right to freedom of expression in the light of the *Reynolds* judgements. As Lord Steyn observed, the constitutional dimension of freedom of expression will be reinforced in October 2000 when the UK Human Rights Act 1998 comes into force. It explicitly provides that the courts must have particular regard to the right of freedom of expression.

Libel practitioners in England face a new legal landscape in the area of qualified privilege. Lord Nicholls anticipated the building up over time of a "valuable corpus of case law." It will be fascinating to see how the media and the courts live up to the new challenge.

Katherine Rimell is a partner with the firm Theodore Goddard and represented The Sunday Times in this case.

A copy of the decision is available at: www.parliament.the-stationery-ffice.co.uk/pa/ld199899/ldjudgmt/jd991028/rey.01.htm

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Irish Supreme Court Rejects Stiffer Appellate Review of Jury Damage Awards

Invokes "Sanctity" of Jury Determinations in Upholding £300,000 Libel Award

In an opinion handed down at the end of July, the Supreme Court of Ireland refused to reduce a jury damage award of £300,000 and costs leveled against an Irish newspaper company, resisting challenges that the award violates provisions of the Irish Constitution and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The Court also upheld a common law rule disallowing both judge and counsel from suggesting proper damage figures to the jury, and held that appellate courts could only overturn jury awards when they are patently unreasonable. *Proinsias de Rosa v. Independent Newspapers*, No. 282/97 (Supr. Ct. Ireland 30 July 1999).

Libel By Implication Claim

The case concerned the leader of the Workers' Party in Ireland, Proinsias de Rosa. In 1992, the *Irish Times* described a 1986 letter allegedly signed by the plaintiff and sent to the Central Committee of the Communist Party of the Soviet Union. The article, which was accompanied by an interview with the plaintiff, concedely stated that the Workers' Party received funds from the Communist Party of the Soviet Union, and that high-level members of the Workers' Party had links to the Official Irish Republican Army and were involved in criminal activities (throughout trial, the defense continued to assert that it had factual support for these statements).

De Rosa sued the newspaper for libel, claiming that the article suggested he had involvement in criminal activities. A total of three juries were called in the case. The first was adjourned after the *Sunday Independent* published an article referring to the same letter, and the second failed to reach a verdict. The third jury, finding that the statements complained of meant that "the Plaintiff was involved in or tolerated serious crime," and that "the Plaintiff personally supported anti-semitism and violent communist oppression," awarded £300,000 and costs.

Constitution and Article 10 Invoked

The defendant appealed the award based on the right to freedom of expression guaranteed under the Irish Constitution and Article 10 of the Convention, and also claimed that the trial court's directions to the jury had been in error. First, the defendant argued that the Constitution and Convention required that jury awards in defamation cases be reasonably proportional to the injury. This proposition was taken up by the European Court of Human Rights in *Tolstoy Miloslavsky v. United Kingdom* [1995] 20 E.H.R.R. 442, in which the court held, "under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered." In this regard, the defendant proposed that counsel should be able to advise juries as to awards granted in other types of personal injury cases for points of comparison.

Noting that the assessment by a jury of damages for defamation "'*has a very unusual and emphatic sanctity*'" (*quoting Barrett v. Independent Newspapers Ltd.* [1986] I.R. 13), the Supreme Court refused to reconsider the longstanding rule in Ireland that neither judge nor counsel can suggest figures to the jury. It examined divergent case law on the topic from the English Court of Appeal, and came to the opinion that if such a procedure were to be followed,

> the jury would be buried in figures [from the judge and the two sides of opposing counsel] and at the same time be subject to the direction of the trial judge that it is not bound by such figures and must make up its own mind as to the appropriate level of damages.

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Irish Supreme Court Declines Reassessment of £300,000 Jury Damage Award

(Continued from page 31)

The court, therefore, resolved that "the giving of such figures . . . would constitute an unjustifiable invasion of the province or domain of the jury." The court apparently did not find it troubling, however, or inconsistent with the rule, that the trial judge instructed the jury three times in two paragraphs that, should it award damages, the amount would be "substantial."

As for the defendant's other recommendation, based on the English case of *John v. M.G.M. Ltd.* [1996] 2 A.E.R. 35, proposing that reference might be made to awards made or approved by the Court of Appeal, the Irish Supreme Court found the English court's holding inapplicable. It found that the resolution in *John* was based on the British Courts and Legal Services Act of 1990, which allows the Court of Appeal to substitute its own award for a jury's damage award, and is not in force in Ireland.

Second, the court examined the propriety of the damage award itself. It held that

> while awards made by a jury must, on appeal be subject to scrutiny by the Appellate Court, that Court is only entitled to set aside an award if it is satisfied that in all the circumstances, the award is so disproportionate to the injury suffered and wrong done that no reasonable jury would have made such an award.

After considering the gravity of the libel, the effect on the plaintiff, the extent of publication, and the conduct of the appellant following publication, the court held that the award did not go beyond "what a reasonable jury applying the law to all relevant considerations could reasonably have awarded," and therefore dismissed the appeal.

Particular consideration was given to the conduct of the defendant, who had offered no apology or retraction for the published statements. Of course, the defendant had claimed that the statements were not libelous (that the factual allegations were substantially true, and that there was no suggestion that the plaintiff was a criminal).

The court also quoted extensively from transcripts of the defense counsel's cross-examination of the plaintiff, in which the plaintiff reiterated several times that his primary desire was for a retraction. The defendant had refused to retract statements it did not feel suggested criminal wrongdoing on the plaintiff's part, and the court found it appropriate to consider the refusal a sort of "aggravating factor" in awarding damages. It also considered the "immensely prolonged and hostile cross-examination" to which the plaintiff was subjected at trial.

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An International View of Dangers to Journalists

Murray Hiebert's one-month stay in a Malaysian prison was an object lesson in "the absolute value of freedom and the preciousness of the right to speak freely," he told a Dow Jones reporter.

Thanks to the First Amendment, it is a lesson that journalists working in the United States seldom have to experience. But outside the U.S. journalists regularly face risks based on their reporting that are virtually unheard of here. Reporters and editors who offend the authorities in other nations may end up in jail. Sometimes, they are injured or even killed in reporting the news. Below we note a few cases from recent months.

The Canadian-born Hiebert's sin was to report a $2.4 million civil lawsuit filed by a popular appeals court judge and his wife against a school that had dropped their 17-year-old son from the debate team. Hiebert, who is the Malaysian bureau chief for *Far Eastern Economic Review,* was convicted of contempt of court because the judges said his article "scandalized" the country's judicial system by insinuating it had "fast-tracked" the case.

Bheki Makhubu scandalized the royal court and citizens of the tiny African nation of Swaziland by printing in the country's only independent newspaper a report that the king's latest liphovela, or fiancee, had dropped out of high school — not once but twice. According to *The New York Times*, Makhubu, who was fired from his job as Sunday editor, faces six years in jail if convicted of the criminal libel charges that have been lodged against him.

"Truth is not the issue in the case," the prosecutor said. "You can say something truthful about someone and still be charged with defamation."

The Media Institute of Southern Africa, a press advocacy organization based in Namibia, says that criminal prosecution of journalists has become more and more common in the region. Journalists in other regions also are feeling the heat of official displeasure. Some examples:

- A leading opposition newspaper in the former Soviet republic of Belarus shut down following a court order that it pay exorbitant damages for articles the national security chief said damaged his reputation. According to The Associated Press, *Naviny* was ordered to pay the official $52,000 after what its editor said was "a summary and unfair" trial in a Minsk court.

"We interfered with the efforts of (President Alexander) Lukashenko and his entourage to frighten citizens and quash dissent," said chief editor Pavel Zhuk.

The newspaper reported on September 14 that Security Council chairman Viktor Sheiman had bought a house for his parents and built a luxurious summer place for himself nearby. It also said that he had risen from the rank of major to major general in five years. The newspaper's assets were frozen the next day. The court ruled in Sheiman's favor on September 24.

The amount of the award was staggering for a publication that earns about $2,700 a month. *Naviny* will resume publication as *Nasha Svaboda*, or "Our Freedom," a tactic it has been forced to use several times.

- A media watchdog group warned that attacks on Romanian journalists investigating possible corruption have increased in recent months, the AP reported. In one incident cited by the Agency for Media Monitoring, Marian Tudor, a reporter for the *Jurnalul de Constanta* weekly, was thrown from a moving train while he was taking manuscripts to Bucharest for printing. Although he had money and other items on him, the unknown attackers took only manuscripts exposing illicit business deals involving companies in the Black Sea port of Constanta.

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An International View of Dangers to Journalists

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"I'm shocked and revolted by what happened, but I shall never renounce my job," said Tudor, who suffered multiple injuries.

The media agency also said that Lorena Boros and Dorina Tataran, reporters for the *Gazeta de Nord-Vest* daily, were attacked by several workers while investigating a construction project in Satu Mare, about 300 miles northwest of the capital. The workers pushed Boros to the ground and took away her digital camera. When police arrived, they arrested the reporters; the Satu Mare Police Chief apologized after publication of a story about the incident.

Ironically, the fall of communism has not stopped the use of communist-era libel laws against Romanian journalists. Several have been jailed or physically attacked in the last ten years.

- Moscow police have launched a criminal libel investigation against Sergei Dorenko, a reporter for ORT Television, the ITAR-Tass news agency said. Dorenko is in trouble for saying that Mayor Yuri Luzhkov and his family are involved in corruption. Luzhkov sued Dorenko and threatened to sue again if the libels continue. ORT is seen as supportive of Luzhkov political rival President Boris Zeltsin whom the Moscow boss accused of trying to smear him.

Dorenko faces a fine and six months in jail if charged and found guilty.

- *The Washington Post* reported that there has been little coverage in Russia of the recent fighting in Chechnya. Much of the news about the war comes from official spokesmen; there have been almost no pictures of actual combat. This contrasts with the aggressive handling when the war flared five years ago in the breakaway republic. The newspaper report underscored the fear of Russian journalists of being kidnapped in Chechnya. A leading NTV correspondent, Yelena Masyuk, was taken prisoner in 1997 and held hostage with two members of her crew for 101 days. They were released only after NTV paid a $2 million ransom.

- Croatia's independent political weekly *Nacional* sued ultranationalist rightwing leader Anto Djapic for harassment after the politician threatened to organize a protest rally of 10,000 supporters against the publication. "The situation could get out of control," Djapic warned.

"It is absolutely unthinkable that a member of parliament should call for a public lynch. . . . This (the harassment charge) is the only way we can get protection for ourselves," editor-in-chief Ivo Pukanic told Reuters.

Djapic is closely linked to President Franjo Tudjman's ruling Croatian Democratic Union Party (HDZ). Reuters reported that Tudjman has attempted to curb media freedom by prosecuting independent journalists and outlets under an extremely restrictive libel law. During a recent Congress of his Party of Rights (HSP), Djapic warned reporters not to write so freely about his party, saying he was running out of patience with them.

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UPDATE

Boehner v. McDermott Rehearing Sought FBI Investigating McDermott?

The FBI has interviewed a Republican congressman who claims that a Democratic colleague illegally distributed a conversation of several Republican leaders taped in 1996.

Agents talked to Ohio Rep. John A. Boehner last month, shortly after a 2-1 ruling by a panel of the Court of Appeals for the District of Columbia that reinstated a civil suit brought by Boehner against Washington Democrat Jim McDermott, whom he blames for distributing the taped conversation to several newspapers. This suggests that the government may be looking into criminal charges against McDermott if it can be shown that he was, in fact, the source of the tapes. There is no suggestion that McDermott had anything to do with the intitial interception and taping of the call.

"Either the investigation was stalled and is now resumed or it's been moving all along, albeit quietly," said Dave Schnittger, a spokesman for Boehner, told the Associated Press. "The pace has picked up considerably in recent weeks."

Meanwhile, lawyers for McDermott, in papers filed November 8, asked the full Appeals Court to reconsider the three-judge panel's ruling.

Federal law prohibits the intentional interception of calls from cellular phones and the distribution of any such recordings if the person distributing the tape knows it was obtained illegally. McDermott has never admitted leaking the tape.

A Florida couple already has been fined $500 each for intercepting the conversation initiated by Boehner, then chairman of the House Republican conference. Boehner and other GOP leaders discussed the House Ethics Committee's investigation of then Speaker of the House Newt Gingrich. McDermott was co-chairman of the Ethics Committee at the time.

Supreme Court Denies Cert. in Louisiana Wiretap Case

The United States Supreme Court has declined to review a Louisiana state court decision reinstating the civil suit of two public officials against a newspaper which published transcripts of wiretapped conversations between them. *Central Newspapers, Inc. v. Johnson*, 1999 U.S. LEXIS 7082, 68 U.S.L.W. 3289 (Nov. 1, 1999). In April, the Louisiana Supreme Court also denied certiorari in the case. *See LDRC LibelLetter*, April 1999 at 45.

The case began when Carol Aymond, a Louisiana attorney, played and distributed copies of taped telephone conversations between the plaintiffs, McKinley "Pop" Keller, a police juror (Louisiana's equivalent for a county commisioner) and Michael Johnson, a state district judge whom Aymond had opposed in a judicial election. When the *Avoyelles Journal* and the *Alexandria Daily Town Talk* published excerpts of the tapes, the plaintiffs sued Aymond and the newspapers under the Louisiana Electronic Surveillance Act.

The trial court granted summary judgment to the the Avoyelles Publishing Company, publisher of the *Journal*, and its owner, holding that the Act imposes civil liability only upon defendants who act with criminal willfulness. It also granted the other newspaper defendant's writ of no cause of action (which is equivalent to a motion to dismiss). However, the Court of Appeal reversed on both counts and held that only publication need be proved in order for a plaintiff to prevail at trial. *See LDRC LibelLetter*, January 1999 at 19.

After the Louisiana Supreme Court denied review, the *Journal*'s owner petitioned for certiorari in the U.S. Supreme Court, to no avail.

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UPDATE

Cert. Denied in Indiana's *Bandido's vs. Journal-Gazette Co.*

The U.S. Supreme Court declined to hear the libel plaintiff's petition for certiorari in *Bandido's v. Journal-Gazette Co.*, letting stand an Indiana Supreme Court judgment that, among other things, held that a private figure plaintiff must prove actual malice when the alleged defamatory statement involves a matter of public interest. *Bandido's v. Journal-Gazette Co.*, 1999 WL 418697 (Ind. June 23, 1999), *cert. denied*, (U.S. Nov. 15, 1999) ("In our view, imposing legal liability only when the news media engage in conduct with actual malice on matters of public or general concern protects the rights and values embodied in the First Amendment to the fullest extent.") *See also LDRC LibelLetter* July 1999 at 11.

The restaurant owner-plaintiff brought suit over a 1988 Fort Worth *Journal-Gazette* article that reported on forced closure of one of its restaurants for health code violations. A subhead in the article attributed the closure to "rats" but the inspection report and text of the article referred only to "evidence of rodents." A jury found the reference to "rats" to have been made with actual malice and awarded plaintiff $985,000.

An Indiana appeals court threw out the award for lack of clear and convincing proof that the newspaper had published the headline with actual malice. The Indiana Supreme Court decision, handed down in June 1999, affirmed holding that the actual malice standard applied in matters of public interest. It also held that the headline was substantially true, noting that "rats" and "rodents" are often used interchangeably.

Supreme Court Ends *Toledo Blade's* Libel Battle With Police

Early this month, the United States Supreme Court denied certiorari of an Ohio appellate court's opinion in *Early v. Toledo Blade*, 25 Media L. Rep. 2569 (Ohio Ct. App. 1997), removing the multiple plaintiffs' last hope to see their claims reinstated. The litigation, which continued for nine years and involved thirty seven claims of libel and invasion of privacy, arose out of a newspaper series documenting reports of police misconduct in Toledo. Most of the information on which the articles were based came from Internal Affairs records of the Toledo Police Division, which the *Blade* obtained through a demand for the disclosure of public records. A group of police officers, and two widows of police officers, brought suit in 1990 for libel and various forms of invasion of privacy.

In a long opinion heavily invoking First Amendment considerations, trial Judge William J. Skow of the Lucas County Court of Common Pleas granted summary judgment to the defendant. *See LDRC LibelLetter*, July 1997 at p.13. The court based it decision on the libel claims partly on Ohio's broad innocent construction rule. As for privacy, relying on *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), the court found that the identity of the individual plaintiffs, each a blameless victim, was newsworthy in the context of a story which as a whole is newsworthy. It rejected out of hand the testimony of a psycholinguist which the plaintiffs presented as evidence, stating that the field of psycholinguistics "barely rises to the category of junk science."

The Ohio Court of Appeals affirmed, and the Ohio Supreme Court denied certiorari. The U.S. Supreme Court denied review without comment. 68 U.S.L.W. 3285 (Nov. 2, 1999).

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UPDATE

Brooklyn Museum of Art Wins Round Against Mayor Giuliani

By Susan Buckley and Matthew Leish

After New York City Mayor Rudolph W. Giuliani sought to force the Brooklyn Museum of Art to remove certain works of art that the Mayor found "sick" and "disgusting" from the exhibition "SENSATION: Young British Artists from the Saatchi Collection," and then sought to punish the Museum when it failed to do so, the Museum brought an action in the United States District Court for the Eastern District of New York alleging that the Mayor's actions violated the First Amendment, the Equal Protection Clause, and state and local law.

On November 1, 1999, Judge Nina Gershon granted a preliminary injunction enjoining Mayor Giuliani and the City of New York from imposing any penalties on the Museum and ordering the payment of all City funds that had been withheld from the Museum. *Brooklyn Institute of Arts and Sciences v. City of New York*, 1999 WL 989081 (E.D.N.Y. Nov. 1, 1999). Judge Gershon held that the defendants' actions in cutting off funding, seeking to evict the Museum from its City-owned building, and threatening to remove the Museum's Board of Directors amounted to "direct and purposeful penalization by the City in response to [the Museum's] exercise of First Amendment Rights." *Brooklyn Institute*, 1999 WL 989081 at *12.

Judge Gershon's opinion reaffirmed the principle that although the City is under no obligation to fund museums at all, having allocated a general operating subsidy to the Museum, it could not revoke the subsidy "because of the perceived viewpoint of the works in the Exhibit." *Id.* at *17 The Court rejected the argument that the Museum's century-old lease and contract with the City gave the Mayor veto power over works displayed in the Museum, noting that "there are no rules, regulations or procedures or even an ad hoc method for determining whether the City would view a particular work as inappropriate." *Id.* at *19.

Judge Gershon also found the defendants' reliance on *National Endowment for the Arts v. Finley*, 524 U.S. 569, 118 S. Ct. 2168 (1998) "misplaced," noting that the Supreme Court had upheld the "decency" provisions at issue in *Finley* only after concluding that the provisions did not in fact permit viewpoint discrimination of the sort engaged in by the City and Mayor Giuliani. *Brooklyn Institute*, 1999 WL 989081 at *17.

In addition to granting the preliminary injunction, the court denied defendants' motion to dismiss on abstention grounds under the principles of *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971), ruling that an ejectment action instituted by the City against the Museum in New York State Supreme Court two days after the federal action was commenced was a pretextual effort to pressure the Museum to cancel the exhibit and was brought "without any reasonable expectation by the City that it could prevail on the merits." *Brooklyn Institute*, 1999 WL 989081 at *11.

The City and Mayor Giuliani have appealed from Judge Gershon's preliminary injunction ruling. It is anticipated that the Second Circuit Court of Appeals will hear argument in early January.

Susan Buckley and Matthew Leish worked with Floyd Abrams, Cahill, Gordon & Reindel, New York, in representing the Brooklyn Museum in this matter.

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UPDATE

Texas Court Dismisses Wiretap and Civil Rights Claims Against School Board and Former Board President

By Stacey Doré

In his third wiretap act lawsuit, former Dallas Independent School District (DISD) trustee Dan Peavy came away empty-handed again as the federal court dismissed his claims against the DISD and its former president Sandy Kress. At a DISD board meeting in 1995, two DISD trustees read into the public record a transcript of a telephone conversation during which Peavy used racial slurs and other offensive language. Peavy resigned from the DISD board within days after the public airing of his conversation, which he claimed had been intercepted illegally. In other lawsuits, Peavy has sued New Times, Inc., publisher of the *Dallas Observer* (*See LDRC LibelLetter*, September 1997 at 8) and WFAA-TV in Dallas (*See LDRC LibelLetter*, October 1999 at 10).

Peavy sued DISD and Kress under the federal wiretap act (18 U.S.C. § 2510 *et seq.*) and 42 U.S.C. §1983 for allowing the transcript to be read at the DISD board meeting and for subsequently disclosing the transcript to members of the media. Dallas federal Judge Sam Lindsay granted summary judgment for the defendants in August. *See Peavy v. DISD*, 57 F. Supp.2d 382 (N.D. Tex. 1999).

Assuming *arguendo* that the telephone conversation was unlawfully intercepted, the court held that Peavy failed to provide any evidence that the defendants knew or should have known that the taped conversation was the result of an illegal interception, as the federal wiretap act requires. Importantly, the court noted that neither the offensive content nor the private nature of the telephone conversation was enough to put the defendants on notice that the recording was illegal. Moreover, the anonymous note accompanying the tape, which described the tape as containing "parts of a conversation that I had with Dan Peavy," would have led a reasonable person to conclude that one party to the intercepted conversation had consented to the recording, which would have made it lawful under the federal wiretap act.

With respect to Peavy's civil rights claim, the court held that the defendants did not violate Peavy's Fourth Amendment right to privacy by disclosing the unlawfully intercepted conversation because they did not participate in or have knowledge of the underlying illegal interception. Accordingly, there was no state action. Although Peavy also claimed that the defendants disclosed the intercepted conversation to the media and others in violation of the Texas Open Meetings and Records Acts, the court declined to address that claim because Peavy failed to specify which provisions of those Acts the defendants allegedly violated.

Finally, the court held that, even if Peavy had stated a claim for violation of his constitutional right to privacy, Kress was entitled to qualified immunity. Because Kress did not know or have reason to know that the interception was illegal, his conduct in allowing the transcript to be read into the record was not objectively unreasonable in light of clearly established law.

The court rejected Peavy's claim that Kress's conduct was objectively unreasonable because it violated the Texas Open Meetings Act. First, the court noted that Peavy was required to establish a violation of federal law, not a state statute, to recover under § 1983. Second, the court opined that reading the transcript of the telephone conversation into the record did not violate the Texas Open Meetings Act because Peavy's opinion about minorities was a matter of public concern which the Act permitted to be discussed and disclosed at a public DISD board meeting.

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UPDATE

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Peavy has not appealed the district court's judgment dismissing his claims against Kress and DISD.

Stacey Doré is with Vinson & Elkins, Dallas, Texas, which is representing WFAA-TV in the related litigation.

Jewell Appeals Public Figure Ruling in Atlanta *Settles Other Suits*

The Richard Jewell litigation saga continued this month with a settlement and an appeal. Jewell was once under FBI investigation for the Olympic Park bombing and subsequently brought suit against several news organizations that reported on it. In November, Jewell agreed to a settlement from ABC in a libel suit brought against WABC-FM in New York. His claims were based on statements made by talk show host "Lionel" Michael Lebron. *See LDRC LibelLetter*, October 19998 at 19. The case settled for $5,000. Jewell has obtained settlements for unspecified amounts from CNN, NBC-TV, NewsAmerica, and Piedmont College, his former employer.

In Georgia, however, litigation continues in the case of *Jewell v. The Atlanta Journal-Constitution*, Jewell's last remaining lawsuit related to the bombing investigation. Last month's *LDRC LibelLetter* reported that a trial court had deemed Jewell a voluntary limited-purpose public figure because of his many voluntary media appearances following the bombing. *See LDRC LibelLetter*, October 1999 at 13. The Georgia Court of Appeals recently agreed to review this decision at the request of Jewell's counsel, L. Lin Wood Jr.

That appeal is in addition to one already pending in the Court of Appeals, which was raised by two *Journal-Constitution* reporters who refused to reveal confidential sources who supplied information for the Jewell reports. The trial court judge, John R. Mather of the Fulton County Court, ordered the reporters, Ron Martz and Kathy Scruggs, jailed if they did not reveal the sources. The reporters have remained free while the appeal is pending.

Ninth Circuit Affirms Injunction to Keep Hawaiian Newspaper Running

In an interlocutory appeal, the Ninth Circuit affirmed a district court injunction prohibiting two Hawaiian newspapers from ending their Joint Operating Agreement (JOA). *State of Hawaii v. Gannett Pacific Corporation*, No. CV-99-00687-ack (9th Cir. Nov. 15, 1999). The Court of Appeals applied an "abuse of discretion" standard and found that as the trial court had not based its decision on erroneous legal principles or on clearly erroneous findings of fact, reversal was not called for.

The *Honolulu Advertiser* and the *Honolulu Star-Bulletin* have operated under the JOA at issue since 1993, pursuant to which they share commercial, circulation, and advertising departments (which are owned by the *Advertiser*), but maintain editorial and reportorial independence. Such JOA's are permitted under the Newspaper Preservaton Act, which provides exemptions from antitrust liability in order to slow the proliferation of one-newspaper communities.

In October, the newspapers agreed to end the JOA, with the *Advertiser* paying the *Star-Bulletin* $26 million, an amount roughly equivalent to what it would have received during the remainder of the JOA's term in guaranteed annual returns. Because the *Advertiser* holds all of the operating assets, the end of the JOA would effectively shut down the *Star-Bulletin*, leaving the island of Oahu with only one daily newspaper.

The State of Hawaii filed an antitrust complaint against the shut-down and moved for a preliminary injunction. The U.S. District Court for the District of Hawaii granted the injunction based on a theory of "editorial competition." *See LDRC LibelLetter*, October 1999 at 31. Essentially, the court held that the termination agreement constituted a conspiracy to end competition for readers between the two independent editorial departments. This, the court

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UPDATE

Ninth Cir. Affirms Injunction to Keep Hawaiian Paper Running

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found, constituted restraint of trade, a conspiracy to monopolize, and an attempt to monopolize under the Sherman Act. Under the terms of the injunction, to which the defendants have offered both antitrust law and First Amendment challenges, the newspapers must not proceed in any way toward implementing their termination agreement, and they must both continue producing "high quality newspapers."

The case will proceed on the merits of the Sherman

Ninth Circuit Issues Amended Opinion in *Berger v. Hanlon*

In an order issued November 4, 1999, a panel of the Ninth Circuit amended its opinion of August 27, 1999 in the media ride-along case of *Berger v. Hanlon*. The amended opinion reflects the concerns of the media defendants that the August decision, issued on remand from the Supreme Court following its decision in *Wilson v. Layne*, 119 S. Ct. 1692 (1999), misapprehended the Supreme Court's order. In effect, it reopens the question of the media defendants' Fourth Amendment liability, which the August opinion appeared to presume. *See LDRC LibelLetter*, October 1999 at 41.

This case, which involved coverage by CNN of the execution of a search warrant on Paul and Erma Bergers' Montana ranch by Fish & Wildlife agents, was disposed of by the Supreme Court at the same time as *Wilson v. Layne*. In *Wilson*, the Court held that the Fourth Amendment was violated when law enforcement officers allowed reporters to accompany them in executing a valid search warrant. However, the Court also found that at the time of the violation, the law was unclear, and therefore the law enforcement defendants enjoyed qualified immunity from liability. *See LDRC LibelLetter*, June 1999 at 1.

In a per curiam opinion issued the same day, the Court vacated the Ninth Circuit's first judgment in *Berger* and remanded for further proceedings in line with *Wilson*. Soon after, it denied CNN's petition for certiorari, seeking review of the Ninth Circuit's holding that CNN was a "joint actor" in the alleged Fourth Amendment violations and therefore incurred joint liability with the state actors.

The Ninth Circuit's first opinion on remand, although dismissing the Bergers' claims against the Fish & Wildlife officers pursuant to their qualified immunity under *Wilson*, reinstated the claims against CNN, the CNN reporters, and Turner Broadcasting System. The panel held that the media defendants were not entitled to qualified immunity.

It also appeared to presume that the Bergers' Fourth Amendment rights were indeed violated, although the Supreme Court had vacated the opinion finding those violations. The August holding remanding the case against the media defendants to the district court stated:

> In our original decision, we held that the media defendants were not entitled to summary judgment on the Bergers' *Bivens* claims because the media participated as 'joint actors' with the federal officers . . . . The Supreme Court affirmed our holding that a violation of the Fourth Amendment occurred in this case. *Berger v. Hanlon*, 27 Media L. Rep. 2213, 2214-15 (9th Cir. 1999).

As reported in last month's *LibelLetter*, the media defendants were concerned that this language would foreclose them from arguing, when the case is reheard at the district court level, that they had not violated the plaintiffs' Fourth Amendment rights in accompanying the law enforcement officers onto the plaintiffs' land. They moved for rehearing or rehearing *en banc*, arguing that the Supreme Court had not held that Fourth Amendment violations had occurred, but merely that the Bergers had *alleged* them in their complaint.

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UPDATE

Ninth Cir. Amended Opinion in *Berger*

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The language in the per curiam order referring to Fourth Amendment violations, argued the defendants, quoted the finding in *Wilson v. Layne* that the "police violate the Fourth Amendment rights of homeowners when they allow members of the media to accompany them during the execution of a warrant in their home." According to the defendants, this holding did not necessarily decide the Bergers' case, which differed from *Wilson* at least in the sense that the search took place out of doors. They also contended that the panel mischaracterized its own original holding on the issue of joint actor liability, as the first opinion held only that the defendants were not entitled to summary judgment based upon the record before the court at the time. *See LDRC LibelLetter*, October 1999 at 41.

Initially, the Ninth Circuit refused to rehear the case, but it recently amended the offending language. The amended opinion reads:

> The Court agreed with our holding that the plaintiffs *stated a claim when they alleged* that the federal officers violated the Fourth Amendment . . . . In our original decision, we held that the media defendants were not entitled to summary [sic] on the Bergers' *Bivens* claim because the Bergers *alleged* the media participated as 'joint actors' . . . . The Supreme Court affirmed our holding that a violation of the Fourth Amendment *by the media defendants was alleged* in this case.

Berger v. Hanlon, No. CV-95-00046-JDS (9th Cir. November 4, 1999) slip op. at 13305-6 (emphasis added).

The Bergers' Fourth Amendment claims against Turner Broadcasting, CNN, and the CNN reporters have been remanded to the district court for further proceedings.

Federal Judge Dissolves TRO in JonBenet Newsgathering Case

Judge Walker Miller of the U.S. District Court in Colorado has refused to extend a temporary restraining order which prevented a Colorado District Attorney from proceeding with a grand jury investigation of the *Globe* tabloid and one of its editors. The investigation concerns whether alleged newsgathering attempts by *Globe* and editor Craig Lewis violated Colorado's commercial bribery and extortion statutes. *Lewis v. Thomas*, No. 99-WM-1931 (D. Colo. Nov. 12, 1999).

In the instant order, Judge Walker referred to his oral ruling of October 28. In that ruling, the judge found no clear legal precedent as to whether a pre-indictment grand jury investigation constitutes a pending state criminal prosecution for purposes of *Younger v. Harris*, 401 U.S. 37 (1971). Because an attorney who assisted *Globe* in its newsgathering for the Ramsey coverage had already been indicted on the same criminal charges, and an injunction in this case might affect the outcome in the other prosecution, Judge Walker found it appropriate to abstain from enjoining the investigation. He dismissed the case with prejudice and awarded costs to the District Attorney, David A. Thomas.

The order dissolves a TRO that Judge Miller granted to the *Globe* and Lewis in early October which prohibited the District Attorney Thomas from investigating whether Lewis attempted to purchase a copy of the JonBenet Ramsey ransom note from a handwriting expert. Thomas launched a grand jury investigation aimed at indicting Lewis and *Globe* for violating the bribery and extortion statutes, both of which are felony charges.

Judge Walker granted the TRO after *Globe* and Lewis argued that any criminal charges would constitute a First Amendment violation, in that application of the statutes to routine newsgathering activities would chill conduct protected by the First and Fourteenth Amendments.

An identical proceeding in a Colorado state court, which has also temporarily enjoined further grand jury proceedings in the matter, was still pending at press time.

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Minutes of the Annual Meeting of the Media Membership of LDRC, Inc.
November 10, 1999

Chairman's Report

The meeting was called to order by the Chair, Kenneth M. Vittor (The McGraw-Hill Companies). Ken Vittor noted that LDRC, Inc. has had a very productive year and is enjoying financial health, and he thanked the Board of Directors for taking an active role in LDRC's endeavors.

Election of Directors

Board Member Harold W. Fuson, Jr. (The Copley Press, Inc.) nominated Anne Egerton of National Broadcasting Company, Inc. and Dale Cohen of the Tribune Company to the two newly created seats on the Board of Directors. The nominations were seconded by Robin Bierstedt (Time Inc.) and were unanimously approved by the membership. Sandra Baron, who held the proxies for members not present, voted approval on their behalf.

Hal Fuson also nominated Mary Ann Werner of The Washington Post Company and Robin Bierstedt of Time, Inc. for reelection to two-year terms on the board. The nominations were seconded by Susanna Lowy (CBS Broadcasting Inc.) and again received unanimous approval. Susanna Lowy, Kenneth Vittor, and Harold W. Fuson, Jr. will be entering the second year of two-year terms.

Executive Director's Report

Next, LDRC Executive Director Sandra Baron gave her report. First she introduced the staff members that were present, staff attorneys John Maltbie and David Heller and LDRC Fellow Elizabeth Read. She also mentioned the efforts of legal assistant Nila Williams and administrative assistant Michele LoPorto in preparing for the LDRC annual dinner to be held that evening.

Sandy thanked the membership, and particularly the board, for setting the organization's priorities and agenda. She voiced her appreciation for various members' contributions to LDRC's 50 STATE SURVEY's. She also expressed thanks to those members who contributed articles to the Texas Interlocutory Appeal Statute BULLETIN, which has been helpful in the effort to have such a statute enacted in Pennsylvania. On that note, Sandy urged those present to work for the enactment of interlocutory appeal statutes in their respective jurisdictions.

Next Sandy described LDRC's other recent or current projects, including the decade-ender BULLETIN and the Cyperspace articles project headed by Steve Lieberman. She noted that this year's biennial NAA/NAB/LDRC conference in Virginia had record attendance. Sandy urged members to submit their briefs, or well-written briefs by their outside counsel, to the LDRC brief bank, noting that it is often used. She suggested that one improvement of the current system, under which LDRC interns typically fill out the summary form, would be to include the form on the LDRC website so that the attorneys submitting briefs could fill it out themselves.

Sandy also mentioned the LDRC LIBELLETTER, which benefits from the efforts of a committee headed by Adam Liptak of the New York Times Company and from the many members who contribute articles. Noting that Media Members have in recent years become active on committees, which once were thought of as exclusively the province of the Defense Counsel Section, Sandy urged those present to promote the idea of joining a committee to their in-house colleagues.

She introduced the fledgling Newsroom Seminar Bank project, which came about because of the many requests for outlines of newsroom

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Minutes of the Annual Meeting of the Media Membership

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seminars and examples of media materials that had engendered legal disputes. This project is headed by David Korzenik and Robert Nelon, co-chairs of the Prepublication Review committee. Sandy urged the membership to submit such examples, and/or ideas for topics that they cover in their own newsroom seminars.

Another current project to which Sandy referred is the Summary Judgment Checklist currently being prepared by the Pretrial Committee, and headed up by DCS members Charity Kenyon, Joyce Meyers, and Henry Abrams. Also, she suggested that the ongoing expansion of the expert witness bank, a project headed by the Expert Witness Committee, chaired by James Stewart, could be facilitated by media members who know of retiring colleagues. Sandy noted that the database now suffers from an excess of academics.

She went on to discuss the forthcoming complaint survey assembled by John Maltbie and Nila Williams, which has benefitted from the input of Media/Professional and Employers Reinsurance Corporation, as well as other members. Sandy noted that gaps in the survey's coverage previously noted by members have been closed, and the numbers indicate a similar bottom line.

Sandy closed her report with a reminder that LDRC is a cooperative organization, and requires collective efforts by the membership to continue its success.

The London Conference

Sandy turned the floor over to David Heller, who has been active in making arrangements for the "London 2000" conference to be held September 25-26, 2000. David announced the chosen venue, Church House, and the event planner, Blair Communications, both of which have websites. He noted that, along with fifty U.S. members who have indicated an intention to attend the conference, some Canadian attorneys who are members of an organization much like LDRC in Canada also have expressed an interest. International Committee co-chairs Kevin Goering, Richard Winfield, and Robert Hawley will create a timeline mapping out the goals to be accomplished over the next eleven months.

David described the theme of the conference as a review of significant developments in English law, creating a platform to advocate legal reform in the UK and to maintain and extend professional relationships with UK media lawyers. As an addendum, Sandra Baron mentioned that Bob Hawley has a particular interest in urging US media to insist that their UK lawyers only represent media and not plaintiffs.

New Business

Ken Vittor discussed other new business, which consisted of the LDRC annual dinner to be held next year. Noting the efforts of the board to choose speakers and a recipient of the *William J. Brennan, Jr,. Defense of Freedom* award each year, he made a plea for ideas for next year's dinner. By some accounts it will be the twentieth anniversary of LDRC, and he suggested the possibility of recognizing the founders at some point in the year.

Sandra Baron remarked that DCS has already begun to brainstorm ideas for the event, and that it would be discussed at the joint Board of Directors/DCS Executive Committee meeting to be held the morning of Friday, November 12. She complimented David Schulz, Treasurer and soon-to-be Secretary of the DCS Executive Committee, for his efforts in this regard.

Defense Counsel Section

Due to Tom Leatherbury's absence, Sandra Baron spoke about DCS business. She noted that

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Minutes of the Annual Meeting of the Media Membership

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the annual meeting would occur on the following morning, at which each current officer of the Executive Committee would ascend to the next office. Thomas Kelley would become the President, Susan Grogan Faller the Vice-President, David Schulz the Secretary, and Tom Leatherbury the President Emeritus. Sandy noted that Luther Munford of Phelps Dunbar had been nominated to become the next Treasurer, and she remarked on the geographic diversity of the Committee.

NAA/LDRC/NAB Conference

Toni Gilbert of the Newspaper Association of America spoke about this year's conference, which was held in Arlington, Virginia from September 22 to 24. She noted that there were only a few logistical problems, and that overall the conference was quite a success. Though the numbers are not final, it seems that the conference came out in the black. She announced that her efforts in securing New York CLE credit for the conference had finally borne fruit, and that attendance would count as 15 hours of CLE credit. She also announced that the next conference would also take place in the Washington, D.C. area, as most attendees felt that it was the most convenient location. However, as NAA had heard some complaints about the hotel, a new venue would be chosen.

Sandra Baron also reminded those who had attended the conference to return their evaluation forms, as the NAA has received very few as of yet.

There being no further business, the meeting was adjourned.

The minutes from the 1999 Annual DCS Breakfast Meeting will be mailed with the December *LibelLetter*.

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Ventura v. Cincinnati Enquirer: Context from the Past and Questions for the Future

By John P. Borger

In the latest fall-out from the *Cincinnati Enquirer's* investigative articles on Chiquita Brands International, Inc., a former Chiquita in-house lawyer who provided information to reporters has sued the newspaper because he claims a fired reporter disclosed the source's name to Chiquita and to law enforcement officials. The public attention given to this lawsuit could encourage more attempts to use "broken promise" suits against the news media.[1]

Ventura's Claims

In his complaint filed Sept. 27, 1999, against the *Cincinnati Enquirer* and Gannett Company, Inc. (but not against reporters Michael B. Gallagher and Cameron McWhirter)[2], George G. Ventura alleges that he initially responded anonymously to the reporters' Internet plea for assistance in providing information about "the Cincinnati-based multinational corporation."[3] He followed this with a phone call in which he stated "I do under all circumstances wish to remain anonymous." Once he identified himself to the reporters, McWhirter allegedly told Ventura "we would never reveal [your name]. I'd go to jail and never reveal it." In a later conversation, Gallagher assured Ventura that "we're fully protected from disclosure of any sources or information" and that "I've sat in a jail cell in Michigan for not disclosing stuff before. We take that, obviously, very seriously and no matter what you decide, we're not going to reveal anything, and we will protect the identity."

Based on these and other statements, Ventura provided certain material to the reporters. In his final communication to Ventura (and in an attempt to apologize for not responding more quickly to some expressions of concern by Ventura), Gallagher advised him that Chiquita had launched an investigation claiming that internal voice mail messages and documents had been accessed by or provided to the reporters and that Gallagher consequently was attempting to maintain a low profile "while our lawyers handle all of this to protect all our sources."

Ventura states that, unknown to him at the time, the reporters secretly tape recorded their conversations with him, thereby breaking a promise not to attach his name or identity to the information he provided. He complains not only about the initial taping, but about the failure to destroy those materials.[4] Ultimately, of course, he complains that these materials and his name were provided to Chiquita and to local and federal law enforcement authorities, and alleges that the defendants "did so voluntarily and purposefully in order to further its, his or their own financial, legal, professional or personal interests" despite their promises to him.

Ventura casts this scenario into five legal theories: breach of contract; tortious breach of contract; promissory estoppel; promissory fraud; and negligence. The negligence claim addresses potential problems in holding the corporate defendants liable for Gallagher's disclosures about Ventura after Gallagher had been fired by the *Enquirer*. Ventura alleges that the paper "knew or with reasonable diligence should have known that Mr. Gallagher in performing his professional responsibilities as a journalist on previous occasions had made material misrepresentations of fact concerning sources of information."[5]

Defendants' Position

Defendants' answer was not due until late November, and therefore not available for this article. However, in a published account shortly after Ventura filed his complaint, *Enquirer* publisher Harry M. Whipple stated that the paper "has never disclosed any information that would identify a

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source" and characterized the suit as "without merit."[6] In the same article, Gallagher's lawyer stated that "we don't believe that Mike Gallagher broke any promises to Mr. Ventura," and McWhirter's lawyer said that McWhirter did not identify sources for the Chiquita story. The article further explains that Gallagher named Ventura as one of his sources during a criminal court hearing and signed a cooperation agreement requiring him to identify sources; McWhirter, who was not charged with a crime, signed a cooperation agreement but did not name sources.

Background: Claims of Broken Promises before and after Cohen v. Cowles Media Company

As most media lawyers will recognize, Ventura is sailing into waters so far most thoroughly explored in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).[7] *Cohen* was not the first time sources or news subjects had claimed that the press had broken a promise. Despite the fears of some media observers, the case did not lead to hosts of successful reported copycat actions in the decade since the jury returned a $700,000 verdict in Cohen's favor, although it is impossible to quantify the number of threats or claims that have been quietly rebuffed or settled.[8]

Broken Promise Claims before Cohen

One of the earliest attempts to enforce a "press promise" in the courts leapt all the way to the United States Supreme Court decades before *Cohen*. It arose in the mid-1960s from a documentary film on the life of inmates at the Massachusetts Correction Institute at Bridgewater, which included a scene of guards conducting a "skin search" of naked inmates. The producers allegedly had received permission to film only upon conditions that photographs would be used only of inmates legally competent to sign releases, that only the "upper extremities" of inmates would be photographed, and that the film would be exhibited only for educational purposes and not in commercial theaters. The United States District Court for the Southern District of New York rejected the guards' attempt to enjoin commercial distribution of the film,[9] but the Massachusetts Supreme Judicial Court enjoined distribution, in the name of the inmate.[10] The United States Supreme Court denied certiorari in the Massachusetts case, over the objections of Justices Harlan, Brennan, and Douglas, who discerned an important First Amendment dimension in the case. A Superior Court judge in Boston finally lifted the injunction in 1991.[11]

Over the next two decades, "broken promise" claims occasionally accompanied defamation or privacy claims against the press, with little success.[12] Two cases, however, came to trial. In *Fries v. National Broadcasting Co.*, the plaintiff alleged that a reporter had obtained information after an oral promise of confidentiality, but had broken the agreement by identifying the plaintiff as a source to the plaintiff's co-workers. In pretrial motions, the court ruled that the agreement fell under the California statute protecting reporter-source communications. The judge ruled that the effect of the statute was to require that the plaintiff prove the media defendant breached the contract with "wanton and reckless disregard of the consequences" to the source. The first trial resulted in a hung jury, and the case settled before the second trial began.[13]

A more widely known case came to trial several years later, also in California. Jeffrey MacDonald, a doctor in the Marine Corps' Green Beret unit, was convicted of the murder of his pregnant wife and their two daughters. Prior to the trial, Joe McGinnis arranged with MacDonald to write a book detailing the murders and MacDonald's trial. Under this contract, McGinnis was to get total access, a promise of exclusivity and a release from all legal liability, while MacDonald was to receive a percentage of the advance and royalties. During their association, MacDonald believed that he and McGinnis had

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become friends, and that McGinnis was writing a favorable account. In the final version entitled *Fatal Vision*, however, McGinnis portrayed MacDonald as a brutal killer.

MacDonald filed suit for fraud, breach of contract, breach of the covenant of good faith and fair dealing, and intentional infliction of emotional distress. The count for breach of contract was based upon a provision in the release "that the essential integrity of my life story is maintained." MacDonald claimed that because McGinnis' book did not support MacDonald's version of how the murders occurred, McGinnis must have been lying when he represented he was writing the "true" story. The trial court denied McGinnis' motion for summary judgment and allowed the case to go to the jury. The trial lasted six weeks, beginning in July 1987. The trial judge ruled that there were no First Amendment issues involved in the dispute. The jury was unable to reach a verdict, after which the case was settled. McGinnis paid MacDonald $325,000 and MacDonald agreed to a statement that McGinnis had done nothing legally wrong.[14]

The Cohen Case

Cohen arose from the disclosure by two newspapers of the identity of Dan Cohen as the source of certain campaign information about Democratic Lt. Gov. candidate Marlene Johnson in the 1982 elections. Cohen was a public relations representative working on Republican candidate Wheelock Whitney's gubernatorial campaign; although his actions had not been approved in advance by that campaign, he expected the campaign to pay for his work. He did not explain his relationship to the Whitney campaign to any reporters when he gave them court documents reflecting 12-year-old misdemeanor convictions against Johnson for shoplifting and unlawful assembly.

Although their reporters had promised Cohen confidentiality when he first provided documents to the reporters, editors at the Minneapolis and St. Paul newspapers independently concluded that the public interest in learning facts relevant to an upcoming election supported disclosure of Cohen's identity, due to multiple factors, including spreading knowledge within political circles of Cohen's role in providing the information, Johnson's allegations of "smear campaign" tactics by Whitney forces, and the Whitney campaign's adamant denial of involvement.

Cohen's original claims against the newspapers were based upon breach of contract and upon fraudulent misrepresentation. Minnesota appellate courts rejected both breach of contract and misrepresentation claims on state law grounds at various points in the proceedings. The Minnesota Court of Appeals affirmed the compensatory damages of $200,000 for breach of contract, but overturned the fraud claim (and with it, the $500,000 punitive damages award) because of the clear evidence that the reporters intended to keep their promises of confidentiality when they made them.

The Minnesota Supreme Court affirmed the ruling as to lack of fraudulent conduct, and further held that contract law did not apply to promises between reporters and sources in "the special milieu of media newsgathering." The Minnesota Supreme Court itself first raised the possibility of applying a theory of promissory estoppel, but concluded that in this case involving the "quintessential public debate" of a political campaign, the First Amendment interest in encouraging public debate outweighed any interest in enforcing the promise to the source.

Cohen appealed that First Amendment conclusion to the United States Supreme Court. That court ruled 5-4 that the First Amendment does not prohibit a plaintiff from recovering damages, under state promissory estoppel law, for a newspaper's breach of a promise of confidentiality given to the plaintiff in exchange for information, because the press is not immune from the general application of general laws. Justices Blackmun, Marshall, O'Connor and Souter dissented in strongly worded opinions, arguing that

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only a compelling governmental interest could justify punishing the press for publishing truthful information and that no such interest had been presented in the instant case.

Perhaps weary of the long legal battle, the Minnesota Supreme Court on remand allowed Cohen to recover the compensatory damages award under a theory of promissory estoppel, even though that theory had never been submitted to the jury.

Some courts have been skeptical of "broken promise" claims, dismissing them because the defendants were not parties to the alleged contract, because there were no "clearly ascertainable damages," because the alleged contract was ambiguous, or because the promise could not have been enforced to begin with.

Broken Promise Cases after Cohen

Although the precise circumstances of *Cohen* — disclosure of a source's identity despite an express pledge of confidentiality — are extremely rare, the attention given to the case seemed to encourage claims involving less-specific promises. Those claims produced mixed results.

In *Morgan v. Celender*,[15] the mother of two children who had allegedly been abused by their father claimed that the newspaper published the names of the children despite an agreement by the reporter not to identify them. The reporter, on the other hand, took the position that the mother had specifically authorized the disclosure of her children's identity and had asked only that her new married name not be published. The complaint sought damages based on fraud and invasion of privacy, and after a three day trial in which each side testified about the conversations between the reporter and the source, the judge dismissed the case, ruling that the information was public and of public concern, so there was no invasion of privacy, and that the reporter had not misrepresented any existing fact but merely promised to do something in the future, so there was no fraud.

In *Anderson v. Strong Memorial Hospital*,[16] an individual brought suit after a newspaper published a rear-angle photograph of him receiving treatment in an AIDS clinic. The individual claimed the newspaper broke a promise that he would not be identifiable and, at trial, produced several friends who testified they were able to recognize him in the photograph. The newspaper acknowledged that its photographer had told plaintiff he would not be identifiable, but claimed the rear angle setup, along with retouching techniques, had successfully obscured plaintiff's identity. The New York court disagreed. Relying on *Cohen*, the court held that where a promise of anonymity is made, the burden of carrying out that promise rests with the news organization. The fact that the newspaper's editors could not identify the plaintiff was not enough, the court said, when the plaintiff was subsequently identifiable to friends.[17]

In *Ruzicka v. Conde Nast Publications, Inc.*, plaintiff, a sexual abuse victim who had been interviewed for a *Glamour* report on abuse by psychotherapists, claimed that the magazine broke its promise that she would not be identifiable by including in the report a number of details about her personal background that she claimed allowed her friends to identify her. In defense, the magazine argued that by changing the name of the woman, they kept their promise that she would not be "identifiable."

The district court ruled against the plaintiff, holding that the promise was not sufficiently "clear

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and definite" to be enforceable:

> Just what will make a private figure identifiable depends on the information known by that person's friends and acquaintances. A reporter, for the most part, cannot know what information will threaten the anonymity of a source, unless the source specifies what facts should not be published.[18]

However, that decision was reversed on appeal to the Eighth Circuit, which objectified "identifiability" by equating it with the concept of identification in a defamation action.[19]

Some courts have been skeptical of "broken promise" claims, dismissing them because the defendants were not parties to the alleged contract,[20] because there were no "clearly ascertainable damages,"[21] because the alleged contract was ambiguous,[22] or because the promise could not have been enforced to begin with.[23] Others have allowed "broken promise" claims to proceed, even if the damages were only nominal.[24] It should be remembered that Cohen recovered damages based on his loss of employment after he had been identified as the confidential source, and not for injury to his feelings or reputation; this made it easier for the United States Supreme Court to distinguish its earlier decision in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). Consequently, some courts have rejected "broken promise" claims which accompanied defamation or privacy claims, where the plaintiff clearly was seeking recovery for emotional distress or damaged reputation.[25]

As these claims generally met with little success in the 1990s, they appeared to be falling out of faddish favor, supplanted by *Food Lion*-inspired claims of trespass and fraud. But within the past year or two new "broken promise" claims have surfaced. Some of these claims received no public attention before they were quietly resolved, so — apart from the participants in the cases, who have little incentive to discuss them — knowledge about these instances is anecdotal, scattered, and vague. However, there have been a few higher-profile situations. For example, in mid-1998, Julie Hiatt Steele, a figure in the Jones-Clinton controversy sued reporter Michael Isikoff and *Newsweek*, claiming that he improperly quoted off-the-record remarks she made during his reporting about Clinton's alleged groping of Steele's friend Kathleen E. Willey. She sought at least $75,000 damages, charging that the reporter breached an "express oral contract" by publishing her off-the-record comments.[26]

In January 1999, a former teenage prostitute sued CBS and the Las Vegas Police Department, claiming that she was subjected to humiliation after appearing on "48 Hours" as part of a story about how Las Vegas police and social service providers fight teen prostitution. According to an Associated Press report at that time, she alleged that the show manipulated her into telling her story and did virtually nothing to shield her identity. CBS contends that the young woman agreed to tell her story with no restrictions on the use of her name, likeness, or identity. After interviews were completed and on the eve of broadcast, the show did accomodate the plaintiff by changing her name and digitally obscuring her face on the broadcast. The case is still in the early stages of discovery.

In *WDIA Corp. v. McGraw-Hill, Inc.*,[27] 34 F. Supp.2d 612 (S.D. Ohio 1998), the court awarded $7,500 in damages for fraud and breach of contrct against *Business Week*, in favor of a re-seller of credit reports. A reporter had obtained credit reports on then-Vice President Dan Quayle and others (with their permission) by stating that he was seeking credit histories of prospective employees, when in fact he was researching a story on breaches of regulations in the Fair Credit Reporting Act

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regarding access to credit histories. The reporter presented false information in order to test whether the re-seller had adequate safeguards in place to protect individuals' privacy. He cited the credit report in an article describing how easily credit reports on any individual could be obtained, but did not name the credit reporting agency in the article.

The court found that the reporter had intentionally misled the agency in negotiating for its services, and found that the reporter breached his contract with the agency by using the credit reports for purposes not authorized in that contract and not paying the fees provided for. It further found that the reporter could not escape liability simply because of his status as a member of the news media. It awarded damages consisting of payment for the services rendered by the agency and consequential expenses associated with an emergency meeting with the agency's principal source of credit information (to avoid being cut off from information after the article appeared).

WDIA may have particular significance in *Ventura*, because both were brought in federal district court in Ohio. *Ventura* threatens to have the highest profile of any such claim since *Cohen*.[28]

Questions Presented by Ventura

Any attempt to assess the likelihood of future developments in *Ventura* is necessarily hampered by lack of access to many of the critical facts, as well as the still-unsettled nature of the law in many respects. With that caveat, however, here are some questions and preliminary thoughts about what this case may mean for the parties and for the press in general.

Nature of Contract

Will reporter-source promises be construed as "contracts" under Ohio law? In the leading case in this area, the Minnesota Supreme Court opted not to use contract law to govern promises between reporters and sources, reasoning:

> We are not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract. They are not thinking in terms of offers and acceptances in any commercial or business sense. The parties understand that the reporter's promise of anonymity is given as a moral commitment, but a moral obligation alone will not support a contract. . . . Each party, we think, assumes the risks of what might happen, protected only by the good faith of the other party. In other words, contract law seems here an ill fit for a promise of news source confidentiality. To impose a contract theory on this arrangement puts an unwarranted legal rigidity on a special ethical relationship, precluding necessary consideration of factors underlying that ethical relationship. We conclude that a contract cause of action is inappropriate for these particular circumstances.[29]

Although *Cohen* has been cited many times and spawned dozens of law review articles, this particular "no contract" aspect of the Minnesota Supreme Court's first decision has received relatively little attention. This lack of attention may be due to some courts' fairly casual dismissal of pseudo-*Cohen* contract claims,[30] the use of other legal theories such as invasion of privacy to enforce the promised confidentiality,[31] or a failure of the court to consider issues of contract formation at all.[32] Nevertheless, the approach of the Minnesota Supreme Court remains the most extensive judicial examination of this issue, and may be worth argument in *Ventura*. *See generally* A. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 276-94 (1998).

Fraud

Did the reporters have fraudulent intent when they promised confidentiality? A representation as to

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future acts does not support an action for fraud merely because the represented act did not happen, unless the promisor did not intend to perform at the time the promise was made. This fundamental principle led to the reversal of the plaintiff's verdict on the fraud claim in *Cohen*, because the reporters intended to keep their promises of confidentiality at the time they made them.[33] Ventura is likely to face a difficult task in proving that the reporters, at the time of their dealings with him, had no intention of keeping their promises of confidentiality.

He does, however, take a stab at this, alleging that the reporters secretly tape recorded their conversations with him, "thereby breaking their promise not to attach Mr. Ventura's name or identity to the information he provided." Complaint, ¶ 25. While contemporaneous inconsistency with a promise could support a claim of fraudulent intent, the Complaint is inconsistent in its description of this particular alleged promise, and there may be additional problems attributing this fraudulent intent to the employer, such as state law requirements with respect to supervisory complicity in fraud.

> *Courts also are likely to hesitate before enforcing promises of confidentiality among persons involved in criminal activity.*

Employer Liability

Was the newspaper responsible for any disclosure of Ventura's identity by Gallagher? Assuming that Gallagher identified his source only after he had been fired by the newspaper and only as part of the criminal proceedings against him, it seems a stretch to hold the newspaper responsible for those disclosures. Once he was fired, Gallagher could hardly be called an agent of the newspaper, and the paper would seem to have had no power to control or restrict his activities.

Ventura himself moved to suppress evidence against him, contending that he should be protected by Ohio's shield law, only to have the court reject his claim because the privilege belongs to the reporter, not the source.[34] Ventura may have contributed to any disclosure of his role by this motion, or by his own attorney's questioning of Gallagher, and judicial rejection of his claim of confidentiality, whatever the context, likely will have some negative effect on his claims for damages from a breach of that same confidentiality.

The state court rejected his claim of privilege, in part, because extending the privilege could potentially shield the commission of the crimes of unlawful interception of communications and unauthorized access to a computer system, which suggests yet another problem with Ventura's claims.

An Enforceable Contract?

Was Ventura a news source with an enforceable contract? Ventura is likely to find that *Cohen* has not settled all of the law in his favor. Cohen's conduct in leaking campaign dirt to reporters may have been questionable, but it was not illegal in itself or part of an illegal agreement.[35] And the editors' decision to reveal Cohen's identity was voluntary, prompted by their view of their obligation to their readers and the general public in the context of providing political information, rather than compelled by a court or coerced by prosecutors. A court should not sanction a journalist for revealing information that the court itself, or another court or government official, has compelled her to disclose.[36]

Courts also are likely to hesitate before enforcing promises of confidentiality among persons involved in criminal activity.[37] It is inconceivable, for instance, that a court would even recognize a contract, even if promises were explicitly made, among members of organized crime not to inform on one another to law enforcement officials, much less award damages to someone who faced criminal prosecution as a result of a colleague testifying

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against him. Whatever extra-legal enforcement mechanisms might be available to a participant in a joint criminal enterprise, he is not likely to obtain a damages remedy in the courts.

If secondary reports are to be believed, Ventura did more than grant interviews or provide copies of selected documents. He apparently provided passwords and other guidance that enabled the reporters to get into Chiquita's internal voice-mail system.

Reporters' working relationships with sources can take many forms, and are not limited to the pure question-and-answer of interviews or transfer of documents. Sources can provide access to places or events that reporters otherwise would not see.[38] Most journalists would try to protect such sources from any anticipated reprisals. It is not as clear, however, that the law protects this type of source in the same way it protects (or can protect) the more traditional source.

Ohio's shield law, Ohio Rev. Code §§ 2739.04 and 2739.12, for example, provides that no person employed "for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news shall be required to disclose the source of *any information* procured or obtained by such person in the course of his employment" (emphasis added).

To the extent that cases such as *Food Lion* analyze techniques like hidden cameras and surreptitious entry less as expressive newsgathering and more as unlawful conduct outside any First Amendment protection, it may follow that those who make such conduct possible are treated less like news sources and more like accomplices. By simply opening the files of his employer to the unsupervised explorations of a reporter, Ventura arguably placed his employer's interests more at risk (and to less purpose) than by selecting only data that — however adverse disclosure might have been to the employer's interest — directly served the public purposes involved in the news articles. The analogy could become less like Daniel Ellsberg courageously leaking the Pentagon Papers, and more like a security guard leaving the store's back door unlocked for friends to enter and do whatever they pleased.

Such analysis has uncomfortable implications for the press, and one is more likely to see it used by plaintiffs, however, trying to obtain the identity of confidential sources by arguing that such sources are outside the protection of the the privilege or shield laws. Persons seeking disclosure of the identity of confidential sources may argue that particular sources are outside the protection of the privilege because they facilitated the acquisition of information but did not themselves supply information, or because they violated legal duties by providing information. That argument, however, ignores the long-recognized principle that traditional and legitimate newsgathering activity includes cajoling sources into disclosing information that others, such as employers, would prefer not to be disclosed.[39] Protecting journalists from having to disclose confidential sources in such situations may impede remedies for private harm to the employer, but it also serves the broad public purpose of bringing important information to public attention.

Protecting journalists from compulsory disclosure of confidential sources is not the same, however, as financially rewarding sources who have violated their fiduciary duties[40] or engaged in criminal activity.[41] Courts may feel virtuous in enforcing promises of confidentiality when they protect whistleblowers who have come forward with important public information. As in *Cohen*, the courts may enforce promises of confidentiality where no one has the "moral high ground," where no one has engaged in independently tortious activity.

Ventura, however, could find himself in an unsympathetic position, based upon involvement in criminal activity or on violation of possible fiduciary duties owed to his ex-employer that could prevent his recovery under contract law, or based upon "unclean hands" that could bar his recovery under the equitable theory of promissory estoppel.[42] Similarly, in some states, the action would be barred under the

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"wrongful conduct rule."[43]

Damages

What legal constraints exist on Ventura's claims for damages? Unlike Dan Cohen, Ventura does not allege that he lost his job because he breached the confidence of his then-current employer. Rather, he alleges three broad types of damages: First, that he suffered "humiliation, damage to his professional and personal reputation and great emotional distress." Second, that he was "ultimately constrained to relinquish" a position as a law firm partner to which he had been elected prior to the disclosures. Third, that he "has been subjected to a state criminal prosecution, a threat of a federal prosecution and the threat of civil litigation and professional disciplinary proceedings," with attendant financial burdens.

> *Ventura could become just another example of the fundamental principle that "a wrongdoer should never profit from crime."*

Extra-contractual Damages

Ventura is likely to face significant obstacles in his quest for reputational and emotional distress damages, both as a matter of contract law and under the First Amendment. The general rule in many states regarding recovery of emotional distress damages in breach of contract actions is that extra-contractual damages are not recoverable for breach of contract except in exceptional cases where the breach is accompanied by an independent tort.[44]

In *Dean v. Dean*, 821 F.2d 279 (5th Cir. 1987), the Fifth Circuit applied this general rule and denied plaintiff all damages related to emotional distress (including physical harm resulting from emotional distress) arising from a claimed violation of a mutual non-disparagement clause in a settlement agreement. The clause in that case was included as a major inducement to settle a libel and slander lawsuit, and the clause prohibited the parties from making "any statements whatever about the other party, whether derogatory in nature or not." 821 F.2d at 280 n.1.

Nevertheless, when the defendant made multiple statements "bad-mouthing" the plaintiff and the plaintiff brought an action "purely on the basis of a breach of contract theory," 821 F.2d at 281, the Fifth Circuit as a matter of law reversed the $500,000 verdict that a jury had returned in plaintiff's favor. The court pointed out that "had the parties contemplated at the time of [the settlement agreement's] negotiation that mental damages would be an element of damages growing out of a breach of the agreement, they could have so provided by language to that effect in the agreement." 821 F.2d at 283 n.3.

Like claims for mental anguish and emotional distress, claims for injury to reputation are generally considered a form of "extra-contractual damages" that cannot be recovered in an action for breach of contract.[45]

In short, damages for emotional distress and injury to reputation are available in contract cases only in the "exceptional circumstance" when the breach of contract is accompanied by an independent tort; in that circumstance, the "extra-contractual damages" are effectively a function of the independent tort rather than the breach of contract. Promissory estoppel is essentially a variant of contract law, and is subject to the same restrictions on damages.[46]

First Amendment Limitations

Even if Ventura manages to avoid these common-law limitations by invoking his fraud or negligent supervision tort claims, he should face

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First Amendment limitations on these damages. Injury to reputation and emotional distress are classic forms of damages in defamation actions, where they are subject to strict standards of proof.[47] In *Cohen*, the Supreme Court permitted recovery only because it viewed Cohen as "not seeking damages for injury to his reputation or his state of mind," but only for "breach of a promise that caused him to lose his job and lowered his earning capacity."[48]

In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, the Fourth Circuit held that Food Lion could not use the torts of trespass and breach of duty of loyalty to bypass "constitutional libel standards" and recover reputational damages (in the forms of loss of good will and lost sales) caused by ABC's broadcast that revealed the company's questionable food-handling practices.[49]

Ventura's damages by their very nature flow from a truthful disclosure, not a false statement of fact, and — like Cohen — he cannot succeed under the defamation standards of proof. The First Amendment therefore should bar his claims for the defamation-type damages relating to injury to reputation and emotional distress.

Ventura's second broad category of damages — arising from the loss of position in a law firm — may well come within the same proscribed class of damages. The complaint suggests that his problems in this area may have resulted from the law firm's reaction to the general disclosure of his role in *L'affaire Chiquita* and the attendant negative publicity. The more that discovery in the case reveals this injury to resemble typical special damages in a defamation action, or to be simply part of his reputational damages, the greater the likelihood that Ventura will find this area of injury barred from recovery.

Ventura's lawyers, on the other hand, may well advocate a simplistic interpretation of *Cohen*: if you lose your job because a reporter has broken a promise to keep your identity secret, the resulting damages are economic rather than reputational, and are not barred by the First Amendment.

The third type of damages — the claims that Ventura faced criminal and civil prosecutions, disciplinary proceedings, and attendant expenses that he would not have faced if his identity had not been disclosed – could be more troublesome to the defendants. Cohen's claim was that he lost his job because a single supervisor disapproved of his actions. Ventura may argue similarly that these consequences resulted from a few individuals' decisions to bring the legal actions against him, rather than from a broad impact upon his reputation with the general public, and do not require analysis of whether the defendants made any false or defamatory statements.

But that argument ignores the principle that a defamation action can involve publication even to a single third party, as in the infamous libel action that led to the bankruptcy of the *Alton Telegraph*.[50] In this area, the parties are not likely to have clear law to guide them as they work through the factual discovery. That, at base, is a function of the Supreme Court in *Cohen* relying more upon *ipse dixit* than upon extended analysis to explain why Cohen could recover damages and Jerry Falwell in *Hustler* could not.

The courts also might review Ventura's claim for damages arising from the criminal and disciplinary proceedings as, in effect, a claim for indemnity based upon his own criminal or otherwise wrongful activity. Courts often hold that contracts to indemnify another for criminal activity are void against public policy.[51] Ventura could become just another example of the fundamental principle that "a wrongdoer should never profit from crime."[52]

John Borger, a partner at Faegre and Benson LLP in Minneapolis, Minnesota, represented Cowles Media Company in the Cohen action.

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[1] Six weeks after publishing an 18-page series on Chiquita's business practices, the paper fired reporter Michael Gallagher, saying he deceived his editors about how he obtained voice-mail recordings quoted in the report. The paper renounced the articles, published a front-page apology, and said it had agreed to pay Chiquita more than $10 million. For background see *LDRC LibelLetter* July 1998 at 16, April 1999 at23, May 1999 at 5, July 1999 at 23 and October 1999 at 39; *see also* Alicia Shepard, *Bitter Fruit*, AJR, Sept. 1998, at 32. This article proceeds on the assumption that readers are generally familiar with the matter. The focus here is on the general context of this type of claim, and some of the questions that the case is likely to present.

[2] In a criminal court hearing in 1999, Gallagher named Ventura as one of the sources for the article. Gallagher later pleaded guilty to two felony counts of breaking into the company's voicemail, was put on probation for five years and ordered to do 200 hours of community service, and signed a cooperation agreement requiring him to identify sources. Fellow reporter Cameron McWhirter, who now works for the *Detroit News*, was not charged with a crime. He signed a cooperation agreement but did not name sources.

[3] Complaint, ¶ 19. The Complaint is curiously coy about not naming Chiquita. It is also circumspect in its general references to "information and documents or other benefits" that Ventura provided to the reporters. *See* Complaint, ¶ 28.

[4] Ventura complains that he was singled out for retention. *See* Complaint, ¶ 33 ("At or about the time of the publication of the *Enquirer* Articles, Defendants made a conscious decision to destroy any and all tapes or documents relating to or which could identify news sources used in connection with the *Enquirer* Articles — with the glaring exception of Mr. Ventura. In Mr. Ventura's case, Defendants preserved and maintained tapes and documents identifying Mr. Ventura as a source.").

[5] *See* Complaint, ¶ 48. Ventura elaborates on this allegation in Complaint, ¶ 32, contending that Gallagher "was not an honest, principled or ethical journalist." The complaint provides only two examples, one involving an accusation by a federal law enforcement agency that Gallagher had fabricated a news story about drug smuggling in a Michigan prison, and the second involving a woman in a federal witness protection program who denied that Gallagher had spoken to her in investigating an article in which she was widely quoted. There is no description of the resolution, if any, of either accusation.

[6] Ben Kaufman, "Former Chiquita lawyer sues paper," *The Cincinnati Enquirer*, Sept. 28, 1999, at B2.

[7] Or, to give the case its full history: *Cohen v. Cowles Media Co.*, 14 Media L. Rep. 1460 (Minn. Dist. Ct. 1987), *subsequent opinion*, 15 Media L. Rep. 2288 (Minn. Dist. Ct. 1988), *affirmed in part, reversed in part*, 445 N.W.2d 248 (Minn. Ct. App. 1989), *affirmed in part, reversed in part*, 457 N.W.2d 199 (Minn. 1990), *reversed and remanded*, 501 U.S. 663 (1991), *compensatory damages affirmed on remand on different legal grounds*, 479 N.W.2d 387 (Minn. 1992).

[8] For earlier surveys of the antecedents and progeny of *Cohen*, *see* J. Borger, *Promises, Promises: An Historical Perspective on Cohen v. Cowles Media Co.*, 3 Communications Law 821 (PLI 1991); B. Wall & J. Borger, *Broken Promises in the Aftermath of Cohen*, 13 Communications Lawyer 1, 16 (ABA 1995).

[9] *Cullen v. Grove Press, Inc.*, 276 F. Supp. 727

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(S.D.N.Y. 1967).

[10] *Commonwealth v. Wiseman*, 249 N.E.2d 610 (Mass. 1969), *cert. denied*, 398 U.S. 960 (1970). In 1986, another prison inmate's suit against a television network, alleging that it had filmed him in the "exercise cage" despite his protests and despite a contractual agreement with the warden not to photograph inmates without their consent, survived an early motion to dismiss the complaint. *Huskey v. National Broadcasting Co., Inc.*, 632 F. Supp. 1282 (N.D. Ill. 1986).

[11] *See* "Judge Lifts Ban on 'Titicut Follies' Film," 15 *The News Media and the Law*, No. 4 at p. 36 (Fall 1991). The judge wrote: "As each year passes, the privacy issue of this case is less of a concern than the prior restraint issue. I am now convinced that the scales have tipped in favor of an unrestricted showing."

[12] *E.g.*, *Sellers v. American Broadcasting Co.*, 668 F.2d 1207 (11th Cir. 1982); *Little v. Washington Post*, 11 Media L. Rep. 1428 (D.D.C. 1985); *Corbit v. Denley*, 541 So.2d 475 (Ala. 1989); *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (Cal. Ct. App.), *cert. denied*, 444 U.S. 984 (1979); *Strick v. Superior Court*, 143 Cal. App. 3d 916, 192 Cal. Rptr. 314 (Cal. Ct. App. 1983) (noting but not addressing plaintiffs' causes of action based upon magazine's breach of oral contract to "portray [plaintiffs] in a favorable light to the readers" if plaintiffs would talk to reporter for article entitled "Anatomy of a Highrise Murder"); *Stevenson v. Nottingham*, 4 Media L. Rep. 1585 (Fla. Cir. Ct. 1978); *Poteet v. Roswell Daily Record, Inc.*, 584 P.2d 1310 (N.M. Ct. App. 1978); *Virelli v. Goodson-Todman Enterprises, Ltd.*, 536 N.Y.S.2d 571 (N.Y. App. Div., 3rd Dept. 1989), *appeal after remand*, 558 N.Y.S.2d 314 (N.Y. App. Div., 3rd Dept. 1990); *but see*, *Falwell v. Penthouse Int'l, Ltd.*, 521 F. Supp. 1204 (W.D. Va. 1981) (commenting in dicta that reporters who had failed to tell Jerry Falwell that an interview he had granted them would appear in *Penthouse* magazine possibly could be sued for breach of contract); *Mayer v. Florida*, 523 So.2d 1171 (Fla. Ct. App.), *review denied*, 529 So.2d 694 (Fla. 1988) (reporter held in contempt for publishing information obtained at child custody hearing, when the reporter had promised the court that she would not publish any information about the proceeding pending court's determination whether statute mandated that hearing be closed and confidential); *Doe v. American Broadcasting Companies, Inc.*, 543 N.Y.S.2d 455 (N.Y. App. Div., 1st Dept.), *appeal dismissed*, 549 N.E.2d 480 (N.Y. 1989) (rape victims were interviewed by television station and given assurances that the sound and picture would be altered to protect their anonymity, but when the story was broadcast plaintiffs were readily identifiable to people who knew them; court held without elaboration that facts alleged were sufficient to support claims for breach of contract and negligent infliction of emotional harm).

[13] *Fries v. National Broadcasting Co.*, No. 456687 (Cal. Super. Ct. 1982). *See* Note, *Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement*, 73 Minn. L. Rev. 1553, 1555 n. 14, 1588 n. 195 (1989).

[14] *MacDonald v. McGinnis* (C.D. Cal. 1987). *See* J. McGinnis, "The 1989 Epilogue," *Fatal Vision* 660-84 (Signet 1989); J. Malcolm, *The Journalist and the Murderer* (pts. 1 & 2), *The New Yorker*, Mar. 13, 1989, at 38, and Mar. 20, 1989, at 49; F. Judge, Fatal Vision: *Truth and Betrayal*, *The American Lawyer* Nov. 1987, at 77. MacDonald's share of the settlement proceeds was reduced dramatically by attorneys' fees and by separate claims asserted by his dead wife's parents.

[15] *Morgan v. Celender*, 780 F. Supp. 307 (W.D. Pa. 1992)

[16] *Anderson v. Strong Memorial Hosp.*, 531 N.Y.S.2d 735 (N.Y. Sup. Ct. 1988), *aff'd*, 542 N.Y.S.2d 96 (N.Y. App. Div. 1989), *opinion on third-party claim*, 573 N.Y.S.2d 828 (N.Y. Sup. Ct. 1991). The trial court

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summarily granted the media defendant's motion to dismiss plaintiff's direct claims of libel and invasion of privacy on the grounds that those claims failed to state a cause of action. The court permitted claims against the doctor and nurse for breach of the physician-patient privilege. In subsequent developments, a court trial resulted in an award of $35,000 in damages in favor of the patient's estate against the hospital and doctor. The hospital and doctor commenced a third-party action for contribution against the newspaper, and the trial court denied the paper's motion for summary judgment for the reasons discussed in the text. Shortly after that ruling, the third-party plaintiffs abandoned their contribution claim, thereby foreclosing appellate review.

[17] 573 N.Y.S. 2d at 833.

[18] 794 F. Supp. 303, 308 (D. Minn 1992).

[19] 999 F.2d 1319 (8th Cir. 1993). The case eventually settled for $250,000 early in 1995, only to lead to a fight over attorneys' fees. *See Ruzicka v. Rothenberg*, 83 F.3d 1033 (8th Cir. 1996).

[20] *Doe v. KTNV-Channel 13*, 663 F. Supp. 1259 (D. Nev. 1994).

[21] *Norse v. Henry Holt and Co.*, 21 Media L. Rep. 1305 (9th Cir. 1993).

[22] *Wildmon v. Berwick Universal Pictures*, 803 F. Supp. 1167 (D. Miss.), *affd.*, 979 F.2d 21 (5th Cir. 1992). In *Ferlauto v. Hamsher*, 74 Cal. App.4th 1394, 88 Cal. Rptr.2d 843, 848-49, 27 Media L. Rep. 2364, 2366 (Cal. Ct. App. 2d Dist. 1999), the California Court of Appeals held that general language about confidentiality in a settlement agreement did not constitute a waiver by the defendants that kept them from asserting First Amendment defenses in a defamation action brought by the attorney who represented the plaintiff in the settled action; the defendants' book described the attorney in caustic terms. The court noted that a mutual limited release among the parties established that plaintiff "may not amend his complaint to state a cause of action against respondents for breach of contract as to the . . . confidential settlement agreement." 88 Cal. Rptr.2d at 847 n.3, 27 Media L. Rep. at 2365-66 n.3.

[23] *Sirany v. Cowles Media Co.*, 20 Media L. Rep. 1759 (Minn. Dist. Ct. 1992).

[24] *Desnick v. Capital Cities/ABC Inc.*, 22 Media L. Rep. 1937 (N.D. Ill. 1994). Plaintiffs abandoned their contract claim in order to pursue an appeal from the dismissal of their other claims — a strategy which was only partially successful. 44 F.3d 1345, 23 Media L. Rep. 1161 (7th Cir. 1995).

[25] *See, e.g., Moldea v. The New York Times Co.*, 793 F. Supp. 338 & n.1 (D.D.C. 1992), *affd.*, 22 F.3d 310, 319-320 (D.C. Cir. 1994); *O'Connell v. Housatonic Valley Publishing Co.*, 1991 Conn. Super. LEXIS 2749 (Conn. Superior Ct. 1991).

[26] *Steele v. Isikoff*, No. 1:98 CV 01471 (D.D.C.; filed July2, 1998); *see* May 1999 (3) *LDRC LibelLetter*.

[27] *WDIA Corp. v. McGraw-Hill, Inc.*, 34 F. Supp.2d 612 (S.D. Ohio 1998); *see LDRC LibelLetter*, January 1999 at 10.

[28] *See also* V. Kovner, "Recent Developments in Newsgathering, Invasion of Privacy and Related Torts," 2 COMMUNICATIONS LAW 411, 442 (PLI 1999) ("In a breach of promise claim against the publisher of debt ratings, Standard & Poor's, a federal court applied the actual malice standard to claims that S&P breached its

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obligation to perform ratings services competently. Some, but not all, of the claims were dismissed. *County of Orange v. McGraw-Hill*, Case No. SA CV 96-765-GLT (C.D. Cal. 1999).").

[29] *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 203 (Minn. 1990).

[30] *See,e.g., Moldea v. The New York Times Co.*, 793 F. Supp. 338 & n.1 (D.D.C. 1992), *affd.*, 22 F.3d 310, 319-320 (D.C. Cir. 1994); Doe v. H & C Communications Inc., 21 Media L. Rep. 1639 (Fla. Cir. Ct. 1993) (not mentioning resolution of breach of contract claim).

[31] *See, e.g., Friedrich v. Salina Newspapers, Inc.*, 22 Media L. Rep. 1478 (Cal. Super. Ct. 1993); *Doe v. Univision Television Group, Inc.*, 26 Media L. Rep. 2342 (Fla. Dist. Ct. App., 3d Dist. 1998); *Multimedia WMAZ, Inc. v. Kubach*, 443 S.E.2d 491 (Ga. App. 1994); *Small v. WTMJ Television Station*, 24 Media L. Rep. 1511 (Wis. Ct App. 1995) (unpublished); *Upchurch v. The New York Times Co.*, 19 Media L. Rep. 1602 (S.C. Ct. Cm. Pls. 1991) (dismissing claim of intentional infliction of emotional distress connected to use of photograph allegedly obtained in exchange for promise not to include offensive information about deceased family member's suspected use of drugs).

[32] *But see Pierce v. St Vrain Valley School District*, 981 P.2d 600, 602-603 (Colo. 1999) (finding all elements of contract formation present in settlement agreement between school district and school superintendent who resigned during investigation into charges of sexual harassment against him; superintendent and board members agreed not to discuss the details of that investigation and not to make disparaging public comments or remarks about the other parties).

[33] *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 202 (Minn. 1990).

[34] *See* "Former Chiquita Attorney Not Protected by Shield Law," *News Media Update*, May 3, 1999.

[35] Gallagher, it should be remembered, pleaded guilty to charges of unlawful interception of wire communications and unlawful access to computer systems. Ventura pleaded no contest to several misdemeanor charges and was sentenced to two years probation and 40 hours of community service.

[36] "[A] journalist who is forced to reveal a source by the courts should not be held liable to the source for the disclosure. *See Restatement (Second) of Contracts* § 264 (1981) (duty to perform discharged when performance made impracticable by need to comply with government order)." J. Goodale *et al.*, "Reporter's Privilege Overview," 1 Communications Law 27, 81, n.178 (PLI 1999).

[37] *See, e.g., Restatement (Second) of Contracts* §§ 178, 179 (1981) (terms of contract unenforceable on grounds of public policy).

[38] *See Branzburg v. Hayes*, 408 U.S. 665, 667-77 (1972).

[39] *See Nicholson v. McClatchy Newspapers*, 223 Cal. Rptr. 58, 64 (Cal. App. 3 Dist. 1986) ("[T]he newsgathering component of the freedom of the press — the right to seek out information — is privileged at least to the extent it involves 'routine . . . reporting techniques.' . . . Such techniques, of course, include asking persons questions, including those with confidential or restricted information. While the government may desire to keep some proceedings confidential and may impose the duty upon participants to maintain confidentiality, it may not impose criminal or civil liability upon the press for obtaining and publishing newsworthy information through routine reporting

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techniques.").

[40] *See, e.g. Restatement (Second) of Contracts* § 193 (1981) ("A promise by a fiduciary to violate his fiduciary duty or a promise that tends to induce such a violation is unenforceable on grounds of public policy.").

[41] *See., e.g., Restatement (Second) of Contracts* § 179, illustration 2 (1981) public policy against the enforcement of promises may be derived from legislation relevant to such policy; promise to pay bribe may be unenforceable on grounds of public policy.).

[42] Promissory estoppel is a form of equitable relief. *See, e.g., Barton v. Moore*, 558 N.W.2d 746, 752 n.3 (Minn. 1997) ("equity claim[] of promissory estoppel"); *Deli v. University of Minnesota*, 578 N.W.2d 779, 780 (Minn. Ct. App. 1998). Enforcement of such promises must be necessary "to prevent injustice." *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 391 (Minn.1992). It would not just be "unjust" to deny monetary damages to someone who committed a crime or violated legal duties. See Restatement (Second) of Contracts § 90.1 cmt. b (1981) ("Satisfaction of the [injustice] requirement may depend on the reasonablenes of the promisee's reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to which the evidentiary, cautionary, detterent and channeling functions of form are met by the commercial setting or otherwise, and on the extent to which such other policies as the enforcement of bargainsand the prevention of unjust enrichment are relevant.").

[43] "When a plaintiff's action is based, in whole or in aprt, on his own illegal conduct, a fundamental common-law maxim generally applies to bar the plaintiff's claim: '[A] person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral acto or transaction to which he is party.' . . . When a plaintiff's action is based on his own illegal conduct, and the defendant has participated equally in the illegal activity , a similar commom-law maxim, known as the 'doctrine of in pari delicto' generally applies to also bar the plaintiff's claim.: '[A]s between parties in pari delicto, that is equally in the wrong, the law will not lend itself to afford relief to one as against the other, but will leave them as it finds them.' . . . We shall refer to these maxims collectively as the 'wrongful-conduct rule.'" *Orzel by Orzel v. Scott Drug Co.*, 537 N.W.2d 208, 212-13 (Mich. 1995) (citations moitted).

[44] *See Restatement (Second) of Contracts* § 353 cmt. a (1981); *Haagenson v. National Farmers Union Property and Casualty Co.*, 277 N.W.2d 648, 652 (Minn. 1979) (holding that a malicious or bad-faith motive in failing to pay an insured's claim does not convert a contract action into a tort action so as to allow emotional distress damages); *Swanson v. First Nat. Bank of Barnum*, 185 Minn. 89, 91, 239 N.W. 900, 901 (1931) (holding emotional distress damages are not available for breach of an agreement to pay a mortgage even though foreclosure proceedings were begun and notice of the foreclosure made public); *Deli v. University of Minnesota*, 578 N.W.2d 779, 782 (Minn. Ct. App. 1998) (finding that emotional distress damages were not available in a promissory estoppel claim in the absence of an independent tort, where plaintiff's supervisor broke her promise not to view a videotape of plaintiff gymnastics coach and her husband having sex -- a tape inadvertently played to members of the college sports team); A. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 290 & n. 142 (1998).

[45] *See* D. Dobbs, LAW OF REMEDIES § 12.5(1) (2d ed. 1993).; *O'Leary v. Sterling Extruder Corp.*, 533 F. Supp. 1205, 1209 (E.D. Wis. 1982) ("The courts seem to be in general agreement that damages for injury to reputation are not properly awardable in a breach of contract suit."); *Quinn v. Straus Broadcasting Group, Inc.*, 309 F. Supp. 1208 (S.D.N.Y. 1970); *Swanson v. First Nat. Bank of Barnum*, 185 Minn. 89, 239 N.W. 900, 901 (1931) ("In actions for breach of contract, it is only in exceptional cases that damages for injury to reputation, or for mental suffering, can be

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ENDNOTES: *VENTURA V. CINCINNATI ENQUIRER*

(Continued from page 59)

recovered.")(emphasis added) (farmer whose bank failed to pay prior mortgage, resulting in foreclosure and publication of foreclosure in local newspaper, could not recover damages for difficulty in obtaining credit, for injury to reputation as shown by many persons speaking to him about his farm being foreclosed, or for extreme worry over status of mortgage). State law on this point may vary.

[46] *Restatement (Second) of Contracts* § 90 (1981). Indeed, remedies under promissory estoppel may be more limited than those available under breach of contract. *Id.*, comment *d.*

[47] *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (actual damages in defamation action are not limited to out-of-pocket losses, but also include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering).

[48] 501 U.S. at 671.

[49] __ F.3d __, 1999 WL 957738 (4th Cir. Oct. 20, 1999); *accord*, *La Luna Enterprises, Inc. v. CBS Corp.*, 1999 WL 959373 at *5-6 (S.D.N.Y. Oct. 20, 1999).

[50] *See Green v. Alton Telegraph Co.*, 8 Media L. Rep. 1345 (Ill. Ct. App. 1982) (dismissing appeal due to newspaper's filing petition in bankruptcy). In that case, two Telegraph reporters wrote and gave to the U.S. Justice Department a confidential memorandum that linked a contractor with organized crime. A subsequent government investigation failed to substantiate the allegation. The contractor was allegedly denied a bank loan he needed to keep his business viable due to the allegation, and an Illinois jury awarded him $ 9.4 million. While the case was on appeal, the newspaper settled the suit for $ 1.4 million. *See Owen v. Carr*, 113 Ill. 2d 273, 284, 497 N.E.2d 1145 (Ill. 1986) (describing *Green*); *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 491 n. 19 (Minn. 1985) (describing impact of the litigation on the newspaper).

[51] *See, e.g., National Union Fire Ins., Co. v. Gates*, 530 N.W.2d 223, 228 (Minn.App. 1995) ("the public policy against indemnifying intentional and criminal acts"), *rev. denied* (Minn.1995); *Ohio Cas. Ins. Co. v. Clark*, 583 N.W.2d 377, 381 (N.D. 1998) ("public policy preclud[es] and insured from being indemnified for losses caused by the insured's intentional or willfull conduct."); *Jessica M.F. v. Liberty Mut. Fire. Ins. Co.*, 561 N.W.2d 787, 790 (Wis. Ct. App. 1997) ("Case law and public policy prevent a homeowner's policy for being used to pay for sexual assaults").

[52] *Lichon v. American Universal Ins. Co.*, 459 N.W.2d 288, 291 (Mich. 1990).

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Libel Defense Resource Center, Inc.
404 Park Avenue South, 16th Floor
New York, New York 10016
(212) 889-2306
www.ldrc.com

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LIBEL DEFENSE RESOURCE CENTER

SEVENTEENTH ANNUAL DINNER PROGRAM

"SULLIVAN IN THE YEAR 2000: WILL IT – SHOULD IT – SURVIVE?"

NOVEMBER 10, 1999

WITH PRESENTATION OF THE

WILLIAM J. BRENNAN, JR.
DEFENSE OF FREEDOM AWARD

to

FLOYD ABRAMS

SPEAKERS

HAROLD EVANS
NINA TOTENBERG
JEFF GREENFIELD

PRESENTATION OF AWARD BY

DAN ABRAMS

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SANDRA BARON: Good evening. LDRC members, their guests, members of the Bar, members of the media. As always, as you know, it is my job and my pleasure to welcome all of you and to give some thank you's. First and foremost, I want to thank all of you for coming tonight. Thank you very much, it's good to see you all. Special thanks, I think, we need to give to Media/Professional and Scottsdale Insurance for sponsoring the cocktail party which preceded this dinner. It's a long-standing tradition for which we should all express our appreciation to Chad and his colleagues who are here.

LDRC, as most of you know, is a membership association that was founded by some exceptional media companies about twenty years ago and has grown to include major broadcast and cable companies, magazine, book, newspaper and Internet publishers, the trade associations that represent media, reporters, news directors and editors, and media insurance industry representatives. The Defense Counsel Section, made up of law firms which do First Amendment defense, has grown to almost two hundred law firms across the country, Canada and England.

LDRC's mandate is to serve as a clearinghouse for information about media and First Amendment issues and to provide materials and services to assist all media and non-media to better understand, prevent and defend First Amendment matters. A description, for those of you who are not familiar with LDRC, and identification of some of the resource materials and services is in the program. As you all know, we are honoring Floyd Abrams tonight with LDRC's William J. Brennan, Jr. Defense of Freedom Award. A description of the award and the purpose of the award is also in the program. It was, as many of you remember, first given to Justice Brennan, who then allowed LDRC to rename it in his honor.

We've chosen to honor Floyd Abrams because Floyd is a unique advocate of First Amendment freedoms, one whose name has become virtually synonymous in the public mind with the defense of freedom. In honoring him with this award, we recognize the enormity of Floyd's contribution as an advocate, spokesman, and teacher for the First Amendment. For Floyd is not only one of the foremost advocates in courts of law, and he truly is that—a list of some of his cases appear in the program—but he's foremost a public spokesman, who in his countless public appearances, media appearances and interviews, as well as his own articles in the popular media, has been capable of making complex issues of First Amendment scholarship comprehensible well beyond the legal community. He has also, not surprisingly, proven to be an exceptional teacher of law students and journalism students. In this room, I know, is but some of the evidence of Floyd's persuasive qualities, lawyers whom he has taught and whom he has mentored who have, in turn, gone out to practice First Amendment and media law.

We selected Floyd to be the Brennan Award winner long before the mayor of New York decided to create a First Amendment crisis for the Brooklyn Museum of Art, and indeed for the entire creative community of the city, one that Floyd is endeavoring to resolve, both in the courts and in the court of public opinion. But these recent events, we believe, only underscore the correctness of our choice.

We wish to thank the speakers tonight, to be sure, and to thank Sidney Zion and Anthony Lewis, who wrote the wonderful essays about Floyd that appear in our program, two of the most literate and captivating writers on a subject that is quite dear to them both. And now I want to bring up Ken Vittor, Executive Vice President and General Counsel of the McGraw-Hill Companies and chair of the LDRC Executive Committee, now re-named our Board of Directors, who will introduce the theme we asked our speakers to address: "*Sullivan* in the Year 2000: Will it—Should it—Survive?" Ken . . .

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KENNETH VITTOR: When the Supreme Court issued its historic—and stunning—decision 35 years ago in *New York Times Co. v. Sullivan*, First Amendment scholar Alexander Meiklejohn exclaimed: "It is an occasion for dancing in the streets." And so it was.

In the revolutionary ruling written by Justice Brennan—aptly described by Floyd Abrams as a "majestic opinion" having "a command of American history that is rare in a judicial opinion"—the Court not only constitutionalized the law of libel, it rediscovered what Justice Brennan described as "the central meaning of the First Amendment." Born out of the civil rights battles in the early sixties, *Sullivan* taught us that "uninhibited, robust and wide-open" criticism of government and government officials—even false and defamatory criticism—is indispensable to our constitutional form of government.

First Amendment commentator Harry Kalven distilled the essence—and the importance—of the *Sullivan* decision as follows: "[T]he presence or absence in the law of the concept of seditious libel defines the society. If . . . it makes seditious libel an offense, it is not a free society, no matter what it's other characteristics."

Now, 35 years after *Sullivan*, it appears to many that the dancing has stopped. Yes, *Sullivan* has resulted in significant First Amendment victories, particularly at the appellate level. And in a "chilling effect" we can all happily applaud, countless potential litigants and their contingency fee counsel have been persuaded not to bring libel claims against the media because of the heavy burdens of the "actual malice" rule. Indeed, in sharp contrast with tonight's impressive gathering of First Amendment lawyers, there is no organized plaintiffs' libel bar in the United States, in large measure due to *Sullivan*.

Yet the substantial gains achieved under *Sullivan* have come with surprising costs and unanticipated consequences. To cite but a few:

- Multi-million dollar jury verdicts against media defendants in libel cases—unknown and indeed unimaginable prior to *Sullivan*—are now barely newsworthy. Jurors, angry at what they perceive to be an arrogant and irresponsible press and hopelessly confused by the daunting complexity of the "actual malice" rule, now routinely and predictably deliver their expensive messages to the media in libel cases.
- Highly intrusive pre-trial discovery, concerning all aspects of the editorial process—generally irrelevant prior to *Sullivan*—now routinely compels the disclosure to libel plaintiffs of voluminous evidence concerning reporters' states of mind and their most sensitive editorial work product.
- Substantial settlements—in amounts (even adjusting for inflation) far exceeding the $500,000 verdict which shocked the Supreme Court to action in *Sullivan*—are now considered by prominent media organizations to be the regrettable but unavoidable cost of doing business in the *Sullivan* era.
- Fraud, trespass, breach of contract litigations which attempt to avoid *Sullivan* by attacking newsgathering methods rather than the content of disputed—and often entirely accurate publications—are now increasingly commonplace.

Even some of the most passionate supporters of the *Sullivan* decision are troubled by what they perceive to be the unwise expansion of the scope of the original *Sullivan* rule. Anthony Lewis, author of an otherwise celebratory history of the *Sullivan* case, is critical of the extension of the "actual malice" rule to celebrities and other public figures seemingly far removed from the robust

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criticism of government and "the central meaning of the First Amendment" discussed in *Sullivan*. Concerned that the *Sullivan* doctrine has become vulnerable because it has been spread too thin, Lewis pointedly asks what celebrity-libel plaintiffs such as Carol Burnett or Wayne Newton have to do with James Madison?

Other strong proponents of *Sullivan* fear a potential judicial backlash in response to a perceived imbalance in the current libel law and, perhaps more importantly, in reaction to what many judges believe to be an irresponsible press. After leaving the D.C. Circuit Court of Appeals to become President Clinton's counsel, Abner Mikva ominously warned the press as follows:

> A feeling is abroad among some judges that the Supreme Court has gone too far in protecting the media from defamatory actions resulting from instances of irresponsible journalism . . . I've been a judge for fifteen years, and now that I've taken off my robes, one of the first things I must say is—Watch Out! There's a backlash coming in the First Amendment doctrine.

We thought the best way to honor Floyd Abrams and the First Amendment values he so eloquently articulates was to discuss—hopefully, provocatively—the dilemmas and current challenges posed by the *Sullivan* case. Floyd's willingness throughout the course of his illustrious career to question conventional wisdom surrounding First Amendment issues—to demand more of the press than it frequently demands of itself—has inspired us to reexamine the *Sullivan* case, and to ask: "*Sullivan* in the Year 2000: Will it—Should it—Survive?"

To help us think about these important issues, we are privileged and honored tonight to have uniquely qualified experts—and, of course, our Award winner Floyd Abrams—to share their thoughts and experiences with us. Recognizing that our distinguished speakers really need no introduction—and in the interest of time—I will not repeat the biographical information that is set forth in your Dinner program. Suffice it to say that each of our guests brings to this occasion a unique perspective and a rich range of journalist experiences from which to view and discuss the contemporary issues raised by the landmark *Sullivan* case.

Our first speaker tonight, Harold Evans, has practiced journalism on both sides of the Atlantic. As current Editorial Director and Vice Chairman of *U.S. News and World Report* and the *New York Daily News* and former editor of *The Sunday Times* and *The Times* in London, Harold Evans brings to our discussion the special perspective of a journalist of the first order who has worked both with and without the broad protections of the *Sullivan* case and the First Amendment. Harold . . .

HAROLD EVANS: *Is this the point where I plead guilty?* (LAUGHTER). I wanted to say when I received the invitation to speak here tonight, I thought of the paragraph in the New York newspaper (now happily extinct—we don't like too much competition) in the fifties when I came here and the paragraph said—it was a reporter at the airport interviewing an actor—"He was asked if he contemplated any further act of matrimony. 'Certainly,' was his evasive reply."

I felt like being "evasive" myself tonight because *Sullivan* is sacred to many of you, and I am very uneasy about *Sullivan*. But I was certainly pleased to say yes, yes, to speak in honor of Floyd Abrams. For me, his monogram, F.A., stands for "Flying Angel." Whenever I was served a writ in Britain as editor of *The Times* or *The Sunday Times*—and that was pretty often over fifteen years—we knew we could always count on the brilliant Floyd for moral support and often an insight we might deploy, like a secret weapon, when we slunk into the High Court in the Strand. Hearing

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that Floyd was on the line was like catching the sound of the trumpet in *Fidelio*. Liberation.

Our silks—that's what we call our lawyers, you should come over, it's really a lot of fun—our silks, with their wigs and everything, did pretty well considering that if ever we sought to infer that *Sullivan/New York Times* or *Near/Minnesota* might have a point or two, we would get the icy response from the judges that Britain was not yet the 51st state, and England's green and pleasant land would never be soiled by America's appalling trial by newspaper. I sat through many of those lectures. I was in the Supreme Court in Washington as it happens when Floyd fielded spitballs from the Justices in the *Nation* case, and I would have loved to bring him in as a pinch hitter for the orals in our encounters with the five law lords—five lords a leaping to the wrong conclusions (LAUGHTER).

So thank you, Flying Angel.

At least your familiarity with English law enabled you to remind the mayor of this great city that if he defamed a judge in England, as he defamed the judge in the Brooklyn art trial, he would have been slapped with contempt and might even now be serving time (LAUGHTER). Maybe there is a lot to be said for our system after all (LAUGHTER).

But actually there isn't much. In 1972, in a Guildhall lecture, I described the British press as half-free by comparison to the United States press. Maybe now it's 60% free, but a long way from 100%. The half-free press in Britain would never have been able to report the Watergate scandal, the laws of subjudice would have come down as soon as the burglars were arrested and then the law of confidence—even the most brilliant of you here have probably never heard of the law of confidence—the law of confidence would have prevented using the name of the Campaign to Re-elect the President Committee to find out where the money had gone. We would never have been able to do Watergate.

The law of confidence was wheeled out when I started to publish the diaries of the Cabinet Minister, Richard Crossman, even though he wanted them published and was long dead—he left it in his will—and it was used to prevent publication of the book *Spycatcher*, which is freely available here, and to punish the civil servant in the Falklands War who revealed that the Belgrano battleship was not where the government said it was when the Royal Navy sank it.

My Insight team was solely engaged in the investigation of serious political, social and business wrongdoing. For the half-free press, working on a piece was like defusing a bomb, turn the wrong screws and the whole thing would go off because of contempt, confidence, official secrets, Parliamentary privilege, slander— and libel. All subject to prior restraint, though it was the English jurist Blackstone who insisted that the freedom of the press lay in unfettered freedom to utter, then followed by punishment if wrong. I edited newspapers in Alice in Wonderland. Punishment first, verdict later. Punishment by suppression, verdict sometimes by letting you publish, but often not.

In my very first week of editorship, I was working on a story for the newspaper when a man in a bowler hat came in and gave me an envelope, but I opened it and it basically said I had to take the story off the front page and not publish it at all because the subject, a British Member of Parliament, had protested to the court and gotten an ex parte injunction. We were simply showing that this British Member of Parliament was in the pay of the Greek colonels of the military junta. So we lost the right to publish the story. It took two or three weeks to get it into the paper. But that was only scene one, act one.

Libel of course was our constant concern. But I give you a glimpse inside the penitentiary in which I served because I want to keep concerns about libel in context. And though it was often intense and difficult and costly and raised my blood pressure, I want to say, absolute liability never

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deterred us. There was no single investigation we abandoned because we had to prove the truth of what we printed and face the risk of a jury going wild about damages. The Insight team—an exceptional bunch, it had a mix of Australians in it, South Africans, it was kind of a British Empire group—took pride in amassing the evidence. But can we prove it? Can we prove it? was the constant refrain throughout the corridor and in my office, and our house lawyers were only too happy to test our levels of proof.

Despite the onus of proof on us, we were able to publish an amazing amount of material. That the makers of the drug thalidomide were negligent, that the lawyers on behalf of the plaintiffs were negligent, that contempt should not apply in the face of the manifest injustice of little compensation for the victims—which took us all the way to the European Court. That the DC-10 Ship 29, dropped out of the sky over Paris, killing 346 people because McDonnell-Douglas had failed to replace a defective door. That Kim Philby was a Soviet spy, that Bernie Cornfield of IOS was a fraud, that the Member of Parliament for Buckingham South was a crook, the Right Honorable Robert Maxwell, then thought not to be a crook.

Would *Sullivan* have helped us in all this? The answer is, how many people here know Evelyn Waugh's novel *Scoop*? Well you should. Anybody with any remote connection with the press should read Evelyn Waugh's *Scoop*. In it, the owner of the paper the *Daily Beast* of Fleet Street is called Lord Copper. And when he ventures an opinion, such as it is very hot in the arctic, his staff is frightened to question him and the answer always is, "yes, Lord Copper, up to a point, Lord Copper." Up to a point. Well "Up to a point, Lord Copper" is the way I feel about *Sullivan*. Clearly a whiff of *Sullivan* can be rejuvenating. It influenced the unprecedented ruling in favor of the *Sunday Times* when it was sued for libel by the Derbyshire County Council a few years ago. A local authority, it was ruled for very first time in England, could not sue for libel. This was very much a victory in the public interest, for which we are grateful to *Sullivan* and those lawyers who argued the case.

I cannot say the same for the workings of what I know of *Sullivan* in the United States since I came here to live permanently in 1984. The verdict in *Sullivan* was welcome, vital in enabling light and heat to be applied to the crimes of the South. It certainly was. But as a precedent, we cherish it to protect the press in the very important business of reporting and commenting on public affairs of comparable significance. As Tony Lewis put it, it recognized that free speech was not simply a right but a political necessity.

But I have the impression that *Sullivan* is being grossly abused in a culture of celebrity.

Now it will be objected that the British press, without the protection of *Sullivan*, is as reckless and lethal. Actually it isn't quite as bad, not quite. But bear in mind that there is a very real restraint on victims in Britain—the fear that if they complain, they will become the subject of a vendetta, and that happens all too often.

Sullivan here seems to me to have afforded the most protection—if you will, the most license—to the trivia cops, to the trashers, the casual character assassins on the Internet and the supermarket sheets. Investigative journalism has not observably flourished because of *Sullivan*, and I first saw it in operation in the '50's when I came here. Altogether—and I'm not alone in saying this, many editors say it—standards have fallen. Just one instance, the leading newspapers BS, before *Sullivan*, would not publish ad hominem blind quotes. You know what I mean: "Friends say he has only recently stopped beating his wife . . ." The *New York Times* will now publish ad hominem blind quotes—all the rumor that's not fit to print. So will the electronic anarchists. We won't at *U.S. News* and those good people at the Associated Press won't, but we're all wimps. Casual defamation is a gross industry, any source will do, as you saw in the Clinton scandal. Any source will do. It is so

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easy. And it is one thing, I think, to facilitate criticism and the exposure of public business. It is another to remove the right to a reputation from anyone who happens to have five minutes of fame.

I think this is regrettable, not simply because it discourages entry into public life. Not simply because professional standards and aspirations are eroded, bad journalism driving out good. Not simply because it is one of the reasons the press has come to a disabling all-time low in public esteem. All that is true.

What should concern us most of all is that the values of human dignity have been debased by too many of *Sullivan*'s exploiters, and human dignity was the very heart of *Sullivan*.

If my best friend Plato asked me to construct a new Republic of laws tomorrow, I think I would keep everything you have here, from the First Amendment on to the Freedom of Information Act, but amend *Sullivan*. The language would be about freedom to report matters of genuine public concern, about fairness, and it would pay obeisance to the right to personal privacy, and protection from harassment and intrusion. I know I would have to wrestle with Chief Justice Hughes' insistence in *Near v. Minnesota* that "the rights of the best of men are secured only as the rights of the vilest and most abhorrent are protected." So it would be very hard work drafting, but of course we would call upon the wisdom of the best of reasonable men, the Flying Angel, Floyd Abrams. Thank you.

KENNETH VITTOR: Well we asked our speakers to be provocative. Our next speaker, Nina Totenberg, National Public Radio's legal affairs correspondent, is uniquely qualified to discuss the *Sullivan* case. As one of the most respected and authoritative commentators on contemporary legal issues and the Supreme Court, Nina Totenberg's observations on the judiciary and the press under *Sullivan* are of particular interest. Nina . . .

NINA TOTENBERG: Good evening. Before I talk about *Sullivan*, I want to talk about Floyd. This award tonight is given in the name of the late and great Justice William J. Brennan, Jr., and I can think of no one who deserves it more than my dear friend, the Flying Angel. And my dear lawyer, the Flying Angel. There are a lot of reasons—some of them obvious, some of them not. Obviously he is a hero to those of us who prize the values of the First Amendment. He is the, this may be not as glorious as the Flying Angel, he is the crusader rabbit of free expression (LAUGHTER), defending most recently, like the Energizer Bunny, the Brooklyn Museum of Art. He's been at the vortex of just about every major First Amendment battle since and including the Pentagon papers case. And while he's at the very top of everyone's "A" list of First Amendment scholars and litigators, what makes him so remarkable, frankly, is his personal decency, his willingness to give of his time, his genuine care for the positions and the people he's chosen to defend . . . in my case, rushing to the rescue when the U.S. Senate had me tied to the railroad tracks of its leak investigation in the Anita Hill/Clarence Thomas affair.

Spill the beans, spill the beans, they cried, or we will run you over. Not so fast, said Floyd Abrams, she's my client (LAUGHTER).

For those of you who haven't experienced it, there is really nothing quite like the mantle of the Abrams protective arm. You know you have a lawyer with the best judgement, the savviest media approach, and the greatest legal skill that money can buy—or in my case, get donated to you and your organization for half the price (LAUGHTER). In short, Floyd is a mensch, but a really, really, really smart mensch.

About the only time I know of that he exhibited poor judgement—and I've told this story before— was the night after I had broken the Anita Hill story and he called me back. I'd spent the

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day watching the doings in the United States Senate and decided that the person that they really wanted to kill was me. And so I put in a call to Floyd. Will you represent me if it comes to that? I asked him. Oh, Nina, he said, don't be silly, they're not going to go after you. As I said, it was the only time in all the years that I've known him that he has misjudged a situation, but then he wasn't in Washington.

In the six months that followed, he helped me navigate the shoals of a congressional subpoena and investigation, a body politic that wanted someone to punish; my own occasional and often not so occasional short temper about the whole thing; and an organization that stood behind me 100%, except that it would have loved to have found a place to run and hide.

To NPR's credit, and Floyd's, he somehow, gently, in that very special way of his, made it possible for us all to stand firmly for an important principle, and most importantly, to win. As usual, he never took any credit, but he deserved it all.

I want also to say something about Floyd as a friend to the man whose name graces this award. Justice Brennan was one of those very special people who never lost his humanity despite his stature. He was never too important to spend time with a youngster or a student or a friend who had become infirm. When Judge Bazelon became ill with Alzheimer's disease, Justice Brennan would have him up to chambers with other judges sometimes or friends, to have lunch. Bazelon was really too ill to contribute much to the conversation, but Brennan knew it was important that he could still be part of the game. And so when Justice Brennan became so very ill in the last year of his life, I watched with great care, that Floyd Abrams was one of those who visited the hospital regularly to see and entertain the old man who had done so much for the country and for us all.

Now, my assigned task here for the evening is to deliver some incredibly perceptive and smart piece of First Amendment analysis or wisdom and in this crowd, I'm just not smart enough to do that. So let me revert to the thing I do know something about, well *maybe* know something about, and that's the Supreme Court and the press. What do the justices think of the "media"? Well in a word, they hate us. Much like the rest of the American public, they hate us, and I would have to say, sometimes with good reason.

Fortunately for us, they do think a good deal of the First Amendment. More than I might have given them credit for a few years ago. The question is in what context? In the context of forbidding people to publish and earn money—as in the Son of Sam law—the Court was, I think, surprisingly firm. The state can't do it. But in the national security context—the *Snepp* case is the most recent example that comes to mind—the result was really quite different. I have wondered often what would happen today if a case like the Pentagon Papers case were to come up. Supposing, for example, that I were to get hold of the government's secret submission in an immigration court to exclude foreign nationals from the country because of allegations that they might be terrorists. And suppose that the government claimed that my story might compromise key intelligence sources on terrorism. I wouldn't bet the farm on the outcome.

On the domestic side of the equation, the court has been pretty reliable in dealing with direct threats to press freedom. It said Jerry Falwell couldn't get damages for emotional distress when a less than auspicious publication said naughty things about him in a satire. I doubt that the notion of tortious interference is likely to go anywhere these days, or really that it ever was. But there are other, back door, ways to intimidate news organizations. Not the least of which is the cost of defending lawsuits that in the end may exonerate the news organization. *Food Lion* is a prime example, and it ain't over yet.

But the best example that I can think of is last year's ride along case in the Supreme Court.

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CNN went along when the Interior Department executed a search warrant on a rancher's property to find evidence of violations of the Endangered Species Act. The rancher sued the feds for invading his privacy by bringing along the press, and the rancher sued CNN. The Supreme Court granted the case, but only as it applied to the feds. In the end, the court concluded the feds were liable, but may have had qualified immunity since there was no law against them doing what they were doing at the time. The Court, however, did not review the case as it applied to CNN. And it wouldn't let CNN participate in the argument and it refused to stop the case against CNN brought by the rancher. So, while the Court continues to have great respect for the First Amendment, the treatment of CNN suggests that it has considerably less respect for modern journalism. And that, over time, I think, is worth worrying about.

Finally, I want to address the question about *New York Times v. Sullivan* and what the Court might or might not do to trim it's sails. The big opening, it seems to me, is in the question of malice and the standard for proving reckless disregard for the truth. This is a subject that all public figures have views about, I promise you, as the widow of a one-time United States Senator who had to be talked out of suing a publication for libel when he was told by me and every lawyer he consulted that he couldn't win. I promise you, they all think about it.

We all told him then that the standard was too high. But that was then, and this is now—post-George W. Bush and cocaine, post-Richard Jewell and the Atlanta bombing, post-Bill Clinton and every screwy scrummy story, true and untrue, published about him and the Mrs.

"One of these days," as Ralph Cramden used to say, "one of these days, Alice, it's going to be pow, right in the kisser." If Bill Clinton had not had so much soiled linen, do you think he could have sued Jerry Falwell for that video essentially accusing the President and the First Lady of murder and drug running? Well, we will never know whether Falwell would have been held liable, but one of these days there will be a politician willing to take the leap, and without so much dirty linen. And my guess is that the courts will use that occasion to constrict *New York Times v. Sullivan* in terms of its definition of actual malice.

If, over time, the protections of *Sullivan* are eroded, I feel constrained to observe that there are some in our profession—and I do not mean just tabloid journalists—who bear some responsibility. Maybe even some of us in this room. It seems to me that freed from the onus of pre-*Sullivan* type libel suits, we have gotten awfully sloppy in our thinking and our use of language.

Too often these days, I pick up the newspaper or switch on the tube to hear that such and such fact has been learned which "raises questions" about whether so and so violated the law or told the truth or whatever. With expressions like "raises questions," we can go from an innocuous fact A right to conclusion Z, barely stopping to pause in the middle. It *raises questions* about how long we will continue to have the full protections of *New York Times v. Sullivan* as we have come to know and love them. Thanks very much.

KENNETH VITTOR: The press has undergone significant transformational changes since the turbulent days of the civil rights movement and the *Sullivan* case. From Walter Cronkite and Huntley/Brinkley to 24-hour news cycles, the Internet and, yes, Matt Drudge, the changes in the way news is gathered and disseminated have been truly profound. As one of most respected and perceptive observers of journalism and contemporary modern politics, CNN senior analyst and co-anchor of CNN's *Newsstand*, Jeff Greenfield is particularly well qualified to discuss the *Sullivan* case and the press.

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JEFF GREENFIELD: I should just observe, in case some of you wonder what the hell I'm doing here, I was trained as a lawyer before I abandoned the law for journalism, thus giving me a connection to two of the most revered and respected professions. One request tonight was for a food taster. Thank you. (LAUGHTER).

A lot of you are here to honor Floyd Abrams, I'm sure, for very high-minded and noble reasons, and I'm here because I owe Floyd Abrams—big time.

A year and a half ago, when the "Tailwind" story blew up in our face at CNN, we made a decision that helped us climb out of the hole that we had dug for ourselves. We decided to bring in an independent analyst to look at what had happened and to explain not just to us but to the public, why it had happened.

We wanted someone who understood the press, who is not an enemy of the press, but who would also be neither protective nor defensive—someone who, in the words of the late, great National League umpire Bill Klein, would "call 'em as he saw 'em." And Floyd Abrams was the man, and painful as his findings were about what had happened, it was a critical first step, not just in leveling with our audience but also in helping us put into place safeguards that make it much less likely that it will ever happen again. So we owe him.

I think the fact that a man that spent and spends his life defending the First Amendment would prove so clear-eyed a critic is no surprise to anyone who has known, or worked with, or interviewed for that matter, Floyd Abrams.

I particularly delight in that small smile of his—as Mark Twain once described it, a Christian with four aces. Floyd understands the press and its failings, even as he resolutely defends us from, sometimes, the consequences of our own acts. And I think it's that approach, that clear-eyed approach that we could use a lot more of in the press.

So it's one of those occasions when people love to trot out Thomas Jefferson's famous line that, "were it left for me to decide between a government without newspapers, and newspapers without government, I should unhesitantly choose the latter."

We in the press, we love that line. We never tell people he said that before he became President. After seven years in office, he said, "nothing is to be believed that now appears in a newspaper. Truth itself becomes suspicious by being put into that polluted vehicle." That same year he said, "the man who never looks at a newspaper is better informed than he who reads them; inasmuch as he who knows nothing is better informed than he whose mind is filled with falsehood and errors." I offer these words as a reminder that even the most devoted defender of liberty may have less than a sanguine view of what we do and how we do it.

Which brings me to the brief and possibly unsettling point I wish to make. I must have had a premonition of what I was going to do with my life in law school because my note in law school was about libel. And about *Times v. Sullivan*. And it's clear, as Tony Lewis has noted—he being more or less an official historian of the case—this was basically the Court's way of saying, look, you can't use libel as a backdoor approach to seditious libel prosecutions against critics of your official conduct.

And in that context and in many other First Amendment cases, we often hear talk about—we heard it tonight—about the "chilling" effect that government actions or law suits might have upon the press or on speech. And I just want to make two quick points.

The first is: it hardly needs the government or even enemies of the press to chill the press. Many things chill good journalism, corporate tenacity, laziness, focus groups, consultants who tell you that the people don't really care about that stuff anymore. Mindless mania for ratings which say

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that we will skip the story about what your government is doing for one about you lunching at a salad bar of death (LAUGHTER). All of these things, in effect, have a chilling effect on good journalism, even though they have nothing really to do with the First Amendment in terms of our enemies or advisories.

There's another point I wish to make before I leave. And I make it as a practicing journalist. Which is, one of the things that *Sullivan* still maintains is that some speech should be chilled. Some speech is unworthy of protection. You want people in the press not to perform that kind of speech. Specifically, if I, as a journalist, broadcast a false statement that defames someone and I do it deliberately, or, if that guy can prove it, recklessly, I should be sanctioned, in a way that will keep me and my colleagues from doing it again.

Remember, some journalists make the mistake of calling journalism a profession. And by most standards, is it a profession? In that there are no barriers to entry, and there are no sanctions to remove people from that profession? So if I behave as not simply an incompetent journalist, but a malicious one, what is the remedy?

Now, in the old days, people aggrieved by a newspaper editorial would march out of the office with a horse whip. But, except in certain neighborhoods, that is not considered desirable. So what is the alternative? Barring infliction of physical violence—which I think justified only in the case of news people acting as a mob and in which case I would have hoped Richard Jewell would have been in good enough shape to just deck one of those people and get them out of his way—but that not being logical or practical, what's the sanction?

Some years ago, in Philadelphia, a local news station rushed onto the air with a breathless report that the Mayor of Philadelphia, a public official by anybody's standards, was under federal investigation for bribery and kickbacks. It led the news, it was a great story, and they got it really late. So they put it on the air without one iota of checking, and the story turned out to be false. And the station not only apologized, they, without even a suit being filed, paid the mayor a substantial amount of money.

And I suspect, I hope, the station made sure that kind of reporting wouldn't happen again. And the damage to the First Amendment was exactly what? The damage to speech that we revere was exactly what? By my rights, none. Of course you don't want public officials or, for that matter, powerful private people like a Robert Maxwell to silence critics with the threat of libel suits. And the Maxwell case is a good example. He filed a writ the minute somebody started looking into that Ponzi scheme of his.

But neither, I suggest to you, do we want powerful media entities, which grow bigger and more powerful and more complicated and more entwined with potential conflicts by the day, to use the First Amendment the way a drunken diplomat uses a passport on the New Jersey Turnpike: to whip it out and say, sorry, the discussion is over. The First Amendment, I think, is the beginning of the discussion, not the end of the discussion. The snappy title of that law review note that I wrote was, "The Scope of First Amendment Protection for Good Faith Defamatory Error." (Some of you may have heard the Dixie Chicks version of that recently) (LAUGHTER).

Well, the fact of the matter is there is also plenty of First Amendment protection for a lot of bad faith speech . . . for robust and wide-open exchanges that are often, not only impolite, but downright mean-spirited. Just turn on your radio or television. That's fine. But I have to say as we look at where *Sullivan* may go—and I think that the warnings of both Harry and Nina are quite appropriate—I do want to say that I hope we never see the day where *Sullivan* will mean that people who hold public trust or high public profiles are helpless, legally helpless, in the face of deliberate or

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reckless falsehoods that smear their reputations and do them real harm.

Seventy years ago, nearly, in a line that used to be quoted all the time—and maybe it's a sign of the times that it isn't quoted nearly so much—Judge Learned Hand gave a then once famous speech on the spirit of liberty. And what he said that most resonated was, "the spirit of liberty is the spirit that is not too sure it is right." And I think it is a test we and the press ought to remember, and not just about those we cover, but about ourselves. Thank you.

KENNETH VITTOR: To present the LDRC's William J. Brennan, Jr. Defense of Freedom Award to Floyd Abrams, the LDRC Board of Directors wanted to find a first-class journalist who has known Floyd for the reporter's entire life. After an exhaustive search, we found Dan Abrams. We all know Dan Abrams as an intrepid, enterprising reporter with Court TV and now NBC News, but Floyd knows Dan best as his son.

DAN ABRAMS: I remember my father telling me about a senior thesis written by a nineteen-year-old Cornell University student, entitled "Lest Justice Prove Violence: Fair Trial, Free Press and the First Amendment." The author, president of the Cornell University debate team, advocated adoption of the English system— that the press should be prohibited from publishing the criminal record of a defendant or even from publishing a confession unless they had already been admitted into evidence. Precisely the kind of legal standards my father battles against on a regular basis. Many of the details, even the words, from that essay remain imbued in my father's mind . . . but it is not because he was appalled or because he recalls some scathing intellectual battles with the author. It's because "Fair Trial, Free Press" was written by Floyd Abrams.

When the author was contacted for comment about his 1956 senior thesis, Abrams said, "I was very young and conservative back then. I was in thrall to Justice Frankfurter and his Anglophile views. And I had never met a journalist" (LAUGHTER).

Well, whether he saw the error in Justice Frankfurter's ways or whether he has just become smitten with the journalists he has encountered, Floyd Abrams has returned from the dark side with a vengeance.

When I was in the seventh grade (they asked me to do the personal side), my English teacher asked me what my Dad did for a living. I remember proudly pronouncing that he was a First Amendment lawyer. I am sure I had no idea what that meant, but I said it with that confidence only a seventh grade can muster when talking about his father. She smiled and lowered her voice and with an ever so patronizing whisper assured me that there was really no such thing as a First Amendment lawyer.

Well now she was treading on my turf. She could teach me about words like sinecure and lugubrious, but I would teach her about *my* father. I knew that, at the least, I had heard people describe my father that way. I was adamant, he was more than just a lawyer, he was a First Amendment lawyer! She suggested I go ask my father. Well I did.

His response was the right one, that I was right. He did a lot of work on First Amendment cases, and he was a lawyer. And while most people weren't really called First Amendment lawyers yet, he warned with that "Times are a changin'" kind of tone, in the coming years, there might be more need for these type of lawyers and expected that my teacher would become more familiar with the terms First Amendment lawyer and libel lawyer. Apart from the thrill of correcting Mrs. Sherman, in retrospect, he was right about the future of libel law. And while it has certainly created business for him, maybe even a career, I assure you, the wave of lawsuits against the press and particularly

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those applying novel theories of liability, are viewed by Floyd Abrams not just as a phenomenon but as a constitutional tragedy.

That is what makes him the ideal candidate for this type of award . . . what he says behind closed doors. When he is representing the press, he is not just serving as an advocate. He believes in it with all his heart and he loves what he does. When he used to come say goodnight to my sister and me when we were kids, we knew that to prolong the visit, we could ask him about one of his cases (LAUGHTER). With a gleam in his eye and the excitement of a teenager, he would try to explain concepts like actual malice and involuntary public figures (LAUGHTER) to two pre-teens who's sole interest in probing the issue was to secure those extra minutes.

And to his credit, we understood enough to talk about his cases with him . . . quality, I might add, which makes him a superb trial lawyer.

In conclusion, let me just say as you all present the Defense of Freedom Award to my father, I would like to take this unique opportunity to present a sort of lifetime parent award. The only thing more important to Floyd Abrams than his work is his family. People who know my dad often talk about how he still works every weekend, as he has for most of his life. But he has always made, and still makes, plenty of time for my sister Ronnie and me.

When we were younger, it meant taking us to the park or on trips. When I was in high school, it even meant renting a lime green hot rod Corvette to drive me upstate because he thought I would like a "sportier car" (LAUGHTER). If you know my dad, you know he is not a hot rod kind of guy. Ronnie and I have always known he would support us in all of our choices and endeavors. Even the absurd ones like when I wanted to build an enormous Monopoly set out of wood or when Ronnie and I wanted to move into a houseboat or Ronnie's desire for a pet Cougar to keep her company in her closet-size bedroom. Somehow he dissuaded us while always making us feel like our goals were admirable.

And most importantly, now I speak to my father on the phone almost every day . . . often about the indignities one suffers as a television journalist. He convinces me not to change careers. But most often it's just to say, "Hi." So thanks to the Libel Defense Resource Center for choosing the right guy for this award, and Dad, thanks for everything. You will always be my role model and one of my best friends.

FLOYD ABRAMS: We're in New York City so you know all the word nachas. (LAUGHTER). What more could a father ask for than to have a son like Daniel, a daughter like Ronnie and a mother like Efrat, who made it all possible. How can I turn to *New York Times v. Sullivan* after that? But I will say that standing here with all of you, so many of you that I know, with my family, with many of the partners in my firm and many of the associates in my firm, I do want to start by paying tribute to two people who cannot be here today, two people from whom I learned so very much and whom I think of as I hear the speeches here today. When I listen to Nina Totenberg, I can't help but think of the unforgettable lunches she and I used to have with Justice Brennan, whose name graces the award that has been given to me tonight. Every moment of those extraordinary, warm, intimate, loving exchanges is indelibly imprinted in my memory.

And listening to Harry Evans recalls the first time I met him in one of the Fred Friendly seminars, this one held in England, with English and American judges, journalists and lawyers. It was an exchange that left all of us, all of us Americans at least, sure that whatever the differences there were between us, we had more in common with other Americans than with any of the Brits over there (LAUGHTER). And it also left me with enormous, unending, lasting memories of Fred Friendly.

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I'm so very glad Ruth Friendly is with us tonight.

Years later, I dined once with, among others, Fred and Justice Brennan. They were two of the greatest teachers ever. And they had a marvelous exchange. The case was then pending in the Supreme Court about who owned Ellis Island, between New York and New Jersey, and Fred Friendly—in his understated way—asked Justice Brennan how he would have voted it in the case. And Brennan said, "for New Jersey." And Friendly, who was absolutely outraged, said, "You just can't say that, you can't just say New Jersey, you have to know what the framers intended and what the documents were between New York and New Jersey and what was intended back then." And Brennan said, "No, I'm from New Jersey" (LAUGHTER). "And," he said, "by the way, that's as good a reason as any of them will come up with" (LAUGHTER).

A few years ago, I received an award from the Anti-Defamation League. I was very honored—it's an extraordinarily effective and important organization, not at all antithetical to the First Amendment, that identifies and combats racist speech—but I did feel just a bit out of place. I remember thinking it was a little odd for me—spending so much of my life doing what might be thought of as pro-defamation work—to be receiving an award from the Anti-Defamation League. Tonight I feel right at home (LAUGHTER) with all of you.

I wanted to say just a few words about something that comes to mind when one thinks of *New York Times v. Sullivan*, but is not at the heart of the question of whether we should have it or will have it— I'll say a word or two at the end about that—but something about truth and journalism.

The topic, of course, is suggested by the central, the most important and certainly best known holding of the *Sullivan* case itself: that the protection of speech about public officials (or, now, public figures) exists even when it is false, so long as it is not uttered with actual malice. The idea of affording more protection to speech than the defense of truth provides. And that notion, the fact that *Sullivan* does give that protection, leads me to just a few thoughts about what we mean about truth and some related subjects.

We lawyers know that when we speak of the truth of journalists, we frequently mean what we call hearsay. That is, journalists frequently report on what people say. If the journalist gets it right—if the substance of it is correct, if it is fairly and accurately conveyed—the story is likely to be accurate. Accurate but, on a different level, not necessarily true. What a source says—even a prominent, well-placed, responsible source—may not be true. It does not make it less journalistically sound to report (accurately) on what such a source says, and it is one of the benefits of *New York Times v. Sullivan*, that it protects such reporting. But it still may not be true in the other sense we use the word truth. We lawyers know that even when journalists report accurately about what people say, our journalistic clients may still be at risk, since, as a general matter, when a journalist reports a false and defamatory charge, the publication may still be at risk for doing so, at least until the Supreme Court adopts some kind of concept of neutral reportage.

But to move away for a moment from the law, let's talk a little bit about the limitations of truth. Truthful reporting does not necessarily mean fair reporting. It does not necessarily mean wise reporting, or even reporting that is worth reporting. Truth is a pre-condition for good reporting, but it is only the first element in it.

Years before the awful excesses of the reporting on Bill and Monica, which I have no doubt the press will pay dearly for in the years to come, Pete Hamill had written in *Esquire* that "These days, most members of the Washington press corps wear a self-absorbed sneer. They sneer at any expression of idealism. They sneer at gaffes, mistakes, idiosyncrasies. They sneer at the 'invisibility' of national security advisor Anthony Lake but sneer at others for being publicity hounds. They sneer

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at weakness. They sneer at those who work too hard, and those who work too little. They fill columns with moralizing and then attack others for moralizing. The assumption is that everyone has a dirty little secret, and one's duty is to sniff it out."

And there was a line by Oz Elliott, an old friend and former Dean of the Columbia Graduate School of Journalism, who—also pre-Bill and Monica—wrote, "Having withdrawn from the field in the 1980's, it appeared that journalists were returning to the fray in the '90's—with a vengeance, and with a chip on the shoulder. In the cynical new journalism that results, it seemed there was an unkind cut for almost anyone in public office, and little sense that any public policy was much worth pursuing."

Let me just pursue with you the last phrase that Oz Elliott used. The single most telling criticism of the press that I've read in recent years related less to its quite occasional publication of falsehoods or even its more than occasional dissent into cynicism, than to its ignorance and self-satisfaction about its ignorance. Early this decade, Jay Rosen, the Professor from NYU, wrote an extraordinary article, I think, about the press treatment of the then-newly elected President, Vaclav Havel of Czechoslovakia. He had come to Washington to give a speech. He had, of course, been jailed in Czechoslovakia for years, for his writings under Communist rule, and Washington—bi-partisan Washington—was delighted to greet him. He spoke to Congress; he was applauded enthusiastically. He told the Congress that the people of Eastern Europe could offer to the West some lessons from their "bitter experience" under Communist rule, and that experience, Havel said, had left him certain of his proposition. "Consciousness precedes being and not the other way around, as the Marxists claimed."

Members of Congress broke into sustained applause. The press was amused. The *Boston Globe* wrote about the speech as follows:

"What, a real live philosophical notion, discussed in front of our Congress people? What gives? Hey, folks, the man is an intellectual."

The *Washington Post* wrote that "while 'consciousness precedes being' is not often the subject of floor debate, this did not stop Congress from cheering."

The *Washington Post* editorial about the speech said it was "impressive and humbling." It said that Havel "is not kidding about this stuff." It's editorial was headlined, "Let's Hear it for Hegel." (LAUGHTER).

Newsday reported: "The audience looked a little perplexed, but it went ahead and applauded anyway."

And the *Washington Times* article put it this way: "I don't think ten men in the chamber knew what he was talking about, and in fact, I don't know what he was talking about" (LAUGHTER).

Now one of the striking things to me about all these comments was this: no one, not anyone, tried to explain what it was Havel was talking aobut. Journalists who had mastered extraordinarily complex matters, relating to weapons systems, economics and the like, laughed at Congress, laughed a little at themselves, but made not the slightest effort to understand what it was the man was trying to convey. The portrait of Havel offered by journalists, as Professor Rosen said, was "a speaker of alien discourse."

Rosen's view was that the answer had less to do with a lingering anti-intellectualism in the press than its resistance to a certain kind of discourse. To raise the issue of "consciousness," he wrote, is to speak frankly of the inner life, rather than outward events. Journalists tend to dismiss such talk, but not because they are godless technocrats, unmoved by deeper questions. They are simply more interested in the game of power, and they consider ideas about the nature of "being"

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irrelevant to their journalistic task.

I think that is a serious criticism of the press, and it has nothing to do with truth-telling or the lack of it.

Let me put it in my own language. Too many reporters, I think, shy away from discussing ideas, even when political figures voice them. Even when ideas are offered in statements by candidates for President of the United States. Too many reporters are in a different sort of way so truth-obsessed—in the too-narrow sense—that they cannot distinguish between truths that matter and lies that don't. Too many journalists can no more distinguish between a fib and a lie than between a lie and a war crime, and too many editors, formerly my clients, cannot distinguish between fact and opinion and tough mindedness and cynicism.

These are real problems, I think, with journalism. They're among the problems that have led the public to be so critical of the press that a recent report of the First Amendment Center concluded, based upon significant new polling data, that more than half the public now believes the press has too much freedom.

I've thought a lot, or tried to, about journalists and truth-telling and I've come to the conclusion that one of the things that journalists are best at doing is truth-telling. Truth-finding, truth-telling and often lie-detecting. They don't always get it right, they sometimes get it wrong, but they are successful, effective, talented and in that respect, the press knows just what Walter Lippman was talking about long ago when he said that the role of the press was to be "like the beam of a searchlight that moves restlessly about, bringing one episode and then another out of darkness and into vision."

That is not a minor skill. That is an irreplaceable contribution to the public, and when the press aims its search light at public officials, when it (in de Tocqueville's great phrase) "summons the leaders of all parties in turn to the bar of public opinion," it serves the public mightily.

But telling the truth and exposing those who don't, are not the only virtues. There are others. One of the many others is a sense of balance and perspective, an ability to assess just how important a particular truth or lie is. And that virtue, I suspect, is often just as lacking in newsrooms as it is in law offices.

None of which, of course, begins to answer the ultimate question posed by our hosts tonight, and an interesting question it is. Will *New York Times v. Sullivan* be retained in the 21st century? Should it? If the question were phrased more harshly: has the press shown that it *deserves* the added protection of that case—deserves in the sense of behaving in a fashion that all of us would agree entitles it to that protection—I think all of us would take, at least all of the lawyers here, would take a deep breath. We do have clients around.

But if the question asks something else—and this is what Harry Evans addressed—whether the public benefits sufficiently from giving the press an extra legal break—from paying the price, having victims of sometimes wrong-headed statements lose their right as it would otherwise have been to vindicate their reputation—then I think the answer is yes. And that is because Justice Brennan and his colleagues understood in 1964 what the libel lawyers who represent the press in this room, understand today. And that is that, in fact, the defense of truth is insufficient to protect even truthful speech. That is the nature of our legal system. It is because, in fact, the press would steer clear of setting forth its truth if by doing so it exposed itself to truly ruinous libel judgements.

Will *Sullivan* survive? I sometimes think of the case as sort of a wondrous gift to the press from a loving uncle who is no longer alive. In his place in the family comes a not-at-all avuncular figure who is not at all loving and not, in fact, at all admiring of press behavior. And the new uncle

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has it in his power to take the gift back. To do so however, will be aggravating to the uncle, will be irritating because the uncle will be criticized within and without the family for doing so. To leave the gift as it is, however, will frustrate the new uncle's increasingly deeply-felt sense that his nieces and nephews should behave better.

What to do? What to do indeed and what is there to say to the new uncle to persuade him to leave things as they are? Probably nothing. It is probably best to stay away from him, hoping he will become interested in other subjects— (LAUGHTER) the Second Amendment perhaps.

But there is something worth doing. It's easy to say as it is hard to do: it's to behave a bit better, to show anew that the gift is deserved and that it will be used, not alone for private benefit, but for public good. I know there are journalists here, so I say to them, is that clear? (LAUGHTER)

I want to say to all of you, I deeply appreciate this award. I appreciate the presence of so many of my friends here. I appreciate Sid Zion and Tony Lewis for writing those glowing, sometimes not entirely truthful, descriptions of me. I told you before, truth doesn't matter that much, and it's good to have you all here. Thank you very much. I do want to offer an absolutely last comment and that is that without Ken Vittor, without Sandy Baron, none of this, not a bit of it would have been possible. Thank you very much.