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BULLETIN

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Criminal Prosecutions of the Press:

The Espionage Act, Newsgathering Post-*Bartnicki*, Criminal Libel, Restricting Juror Interviews

80 Eighth Avenue, Suite 200 New York, New York 10011 (212) 337-0200
www.ldrc.com

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INTRODUCTION

The 1990's put at center stage a number of unresolved questions concerning the scope of civil sanctions and criminal penalties that can be imposed on the acquisition and subsequent publication of information by journalists engaged in newsgathering. The intense focus was not the result of high libel verdicts, although libel was by far and away the most common claim against media defendants[1] and the most likely to result in high damage awards against media institutions.[2] But, libel involves a body of law that has become increasingly well-defined and well trod by litigants. Journalists and their editors understand, probably better than ever, what to look for and how to analyze their work with libel in mind.

The new element has been a number of claims based upon actions taken by journalists and even their sources to obtain information. While not large in number, the impact of each case and each decision has been outsized, as the media struggles to understand what actions really are at risk of involving sanctions. Up for a new look were undercover reporting techniques, including use of hidden cameras, microphones and even hidden identities;[3] ride-alongs,[4] and reporting from conversations taped contrary to the will of the participants.[5]

When the Supreme Court heard *Bartnicki v. Vopper* in its 2000-2001 Term, involving the publication by a radio station of a telephone conversation clearly taped against the knowledge or wishes of the two parties to that conversation, the media gave the litigation extraordinary attention. The tape was delivered to the station, and the conversation on it carried apparent threats by teacher union representatives against school officials, made during the course of a heated series of negotiations in the local community in which the station operated.

While the newsgathering of the radio station was not at issue in *Bartnicki* – no one accused

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[1] LDRC, *1998 Complaint Study*, (1999).

[2] LDRC BULLETIN, *2002 Report on Trials & Damages*, (2002).

[3] *See, e.g.*, *Food Lion v. Capital Cities/ABC, Inc.*, 984 F. Supp. 923, 25 Med. L. Rptr. 2185 (M.D.N.C. 1997); *Sanders v. American Broadcasting Companies*, 978 P.2d 67, 85 Cal. Rptr.2d 909 (Cal. 1999), *rev. denied*, 2000 Cal. LEXIS 1892 (Cal. Mar. 15, 2000).

[4] *See, e.g.*, *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692 (1999), *Hanlon v. Berger*, 526 U.S. 808, 119 S.Ct. 1706, 143 L.Ed.2d 978 (1999), *on remand*, 188 F.3d 1155 (9th Cir. 1999); *Shulman v. Group W. Productions, Inc.*, 18 Cal.4th 200, 74 Cal. Rptr.2d 843, 955 P.2d 469, 26 Med. L. Rptr. 1737 (1998), *opinion modified*, 18 Cal. 4th 1034A (1998).

[5] *Bartnicki v. Vopper*, 121 S.Ct. 1753 (2001), *Peavy v. WFAA-TV*, 37 F.Supp.2d 495 (N.D. Tex. 1999), *aff'd inpart, vacated in part, rev'd in part*, 221 F.3d 158 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2191, 149 L.Ed.2d 1023 (2001) ; *Boehner v. McDermott*, (D.D.C. 1998), *rev'd* 191 F.3d 463 (D.C. Cir. 1999), *cert. granted, judgment vacated and remanded*, 121 S.Ct. 2190, 149 L.Ed. 2d 1022 (2001).

the station of participating in the taping or even of knowing who had done the taping – the issue before the Court was whether the *use* of the tape would result in penalties against the station under the Federal Wiretap Statute, 18 U.S.C. §§2520-2520. The Court's answer was "no," at least not here. But as is often the case when the Supreme Court opines, there remain open questions about the extent to which the Court is actually willing to protect journalists when the acquisition or disclosure of information arguably violates the wiretap or another law. Within the factual context of *Bartnicki*, for example, would use of a tape on a less clearly public matter obtained by the journalist under less passive circumstances be held punishable under the eavesdropping law ... and, indeed, is *Bartnicki* destined to have ripples with respect to other information received by, even sought by, journalists in their everyday course of reporting?

Running on a parallel track was a sudden new impetus to protect the government's national security secrets. A new "official secrets act" designed to punish the disclosure of "secret" government information was vetoed by President Clinton, but is likely to return in a post-9/11 terrorist sensitive Washington environment.[6] Indeed, even before 9/11, the newly minted Bush Administration went looking for a statutory hardening of rules governing "official secrets." These laws, and the ones that already exist, like the Federal Wiretap Statute, provide for criminal sanctions against those who deal in information contrary to their terms.

LDRC decided that it was time to look at some key areas where the government has the potential to prosecute journalists or penalize them for basic ways in which they operate. This LDRC BULLETIN is intended to start that process.

The LDRC BULLETIN reports first on the Espionage Act and some related law. Particularly now, when the country's attention is on military and national security issues, and the government seems peculiarly bent on preventing information it has not itself released from getting to the public eye, examining the very profound implications, not to mention the broad sweep, of these laws is more than an exercise. These are criminal laws and the failure by journalists or their organizations to appreciate them could have profound consequences in this hyper-sensitive environment.

This BULLETIN also addresses how to start the process of analyzing how to act in a post-*Bartnicki* environment. It is worth remembering that the Wiretap Statute (and the state statutes that mimic it) is a penal statute. There are criminal penalties provided for in the provision. That said, most litigation under the law has been civil, with those whose conversations were taped seeking legal recourse.

First, how to address what behavior by a journalist might be seen as implicating him or her

[6] A Senate Intelligence Committee hearing on another proposal to bolster government secrecy laws in September was postponed because of a request by Attorney General John Ashcroft, according to the committee chairman's office. The provision is supported by the committee's vice chairman, Sen. Richard Shelby, R-Ala. who has indicated he is confident Bush would not veto the measure, but that he will not push to reschedule the hearing before next year.

in the eavesdropping itself. There is a vast array of behavior beyond simply opening the mailbox and pulling out the brown paper envelope containing an anonymously obtained tape.

Second, what kind of information on that tape will be seen as so private, so outside the matters of public concern addressed by the Supreme Court in *Bartnicki*, as to risk penalties.

The LDRC BULLETIN also addresses the hurdles that counsel face when their reporter clients have been accused of criminal activity in the course of newsgathering. The BULLETIN suggests an approach drawn from procedural due process analysis.

Criminal libel has found new life in the millions of messages transmitted each day on the Internet. But, journalists, too, have been the victims of criminal libel complaints, too often brought by public officials. The BULLETIN reports on why it belongs in the ashcan of law, how to address existing criminal libel laws, and reports on the cases brought under criminal libel statutes in the last decade. Also addressed are non-U.S. criminal libel and related laws that protect "honor" and governmental and personal "integrity." These laws are well-used tools of censorship in great swaths of the world.

Finally, the LDRC BULLETIN offers a novel approach to another form of government control and limitation on newsgathering: barring access to jurors. Courts in recent years have increasingly begun to put a wall around jurors, not merely during trials, but after them as well. Patently unconstitutional in all but perhaps a tiny number of cases, these walls are guarded with the court's arsenal of contempt sanctions, with fines and even possible jail time.

What all of these articles attack are the existing and even growing number of ways the government has imposed the threat of penalties upon journalism. Jail time. Fines. Civil sanctions. Civil damages. These are all the weapons of censorship and intentionally so. The government means to keep journalists at bay. The Department of Justice supported the imposition of sanctions on the radio station in *Bartnicki*, arguing that the eavesdropping laws were intended and should prevent journalists from making use of unlawfully obtained tapes, even if they had nothing whatsoever to do with their unlawful acquisition. The Department of Justice has supported the proposition that the Espionage Laws were intended to apply to use of protected information by journalists.

It is little wonder that journalists and their lawyers are acutely focused on these matters and how to behave in the future to limit the imposition of sanctions and, at the same time, to allow the press to function in an optimal way. What lies ahead for journalists in a post-*Bartnicki* environment, when the government is prepared to use all of its legal tools to sequester jurors, to prevent use and publication of information, and when more and more government information is being designated as confidential and more penalties sought for its disclosure?

This BULLETIN cannot give all the answers. But we hope it will enhance the ongoing dialogue.

REPORTING ON THE WAR ON TERROR: THE ESPIONAGE ACT AND OTHER SCARY STATUTES

By Susan Buckley*

*Susan Buckley is a partner at Cahill Gordon & Reindel in New York City.

REPORTING ON THE WAR ON TERROR: THE ESPIONAGE ACT AND OTHER SCARY STATUTES

The U.S. military campaign against the Taliban regime and the al Qaeda terrorist network has spawned considerable debate (and at least one lawsuit)[1] over press access to military operations in Central Asia and information about them. It is a topic that seems destined to be revisited with each modern military campaign our nation embarks on.[2] There has been far less public discussion about the government's power to restrict the dissemination of truthful information about the military campaign once it is gathered by the press from sources other than official government sources. We know from *New York Times Co. v. United States*,[3] *The Pentagon Papers* case, that governmental efforts to enjoin reporting about matters of national security can rarely pass muster under the First Amendment. What we also know from *The Pentagon Papers* case is that at least some members of the Supreme Court were then of the opinion that those who published *The Pentagon Papers* might be subject to criminal prosecution for doing so.[4]

The Justice Department wisely never pursued any prosecutions of the press there and the criminal case against Daniel Ellsberg and Anthony Russo was ultimately abandoned as well.[5] But the vague statutes alluded to in *dicta* by members of the Court then and many others making criminal the dissemination of information concerning the national defense remain on the books today. This article will briefly review the most pertinent federal statutes presently in force and highlight some of the more important cases from the modest body of authority interpreting those statutes.

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[1] Flynt v. Rumsfeld, 1:01CV 02399 (PLF) (D.D.C.) (filed November 16, 2001).

[2] There has been much scholarship on the subject of press access to wars since World War II. For World War II *see, e.g.*, PETER BRAESTRUP, BATTLE LINES 27-40 (1985); PHILLIP KNIGHTLY, THE FIRST CASUALTY: FROM THE CRIMEA TO VIETNAM: THE WAR CORRESPONDENT AS HERO, PROPAGANDIST, AND MYTH MAKER (1975); MEYER L. STEIN, UNDER FIRE: THE STORY OF AMERICAN WAR CORRESPONDENTS (rev. ed. 1995). For the Korean War *see, e.g.*, BRAESTRUP, *supra*, at 47-60; KNIGHTLY, *supra*; STEIN, *supra*. For the Vietnam War, *see, e.g.*, BRAESTRUP, *supra*, at 61-75; DANIEL C. HALLIN, THE UNCENSORED WAR: THE MEDIA AND VIETNAM (1986); KNIGHTLY, *supra*; STEIN, *supra*. For Grenada *see, e.g.*, BRAESTRUP, *supra*, at 83-109; STEIN, *supra*. For the Persian Gulf War *see, e.g.*, STEIN, *supra*; Michael W. Klein, *The Censor's Red Flair, the Bombs Bursting in Air: The Constitutionality of the Desert Storm Media Restrictions*, 19 HASTINGS CONST. L.Q. 1037, 1048-54 (1992); Michael D. Steger, *Slicing the Gordian Knot: A Proposal to Reform Military Regulation of Media Coverage of Combat Operations*, 28 U.S.F. L. REV. 957, 972-78 (1994).

[3] 403 U.S. 713 (1971).

[4] *See* discussion at pp. XX-XX, *infra*.

[5] The prosecution was abandoned as a result of prosecutorial misconduct. *See* Melville B. Nimmer, *National Security Secrets v. Free Speech: the Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311 (1974) ("Nimmer").

There are a number of statutes scattered throughout the United States Code of which a media law practitioner should be aware in counseling his or her clients on issues relating to national security. They include both broad and amorphous provisions and others that are far more narrow and specific. This article will first address the more amorphous provisions (sections 793 and 794 of the Espionage Act) because an understanding of those sections and how they have been interpreted by the courts is critical to an understanding of the more narrow statutes that followed. It will then briefly address more targeted provisions restricting the dissemination of information concerning specific national security issues, such as designated military installations, codes, ciphers and communications intelligence systems, covert agents and data restricted under The Atomic Energy Act. It concludes with a brief discussion of the catch-all federal criminal statute concerning the theft of government property.

But the starting place is the Espionage Act. And the starting place within the Espionage Act is 18 U.S.C. § 793.

18 U.S.C. § 793: "Gathering, transmitting or losing defense information"

On its face 18 U.S.C. § 793 purports to restrict the gathering, retention or communication of documents or information "respecting," "relating to" or "connected with" the national defense.

- **Sections 793(a) and (b)**[6]

Section 793(a) prohibits the gathering of information from, broadly speaking, *places* connected to the national defense if done "for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation . . . ." Such places include, by way of example, any vessel, aircraft, naval station, submarine base, camp, building, office or research laboratory owned, under the control of or within the exclusive jurisdiction of the United States and "any prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army, Navy, or Air Force is being prepared or constructed or stored, information as to which prohibited place the President has determined would be prejudicial to the national defense."

Section 793(b) prohibits the copying, taking, making or obtaining any "sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense" or any attempt to do so with the same purpose and intent set forth in section 793(a).

It is an understatement to say that on their face, sections 793(a) and (b) are maddeningly overbroad. Could Congress possibly have intended to prohibit the gathering or duplication of all

[6] Sections 793 (a) and (b) were originally enacted as sections 1(a) and 1(b) of the Espionage Act of 1917. Espionage Act of June 15, 1917, c. 30, 40 Stat. 217. Some of the statutory language was carried over from provisions of the Espionage Act of 1911.

documents "connected with the national defense"? Could it really be true that negligence alone ("with reason to believe") could trigger criminal liability for gathering or copying such material? The only reason that sections 793(a) and (b) present little cause for sleepless nights is a result of judicial interpretation of some of the more troubling statutory language.

In *Gorin v. United States*, 312 U.S. 19 (1941), the defendant mounted an attack against the statutory terms "relating to the national defense" and "connected to the national defense" arguing that they were unconstitutionally vague. The Supreme Court rejected the claim finding that the term "national defense" had a "well understood connotation." *Id*. at 28. National defense, the Court ruled, is "a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness."[7] What the Court *did* do to narrow the statute's reach was to make clear that *scienter* or bad faith is now required to make out a conviction under sections 793(a) and (b).[8]

In *United States v. Heine*, 151 F.2d 813 (2d Cir. 1945), the Second Circuit directly addressed the ambiguity of the phrase "relating to the national defense."[9] There the defendant had collected publicly available material (concerning the national defense) from newspapers, periodicals and the like, and packed it off to Germany with the requisite criminal intent. The Second Circuit reversed the conviction, holding that unless the information was kept secret by the government, it could not be considered information "relating to the national defense." *Id*. at 816. As the Fourth Circuit has more recently phrased it, information relating to the national defense is information that is "closely held" by the government; information that is widely available to the public or information that is officially disclosed by the government is not. *United States v. Squillacote*, 221 F.3d 542, 578 (4th Cir. 2000). But if the information *is* closely held by the government, the Fourth Circuit has also ruled, even if snippets of it have been "leaked," it would continue to be information "relating to the national defense."

> [A] document containing official government information relating to the national defense will not be considered available to the public (and therefore no longer national defense information) until the *official* information in that document is lawfully available. Thus, as the government argues, mere leaks of classified information are insufficient to prevent prosecution for the transmission of a classified document that is the official source of the leaked information.

Id. (emphasis in original).

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[7] Gorin, 312 U.S. at 28 (internal quotation marks omitted). This was the definition that had been proffered by the government. *Id*.

[8] The Court found the bad faith standard to be lurking in the requirement that the information be "used to the injury of the United States, or to the advantage of any foreign nation." Gorin, 312 U.S. at 27-28. For additional cases discussing Gorin's *scienter* standard, *see, e.g*., In re Squillacote, 2002 WL 58567 (D.C. Cir. 2002); United States v. Truong Dinh Hung, 629 F.2d 908, 918 (4th Cir. 1980); United States v. Enger, 472 F. Supp. 490, 508 (D.N.J. 1978).

[9] It did so in considering the statutory precursor to § 794(a). *See* United States v. Heine, 151 F.2d at 814 n.1.

How does this all play out in the press context? Sections 793(a) and (b) should be construed to have no application at all to the act of publication. The statutes are concerned with the gathering and copying of information related to the national defense; they do not speak to communicating such information to others or to publishing such information. As for newsgathering efforts in advance of publication, the *scienter* requirement imposed by *Gorin* provides the best legal defense to liability under these statutes.

Although sections 793(a) and (b) leave much to be desired, they pale in comparison to the madness of sections 793(d) and (e).

- **Sections 793(d) and (e)**[10]

Section 793(d) prohibits anyone lawfully having possession of any document, writing, photograph (and a host of other things) "relating to the national defense" from "willfully" communicating or transmitting it to anyone not entitled to receive it. On the face of the statute, no specific intent to injure the United States (or to benefit a foreign nation or enemy) is required to trigger liability under section 793(d) where tangible documents or things are at issue; the communication need only be "willful." The section also prohibits the willful communication of "information relating to the national defense [distinguished from documents and things] which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation" to anyone not entitled to receive it.

Section 793(d) applies to those having lawful possession of such documents or information, such as government employees or Members of Congress. It criminalizes the conduct of the source, not the recipient of the document or information. Which brings us to section 793(e).

Section 793(e) is one of the most troublesome sections of the Espionage Act from the perspective of the press, the provision that has spawned the most debate in the press context and, at first blush, pretty much one of the scariest statutes around. Because of its importance, it is worth quoting in its entirety. Section 793(e) provides:

> (e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or

[10] Sections 793(d) and (e) find their roots in section 1(d) of the Espionage Act of 1917, although some of the language in that section had been carried over from the Espionage Act of 1911. The separate offenses described in sections 793(d) and (e) were broken out into two parts as part of the amendments to the Espionage Act enacted by the Internal Security Act of 1950.

> transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it . . .
>
> Shall be fined under this title or imprisoned not more than ten years, or both.

The issues raised by section 793(e) are highly problematic and, for the most part, largely unresolved. As with section 793(d), from the face of the statute it would appear that retaining (and not returning) or communicating documents or other tangible things "relating to the national defense" is prohibited regardless of whether the recipient has reason to believe that the document could be used to the injury of the United States or to the advantage of any foreign nation. The "which" clause, if you will, only modifies "information." If that is so (and if it is constitutional), the statute would make it a crime for any person not authorized to have it to retain (and not return) any document or tangible thing "relating to the national defense" or to communicate any document or tangible thing "relating to the national defense" regardless of motivation as long as it is done "willfully." Communicating other "information" relating to the national defense or retaining and not returning the same is conduct subject to criminal penalties as well but the possessor of the information must have reason to believe that the information "could be used to the injury of the United States or to the advantage of any foreign nation."

The issue of whether section 793(e) can fairly be said to apply to the press was first discussed in the district court's opinion in *The Pentagon Papers* case. Declining to enter the preliminary injunction sought by the government there, Judge Gurfein rejected the government's effort to rely on section 793(e) as providing a valid statutory basis for the entry of the injunction. Judge Gurfein was particularly persuaded by the fact that section 793(e) does not prohibit "publishing" as other sections of the Espionage Act do as "indicating that newspapers were not intended by Congress to come within the purview of Section 793." *United States v. New York Times Co.*, 328 F. Supp. 324, 329 (S.D.N.Y. 1971).

The Second Circuit did not address the issue in its opinion reversing Judge Gurfein. *See United States v. New York Times Co.*, 444 F.2d 544 (2d Cir. 1971) (*en banc*). Nor was it the subject of any ruling by the United States Supreme Court in the case. In his concurring opinion, Justice Douglas (joined by Justice Black) agreed with Judge Gurfein that section 793 simply did not apply to the press. *See New York Times Co. v. United States*, 403 U.S. 713, 720-21 (1971) (Douglas, J., concurring). Justice White, joined by Justice Stewart, remarked that "it seems undeniable that a newspaper, as well as others unconnected with the Government, are vulnerable to prosecution under § 793(e) if they communicate or withhold the materials covered by that section." *Id.* at 738 n.9 (White, J., concurring). Justice White declined to offer his views on Judge Gurfein's conclusion that press publications could not be considered "communications" under section 793(e), adding that the simple retention of the Papers could make out a violation of the section in any event. *Id.* After noting that Judge Gurfein's construction of the statute had some support in the legislative history, Justice Marshall offered that it was not the only plausible construction of the statute, citing to Justice White's opinion. *See id.* at 745 (Marshall, J., concurring).

Edgar & Schmidt

Prompted by this dicta, in 1973 Harold Edgar and Benno Schmidt, Jr. undertook a serious analysis of the consequences of applying the Espionage Act in general (and sections 793(d) and (e) in particular) to press publications (and conduct preparatory to publication) in what was to become the landmark law review article on the subject. H. Edgar and B. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUMBIA L. REV. 929 (1973) ("EDGAR & SCHMIDT I"). What Warren and Brandeis were to privacy and the press,[11] Edgar and Schmidt are to the Espionage Act and the press. Exhaustively marshaling the legislative history of the various espionage statutes to support their arguments, Edgar and Schmidt persuasively urged that sections 793(d) and (e) — which they characterized as "so sweeping as to be absurd"[12] — were not intended to be applied to the "publication of defense information that is motivated by the routine desires to initiate public debate or sell newspapers." EDGAR & SCHMIDT I at 1033.

The legislative materials relied on by Edgar and Schmidt are voluminous and are painstakingly detailed in their article. Three brief points bear particular mention:

- In considering the Espionage Act of 1917, Congress rejected a provision that would have permitted the President to prohibit newspapers from publishing information concerning the national defense that the President determined might be useful to the enemy at the same time it passed the statutory predecessor of sections 793(d) and (e).[13]
- When the Espionage Act was amended in 1950 (creating the separate sections now known as 793(d) and (e)), both the Legislative Reference Service and the Attorney General opined that section 793 would not in their view apply to conduct ordinarily engaged in by newspapers.[14]
- At the same time the 1950 amendments were passed, and specifically to address the concerns of some members of Congress as to the perilous breadth of section 793(e), a provision was enacted stating that "[n]othing in this Act shall be construed to authorize, require or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect."[15]

To effectuate the intent of Congress, Edgar and Schmidt urged that the term "willfully" in both sections 793(d) and (e) should be construed so as to exclude, among other things, conduct

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[11] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[12] EDGAR & SCHMIDT I at 1032.

[13] EDGAR & SCHMIDT I at 946-65. *See* discussion at pp. XX-XX, *infra*.

[14] EDGAR & SCHMIDT I at 1025-26.

[15] EDGAR & SCHMIDT I at 1026-27. The provision was included as part of the Internal Security Act of 1950, Pub. L. No. 81-831, 64 Stat. 987 (1950) and codified as the proviso to the Subversive Activities Act of 1950.

undertaken for purposes of stimulating public debate (although they candidly conceded that to do so was a bit of a strain). *Id*. at 1046. Short of that, the authors offered that the statutes were simply too vague and overbroad to pass muster under the First Amendment. *Id*. at 1058.

In its report to Congress in 1982 on the effectiveness of then-existing laws to prohibit the disclosure of classified information (commonly referred to as the "Willard Report"), the inter-departmental task force headed by Justice Department Deputy Assistant Attorney General Richard Willard offered a different view of the scope of sections 793(d) and (e).

> Certain provisions of the espionage laws may also be violated by unauthorized disclosures of sensitive information. The two provisions that would most likely be violated by an unauthorized disclosure of classified information to the media would be 18 U.S.C. 793(d) and (e). . . .
>
> These provisions have not been used in the past to prosecute unauthorized disclosures of classified information, and their application to such cases is not entirely clear. However, the Department of Justice has taken the position that these statutes would be violated by the unauthorized disclosure to a member of the media of classified documents or information relating to the national defense, although intent to injure the United States or benefit a foreign nation would have to be present where the disclosure is of "information" rather than documents or other tangible materials. These laws could also be used to prosecute a journalist who knowingly receives and publishes classified documents or information.[16]

In the years since the publication of Edgar and Schmidt's article and the Willard Report there has been good news and bad. The good news is that it is still the case that no member of the press has ever been prosecuted for violating section 793(e). Whether that is a function of our nation's commitment to the principles embodied in the First Amendment, of the government's reluctance to air sensitive information in the course of a public prosecution or of the political untenability of prosecuting news organizations for reporting news and information to the public, it is a fact that should provide considerable comfort. The bad news is that the only court that has considered issues raised by sections 793(d) and (e) in the press context since was not terribly receptive to many of Edgar and Schmidt's arguments. *See United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988).

U.S. v. Morison

In 1984, while employed by the Naval Intelligence Support Center, Samuel Morison stole classified pictures of a Soviet aircraft carrier under construction in a shipyard on the Black Sea taken by one of the Navy's KH-11 reconnaissance satellites. He provided the pictures to Jane's Defence Weekly, a British publication. Morison had worked with Jane's on other stories, with the consent of the NISC. The photographs were published by Jane's; one was re-published in the Washington Post. After persuading Jane's to return the photographs, the Justice Department was able to identify Morison as the leaker largely as a result of discovering his fingerprint on one of the photographs.

Although the government could have taken the position that it did not need to prove that there was reason to believe that the transmission of the information would cause any injury to the

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[16] *Report of the Interdepartmental Group on Unauthorized Disclosures of Classified Information*, March 31, 1982 ("WILLARD REPORT"), reprinted as Appendix 2 to *Presidential Directive on the Use of Polygraphs and Prepublication Review: Hearings Before the House Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 98th Cong. 171-72 (1984).

United States or any advantage to a foreign nation (because photographs were at issue), the government urged that the photographs enabled our nation's enemies (particularly the Soviet Union) to better understand the reconnaissance capabilities of the KH-11 satellite to the nation's detriment. Morison argued that the publication of the photographs would help the public better understand the Soviet Union's military readiness, a topic about which he claimed the American public was being misled. Morison was found guilty of violating sections 793(d) and (e) among other crimes.

On appeal to the Fourth Circuit Morison urged (as he had to the district court) that section 793 was never intended to apply to the conduct with which he was charged, *i.e.* leaking information to the press, but, rather, was intended to prohibit communications with a foreign country or other enemy. Morison also argued that the statute should be read as exempting communications with the press (pointing to the same legislative history relied on by Edgar and Schmidt) and, if it were not, it would violate the First Amendment. In the alternative Morison urged that the statute was unconstitutional as applied in his context on the grounds that it was both vague and overbroad. The Fourth Circuit affirmed the conviction.

On the issue of whether sections 793(d) and (e) applied to Morison's conduct or were limited to classic spying, the Fourth Circuit engaged in what it viewed as a straightforward statutory analysis. On their face, the Fourth Circuit reasoned, sections 793(d) and (e) prohibit the willful transmittal of information to "those not entitled to receive it." According to the court, the press was no more entitled "to receive it" than anyone else. The court stated:

> The language of the two statutes includes no limitation to spies or to "an agent of a foreign government," either as to the transmitter or the transmittee of the information, and they declare no exemption in favor of one who leaks to the press. It covers "anyone." It is difficult to conceive of any language more definite and clear.

Morison, 844 F.2d at 1063. As such, the court ruled, the legislative history was simply irrelevant on the issue. And, even assuming that the legislative history should be looked to for a proper interpretation of the statute, the court concluded, it did not support Morison's arguments in any event. As the court also observed, the structure of the Espionage Act was inconsistent with Morison's claim that section 793 should be limited to classic espionage, pointing to section 794 (discussed below), which specifically prohibits communications with foreign governments, foreign military forces and/or their agents. If section 793 were to be limited to classic espionage, the court reasoned, the statute would be redundant of section 794, a result that could not properly be ascribed to Congress. Accordingly, the court held, sections 793(d) and (e) were not limited to conduct that one would ordinarily view as "classic spying."

The Fourth Circuit also rejected Morison's claims that sections 793(d) and (e) were vague and overbroad. The court ruled that any vagueness in the statutory phrase "relating to the national defense" was cured by the trial court's instructions and that the phrase was not vague as applied to Morison's conduct in any event. *Morison*, 844 F.2d at 1073.[17] Addressing Morison's claim that the phrase "anyone not entitled to receive it," was also vague, the court held that for the purposes of Morison's case the phrase could be limited (and was properly limited by the trial court's instructions) to persons not entitled to receive information classified under the government's classification system. *Id.* at 1074. Understandably the court devoted a considerable amount of attention to Morison's position as an experienced intelligence officer, his explicit knowledge of the

[17] The trial court's instructions on intent were also sustained. "An act is done *wilfully* if it is done voluntarily and *intentionally* and with *the specific intent to do something that the law forbids. That is to say, with a bad purpose either to disobey or disregard the law.* Morison, 844 F.2d at 1071 (emphasis in original).

classified status of the photographs, his familiarity with the classification system as a whole and his written agreement to abide by it. *Id*. at 1073-74. Morison's overbreadth arguments were essentially rejected on the same grounds as his vagueness arguments. *Id*. at 1076.

The Fourth Circuit's analysis of the broader First Amendment issues raised by Morison is more difficult to parse. Although the principal opinion in the case was written by Judge Russell (and joined by Judge Wilkinson), the two concurring judges approached the First Amendment issues with far more sensitivity. Judge Phillips concurred in the judgment and joined in Judge Russell's opinion except as to its discussion of the First Amendment issues raised by the case. As to those issues, he joined in Judge Wilkinson's opinion. As such, each of the opinions should separately be considered on these issues with the most precedential weight afforded to Judge Wilkinson's opinion.

Judge Russell concluded that the legislative history of the Espionage Act was "silent on any Congressional intent in enacting sections 793(d) and (e) to exempt from its application the transmittal of secret military information by a defendant to the press or a representative of the press." *Morison*, 844 F.2d at 1067. Turning to Morison's argument that unless such an exemption were read into the statute, it would run afoul of the First Amendment, Judge Russell offered that he did not perceive "any First Amendment rights to be implicated here" observing, rather curiously, that the case was not a prior restraint case, but a criminal prosecution of a government employee. That the First Amendment offered no "asylum" to Morison was, in Judge Russell's view, made clear by the Supreme Court's decision in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). Judge Russell quoted at length from Justice White's opinion there:

> "It would be frivolous to assert . . . that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news."

Morison, 844 F.2d at 1068 (quoting *Branzburg v. Hayes*, 408 U.S. at 691). Significantly, Judge Russell also pointed to the decisions in *Snepp v. United States*, 444 U.S. 507 (1980) and *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972), both dealing with the ability of the government to prohibit government employees from divulging confidential information in violation of confidentiality agreements, in support of his reasoning. However, Judge Russell made quite clear that *Branzburg* was the authority he deemed dispositive of the First Amendment arguments. *Morison*, 844 F.2d at 1069.

In his concurring opinion (joined by Judge Phillips), Judge Wilkinson chose to address the broader First Amendment issues "directly and on their own terms" after observing, significantly, that "Morison as a source would raise newsgathering rights on behalf of press organizations that are not being, *and probably could not be*, prosecuted under the espionage statute. *Morison*, 844 F.2d at 1081 (Wilkinson, J., concurring) (emphasis added). Responding to the arguments of the media *amici* that reporting leaked information was critical to informing the public about the operations of government and had often been vital in exposing governmental misconduct, Judge Wilkinson offered:

> [I]nvestigative reporting is a critical component of the First Amendment's goal of accountability in government. To stifle it might leave the public interest prey to the manifold abuses of unexamined power. It is far from clear, however, that an affirmance here would ever lead to that result. . . . Even if juries could ever be found that would convict those who truly expose governmental waste and misconduct, the political firestorm that would follow prosecution of one who exposed an

> administration's own ineptitude would make such prosecutions a rare and unrealistic prospect. Because the potential overbreadth of the espionage statute is not real or substantial in comparison to its plainly legitimate sweep, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied."

Id. at 1084 (Wilkinson, J., concurring) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973)).

As for the case before him, Judge Wilkinson concluded that it could only be resolved by a balancing of the important First Amendment rights raised and the equally important threat to national security posed by Morison's conduct. "Aggressive balancing" was not appropriate in this context, according to Judge Wilkinson, because issues of national security were at stake. Both Congress and the executive branch were entitled to substantial deference in such a context, he reasoned, because the alternative would simply be too grave.

> To reverse Morison's conviction on the general ground that it chills press access would be tantamount to a judicial declaration that the government may never use criminal penalties to secure the confidentiality of intelligence information. Rather than enhancing the operation of democracy, as Morison suggests, this course would install every government worker with access to classified information as a veritable satrap. . . . The question, however, is not one of motives as much as who finally must decide. The answer has to be the Congress and those accountable to the Chief Executive. While periods of profound disillusionment with government have brought intense demands for increased scrutiny, those elected still remain the repositories of a public trust. Where matters of exquisite sensitivity are in question, we cannot invariably install, as the ultimate arbiter of disclosure, even the conscience of the well-meaning employee.

Morison, 844 F.2d at 1083 (Wilkinson, J. concurring).

Judge Phillips's opinion reflects that he was deeply troubled by the statutory phrase "relating to the national defense" and expressed the view that it was unconstitutionally vague and overbroad on its face. *Morison*, 844 F.2d at 1086 (Phillips, J., concurring). Because the trial court's jury instructions had sufficiently "flesh[ed] out" this key element consistent with Fourth Circuit precedent, Judge Phillips was prepared to let the conviction stand. *Id*. At the same time he observed that

> [J]ury instructions on a case-by-case basis are a slender reed upon which to rely for constitutional application of these critical statutes; and that the instructions we find necessary here surely press to the limit the judiciary's right and obligation to narrow, without "reconstructing," statutes whose constitutionality is drawn in question.

Id. He urged Congress to provide a solution, *id*., commenting that

> If one thing is clear, it is that the Espionage Act statutes as now broadly drawn are unwieldy and imprecise instruments for prosecuting government "leakers" to the press as opposed to government "moles" in the service of other countries.

Id. at 1085.

Although the Fourth Circuit's opinion in *Morison* was viewed with dismay by many as soon as it was issued, it is not quite as bleak as its critics claim. To be sure, a victory for Morison would have been a victory for the press too, but Morison's loss hardly translates easily to others. The press was not prosecuted in *Morison*, the leaker was. And this particular leaker was, as the Fourth Circuit stressed, a sophisticated government employee who knew precisely what he was doing. And

although it is true that the Fourth Circuit necessarily rejected Edgar and Schmidt's contention that the legislative history of the Espionage Act demonstrates that communications *to* the press were intended to be exempt from section 793's reach, its holding certainly does not preclude the argument (even in the Fourth Circuit) that section 793(e) cannot constitutionally be applied where the "communication" at issue is the publication *by* the press of news and information to the public.

Judge Russell's reliance on *Branzberg* is troubling but it is worth pausing to suggest that his reasoning in this regard has been seriously undermined by the Supreme Court's opinion last term in *Bartnicki v. Vopper*, 532 U.S. 514 (2001). In *Bartnicki* too the Supreme Court was quick to point out that the press is not exempt from criminal statutes of general applicability (*see id.* at 1764 n.19), but when faced with the issue of whether the press could be criminally liable for the act of publishing information obtained in violation of the federal wiretap statutes, the Supreme Court declined to extend liability to the press. To be sure the Supreme Court took pains to stress that its holding was narrow and fact-specific, but the fact remains that the Court distinguished between the acquirer and the publisher in applying a criminal law of otherwise general applicability. On the other hand, if history is a guide, it would be unrealistic to predict with any degree of confidence that the Court would look as kindly on the dissemination of information concerning sensitive issues of national security as it did to the dissemination of union threats of violence.

At the end of the day, *Morison* left open as many issues as it answered. The disturbing vagueness and ambiguity of the statute remains, despite the Fourth Circuit's effort to refine the statutory language "as applied to" Morison. In fact the Fourth Circuit's efforts to do so only serve to reinforce the arguments that the statutory language is hopelessly imprecise and potentially boundless.[18]

18 U.S.C. § 794: "Gathering or delivering defense information to aid foreign government"[19]

Section 794(a) prohibits conduct that one would ordinarily view as classic espionage. It prohibits the communication or transmission of the same documents and things listed in sections 793(d) and (e) (documents, writings, photographs, etc.) or any "information relating to the national defense" to "any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States" or to any "representative, officer, agent, employee, subject, or citizen thereof" if done with "intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation." The death penalty may be imposed if the offense resulted in the identification by a foreign power of an individual acting as an agent of the United States who dies as a consequence of the identification *or* if the information disclosed "directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy."

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[18] Section 793 contains several other provisions not discussed here, the most important of which is section 793(c), the section that carries the baggage of every other section in the statute. Section 793(c) imposes liability on the recipient of a document "connected with the national defense, knowing or having reason to believe, at the time he receives [it]" (or agrees or attempts to obtain it) "that it has been or will be obtained . . . or disposed of [in violation of this chapter.]" *See also* 18 U.S.C. § 793(f) (making it a crime for those entrusted with information "relating to the national defense" to lose it); *id.* § 794(f) (the conspiracy section); *id.* § 794(h) (the forfeiture provision).

[19] Sections 794(a) and (b) were also enacted as part of the Espionage Act of 1917.

That section 794(a) was not intended to reach press publications finds strong support in both the statutory language and the legislative history. Most fundamentally, section 794 concerns communications to foreign governments, foreign factions and the like, as the *Morison* court noted. *See Morison*, 844 F.2d at 1065. And, although section 794(a) — like 793 — bars the communication or transmission of information, it does not use the word "publish" to describe prohibited acts. To be sure, an aggressive prosecutor could certainly argue that a publication is, by definition, a communication, but the argument is wholly inconsistent with the structure of the statute. That is because section 794(b), adopted at precisely the same time, does list publishing as a prohibited act. Although the intent requirement is not a model of legislative precision, it is clear from *Gorin* that proof of bad faith would be required to sustain a conviction under section 794(a). *Gorin*, 312 U.S. at 27-28. In short, this is not a statute that realistically could be applied to the ordinary reporting of news and information to the public.

On its face, section 794(b) is more problematic. It provides:

> (b) Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for any term of years or for life.

Unlike the provisions discussed above, section 794(b) specifically uses the word "publishes" in describing prohibited conduct. By publishing a newspaper article about troop movements does one "inten[d] that the same be communicated to the enemy"? Presumably the newspaper publisher intends to communicate with anyone who chooses to read his newspaper. The limitation that the statute only applies "in time of war" also provides little solace. The courts have given little indication as to what "in time of war" means in this context.[20] If it means a war declared by Congress pursuant to Article I of the Constitution, we are not today in "a time of war."[21] If it means pretty much anything else, we surely are (at least at this writing). And at the end of the day it might not even matter whether we are now at "war" or not. That is because 18 U.S.C. § 798A extended section 794(b) during the period of national emergency first announced by President Truman in 1950. Although it is clear that all powers and authorities granted to the executive as a consequence of Truman's declaration have since been repealed, the state of emergency declared by Truman has

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[20] In United States v. Sobell, 314 F.2d 314 (2d Cir. 1963), the Second Circuit concluded that the question of whether and when there is a "time of war" is one of law but observed that it is a question that "is not readily answered even by judges." *Id*. at 326.

[21] Congress has no issued a formal declaration of war. On September 14, 2001 Congress passed a joint resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorists attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

technically not been and arguably remains in effect today.[22]

As with sections 793 (d) and (e), Edgar and Schmidt make a powerful case that section 794(b) was not intended to reach press publications pointing, once again, to the legislative history of the original Espionage Act. *See* EDGAR & SCHMIDT I at 946-965. The fact that there was a proposal to permit the President to designate national defense information unsuitable for print in the very section that ultimately became section 794 — a proposal that was specifically rejected by Congress — is persuasive evidence that the provisions that did pass were not intended to reach ordinary reporting by the press. *Id*. On the other hand, the defeated provision has also been read as simply evidencing Congress' abhorrence to prior restraints; section 794(b), under this view, would still permit subsequent punishment of the press. *See New York Times Co*., 403 U.S. at 733-34 (White, J., concurring).

As noted above, section 794(b) does use the word "publish" making the argument that it cannot be applied to press publications a less attractive one than can be mounted against section 793 (which does not). The debates about the lack of an intent requirement in the defeated provision also lend credence to the view that the simple act of publishing a newspaper to any and all is not alone sufficient to satisfy the requirement that the publication be made "with the intent that the same shall be communicated to the enemy" but would also require a conscious purpose to inform the enemy.[23] *See* EDGAR & SCHMIDT I at 958, 965.

As a practical matter it is inconceivable that the Justice Department would seek to invoke section 794(b) to prosecute the press for the ordinary reporting of news and information to the public. But it is a bit troubling that all that stands in the way are political pressure, prosecutorial discretion and somewhat arcane debates about the intentions of a Congress engulfed in World War I. The statute itself is wholly unsatisfying in defining its potentially formidable reach.

Sections 793 and 794: An Epilogue

No one can read the debates in 1917 over what would become sections 793 and 794 without being struck by the passion and commitment to our nation's need for a free and unfettered press even (and particularly) in the midst of "The Great War." Those (President Wilson among them) who supported more severe restrictions on the dissemination of information concerning the national defense were equally passionate in defense of their cause. This irreconcilable conflict of views undoubtedly contributed to the passage of such vague and ambiguous laws.

During the course of one of the many hearings Congress has held in the last century on the issue of how best to protect against the disclosure of classified information, Anthony Lapham, then

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[22] In 1976 Congress passed the National Emergencies Act, now codified at 50 U.S.C. §§ 1601 *et seq*., apparently intending to end the various states of emergency then in effect, including the state of emergency declared by President Truman. *See* S. Rep. No. 94-1168, at 2, *reprinted in* 1976 U.S.C.C.A.N. 2288, 2289 ("Enactment of this legislation would end the states of emergency under which the United States has been operating for more than 40 years.") The statute itself terminates the powers and authorities possessed by the executive branch as a result of then-existing states of emergencies, but did not literally terminate the state of emergency declared by President Truman. *See CRS Report for Congress, National Emergency Powers* 8, 12 (Congressional Research Service) (updated Sept. 18, 2001).

[23] Gorin's narrowing construction does not automatically translate to section 794(b) because the statute does not contain the requirement that the information at issue be "used to the injury of the United States or the advantage of any foreign nation." *See* n. 8, *supra*. Section 794(b) requires only that the information "might be useful to the enemy.

General Counsel of the CIA, offered the following views on sections 793 and 794 and their applicability to the press:

> I would like to be able to say to you that the meaning and scope of these statutes are reasonably definite. Unhappily I can give you no such assurance. . . . What has never been sorted out is whether these statutes can be applied, and would be constitutional if applied, to the compromise of national security information that occurs as a result of anonymous leaks to the press or attributed publications. I cannot tell you with any confidence what these laws mean in these contexts. I cannot tell you, for example, whether the leak of classified information to the press is a criminal act, or whether the publication of that same information by a newspaper is a criminal act, or whether this conduct becomes criminal if committed with a provable intent to injure the United States but remains non-criminal if committed without such intent.
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> . . . . We have then, at least in my opinion, the worst of both worlds. On the one hand the laws stand idle and are not enforced at least in part because their meaning is so obscure, and on the other hand it is likely that the very obscurity of these laws serves to deter perfectly legitimate expression and debate by persons who must be as unsure of their liabilities as I am unsure of their obligations.[24]

If the *Morison* case is correct, we now know the answer to at least one of the questions posed by Mr. Lapham (at least in the Fourth Circuit), namely whether a criminal conviction can be sustained under section 793 for leaking classified information to the press. But the other questions he posed remain as debatable today as they were then. And the very substantial danger to which Mr. Lapham pointed — that the sweeping vagueness of the statutes alone may serve to deter perfectly legitimate expression and debate — is likely more real today in reporting on the difficult issues raised by our nation's war on terror.

There is no question that the legislative history of the Espionage Act of 1917 offers powerful evidence that sections 793 and 794 should not be applied to activities of the press as frustrating as the language of the statutes may be. As we shall see, the other powerful evidence is that in the years since the passage of the Espionage Act Congress has enacted numerous provisions seeking to protect particular information concerning national security from dissemination. If Congress understood sections 793 and 794 to be as broad as their language would seem to suggest, the passage of most of the statutes discussed below would have been wholly unnecessary.

18 U.S.C. §§ 795 and 797: Photographing and publishing photographs of defense installations

For decades, conspiracy theorists, U.F.O. enthusiasts and others have been obsessed with a military test site in the Nevada desert that has come to be known as Area 51. It has been said that alien spacecrafts are housed there by the government (a vision that came to the screen in the movie "Independence Day") and that other equally mysterious activities are underway deep beneath the ground. For many years the government refused even to acknowledge the existence of Area 51. Now about the only information you will learn if you ask is that what goes on there is *very* classified but that there are *definitely* no aliens. If you visit the surrounding area be sure to dine at The Little

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[24] *Espionage Laws and Leaks: Hearing Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 96th Cong., 1st Sess. 22 (1979).

A' Le' Inn (read it again), the only restaurant in town. But if you're hoping to snag a few pictures — even from public parklands nearby — you might want to consider 18 U.S.C. §§ 795 and 797.[25]

18 U.S.C. § 795 provides that whenever, "in the interests of the national defense," the President designates certain military and naval installations or equipment "as requiring protection against the general dissemination of information relative thereto," it is unlawful to make any "photograph, sketch, picture, drawing, map, or graphical representation of such vital military and naval installations or equipment" without the permission of the commanding officer. Section 797 makes it a crime to reproduce or publish any such photographs, etc. without obtaining the permission of the commanding officer unless it is clearly indicated on the photograph, picture, etc. that it has been censored by the proper military authorities.

Although sections 795 and 797 are among the most clearly articulated of the provisions of the Espionage Act, the executive order currently in effect that enumerates those military and naval installations and equipment requiring protection goes far beyond what the statute envisions. That order, Executive Order No. 10104, 15 F.R. 597, also issued by President Truman, essentially designates all military installations and equipment that are classified as those requiring protection against the dissemination of information. Thus, no photograph of a classified military installation can presumably be published consistent with section 797 "without first obtaining permission of the commanding officer" unless the photograph bears a legend indicating that it has been "censored."

Notably the executive order also purports to designate all "official military, naval or air-force documents" that are marked "top secret," "secret," "confidential" or "restricted" as "requiring protection against the general dissemination of information relative thereto." If Executive Order 10104 is valid in this respect (which seems dubious in light of the statutory language), its effect, together with section 797, would make criminal the publication of any classified military document as long as it contained the appropriate legend and did not indicate that it had been censored. No intent to injure the United States is required. The penalty for violating section 797 is a fine, imprisonment up to one year or both.

There have been no reported cases testing the validity of the scope of Executive Order No. 10104. Nor have sections 795 and 797 themselves been the focus of judicial opinions.[26]

18 U.S.C. § 798: "Disclosure of Classified Information"

On June 7, 1942, the Chicago Tribune published a front-page story reporting on the Battle of Midway, one of the U.S. Navy's most important victories in the Pacific theater and a turning point

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[25] Sections 795 and 797 were originally enacted in 1938. Act of January 12, 1938, c.2, §§ 1, 3, 4, 5 Stat. 3, 4.

[26] A statute substantially similar to § 795 was passed at the outset of World War II and prohibits, among other things, the photographing of any military installation "or other places used for national defense purposes by the War or Navy Departments" within the territory or jurisdiction of the United States (whether classified or not) and the photographing of any equipment or any other property located within any such installation (whether classified or not). *See* 50 U.S.C. App. § 781, *et seq*. Whether the statute remains in effect today is in doubt. By its terms, it was to have expired six months after the termination of the national emergency declared by President Truman in 1950. As noted above, that state of emergency has never technically been "terminated" although all executive powers conferred by reason of it clearly have been. *See* n. 22, *supra*.

in the war against Japan. The article was headlined "Navy Had Word of Jap Plan to Strike at Sea."[27] It didn't require a savvy reader to infer from the article that the success of the military effort was attributable, at least in part, to the fact that the United States had broken Japanese communications codes. That fact had never been reported and was, to say the least, a fact that the U.S. government was attempting to keep quite close to Uncle Sam's vest.[28] President Roosevelt was reportedly so angry about the report that he threatened to send Marines to occupy the Tribune's offices. A grand jury was convened in Chicago to consider an indictment against the newspaper's managing editor and its naval correspondent under the Espionage Act.[29] If a similar scenario were played out today, the Justice Department would need look no further than 18 U.S.C. § 798.[30]

Notwithstanding its misleadingly broad title, section 798 prohibits the publication or disclosure of classified information concerning codes, cryptographic systems and communications intelligence systems. Whatever else can be said of section 798, its effort to achieve the kind of clarity one would hope to expect from statutes dealing with such serious matters is refreshing even if the effort was not altogether successful. Subsection (a) of the statute provides:

> (a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information—
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> (1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or
>
> (2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or
>
> (3) concerning the communication intelligence activities of the United States or any foreign government; or
>
> (4) obtained by the processes of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—

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[27] *See* JOSEPH E. PERSICO, ROOSEVELT'S SECRET WAR: FDR AND WORLD WAR II ESPIONAGE (2001) ("ROOSEVELT'S SECRET WAR") at 188-190; Dina Goren, *Communication Intelligence and the Freedom of the Press: The* Chicago Tribune*'s Battle of Midway Dispatch and the Breaking of the Japanese Naval Code*, 16 Journal of Contemporary History 663-90 (1981) ("Goren").

[28] The Chicago Tribune's report was written by, but not attributed to, its naval correspondent, Samuel Johnston. Johnston reportedly came upon the information by peeking at some confidential dispatches while on board the USS Barnett. Goren at 674-76.

[29] ROOSEVELT'S SECRET WAR at 189-90; Goren at 665.

[30] Section 798 was enacted in 1950, just shortly before the amendments to §§ 793 and 794 were passed. Pub. L. No. 81-513, 64 Stat. 159.

Shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 798(a).[31] The statute applies to any willful publication; no intent to injure the United States is required. Note that the statute applies not only to codes, cryptographic systems and communications intelligence activities of the United States but also those of "any foreign nation."

The protection of codes and coded matter is also the subject of 18 U.S.C. § 952 which prohibits government employees from publishing or furnishing "to another" any "official diplomatic code or any matter prepared in any such code." Government employees are also broadly prohibited from communicating any classified information of *any* kind to an agent or representative of a foreign government. *See* 50 U.S.C. § 783. In 1982, the interdepartmental group chaired by Justice Department Deputy Assistant Attorney General Richard Willard opined that it was "unlikely that [section 783] would be construed to apply to unauthorized disclosures of classified information to the media, even though the information could find its way into the hands of an agent of a foreign government or a member of a communist organization as a consequence of its publication." *Willard Report*, *supra* n. 16 at 171.

There have been numerous other efforts throughout the years to criminalize the leaking of classified information of a sort far beyond that identified in section 798. The most recent effort was that mounted as part of the Intelligence Authorization Act for Fiscal Year 2001. That Act, passed by both houses of Congress, contained a provision, section 304, that would have prohibited all present and former government employees from disclosing any information that is classified to anyone not authorized to have access to such information. Intelligence Authorization Act for Fiscal Year 2001, H.R. 4392, 106th Cong. § 304 (2000). Media organizations and civil rights groups roundly criticized the provision and the Act was vetoed by President Clinton because of it. (It was later reintroduced and enacted without the offending section.).

The issue may well resurface soon. On December 28, 2001 the Intelligence Authorization Act for Fiscal Year 2002, Pub. L. No. 107-108, § 310, 115 Stat. 1394 (2001) was enacted requiring the Attorney General, in consultation with other heads of federal agencies, to conduct a comprehensive review of all current laws and procedures to determine whether they are adequate to protect against the leaking of classified information. In response to the legislation, Attorney General Ashcroft announced the formation of an inter-agency task force to conduct that review; it will report back to Congress no later than May 1, 2002. The task force will study, among other things, whether new federal legislation is needed to prohibit the disclosure of classified information.

As for the effort to prosecute the Chicago Tribune, it never came to fruition. After the grand jury had been convened to consider indictments, the Navy reversed course and declined to cooperate, fearing that the prosecution would only serve further to publicize sensitive information. As it turned out, the Tribune was apparently not on the preferred reading list for Japanese military commanders. Japan never learned of the disclosure.[32] But in the era of the internet . . .

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[31] The statute goes on to define "classified information," "code, cipher and cryptographic system," "foreign government," "communication intelligence" and "unauthorized person." *See* 18 U.S.C. § 798(b). The statute also contains a detailed forfeiture provision. *See id.*, § 798(d).

[32] ROOSEVELT'S SECRET WAR at 190; Goren at 667-68.

50 U.S.C. § 421 *et seq.*: Intelligence Identities Protection Act

The first American casualty of our nation's war on terror was Johnny Micheal Spann, a CIA officer killed during the uprising of Taliban prisoners outside Mazar-e Sharif. In an uncharacteristic move apparently prompted by the numerous press reports about his death, the CIA promptly released his name and confirmed his relationship with the agency. His identity was widely reported. The CIA's disclosures made it unnecessary for media lawyers to dust off their copies of the Intelligence Identities Protection Act ("IIPA") but it remains a statute that has particular relevance during a war on terror.[33]

50 U.S.C. § 421 is designed to protect against the disclosure of information that reveals the identity of covert agents. Sections (a) and (b) prohibit those having authorized access to classified information from disclosing a covert agent's identity or information sufficient to identify a covert agent. Section (c), which is not so limited, provides:

> (c) Whoever, in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States, discloses any information that identifies an individual as a covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such individual and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States, shall be fined under Title 18, or imprisoned not more than three years or both.

50 U.S.C. § 421(c).

It is a defense to a prosecution under the statute if, before the commission of the offense, the United States "has publicly acknowledged or revealed the intelligence relationship to the United States of the individual the disclosure of whose intelligence relationship to the United States is the basis for the prosecution." 50 U.S.C. § 422.

Unlike the Espionage Act, the IIPA contains a detailed definitional section. The term "disclose" as used in the statute means "to communicate, provide, impart, transmit, transfer, *publish* or otherwise make available." 50 U.S.C. § 426(3) (emphasis added). A covert agent is:

- a present or retired officer or employee of an intelligence agency (or a member of the Armed Forces assigned to duty with an intelligence agency) whose identity as such is classified *and* who is serving outside the United States or has within the last five years;
- a United States citizen whose intelligence relationship with the United States is classified and either (a) resides and acts outside the United States as an agent of, informant or source of operational assistance to an intelligence agency or (b) acts as an agent of or an informant to the foreign counterintelligence or foreign counterterrorism components of the FBI, or;
- an individual (other than a United States citizen) whose past or present intelligence relationship with the United States is classified *and* who is a present or former agent of, or informant or source of operational assistance to an intelligence agency.

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[33] The Intelligence Identities Protection Act was passed in 1982. Pub. L. No. 97-200, 96 Stat. 122.

50 U.S.C. § 426(4). For purposes of the Act, the term "intelligence agency" means the CIA, a foreign counterintelligence component of the Department of Defense or the foreign counterintelligence or foreign counterterrorism components of the FBI. *Id*. § 426(5). A "pattern of activities" is defined as "a series of acts with a common purpose or objective." *Id*. § 426(10).

Not surprisingly the IIPA was extremely controversial and hotly debated at the time it was proposed. The statute was characterized by Professor Philip Kurland as "the clearest violation of the First Amendment attempted by Congress in this era"[34] and by Professor Thomas Emerson as "a classic example of an official secrets act" which "would seriously curtail freedom of expression in the United States and violates the constitutional right of freedom of speech and of the press as embodied in the First Amendment."[35]

Doubts as to section 421(c)'s constitutionality repeatedly surfaced in the House and Senate during the more than two years that various versions of this legislation were debated. *See, e.g.*, House Select Comm. on Intelligence, Intelligence Identities Protection Act, H.R. Rep. No. 97-221, 97th Cong., lst Sess. 6 (1981) ("The Committee recognizes fully that the bill's proscriptions operate in an area fraught with first amendment concerns"); Senate Judiciary Comm., Intelligence Identities Protection Act, S.Rep. No. 96-990, 96th Cong., 2d Sess. 6, 18 (1980) (proposing revisions to [the section that became 421(c)] and amendments to other sections, which were not adopted, "to deal with the serious constitutional objections to the bill" and "to ensure that the bill would not be facially unconstitutional").

Individual Senators and Congressmen who strongly supported the general goals of the IIPA expressed serious reservations concerning section 421(c), recognizing that it "falls within a questionable area of constitutional law"[36] and might not "pass constitutional muster."[37] As Senator Moynihan stated on the floor of the Senate after passage of an amendment eliminating the intent requirement for criminal sanctions under the statute:

> I think we are errantly and somewhat arrogantly crossing a constitutional boundary. We are trivializing some of the most revered and protected and depended on constitutional protections that we have known in our country, the first amendment to our constitution. . . . I happen to believe that the amendment we adopted this afternoon is unconstitutional. . . . This cannot be but a mournful and ominous event.

128 CONG. REC. 4,502 (March 17, 1982). Similarly, as Congressman Edwards of California stated on the floor of the House:

[S]ection [421(c)] of the bill, however well intentioned in its effort to prevent

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[34] Letter from Professor Philip B. Kurland University of Chicago Law School, to Senator Edward M. Kennedy dated Sept. 25, 1980, *reprinted in* 126 CONG. REC. 28,068 (Sept. 30, 1980).

[35] Letter from Professor Thomas Emerson, Yale University Law School, to Senator Edward M. Kennedy, dated Sept. 5, 1980, *reprinted in* 126 CONG. REC. 28,066 (Sept. 30, 1980). *See also* Letter from Professor Laurence H. Tribe Harvard University Law School, to Senator Edward M. Kennedy dated Sept. 8, 1980, *reprinted in* 126 CONG. REC. 28,065-28,066 (Sept. 30, 1980).

[36] 128 CONG. REC. 4,493 (March 17, 1982) (statement of Senator Mitchell).

[37] Senate Judiciary Comm., Intelligence Identities Protection Act, S.REP. NO. 96-990, 96th Cong., 2d Sess. 29 (1980) (additional views of Senator Kennedy).

> exposure of our covert agents, tramples on protected first amendment freedoms. For the first time in American history, the publication of information obtained lawfully from publicly available sources would be made criminal.
> [I]t is my firm belief, which is supported by many noted constitutional experts, that no amount of tinkering can rehabilitate a law which criminalizes constitutionally protected freedoms of speech, press, and political expression.

127 CONG. REC. 21,732 (Sept. 23, 1981).

The most significant problem with section 421(c) is that it does not predicate liability on either access to or publication of classified information.[38] It prohibits disclosure of any information identifying an individual as a "covert agent" by any person who makes such a disclosure "in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States. . . ." On its face, the statute would arguably make it a crime under many circumstances for a print or broadcast journalist to disclose any information that identifies an individual as a "covert agent". That the statute was not intended to apply to ordinary news reporting finds force in the pattern requirement and the legislative history that gave rise to it.

The IIPA was passed in response to a concerted campaign by Philip Agee (and others) to reveal the identities of U.S. intelligence agents employed by the CIA. Agee was, in the view of Congress, simply "naming names." In order to diffuse the firestorm that the proposed bill had generated, the pattern requirement emerged as a means for distinguishing between the conduct in which Agee engaged and, in the words of one legislative counsel, the conduct of "reputable journalists." House Judiciary Comm. Hearings, 96th Cong., 2nd Sess. 25 (1980) (statement of Frederick P. Hitz, Legislative Counsel, Central Intelligence Agency).

The House Conference Report, for example, states:

> The standard adopted in [section 421(c)] applies criminal penalties only in very limited circumstances to deter those who make it their business to ferret out and publish the identities of agents. At the same time it does not affect the First Amendment rights of those who disclose the identities of agents as an integral part of another enterprise such as news media reporting of intelligence failures or abuses, academic studies of U.S. government policies and programs or a private organization's enforcement of its internal rules. . .
>
> In order to fit within the definition of "pattern of activities," a discloser must be in the business, or have made it his practice, to ferret out and then expose undercover officers or agents where the reasonably foreseeable result would be to damage an intelligence agency's effectiveness. Those who republish previous disclosures and critics of U.S. intelligence would all stand beyond the reach of the law if they did not engage in a pattern of activities intended to identify and expose covert agents.
>
> A journalist writing stories about the CIA would not be engaged in the requisite "pattern of activities," even if the stories he wrote included the names of one or more covert agents unless the government proved that there was an intent to

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[38] In a letter to the Senate Judiciary Committee, 51 law professors expressed their view that for this reason alone section 421(c) was unconstitutional. See 126 CONG. REC. 28,065 (Sept. 30, 1980) ("We believe that [the provision ultimately codified as § 421(c)], which would punish disclosure of the identity of covert CIA and FBI agents derived solely from unclassified information, violates the First Amendment")

> identify and expose agents. To meet the standard of the bill, a discloser must be engaged in a purposeful enterprise of revealing identities. He must, in short, be in the business of "naming names."

House Conference Report 97-580 at 172, 174 (reprinted in 1982 U.S.C.C.A.N. 170 (1982)).

The report went on to give specific examples of activities that would not be covered by the Act:

- "an effort by a newspaper intended to uncover CIA connections with it, including learning the names of its employees who worked for the CIA or an effort by a university or a church to learn if any of its employees had worked for the CIA. (These are activities intended to enforce the internal rules of the organization and not identify and expose CIA agents.)"
- "an investigation by a newspaper of possible CIA connections with the Watergate burglaries. (This would be an activity undertaken to learn about the connections with the burglaries and not to identify and expose CIA agents.)"
- "an investigation by a scholar or reporter of the Phoenix program in Vietnam. (This would be an activity intended to investigate a controversial program and not to name names.)"

Id. at 174.

There have been no reported prosecutions under the IIPA in the close to 20 years that it has been in effect and no decisions of any significance interpreting it. In the end, as is true of so many of these laws, the statute says more on its face than it is said to say. The CIA's disclosures notwithstanding, there can be no serious argument that reporting on the death of Johnny Micheal Spann could trigger liability under the IIPA.

42 U.S.C. § 2011 *et seq.*: The Atomic Energy Act

The Atomic Energy Act of 1954 created a comprehensive scheme to ensure against the disclosure of data concerning atomic weaponry and "special nuclear material." The Act broadly prohibits anyone having possession of "Restricted Data" (whether lawfully or unlawfully) from communicating or disclosing such data to any person "with intent to injure the United States or with intent to secure an advantage to any foreign nation." 42 U.S.C. § 2274(a). The Act also prohibits the communication or disclosure of "Restricted Data" to any person "with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation." 42 U.S.C. § 2274(b). Receiving "Restricted Data" or tampering with it is also criminal if done with the "intent to injure the United States or with intent to secure an advantage to any foreign nation." 42 U.S.C. §§ 2275 and 2276. "Restricted Data" is defined as all data concerning

- the design, manufacture, or utilization of atomic weapons
- the production of "special nuclear material" (including plutonium and uranium); or
- the use of "special nuclear material" in the production of energy

but does not include data "declassified" or "remove[d] from the Restricted Data category pursuant to [42 U.S.C. § 2162]." 42 U.S.C. § 2014. On the face of the statute "Restricted Data" is not limited to data generated by or for the government. Whether the legislative history can fairly be read as evidencing Congress' intent to reach private data is a subject of some debate. *See* Mary M. Cheh,

The Progressive *Case and the Atomic Energy Act: Waking to the Dangers of Government Information Controls*, 48 GEO. WASH. L. REV. 163 (1980). The government has consistently taken the position that the Act applies to both government data and private data alike. *Id*. at 176-79.

The Act carries severe criminal penalties. Violators of sections 2274(a), 2275 or 2276 can be imprisoned for life; violators of section 2274(b) can be sentenced to imprisonment for ten years. The Act contains its own provision specifically permitting the entry of injunctions to prevent disclosure of information protected by the Act. 42 U.S.C. § 2280.

According to Edgar and Schmidt, the legislative history sheds no light on the issue of whether Congress intended that the Act could be used to enjoin press publications.[39] In the only reported opinion on the subject, a federal district court concluded that it could. *United States* v. *Progressive, Inc*., 467 F. Supp. 990 (W.D. Wis.), *reh'g denied*, 486 F. Supp 5 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

The Progressive case involved the efforts of The Progressive magazine to publish an article entitled "The H-Bomb Secret: How We Got It, Why We're Telling It." Although the district court declined to characterize the article as a "do it yourself" guide to constructing a hydrogen bomb, it was said to be pretty close. Significantly, the author of the article maintained that all the information on which it was based was in the public domain. The government countered that while some of the data was in the public domain, the article contained a "core of information that had never been published." *Progressive*, 486 F. Supp. at 993.[40] When The Progressive declined the government's request to voluntarily refrain from publishing the article, the United States commenced an action to enjoin the publication urging that it would violate section 2274(b).

The district court reluctantly granted the government's motion for a preliminary injunction and enjoined The Progressive from publishing so much of the article as included the sensitive data. In the course of its decision, the district court specifically found that the Atomic Energy Act was not vague or overbroad "as applied to this case." *Progressive*, 467 F. Supp. at 994. The court was also "[c]onvinced that the terms used in the statute — 'communicates, transmits or discloses' — include publishing in a magazine." *Id*.

The court was fully aware that its injunction was likely "the first instance of prior restraint against a publication in this fashion in the history of this country," *id*. at 996, but concluded that the case fell within the exception envisioned in *Near* v. *Minnesota*, 283 U.S. 697 (1931). The court quoted from *Near*:

> "When a nation is at war many things that might be said in times of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."

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[39] EDGAR & SCHMIDT I at 1075.

[40] The district court's subsequent opinion on rehearing would reveal that much of that "core" of data was contained in two reports that the government had declassified; those reports that had been available in the public reading room at Los Alamos for a number of years. The government insisted that the reports had been "erroneously declassified" and that when the error was discovered, the information was promptly removed from the public reading room. United States v. Progressive, 486 F. Supp 5, 7 (W.D. Wis. 1979).

Progressive, 467 F. Supp. at 992 (quoting *Near*, 283 U.S. at 716). According to the district court because the risk of harm that might be caused by the disclosure was so great and because suppression of the information would not impede the defendants from stimulating public debate about the risks of nuclear armament, the *Near* test had been met. *Progressive*, 467 F. Supp. at 996.

Less than three months later, The Progressive returned to the district court urging that the injunction should be dissolved as ineffective on the ground that the formula had been disclosed in other publications in the interim. The district court declined to do so. But by the time the case made its way to the Seventh Circuit, there was no longer any debate that the "secret" was out. The Court of Appeals dismissed the appeal without opinion; the propriety of the issuance of the injunction was mooted.

The Progressive case was the first and only reported effort by the government to enjoin press publication under the authority of the Atomic Energy Act.[41]

18 U.S. § 641: Theft or conversion of government property

No article about national security statutes and the press would be complete without at least a nod to section 641. Although the statute is not in any way limited to matters of national security, it is often at issue in such cases. Section 641 imposes criminal liability on any person who "embezzles, steals, purloins or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record . . . or thing of value of the United States or of any department thereof . . .." The statute also criminalizes the receipt or retention of any such record or thing if the recipient intends to "convert it to his use or gain," knowing the same to have been stolen or converted. The statute contains no specific requirement of criminal intent but the Supreme Court has made clear that a conviction under section 641 cannot be sustained unless criminal intent is shown. *Morissette v. United States*, 342 U.S. 246, 263 (1952).[42] Violators may be fined or imprisoned not more than ten years or both unless the record or thing has a value of $1,000 or less, in which case the term of imprisonment can be no more than a year.

Samuel Morison was convicted of violating section 641 (as well as sections 793(d) and (e)). The statute was also at issue in the aborted prosecution of Daniel Ellsberg and Anthony Russo for their alleged theft of *The Pentagon Papers*.[43] In an *amicus* brief filed by numerous media organizations in the *Morison* case, it was urged that section 641 could not be held to apply to Morison's conduct on the ground that the statute, if properly viewed, required "a permanent or substantial deprivation of identifiable property."[44] The Fourth Circuit rejected the argument (or, more accurately, dodged the argument) on the ground that Morison did take tangible property (the three photographs and two other government reports discovered at his home). "Whether pure

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[41] That is not to say that the government has never used its formidable powers of persuasion to stop the publication of information it viewed as too sensitive for print. In 1950, shortly before Scientific American magazine was about to publish an article on the hydrogen bomb, the Atomic Energy Commission obtained and reviewed an advance copy of the article and urged Scientific American to delete certain material addressed in it. Scientific American reluctantly complied. It has been reported that all copies of the original article and the type and printed plates were destroyed. Cheh, *supra*, at 176.

[42] Thus, a disclosure of information that is inadvertent, negligent or reckless would fail to trigger liability under § 641.

[43] *See* Nimmer, *supra*, n. 5.

[44] *See* Morison, 844 F.2d at 1077.

'information' constitutes property which may be subject to prosecution under section 641" was therefore "not involved" in *Morison* in the view of the Court of Appeals.

The issue is a troubling one. If information alone is a "thing of value" under section 641, the statute could be invoked to criminalize conduct far beyond that prohibited by any of the statutes discussed above (including sections 793(d) and (e)). Consider the defendant who "conveys" classified information "without authority." Assume the information has nothing to do with communications intelligence systems, that the defendant has no intent to injure the United States or advantage a foreign nation and that the information is not reflected in a document. Can liability be sustained under section 641 where it could not be sustained under statutes specifically designed to protect against the disclosure of sensitive security information?

The most articulate answer to this question is found in Judge Winter's opinion in *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980):

> [B]ecause the statute was not drawn with the unauthorized disclosure of government information in mind, § 641 is not carefully crafted to specify exactly when disclosure of government information is illegal. The crucial language is "without authority." The precise contours of that phrase are not self-evident. This ambiguity is particularly disturbing because government information forms the basis of much of the discussion of public issues and, as a result, the unclear language of the statute threatens to impinge upon rights protected by the first amendment. Under § 641 as it is written, no precise standard controls the exercise of discretion by upper level government employees when they decide whether to forbid or permit the disclosure of government information. . . . Consequently upper level government employees might use their discretion in an arbitrary fashion to prevent the disclosure of government information; and government employees, newspapers, and others could not be confident in many circumstances that the disclosure of a particular piece of government information was "authorized" within the meaning of § 641. Thus, the vagueness of the without authority standard could pose a serious threat to public debate of national issues, thereby bringing the constitutional validity of § 641 into question because of its chilling effect on the exercise of first amendment rights.

Truong Dinh Hung, 629 F.2d at 924-25 (Winter, J.) (internal citations omitted).[45] For this reason and because section 641 would otherwise "disturb the structure of criminal prohibitions Congress has erected to prevent some, and only some, disclosures of classified information" *id.*, at 927, Judge Winter concluded that section 641 could not be constitutionally be applied to the unauthorized disclosure of classified information. *Id.*[46] To conclude otherwise would transform the statute into an Official Secrets Act so sweeping as to rival Great Britain's.[47]

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[45] Judge Winter's views on § 641 were not joined by the other members of the panel who found it unnecessary to consider the § 641 issue. Truong Dinh Hung, 629 F.2d at 931.

[46] The majority of the circuit courts that have weighed in on the question of whether information alone is a thing of value under section 641, albeit in other contexts, have not adopted Judge Winter's view. *See* United States v. Fowler, 932 F.2d 306 (4th Cir. 1991); United States v. Jeter, 775 F.2d 670, 679-82 (6th Cir. 1985); United States v. Girard, 601 F.2d 69 (2d Cir. 1979). However, the Ninth Circuit has squarely held that information is not a thing of value under section 641. United States v. Tobias, 836 F.2d 449, 450-51 (9th Cir. 1988).

[47] *See* Harold Edgar and Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349, 401-06 (1986).

Apart from *Morison*, section 641 has never been applied in the context of the unauthorized dissemination of information to the press and it has never been applied to punish a member of the press for disseminating "unauthorized" government information to the public. The most closely analogous case in the press context is *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969). There, former members of Senator Thomas Dodd's staff surreptitiously copied documents from the Senator's files and furnished the copies to journalists Drew Pearson and Jack Anderson who wrote a series of articles exposing Senator Dodd's misdeeds. Dodd brought a civil action for invasion of privacy and conversion. On the conversion issue, the Court of Appeals held that the mere copying of the documents did not give rise to liability for conversion as Senator Dodd was "not substantially deprived of his use of [the documents]" and that the information contained in the documents was not protectable property. The *Morison* court dismissed the argument that *Pearson* was persuasive on the issue of the applicability of section 641 to Morison's conduct on the ground that *Pearson* was simply a case about "copying."

On the issue of "copying," can liability attach under section 641 if government documents are copied on government-owned copiers? Outside the press context it has been held that the use of a government-owned copying machine to make copies of government documents is itself sufficient to invoke liability under section 641. *See U.S. v. Hubbard*, 474 F. Supp. 64 (D.D.C. 1979). The government, after all, owns the paper.

POST-*BARTNICKI V. VOPPER*: COMPLICITY OF THE PRESS

By Paul Smith & Leondra Kruger*

* Paul Smith is a partner and Leondra Kruger an associate in the Washington, D.C. office of Jenner & Block LLC

POST-BARTNICKI V. VOPPER: COMPLICITY OF THE PRESS

Introduction

In what was widely hailed as an important victory for freedom of the press, the Supreme Court in *Bartnicki v. Vopper*[1] held that the First Amendment forbids courts to penalize the press for publishing newsworthy information that others have obtained illegally. In so doing, the Court reaffirmed and partially extended the principles announced in the Pentagon Papers case, *New York Times Co. v. United States*,[2] the historic decision that barred a prior restraint against publication of classified documents supplied by a third party.

The media's victory in *Bartnicki* was, however, only a qualified one. The *Bartnicki* ruling was deliberately narrow, confined to a peculiar set of facts in which the press not only played no part in the illegal acquisition of the information but had never even discovered the identity of its source. The Court left open the question whether, if the media defendants in *Bartnicki* had played a larger part in the illegal acquisition of information, they could be punished for publishing that information. And both the majority and concurring opinions strongly suggested that, at least in some circumstances, it will indeed be constitutionally permissible for the government to penalize the publication of truthful information about a matter of public interest, based on the complicity of the press in improper methods of acquiring the information.

The purpose of this article is to begin exploring the question of where those boundaries begin and end. The Court in *Bartnicki* certainly did not delineate with any clarity what kinds of newsgathering conduct will cause the press to forfeit constitutional protection for publication of truthful and important stories. As a result, it is impossible for counsel to advise clients with a great degree of confidence about where courts will draw the line between permissible and impermissible newsgathering techniques. But such decisions must be made in newsrooms across the country, and the Court's opinion does provide some guidance that may assist members of the press in determining where the First Amendment's protection ends and their exposure to liability may begin.

This article explores the Court's suggestions in order to explain what activities are likely to give rise to liability after *Bartnicki*. Part I lays out the facts and reasoning underlying the Court's decision, focusing on the Court's discussion of the limits of its pro-media holding. Part II follows up on these suggestions by sketching the outer boundaries of liability that courts might impose for

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[1] 121 S. Ct. 1753 (2001).

[2] 403 U.S. 713 (1971).

the press's publication of unlawfully gathered information of public concern, according to one, narrow reading of *Bartnicki*. We describe these outer boundaries not because we believe they represent the fairest reading of the case – or the best prediction of the outcome of future cases – but because such a conservative reading is a useful indication of the *possible* liability that might be imposed on the press, and provides guideposts to those who want to avoid all risk of liability. Adopting such an approach, however, would mean drastically limiting newsgathering activities by avoiding any conduct that could be construed as encouraging future illegal interceptions or encouraging disclosure of information derived from illegal interceptions that have already occurred.

Part III then refines the analysis, arguing that for several reasons the conservative approach overstates the risks and goes too far in narrowing the privilege granted to the press in *Bartnicki*. First, courts are unlikely to go so far as to rule that the press forfeits its First Amendment protections merely because a reporter encourages a source to turn over an already-existing tape. Second, the extent of the risk of liability for a truthful news story has to be assessed case-by-case, based in large part on the nature of the relevant interests of the potential plaintiffs. Where a story disclosing illegally intercepted information would invade someone's legitimate privacy interests, a court is much more likely to refuse to apply the *Bartnicki* privilege than in a case involving information that courts will not consider private in nature.

Finally, in Part IV, we note that although some may be tempted to apply *Bartnicki* outside the context of illegal wiretapping, both courts and litigants should be reluctant to so extend the Court's ruling. As courts have recognized, illegal wiretapping presents a unique threat to privacy interests. Moreover, courts are likely to recognize that to so extend *Bartnicki* would put much investigative journalism in jeopardy, since there are many situations in which reporters seek information that their sources are legally obligated to withhold. It would be unfortunate indeed if *Bartnicki* were to lead to a legal regime in which liability could be imposed on the press merely for asking a source to reveal confidential information.

Background

A. The *Bartnicki* Case as It Was Presented to the Supreme Court

The facts underlying *Bartnicki* were central to the result. The case arose from the radio broadcast of a tape of an illegally recorded private cellular phone conversation between two teachers' union activists, Gloria Bartnicki and Anthony Kane, concerning the status of then ongoing collective-bargaining negotiations with the school board. At one point during that conversation, Kane said that if the board would not yield, "we're gonna have to go to their, their homes . . . To blow off their front porches, we'll have to do some work on some of those guys."[3] The tape, which was made by an unknown party, appeared in the mailbox of Jack Yocum, the leader of a local taxpayer organization that had opposed the union's demands throughout its negotiations with the school board. Yocum, in turn, passed the tape on to Fred Vopper, a local radio host. Vopper then broadcast the tape on a show dealing with the resolution of the negotiations.

[3] 121 S.Ct. at 1757.

Bartnicki and Kane brought suit in federal court seeking damages against Vopper and the two radio stations that had broadcast his show, among others; they later joined Yocum as a defendant. Bartnicki and Kane asserted that the defendants had violated state and federal wiretapping laws by intentionally disclosing the contents of an electronic communication when they "kn[e]w or ha[d] reason to know that the information was obtained through an illegal interception."[4]

On cross-motions for summary judgment, the district court rejected the defendants' argument that the First Amendment barred liability for broadcasting the illegally intercepted conversation. The Third Circuit reversed in a 2-1 decision. Applying intermediate scrutiny, the court determined that the wiretapping statutes were invalid as applied to the media defendants' disclosure of illegally intercepted information, in a case where there was no evidence that the defendants had participated in or encouraged the interception.[5]

Judge Pollak, dissenting, took issue with the majority's distinction between liability for the initial interception and liability for disclosure of illegally obtained information. He noted that Congress was concerned not only with illegal wiretapping, but with the widespread dissemination of the information that was the product of the wiretaps, and argued that imposing liability for disclosure would advance the goal of reducing the incentive for sources to engage in the initial interceptions. Judge Pollak concluded that the law swept no more broadly than necessary, since it restricted First Amendment rights of free expression no more than necessary to combat the evil of unauthorized disclosure of private conversations.[6]

B. *Boehner v. McDermott* and *Peavy v. WFAA-TV, Inc.*

By the time the Supreme Court heard arguments in its review of the Third Circuit's decision, two other federal courts of appeals had issued decisions in cases that presented similar questions. In *Boehner v. McDermott*,[7] the D.C. Circuit reviewed a claim stemming from a U.S. Congressman's disclosure of an illegally intercepted cellular phone conversation that arguably revealed misconduct by then-Speaker of the House Newt Gingrich. Rep. James McDermott had received the tape from the interceptors of the conversation, then allegedly delivered the tape to various news agencies. Rep. John Boehner, a participant in the phone conversation, brought a suit for civil damages against McDermott, alleging violation of the Federal Wiretap Act. The D.C. Circuit held that the Act was constitutional as applied to McDermott's disclosure of the tape to the media. The court's opinion, from which Judge Pollak would draw in his *Bartnicki* dissent, emphasized that the purpose and effect of the Federal Wiretap Act's prohibition of the disclosure of the contents of illegally

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[4] *Id.* (quoting 18 U.S.C. § 2511(1)(c) (1994)).

[5] 200 F.3d 109 (3d Cir. 1999).

[6] *Id.* at 132-35 (Pollak, J., dissenting).

[7] 191 F.3d 463 (D.C. Cir. 1999).

intercepted communications was to "dry up the market" for illegal interceptions.[8] The challenged portion of the statute was necessary in order to remove any incentive for would-be media sources to engage in illicit gathering of information from private conversations in violation of federal and state law.

In *Peavy v. WFAA-TV, Inc.*,[9] the Fifth Circuit addressed the question whether the First Amendment barred penalizing a television station and its reporter for "using" and "disclosing" information intercepted and recorded by third parties who had approached, and had been arguably encouraged to continue taping by, the television station during the course of their illegal interceptions The Fifth Circuit reversed the district court's grant of summary judgment for the media defendants, holding that the reporter's dealing with the interceptors presented sufficient evidence to submit to a jury on the question of liability for procuring a violation of state and federal wiretapping laws. Moreover, it held that the First Amendment did not bar the imposition of damages under the wiretapping laws.

C. The Supreme Court's Decision in *Bartnicki*

The Supreme Court agreed to review *Bartnicki* in order to settle the conflict between *Bartnicki* and the *Boehner* opinion, which Judge Pollak had echoed in his *Bartnicki* dissent.[10] In a 6-3 decision, the Court ruled that the First Amendment shielded Vopper and the other media defendants from liability under the state and federal wiretapping laws.

1. The Majority Opinion

Writing for the majority, Justice Stevens emphasized three facts in the case before the Court: First, Vopper and the media defendants "played no part in the illegal interception. Rather, they found out about the interception only after it occurred, and in fact never learned the identity of the person or persons who made the interception."[11] Second, "their access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else."[12] Third, "the subject matter of the conversation was a matter of public concern,"[13] as distinguished from "trade secrets or domestic gossip or other information of purely private concern."[14]

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[8] *Id.* at 470.

[9] 221 F.3d 158 (5th Cir. 2000).

[10] *Bartnicki*, 121 S. Ct. at 1758.

[11] *Id.* at 1760.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 1764.

These facts were crucial because they placed *Bartnicki* within the reach of a line of cases that had extended First Amendment protection to the publication of confidential information that the media had acquired legally. In the first of these cases, *Cox Broadcasting v. Cohn*,[15] the Court held that the press could not be punished under a state statute that made it a misdemeanor to publish the name of a rape victim, where the press had obtained the victim's name from official court records that were open to the public. Three years later, the Court decided *Landmark Communications, Inc. v. Virginia*,[16] in which it ruled that a newspaper similarly could not be punished for publishing information about confidential judicial disciplinary proceedings where the newspaper had received the information from a participant in the proceedings who had a right to receive the information, albeit no right to distribute it to a journalist.

In *Smith v. Daily Mail Publishing Co.*,[17] the Court held that the government could not constitutionally punish a newspaper for publishing the identities of juvenile offenders, which were by law not to be published in newspapers without court approval, which the newspaper had obtained by interviewing witnesses. Finally, in the 1989 case of *Florida Star v. B.J.F.*,[18] the Court extended the *Daily Mail* principle to the media's disclosure of the name of a rape victim that had been obtained by routine review of police accident reports placed in the sheriff's department pressroom.

The *Bartnicki* Court read these cases to stand for the proposition that, "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order."[19] Here, where the media defendants had received illegally intercepted information from an unknown and anonymous source, without having solicited it, that principle worked to invalidate any statutory penalty imposed for their later publication of the information. In so holding, the Court rejected the government's argument that there was a difference between the acquisition of information kept in governmental stewardship, as in the *Cox* and *Daily Mail* cases, and the acquisition of information intercepted by a private individual with no right of access or control over the information. In the Court's opinion, the initial unlawful act was insufficient to taint the publication of information, where that information had lawfully fallen into the hands of the press.

In so ruling, the majority opinion rejected what the dissenting opinion, joined by three Justices, termed the "dry up the market" theory, which, as the dissent explained it, holds that "it is possible to deter an illegal act that is difficult to police by preventing the wrongdoer from enjoying the fruits of the crime."[20] The theory would hold it permissible to forbid the press to publish

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[15] 420 U.S. 469 (1975).

[16] 435 U.S. 829 (1978).

[17] 443 U.S. 97 (1979).

[18] 491 U.S. 524 (1989).

[19] 443 U.S. 97, 102 (1979).

[20] *Id.* at 1773 (Rehnquist, C.J., dissenting).

illegally acquired information in order to decrease a would-be interceptor's incentive to violate the wiretap laws, just as other laws validly attempt to curb theft or the production of child pornography by forbidding the knowing possession of stolen goods or the distribution of child pornography.[21] The majority opinion distinguished the other contexts in which courts have upheld the "dry up the market" theory on the grounds that they either do not implicate the First Amendment, as in the case of statutes proscribing the receipt of stolen goods, or involve speech of "minimal value," as in the case of child pornography.[22] The Court concluded that "[a]lthough there are some rare occasions in which a law suppressing one party's speech may be justified by an interest in deterring criminal conduct by another, this is not such a case."[23]

2. Justice Breyer's Concurrence

Justice Breyer, in a concurring opinion joined by Justice O'Connor, emphasized the narrowness of the Court's holding, and offered an alternate route to arrive at the Court's judgment. Rather than adopt Justice Stevens's categorical approach, which would extend First Amendment protection to the publication of all lawfully acquired truthful information of public concern, Justice Breyer proposed a balancing test. Where there is a conflict between constitutional values—here, the First Amendment right to speak freely in private, and the freedom of the press to publish truthful, newsworthy information—the question is one of creating a "proper fit."[24] In Justice Breyer's view, that fit would be achieved by balancing the speakers' legitimate privacy expectations of privacy against the media's misconduct in obtaining and disclosing the information contained in the intercepted conversation.[25] Here, where the parties conceded that the subject matter of the intercepted conversation was a matter of public concern, and that the media defendant had played no role in the illegal conduct of its anonymous source, Justice Breyer's concluded that the challenged provisions of the wiretapping laws "d[id] not reasonably reconcile the competing constitutional objectives," and were thus invalid.[26]

Though Justice Breyer's opinion was not joined by a majority of the Justices, the importance of his approach to the question presented in *Bartnicki* should not be underestimated. First, two of the six Justices in the majority were Justice Breyer and Justice O'Connor, who joined in his concurrence. At least one of those votes was therefore critical to assembling a majority favoring affirmance. Second, his balancing approach is likely to provide the best way to argue for constitutional protection in cases that depart from the *Bartnicki* factual scenario – *i.e.*, cases where an illegally intercepted conversation is not simply delivered "over the transom" by an anonymous

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[21] *See New York v. Ferber*, 458 U.S. 747 (1982).

[22] *Bartnicki*, 121 S. Ct. at 1762 n.13 (majority opinion).

[23] *Id.* at 1762 (citation omitted).

[24] *Id.* at 1766 (Breyer, J., concurring).

[25] *Id.* at 1768.

[26] *Id.* at 1767.

source. Justice Stevens's more categorical approach suggests that constitutional protections may extend *only* to such "easy" cases. But where the issue is punishing truthful speech based on the press's newsgathering conduct, such a categorical approach is ultimately indefensible, as Justice Breyer recognized. Courts must take account of both the nature of the press's conduct and the nature of the information revealed in the resulting story.

A "Conservative" Approach to Applying *Bartnicki*

Bartnicki was, without question, a significant victory for freedom of the press. But the Court's ruling was, as the Justices repeatedly emphasized, quite "narrow."[27] The Court largely confined its holding to the facts before it: a case in which the media defendants had received the tape of the illegally intercepted conversation, without having solicited it, from an unknown source. Although the Court confirmed that the press has a privilege to publish newsworthy contents of illegally intercepted conversations, the Court also intimated that the privilege is limited. Under another set of facts, the Court might very well reach the question it has studiously avoided since *New York Times v. United States* and hold that if the media are involved in the illegal acquisition of information, the government may constitutionally punish not just their newsgathering misconduct but the ensuing publication of the information so obtained, even if it is truthful and a matter of public interest.[28]

The *Bartnicki* opinion does provides some support for this broad view of the government's power to punish publication of illegally obtained information. It indicates that the press may lose its privilege to publish when it becomes sufficiently involved with the improper conduct of its sources. The Court's reliance on *Daily Mail* and its progeny suggests this important limitation to the privilege established in *Bartnicki*: While *Daily Mail* stands for the proposition that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order,"[29] the Court's precedents have nothing to say about the constitutionality of punishing publication where a newspaper *unlawfully* obtains such information. Another line of Supreme Court decisions do indicate, however, that a newspaper is not immune from penalty under laws of general applicability.[30] Thus the Court was careful to note that its holding only applied to the federal wiretapping law's proscription of the kind of behavior held to be protected by the First Amendment in *Daily Mail*—that is, the publication of lawfully acquired truthful information of public concern—but did not apply "to punishing parties for obtaining the relevant information unlawfully."[31]

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[27] *Id.* at 1756; *id.* at 1766 (Breyer, J., concurring).

[28] *Id.* at 1762 (*citing Florida Star*, 491 U.S. at 535 n.8).

[29] *Id.* at 1761 (*quoting Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979)).

[30] *See* Branzburg v. Hayes, 408 U.S. 665, 691 (1972) ("It would be frivolous to assert . . . that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws."), *quoted in Bartnicki*, 121 S. Ct. at 1764 n.5.

[31] *Id.* at 1764 n.19.

Moreover, there are indications in *Bartnicki* of the specific kinds of media conduct that could go over the line. Justice Stevens's opinion offers some indication when he distinguishes the *Bartnicki* case from other wiretapping cases on the grounds that the media defendants "played no part in the illegal interception . . . and in fact never learned the identity of the person or persons who made the interception."[32] Justice Breyer draws this distinction more clearly in his concurring opinion: The First Amendment protects the *Bartnicki* defendants at least in part because "no one claim[ed] that they ordered, counseled, encouraged, or otherwise aided and abetted the interception, the later delivery of the tape by the interceptor to an intermediary, or the tape's still later delivery by the intermediary to the media."[33]

By negative implication, under one reading of the majority opinion, a media defendant that had been so involved in the violation of the wiretap statute might very well find itself outside the scope of *Bartnicki*'s protections. Thus, *Bartnicki* itself provides ammunition to potential plaintiffs who would confine the constitutional privilege to the extreme facts of that case – *i.e.*, a situation where the press had no prior knowledge of the illegal interception and played no role in either the interception of the information or the delivery of the information to the media.

A conservative approach to counseling the media would thus be to advise against anything that a court might construe as active participation in the initial interception or even – in a most conservative approach – disclosure of the illegally taped information. We outline below the specifics of how such a conservative approach would play out, not because we embrace that view of *Bartnicki*, but because it is useful to consider the best arguments against the interests of the press. Doing so can be a helpful cautionary exercise and also help define "safe harbors" for those inclined to stay within them. In the process, we focus on the two basic prohibitions in the Federal Wiretap Act – (1) intentional interception of a protected conversation, and (2) subsequent disclosure or use of the fruits of an illegal intercept.[34]

A. Participation in the Illegal Interception

First, and most straightforwardly, *Bartnicki* suggests that the press may forfeit its privilege if it is too extensively involved in a source's illegal interception of a conversation. Plaintiffs may be able to argue that the press "procured" an agent to engage in an illegal interception, or the press may be held indirectly liable for a source's misconduct if a court determines that the press encouraged the source to violate the wiretapping laws.

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[32] *Id.* at 1760.

[33] *Id.* at 1767 (Breyer, J., concurring).

[34] *See* 18 U.S.C. § 2511(1)(a), (c).

The Federal Wiretap Act itself expressly prohibits "procur[ing]" another person to intercept a communication.[35] Though the statute itself does not define what it means to "procure" another person to violate the wiretapping law, courts have generally understood "procure" to mean "actively bringing about, causing or instigating something to be done,"[36] and have held that procurement liability generally reaches "the principal who enlists the aid of an agent to do the actual interception."[37] So, for example, a person may be convicted for directing a telephone company employee, or hiring another agent, to undertake interceptions of others' phone conversations.[38] Some courts have also found that procurement liability may extend to, for example, an attorney's act of counseling a client to use a wiretap to gain evidence against his spouse in divorce proceedings.[39]

The cases on procurement liability contain an easy lesson for members of the press: courts will consider hiring or directing an agent to engage in illegal wiretapping the equivalent of doing the work oneself. A member of the press who, for example, directs a telephone company employee to engage in illegal recordings of private conversations is likely to expose his or her agency to direct liability under the statute for publishing the information uncovered during the course of the illegal wiretapping.

Short of explicitly directing an agent to undertake illegal interceptions, plaintiffs may also seek to hold the press liable based on a more expansive "aiding and abetting" theory, for counseling, commanding, or inducing another to violate the wiretapping laws.[40] Though there is significant overlap between procurement and aiding and abetting liability—indeed, the plaintiffs in *Peavy* argued to the Fifth Circuit that the two were synonymous[41]—the press's potential liability under an aiding and abetting theory is much broader.

The Supreme Court has adopted Judge Learned Hand's famous formulation of the scope of aiding and abetting liability:

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[35] *Id.* § 2511(1)(b). The Fifth Circuit in *Peavy* held that there is no civil action for damages under the Act based on the conduct of procuring another to engage in unlawful interceptions. 221 F.3d at 168-69. But even if this is a valid interpretation of the statute, it should provide little comfort for two reasons. First, as in *Peavy*, state laws may be broader. In any event, most cases will include allegations of subsequent "use" of the intercepted material, and a violation of the ban on "procuring" will be relevant to whether a use through publication retains its constitutional privilege.

[36] *Flowers v. Tandy Corp*., 773 F.2d 585, 590 (4th Cir. 1985) (citing Black's Law Dictionary 1087 (5th ed. 1979)).

[37] *Id.*

[38] *Jacobson v. Rose*, 592 F.2d 515 (9th Cir. 1978); *United States v. Jones*, 542 F.2d 661, 670 n.17 (6th Cir. 1976); *United States v. Newman*, 476 F.2d 733 (3d Cir. 1973).

[39] *Kratz v. Kratz*, 477 F. Supp. 463, 476 n.30 (E.D. Pa. 1979).

[40] 18 U.S.C. § 2 (1994).

[41] *Peavy v. WFAA-TV, Inc*., 221 F.3d 158, 170-71 (5th Cir. 2000).

> In order to aid and abet another to commit a crime, it is necessary that one 'in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed.'[42]

Aiding and abetting liability reaches beyond directing an agent to engage in illegal interceptions. In the wiretapping context, aiding and abetting liability would most clearly attach to certain acts of assistance, such as supplying the equipment necessary to carry out the interception.[43] The requisite participation need not take the form of a physical act, however; verbal encouragement of another's illegal act is sufficient.[44]

Peavy v. WFAA-TV provides an important – and sobering – indication of the press's potential liability for encouraging a source to engage in illicit recording of private conversations. In *Peavy*, the interceptors had approached the television station with a copy of an illegally made tape. When the interceptors met with a station investigative reporter to discuss the tape, they asked if he would like other tapes made in the future. The reporter replied that he would, and further instructed the interceptors "*not* to turn the tape recorder on and off while recording intercepted conversations, and *not* to edit them, so that the tapes' authenticity could not be challenged."[45]

The Fifth Circuit found that, on the basis of this evidence, a reasonable jury could conclude that the reporter induced the interceptions, even though the interceptors began conducting their series of recordings before they ever spoke to the television reporter. First, the reporter's instruction to record entire conversations might have caused the interceptors to record portions of conversations they would not otherwise have recorded. Second, the court found that a reasonable jury might conclude that the television station might have encouraged the interceptions by pursuing the story that the interceptors had hoped to have investigated when they initially approached the station.[46] Aside from exposing the media defendants to "procurement" liability under the federal statute, the Supreme Court apparently thought the reporter's conduct to be sufficient "participation" in the

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[42] *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (*quoting United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)).

[43] *See, e.g.*, *United States v. Lande*, 968 F.2d 907 (9th Cir. 1992) (upholding the aiding and abetting conviction of a criminal defendant who supplied equipment to home satellite dish owners in order to enable them to view scrambled television programming without payment, in violation of the Federal Wiretap Act); *cf. Flowers v. Tandy Corp*., 773 F.2d 585, 590-91 (4th Cir. 1985) (discussing aiding and abetting liability for the seller of equipment used to engage in illegal interceptions); *Greek Radio Network of Am., Inc. v. Vlasopoulos*, 731 F. Supp. 1227, 1233-34 (E.D. Pa. 1990) (dismissing the argument that the manufacturer of modified radio receivers "procures" violations of the wiretapping laws simply by selling its products, as opposed to aiding and abetting such violations).

[44] *See, e.g.*, *United States v. Ivey*, 915 F.2d 380, 384 (8th Cir. 1990) (noting that aiding and abetting liability requires "affirmative participation which at least encourages the perpetrator").

[45] *Peavy v. WFAA-TV, Inc*., 221 F.3d 158, 164 (5th Cir. 2000).

[46] *Id.* at 172.

illegal wiretapping to remove *Peavy* from the scope of *Bartnicki*'s pro-media holding.[47]

The clearest basis for the Fifth Circuit's determination that the reporter in *Peavy* had "participated" in the illegal wiretapping was the reporter's act of advising his sources on the manner in which they should conduct future illegal recordings. Advising a source on how to go about gathering information illicitly is a dangerous proposition after *Bartnicki*, as it is likely to be read as encouraging the source to engage in that conduct in the first place, and is well within the bounds of familiar principles of aiding and abetting liability. Under *Bartnicki*, the press may well publish illegally gathered information, but it must take the information as it comes; counseling a source on the manner in which he or she should collect the information will seem similar enough to directing the source to violate the law for courts to justify penalizing the publication of that information.

The second basis for the Fifth Circuit's finding of the reporter's participation in *Peavy* is quite clearly greater cause for alarm. If simply following up on a source's lead can be considered sufficient encouragement to constitute either procurement under the federal statute or aiding and abetting a violation of the wiretapping laws, then there would appear to be no discernable limit to the liability the press might incur for simply dealing with a source.

Whether the Fifth Circuit would have decided the point in a similar fashion after the Supreme Court issued its opinion in *Bartnicki* is an open question. On the one hand, to punish the media for encouraging an illegal interception by conducting an investigation based on information provided by a source seems dangerously close to the "dry up the market" theory that the majority rejected – that it is permissible to punish the media for publishing illicitly acquired information in order to decrease the source's incentives to acquire the information in the first place. On the other hand, a court inclined to engage in a narrow reading of *Bartnicki* could draw a distinction between the facts of that case, in which the media defendant had no contact with its anonymous source and could not plausibly be said to have encouraged the source's violation of the wiretap laws, and a case such as *Peavy*, in which the media defendant communicated with its sources on an ongoing basis during its investigation.

Under this narrow view of the *Bartnicki* privilege, a media defendant that communicated with a known source during the preparation of a story might be seen as engaging in a kind of encouragement beyond that contemplated by the "dry up the market" theory – that is, as actively inducing the source's ongoing violation of the wiretapping laws rather than merely providing a "market" for information that has already been acquired. According to that reasoning, a media agency that communicates at all with a source while that source is engaging in illegal interceptions might expose itself to liability under federal and state wiretapping laws, if the agency's communications could plausibly be thought to have induced later illegal acts.

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[47] The Supreme Court denied review in *Peavy*, distinguishing it from *Bartnicki* and *Boehner* on the grounds that in *Peavy*, "the media defendant in fact participated in the interceptions at issue." *Bartnicki*, 121 S. Ct. at 1758 n.5.

Under both federal and state law, the encouragement must be express in order to constitute aiding and abetting; failure to intervene alone is not sufficient to establish liability.[48] Courts are, however, generally more amenable to hearing charges of aiding and abetting where the defendant who allegedly provided assistance to others' criminal acts had some "stake in the fruits of their enterprise."[49] It stands to reason that a media defendant that remains silent when a source recounts his proposed illegal wiretapping activities, then ultimately accepts the tape—the fruit of the source's illegal enterprise—runs some risk of being held liable for aiding and abetting a violation of the wiretapping laws. Absent evidence to the contrary, a judge or jury might in this situation treat the ultimate acceptance of the tape as some indication albeit slight that the media defendant intended to help the source in his illegal activities, and that it in fact encouraged it to do so.

In sum, in order to be fully confident of avoiding potential liability based on a theory of indirect participation in the interception itself, the press would have to refrain from almost any dealings with sources prior to or simultaneous with the occurrence of the interceptions. Any conversation in which the a source described a plan to initiate or continue illegal interceptions stands a chance of being construed as sufficient to make the reporter a participant in the illegal actions of the source.

B. Participation in the Interceptor's Illegal Disclosure

As Justice Breyer's concurrence suggests, even after interceptions are complete, a media defendant might arguably also be held liable for aiding and abetting the source's *disclosure* of the contents of illegally intercepted communications, which is also a crime under the Federal Wiretap Act.[50] To be sure, to hold a media defendant liable under such a theory would have a dramatic impact on the freedom of the press. But consistent with the Court's reasoning in *Bartnicki*, plaintiffs may nevertheless argue that the media defendant's publication is not constitutionally protected even if the defendant played no role whatever in the initial interception, if the facts support a claim that agents of the defendant ordered, counseled, or encouraged the source's subsequent delivery of the tape either to an intermediary or directly to the media.[51]

We know from *Bartnicki* that purely passive receipt of a tape – even one with obvious hallmarks indicating that it was illegally produced – combined with passing that tape on to the media does not constitute actionable conduct. That is what defendant Yocum did. But figuring out where

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[48] *See, e.g., United States v. Longoria*, 569 F.2d 422, 425 (5th Cir. 1978) ("To prove participation, there must be some evidence to establish that the defendant engaged in some affirmative conduct; that is, there must be evidence that defendant committed an overt act designed to aid in the success of the venture. Mere negative acquiescence will not suffice."); *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir.1977) ("[M]ere negative acquiescence by a defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting.").

[49] *Backun v. United States*, 112 F.2d 635, 637 (4th Cir. 1940).

[50] 18 U.S.C. § 2511(1)(c) (1994).

[51] *Bartnicki v. Vopper*, 121 S.C Ct. 1753, 1767 (2001) (Breyer, J., concurring).

to draw the boundaries for participating in an illegal disclosure is a far more difficult enterprise than determining the bounds of participation in an illegal interception. As we discuss *infra*, the entire enterprise of investigative reporting would be put at risk if the First Amendment were held to be inapplicable any time a reporter encouraged a source to disclose information that the source had a legal duty not to disclose. But a conservative reading of *Bartnicki* would emphasize the language in that opinion suggesting that, at least in the context of the Federal Wiretap Act, which specifically prohibits the disclosure of illegally intercepted material, there are limits on the extent to which the press can safely seek out the possessor of an illegally made tape and ask for a copy.

A court already inclined to take a narrow view of the *Bartnicki* privilege would be particularly likely to find undue press participation in "disclosure" of a tape if the press offers an inducement to the person in possession of the tape. Paying sources for information, in a situation where they have a duty to maintain confidentiality, is a far less well-established reporting technique than simply asking questions. And it may be viewed by courts as crossing the line, at least in the context of the Federal Wiretap Act.

This privilege applies equally to non-monetary forms of inducement. In *Boehner*, for example, the D.C. Circuit appeared to find it significant that Congressman McDermott may have assured the individuals who made the illegal tape that they would receive immunity if they gave the tape to him. This factor seemed to cement that court's conclusion that McDermott participated in their illegal disclosure of the tape to him and was not a mere passive recipient.

A More Balanced Approach to Advising Clients on the Limits of *Bartnicki*

There are a number of reasons to conclude that the courts will not read *Bartnicki* as strictly as the conservative approach would suppose. While conduct that has the feel of actual participation in illegal wiretapping will always raise flags, the courts are likely to be much less hospitable to claims that the press forfeited its constitutional protection for publishing truthful information about a matter of public importance merely because it actively solicited a tape already in existence, for example. Put differently, plaintiffs will find it more difficult to sue the press for "disclosure" violations than for illegal interceptions in which the press actively participated.

Moreover, courts must take account of the content of the information being published. Regardless of how it is procured, courts will be reluctant to compensate a plaintiff for the consequences of disclosure of publicly significant information for which there is no legitimate claim of a privacy interest – for example, evidence of ongoing criminal wrongdoing by public officials in the conduct of their offices. The resulting reputational injury is not the sort of injury that courts, cognizant of the First Amendment, are likely to want to redress. By contrast, if the information disclosed does involve "private" matters – for example, peccadillos in the private life of a celebrity – the courts are much more likely to conclude that compensation for the resulting injury is a natural and legitimate part of punishing the initial intrusion caused by an illegal wiretap.

A. Mere Encouragement to Turn Over an Existing Tape

We would be reluctant to say that reporters should be advised by counsel never to make affirmative efforts to obtain a copy of a tape already in existence, due to concerns that the tape is the fruit of an illegal interception. As just noted, the separate "disclosure" ban in the statute provides a potential basis for liability under such circumstances, but courts are likely to be very reluctant to rely on that theory alone, because it cuts against the grain of all case law relating to investigative journalism.

To begin with, there is good authority for the proposition that a media defendant cannot be held liable for aiding and abetting the illegal interception itself based on its subsequent receipt of a tape that is already made. One cannot aid or abet an already completed crime, or be held liable for the knowing receipt of the product of an already completed crime—unless, of course, receipt is prohibited by statute.

In the 1969 case of *Pearson v. Dodd*,[52] for example, the D.C. Circuit heard a tort claim brought by a Senator against newspaper columnists for publishing articles containing information gathered by sources who had removed documents from the Senator's office without authorization. The court refused to hold the columnists liable for aiding and abetting their sources' wrongful conduct by simply receiving the information. The court noted:

> [T]he undisputed facts . . . established only that appellants received copies of the documents knowing that they had been removed without authorization. If we were to hold appellants liable for invasion of privacy on these facts, we would establish the proposition that one who receives information from an intruder, knowing it has been obtained by improper intrusion, is guilty of a tort. . . . [W]e are not prepared to go so far. A person approached by an eavesdropper with an offer to share in the information gathered through the eavesdropping would perhaps play the nobler part should he spurn the offer and shut his ears. However, it seems to us that at this point it would place too great a strain on human weakness to hold one liable in damages who merely succumbs to the temptation and listens.[53]

Pearson v. Dodd is a correct statement of the press's potential liability for encouraging an initial interception. Simply put, a member of the press faces the possibility of litigation for almost any dealing with a source engaged in ongoing illegal wiretaps, particularly where that dealing ends with acceptance of the source's illicitly gathered information. But the press cannot be held liable for an interception (leaving "disclosure" issues aside) based on dealings with its source after the illegal interceptions have been completed.

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[52] 410 F.2d 701 (D.C. Cir. 1969).

[53] *Id.* at 705 (footnote omitted).

A second principle, also drawn from investigative journalism case law outside the context of the Federal Wiretap Act, also may serve to assuage some concerns about the broadest possible reading of the Act and the most conservative possible reading of the *Bartnicki* First Amendment privilege. As noted above, general aiding and abetting law may impose liability based on mere encouragement or approval of another's illegal act at least where the recipient had a stake in the enterprise. But courts have also recognized that this principle cannot be extended unthinkingly to the journalistic context, since to do so would come dangerously close to penalizing routine journalistic investigations.

For example, in *Nicholson v. McClatchy Newspapers*,[54] the California Court of Appeal addressed the question of a newspaper's liability for inducing a source to reveal confidential information. There, a failed state judicial candidate brought suit against two newspapers and their reporters, among others, for invading his privacy by publishing the results of his evaluation by a state commission, which were by law to remain confidential. The court of appeal dismissed, as barred by the Supreme Court's decision in *Landmark Communications v. Virginia*, the plaintiff's argument that the newspapers had tortiously invaded his privacy by publishing the information. Moreover, the court found that the newspapers could not be held liable for soliciting the confidential information from members of the State Bar. The court ruled that "asking persons questions, including those with confidential or restricted information" is a routine newsgathering technique protected by the First Amendment, and therefore cannot form the basis for tort liability.[55] Just as the law may not forbid a newspaper from publishing confidential information, so may it not impose sanctions on the newspaper for having asked for it.[56]

The *Nicholson* court's holding was echoed in *Larsen v. Philadelphia Newspapers, Inc.*,[57] in which a Pennsylvania court similarly held that the news media could not be held liable in tort for publishing the contents of proceedings made confidential by law, at least absent evidence that the media had engaged in "the use of subterfuge in obtaining the information published which goes beyond the acceptable bounds of news gathering techniques and exposes news media defendants to liability for torts committed in pursuit of information."[58]

Though these courts' conclusions seem eminently sensible, they are far from clearly established in the Supreme Court's First Amendment jurisprudence. The Supreme Court decisions on which the *Nicholson* court relied do not suggest blanket First Amendment protection for "routine

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[54] 223 Cal. Rptr. 58 (Cal. Ct. App. 1986).

[55] *Id.* at 64 (citing Pell v. Procunier, 417 U.S. 817 (1974); Smith v. Daily Mail Publ'g Co., 443 U.S. at 103; Landmark Communications, Inc. v. Virginia, 435 U.S. at 837-38).

[56] *Id.* at 64.

[57] 543 A.2d 1181 (Pa. Super. Ct. 1988).

[58] *Id.* at 1187 (citing *Nicholson*, 223 Cal. Rptr. at 63).

. . . reporting techniques."[59] Rather, they hold more narrowly that the First Amendment protects publication of information acquired through the use of *lawful* reporting techniques. If a particular newsgathering technique – such as, for example, soliciting a tape of an illegally intercepted conversation – can made unlawful, then the *Daily Mail* principle, strictly speaking, would not apply. *Daily Mail* protects the publication of the information, not its acquisition.

However, the state courts' treatment of the question again provides a useful guide to the limits of courts' willingness to hold the press to the letter of the criminal and tort law at the expense of First Amendment freedoms. Few courts would be willing to impose liability on reporters for merely asking questions. Though the question was not presented in *Landmark Communications*, it is significant that the newspaper in that case acquired confidential information from a source under a duty not to disclose it, just as a source who had acquired information illegally is charged with a duty of nondisclosure by the federal wiretapping law. To impose liability under those circumstances would likely offend many courts' sense of what the First Amendment requires. Members of the press are thus unlikely to be penalized for asking a source to divulge the contents of already gathered information, where that information relates to an important, newsworthy matter.

Though the majority opinion in *Bartnicki* does not foreclose the possibility, Justice Breyer's concurring opinion suggests that liability would probably not be extended so far. Following up on a lead—even with the source's knowledge—belongs in an entirely different category of "participation" from counseling a source on how to violate federal and state wiretapping laws. Though there is still some possibility that a court may determine that the press may be held liable for indirectly encouraging a source by using its information in an ongoing investigation, most courts would hesitate to do so, for the simple reason that it would threaten too wide a swath of the press's First Amendment freedoms.

B. The Content of the Information Revealed in the News Story

A decision about whether to publish information derived from an illegal interception also cannot be made without consideration of the nature of the information itself. A key factor will be the extent to which the courts will view the disclosure as trampling on legitimate and substantial privacy interests. The *Bartnicki* Court itself pointed in this direction, emphasizing that the case involved disclosure of "information of public concern" and refusing to reach the question of how the First Amendment apply to stories disclosing "trade secrets" or "domestic gossip."[60] Justice Breyer went further, relying decisively on the fact that "the information publicized involved a matter of *unusual* public concern" as well as the conclusions that the plaintiffs had no legitimate privacy interest in keeping secret a conversation containing threats of violence and that they had become "public figures" by voluntarily becoming embroiled in a public controversy.

These statements suggest that courts will be much more protective of plaintiffs who can

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[59] *Id.* (citing *Daily Mail*, 443 U.S. at 103).

[60] 121 S. Ct. at 1764-65.

demonstrate that a publication of illegally intercepted information exposed private matters. More fundamentally, they reflect the fact that courts are *not* going to feel comfortable providing compensation for purely reputational injuries relating to matters of clear public interest, based solely on the method by which the press obtained the information. In such a case, the press can make a powerful argument that allowing "publication damages"—damages reflecting the reputational injury caused by a truthful publication about a matter of public interest—would unduly penalize the press and unduly reward wrongdoers.[61]

It is often useful to frame the argument in such a case by reference to the *New York Times v. Sullivan* protections accorded even to negligently false statements about public officials and public figures. Given the protections accorded the press in the Supreme Court's libel jurisprudence, it will always seem extreme for plaintiffs to claim a right to compensation for a reputational injury *they fully deserve*, based solely on the tortious nature of the press's newsgathering process. Assuming that the plaintiff would have no valid claim if the information merely arrived "over the transom," there is a powerful argument that any penalty for improper newsgathering cannot include punishment of the publication of the information. To the contrary, such an approach would have the perverse effect of providing a *greater* reward to the plaintiff – and a greater penalty to the press – as the importance and need for disclosure increased. The damages would increase as the wrongdoing by a public official or public figure being disclosed got more serious. Ultimately, courts are not going to accept such a system of compensation as consistent with basic tort principles and the First Amendment.

A case in point is the Fourth Circuit's recent decision in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*,[62] in which two ABC undercover reporters took jobs at Food Lion stores in order to uncover and film evidence of unsafe food handling practices, which was later broadcast on an episode of "PrimeTime Live." Food Lion brought a successful tort suit against ABC on theories of fraud, trespass, and other causes of action. The question on appeal was whether ABC could be held liable not only for the torts committed in the course of its newsgathering, but also for harm to Food Lion's reputation caused by the broadcast. The court answered that ABC could not be held so liable, since allowing damages for Food Lion's reputational injury would violate the rule announced in *Times v. Sullivan*, in which the Supreme Court held that the First Amendment demands proof of "actual malice" in defamation cases.[63]

Justice Breyer's approach, like that of the *Food Lion* court, reflects a reluctance to punish the press under generally applicable laws when doing so would trespass on the freedom of the press. This is a reluctance that is likely to be shared by courts attempting to sort out questions of the press's liability for publishing illegally gathered information in the wake of *Bartnicki*. It suggests that courts presented with cases in which the press has engaged in some form of newsgathering misconduct are likely to engage in the type of balancing exercise Justice Breyer lays out. That is,

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[61] *See generally* Nathan Siegel, *Publication Damages in Newsgathering Cases*, COMMUNICATIONS LAWYER, Summer 2001, at 11.

[62] 194 F.3d 505, 522-24 (4th Cir. 1999).

[63] *Id.* at 522-24.

rather than follow bright-line formulas, courts are likely to take into consideration the significance of the information that the press uncovers as weighed against the gravity of the press's involvement in the misconduct that produced that information.

Bartnicki and the Broader Context of Investigative Journalism

A final question is the extent to which the Court's ruling in *Bartnicki* can be read to apply to investigative techniques other than wiretapping. Assuming the case is validly read as authorizing punishment of the press for publishing illegally intercepted information in some cases, will that authorization extend to other situations in which reporters encourage or induce sources to make improper or illegal revelations? This question is significant, of course, because the essence of investigative journalism is attempting to uncover information that someone often has a legal right to keep secret. If courts extended *Bartnicki* beyond the wiretapping context, the conservative approach laid out above would mean avoiding any number of well-established investigative techniques, including simply asking questions of sources with confidential information.

Our view, however, is that even courts inclined to read *Bartnicki* strictly are unlikely to extend the ruling beyond the context of illegal wiretapping. As the *Bartnicki* Court saw it, the publication of information acquired through illegal wiretapping presented a unique contest between constitutional free speech values. Courts will not necessarily strike the same balance between privacy interests and freedom of the press when presented with the question of publication of information gathered by other means. As the *Bartnicki* opinion itself makes clear, courts tend to regard wiretapping as uniquely intrusive, with a unique ability to chill private speech, given "our natural reluctance to discuss private matters when we fear that our private conversations may become public."[64] At oral argument, Justice Breyer compared illegal wiretappers to trespassers who "com[e] into your house, steal your diaries, and listen to your most private conversations."[65] Few other means of newsgathering would merit such a comparison.

Given their recognition of the uniquely intrusive nature of illegal wiretapping of private conversations, courts are unlikely to weigh privacy interests quite as heavily in other contexts. Even a court that reads *Bartnicki* privilege very narrowly is unlikely to impose liability where, for example, a reporter has urged a source to turn over company documents that the source had a duty to keep confidential. Not only are the privacy interests at stake far less weighty, but to extend the *Bartnicki* ruling so far would threaten to put an end to investigative journalism as we know it. Few courts would be willing to take such a dramatic step in cutting back the press's First Amendment freedoms.

Conclusion

Only time will tell whether the privilege the Supreme Court created in *Bartnicki* will turn out to be a meaningful one – that is, one applicable outside of the peculiar facts of that case.

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[64] *Bartnicki*, 121 S. Ct. at 1766 (Breyer, J., concurring); *see also id.* at 1764 (majority opinion).

[65] Tr. of Oral Arg., *Bartnicki*, No. 99-1687, 2000 U.S. Trans. LEXIS 77, *32.

Although some may choose to take a more conservative approach, our best judgment is that media defendants may still invoke a First Amendment privilege to publish a news story derived from illegally intercepted information, even where the defendants are not wholly innocent of complicity in the illegal interception, as in *Bartnicki*.

We have attempted to sketch out some of the relevant factors that, in our view, courts will find persuasive: generally, the degree to which the media induced its sources to engage in the illegal interception and disclose the information gained through the interception, and the degree to which that information relates to matters of public concern. While *Bartnicki* may leave the press vulnerable to potential liability for engaging in certain forms of investigative journalism, both courts and litigants should be hesitant to read the Supreme Court's decision as an invitation to undermine this important element of the freedom of the press.

POST-*BARTNICKI V. VOPPER*: MATTERS OF "PUBLIC CONCERN"

By Theodore J. Boutrous, Jr. and Sonja R. West*

*Theodore J. Boutrous, Jr., is a partner and Sonja R. West an associate in the Los Angeles office of Gibson, Dunn & Crutcher LLP.

POST-*BARTNICKI V. VOPPER*: MATTERS OF "PUBLIC CONCERN"

The First Amendment prohibits punishing an individual or the press for disclosing illegally intercepted information concerning an issue of "public importance," so long as the publisher did not participate in the unlawful interception, according to the United States Supreme Court's 6-3 decision last term in *Bartnicki v. Vopper*, 532 U.S. 514 (2001). The *Bartnicki* decision is, at its core, a straight-forward application of hornbook First Amendment law and a reaffirmation of the right of the press and others to publish truthful information on a matter of public concern. Although a concurring decision by two members of the majority creates potential uncertainties regarding the level of scrutiny for issues that pit privacy interests against speech rights, it does not appear to affect the Court's view of what matters are in the "public interest."

The *Bartnicki* Decision

The facts of *Bartnicki* involve the interception and recording of a cellular telephone call between two union officials involved in contentious negotiations with the local school district. The anonymous interceptor sent the recordings to a intermediary who then turned them over to the local media. Local radio stations played portions of the recordings on the air and local newspapers published transcripts of them. The union officials brought suit against the media and the intermediary under the federal wiretap statute, 18 U.S.C. § 2511(1), and parallel provisions of state law.

Writing for the Court, Justice Stevens, joined by Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer, strongly reaffirmed the First Amendment right to publish truthful information of public concern. Justice Breyer filed a concurring opinion in which Justice O'Connor joined. Chief Justice Rehnquist wrote a dissenting opinion that was joined by Justices Scalia and Thomas.

In its opinion, the Court characterized the case as presenting "a conflict between interests of the highest order," which set "the interest in full and free dissemination of information concerning public issues" on one hand against "the interest in individual privacy and, more specifically, in fostering private speech" on the other. Relying heavily on its decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court emphasized repeatedly "the general proposition that freedom of expression upon public questions is secured by the First Amendment." The Court reiterated the rule that it laid down in *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979) and applied in *Florida Star v. BJF*, 491 U.S. 524 (1989), *Landmark Communications Inc. v. Virginia*, 435 U.S. 829 (1978), and other cases:

> [T]his Court has repeatedly held that 'if a newspaper lawfully obtains truthful information about a matter of public significance'" the Constitution prohibits the government from punishing publication of the information "'absent a need of the highest order.'"

The Court stressed that the outcome in *Bartnicki* turned on the fact that the information at issue was "truthful information of public concern." Citing Warren and Brandeis' classic observation that "the right of privacy does not prohibit any publication of matter which is of public or general interest," the Court noted that "[o]ne of the costs associated with participation in public affairs is an attendant loss of privacy." For that reason, the Court held that "privacy concerns give way when balanced against the interest in publishing matters of public importance." Finally, the Court conceded that the information at issue in *Bartnicki* – debate over teachers' union negotiations – "may be more mundane than the Communist rhetoric" at issue in past Supreme Court opinions. It nonetheless confirmed that this speech "is no less worthy of constitutional protection."

In his concurring opinion, however, Justice Breyer, who was joined by Justice O'Connor, explained that the illegally obtained information in *Bartnicki* was a "special kind" of information of "unusual public concern." Justice Breyer referred to a statement by one of the union officials on the recorded conversation discussing members of the local school board and telling the other union official "[t]o blow off their front porches, we'll have to do some work on some of those guys." Characterizing this statement as "a threat of potential physical harm to others," Justice Breyer observed that when a speaker makes a threat of physical harm, he or she has "little or no legitimate interest" in maintaining privacy. Justice Breyer also stressed that the speakers involved were "limited public figures" who "voluntarily engaged in a public controversy" and therefore "ha[d] a lesser interest in privacy."

Although both concurring Justices joined the majority opinion in full, Justice Breyer used the concurrence to expound for the third time on his vision of a new balancing test that would weigh privacy interests against free speech rights. *Bartnicki*, 121 S. Ct. at 1766 (Breyer, J., concurring) (citing *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 227 (1997) (Breyer, J., concurring in part); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)). Even under Justice Breyer's proposed approach, which he has yet been able to persuade five members of the Court to adopt, the concurring Justices concluded that "the statutes, as applied in these circumstances, do not reasonably reconcile the competing constitutional objectives. Rather, they disproportionately interfere with media freedom."

Chief Justice Rehnquist, joined by Justices Scalia and Thomas, filed a dissenting opinion arguing that the majority "diminishes rather than enhances, the purposes of the First Amendment: chilling the speech of the millions of Americans who rely upon electronic technology to communicate each day." Referring to the media's interest in publishing this information as "a marginal claim," the Chief Justice argued that the Court's decision "to hold inviolable our right to broadcast conversations of 'public importance' enjoys little support in our precedents." He further stated that "[e]ven where the communications involve public figures or concern public matters, the conversations are nonetheless private and worthy of protection," and complained that the "public concern" test applied by the Court "was an amorphous concept that the Court does not even attempt to define."

Bartnicki And Matters "Of Public Concern"

Bartnicki represents an important continuation of the Court's vindication of First Amendment rights. While recognizing a strong countervailing interest in privacy for its own sake and as a facilitator of speech, the Court nevertheless held paramount the constitutional interest in disseminating information of public importance. The *Bartnicki* Court's opinion portrayed the dissenters' approach as a practical and serious threat to *Sullivan*'s vision of "uninhibited, robust, and wide-open" debate on public issues.

The Court's opinion in *Bartnicki* is ultimately a straightforward application of First Amendment precedent. The majority opinion applies the *Daily Mail* rule to the specific facts at hand and finds that punishing the disclosure of truthful, lawfully obtained information of "public concern" would violate the First Amendment. The Court explicitly reinforced the importance of protecting the "core purposes of the First Amendment . . . the publication of truthful information of public concern." When viewed in that light, *Bartnicki* is simply the latest in a long and unbroken string of Supreme Court decisions protecting free, truthful speech about matters of public interest.

To provide the greatest latitude to free speech, courts have always interpreted the concept of what is viewed as "newsworthy" or of "public significance" extremely broadly. As Prosser explained in his treatise on privacy, "[i]n determining where to draw the line the courts have been invited to exercise nothing less than a power of censorship over what the public may be permitted to read; and they have been understandably liberal in allowing the benefit of the doubt." William L. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 413 (1960). This concept, moreover, "properly restricts liability for public disclosure of private facts to the extreme case, thereby providing the breathing space needed by the press to properly exercise effective editorial judgment." *Gilbert v. Medical Economics Co.*, 665 F.2d 305, 308 (10th Cir. 1981).

This emphasis on protecting the truthful publication of matters of public concern appears to be unharmed by the *Bartnicki* decision.

In *Bartnicki*, the Court stated that in cases involving "criticism of official conduct," privacy concerns are trumped by "the interest in publishing matters of public importance," The Court further emphasized that "[o]ne of the costs associated with participation in public affairs is an attendant loss of privacy."

In his concurrence, Justice Breyer also concluded that truthful publication of this issue of public concern outweigh any privacy interests at stake. Justice Breyer's concurrence differs from the Court's opinion by its narrow characterization of the contents of the intercepted phone call. For the Court, the salient fact was that the intercepted conversations dealt with public education and the public fiscal spending – these "months of negotiations over the proper level of compensation for teachers at the . . . High School were unquestionably a matter of public concern" that "implicates the core purposes of the First Amendment."

Justice Breyer, however, emphasized that in his view the information published by respondents involved "a matter of unusual public concern, namely, a threat of physical violence by others" and "threats to public safety" although "the danger may have passed by the time of publication." Justice Breyer also mentioned other factors that were not cited by the majority. He declared that the speakers were "limited public figures" who "voluntarily engaged in a public controversy" and "thereby subjected themselves to somewhat greater public scrutiny and had a lesser interest in privacy than an individual engaged in purely private affairs." For these reasons, Justice Breyer concluded that "the speakers had little or no legitimate interest in maintaining the privacy of the particular conversation." This analysis suggests that the concurring justices would consider the identity of the speakers as well as the subject matter of the speech when determining whether the information was in the public interest.

Justice Breyer, moreover, did not say that a threat of physical harm was required before First Amendment protection would be triggered. Rather, this was one of the factors that led him to join the majority opinion in this case. Citing to cases involving the broadcast of a videotape recording of sexual relations between two celebrities, publication of "intimate private characteristics or conduct," and publication of the details of a divorce, Justice Breyer concluded that *Bartnicki* was not a situation "where the media publicizes truly private matters."

Matters Of "Public Concern" Post-*Bartnicki*

The issue of what constitutes matters of "public concern" post-*Bartnicki* has received early attention in the D.C. Circuit following the Court's remand of the related case, *Boehner v. Mc Dermott*, 191 F.3d 463 (D.C. Cir. 1999), *cert granted, vacated and remanded,* 121 S.Ct. 2190 (2001). Like *Bartnicki*, the *Boehner* case involves an attempted prosecution under the wiretapping statute following the publication of an illegally intercepted and recorded telephone conversation. In *Boehner*, the lawsuit stemmed from the public release of a December 1996 phone conversation involving Rep. John A. Boehner (R-Ohio), then-House Speaker Newt Gingrich (R-Ga.), and other House GOP leaders discussing how best to respond to an ethics committee ruling against Gingrich. A Florida couple recorded the conversation off a police scanner and, ultimately, gave it to Rep. Jim McDermott (D-Wash.). At the time, McDermott was the top Democrat on the House ethics panel. Accounts of the conversation soon appeared in news articles. Boehner has alleged that McDermott confidentially leaked the tape's contents to the press. Unlike *Bartnicki*, there were no threatening statements and McDermott knew the identity of the persons who intercepted and recorded the conversation. The proper balance to issues involving both publication of matters in the "public interest" and individual privacy was argued by the parties and a group of media amici curiae on remand in *Boehner*.

The facts of *Boehner* involve a clear case of a matter of "public concern" as that phrase has been used in the past. In fact, the majority in *Boehner* admitted in its original decision that the illegally intercepted conversation included information that had "great news value" for the media. In his supplemental brief to the D.C. Circuit, Boehner argued that the conversation at issue deserved more protection from publication because it did not involve a threat of physical harm, which he characterized as "the key point for the concurrence" in *Bartnicki*. He then argued that because the

facts of *Boehner* involve a "discussion among congressional leaders concerning congressional business," the privacy interest is "uniquely powerful and far stronger" than in *Bartnicki*.

In reply, the media amici responded that this argument "turns the First Amendment on its head. It is precisely because this speech involves 'congressional leaders' discussing 'congressional business,' that it falls squarely within the definition of a matter of 'public concern' and the speakers' privacy interests are either eliminated or drastically lessened."

On December 21, 2001, the D.C. Circuit remanded the case "for further proceedings" to the district court in a *per curiam* decision. *Boehner v. McDermott*, 2001 U.S. App. LEXIS 27798. The Court of Appeals deferred ruling on the First Amendment questions in order to allow Boehner to amend his complaint and because the Court "conclude[d] that we would benefit from having the district court pass upon the [constitutional] arguments that have taken on new-found importance after *Bartnicki*." The Court of Appeals denied McDermott's petition for rehearing and petition for rehearing *en banc* on February 6, 2002.

On February 22, 2002, Boehner filed an amended complaint with the United States District Court for the District of Columbia. In the amended complaint, Boehner alleges that McDermott "acting through his agents or representatives or other intermediaries, informed [the Florida couple] that he would admit them to his office and accept the tape from them, and that they would receive immunity for their illegal conduct if they gave him the tape." In the amended complaint, Boehner further alleges that McDermott "unlawfully aided, abetted, counseled, induced and procured [the Florida couple's] illegal disclosure of the tape [and] . . . acted unlawfully by entering into an agreement with the [couple] to transfer the tape and knowingly and intentionally participating in that transfer." Finally, the amended complaint alleges that McDermott violated "special duties of nondisclosure" inherent in his position on the Ethics Committee.

As the lower courts begin to examine the ramifications, if any, of *Bartnicki* on the issue of matters of "public concern," the United States Supreme Court has continued to address the constitutional issue of privacy. In *Kyllo v. United States,* 533 U.S. 27 (2001), the Court ruled 5-4 that the government's use of thermal imaging to detect infrared radiation emitting from private homes was an unconstitutional search under the Fourth Amendment.

Addressing the issue of privacy, Justice Scalia writing for the Court explained "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology. . . . The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy." Writing for the dissenters, Justice Stevens countered that the case was about "direct access to information in a private area, on the one hand, and the thought processes used to draw inferences from information in the public domain on the other hand."

Earlier this term, the Court heard argument in another case involving privacy rights. In *Owasso Indep. Sch. Dist. v. Falvo,* 122 S.Ct. 934 (2002), the Court decided that the grading practice of a public school in which students grade each other's tests and assignments and announce the grades in class does not violate the students' constitutional and statutory rights to privacy. An en

banc panel of the Tenth Circuit Court of Appeal had held that while the practice does not violate the students' constitutional rights, it is prohibited under the federal Family Education Rights and Privacy Act. In a 9-0 decision the Supreme Court disagreed. Writing for eight of the Justices, Justice Kennedy did not address the constitutional issue but held that prohibiting the practice under the federal law "would impose substantial burdens on teachers across the country." Justice Scalia concurred separately.

Amici representing student and professional reporters urged the Court in *Owasso* to reverse, arguing that allowing federal civil rights laws to enforce statutory privacy interests, rather than constitutionally mandated privacy rights, "will have a devastating impact on public access to government-held information." Media amici further argued that a broad definition of "education records" that are considered "private" could restrict the ability of journalists to access information.

Following the decision in *Bartnicki*, it is clear that the courts will continue to wrestle with the conflicting interests of individual privacy and the right of the public to obtain information regarding matters in the public concern. Yet the *Bartnicki* decision also makes clear that the Supreme Court remains devoted to the idea that "[t]he protection of the public requires not merely discussion, but information." *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942) (cited with approval in *New York Times v. Sullivan*, 376 U.S. 254, 269-82 (1964)).

ALLEGEDLY CRIMINAL NEWSGATHERING AND FIRST AMENDMENT DUE PROCESS

By Charles L. Babcock*

* Charles L. Babcock is a partner in Jackson Walker L.L.P. Dallas and Houston, Texas. Jackson Walker attorney James A. Holmes and legal assistant Christa Liczbinski provided valuable assistance for this article.

ALLEGEDLY CRIMINAL NEWSGATHERING AND FIRST AMENDMENT DUE PROCESS

A True Story of First Amendment Due Process

This is a true story. A newspaper decided to investigate the so called underground railroad which transported illegal immigrants, mostly from El Salvador, through Central America to Mexico over the border to south Texas and onward to points north. The railroad was thought to be operated by people affiliated with the Catholic church. The reporter assigned to the investigation suggested to his editors that it would be useful to accompany some of the illegal immigrants on their journey. The editors agreed but stipulated that the reporter could only travel in the United States; he would not be permitted to cross with the immigrants from Mexico into this country and he should do nothing to violate any criminal statute. The reporter easily found the group operating the "railroad" and traveled to the small south Texas town of San Benito to attend a planning session where the organizers were mapping out a journey for three illegal Salvadorians (a young man, a young woman and the woman's baby) who were to be driven from San Benito to San Antonio. At this meeting there was discussion of where United State Border Patrols checkpoints were located and the driver of the vehicle (a young Catholic nun) was told how to avoid these locations. A Catholic lay worker was chosen to accompany the Salvadorians and the nun. It was agreed that the sixth passenger would be the newspaper reporter.

A road map was prepared which highlighted the suggested route and noted border patrol checkpoints. The highlighted route avoided these sites. The group got into the car and set out for San Antonio but, as luck would have it, the border patrol stopped the car, despite the evasive route, and detained everyone. The reporter got out of the front seat, passenger side. He left behind the map which turned out to contain his fingerprints. The prosecutor later referred to the reporter as the navigator.

When the border patrol agent discovered that he had netted three illegal Salvadorians, a Catholic nun, a Catholic lay worker and a newspaper reporter, his first instinct was to send the Salvadorians back home and let everyone else go. Instead, he called the Assistant United States Attorney for the Southern District of Texas who demanded that everyone be arrested. The reporter called his editor from jail and shortly thereafter the newspaper's lawyer was contacted at approximately 4 a.m.

When the prosecutor got to work that day, he should have referred to 28 C.F.R. Pt. 50.10 (2001), a Justice Department regulation which deals with accusations of criminal misconduct against the media and generally requires personal approval from the United States Attorney General before a member of the media can be subpoenaed, charged, arrested, indicted or prosecuted.

Part 50.10 reads, in part, as follows:

> **Policy with regard to the issuance of subpoenas to members of the news media, subpoenas for telephone toll records of members of the news media, and the interrogation, indictment, or arrest of, members of the news media.** Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues. This policy statement is thus intended to provide protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function. In balancing the concern that the Department of Justice has for the work of the news media and the Department's obligation to the fair administration of justice, the following guidelines shall be adhered to by all members of the Department in all cases:. . .(Subsections a-g deal with subpoenas)
>
> (h) No member of the Department shall subject a member of the news media to questioning as to any offense which he is suspected of having committed in the course of, or arising out of, the coverage or investigation of a news story, or while engaged in the performance of his official duties as a member of the news media, without the express authority of the Attorney General: Provided, however, That where exigent circumstances preclude prior approval, the requirements of paragraph (l) of this section shall be observed.
>
> (i) A member of the Department shall secure the express authority of the Attorney General before a warrant for an arrest is sought, and whenever possible before an arrest not requiring a warrant, of a member of the news media for any offense which he is suspected of having committed in the course of, or arising out of, the coverage or investigation of a news story, or while engaged in the performance of his official duties as a member of the news media.
>
> (j) No member of the Department shall present information to a grand jury seeking a bill of indictment, or file an information, against a member of the news media for any offense which he is suspected of having committed in the course of, or arising out of, the coverage or investigation of a news story, or while engaged in the performance of his official duties as a member of the news media, without the express authority of the Attorney General.
>
> (k) In requesting the Attorney General's authorization to question, to arrest or to seek an arrest warrant for, or to present information to a grand jury seeking a bill of indictment or to file an information against, a member of the news media for an offense which he is suspected of having committed during the course of, or arising out of, the coverage or investigation of a news story, or committed while engaged in the performance of his official duties as a member of the news media, a member of the Department shall state all facts necessary for determination of the issues by the

> Attorney General. A copy of the request shall be sent to the Director of Public Affairs.
>
> (l) When an arrest or questioning of a member of the news media is necessary before prior authorization of the Attorney General can be obtained, notification of the arrest or questioning, the circumstances demonstrating that an exception to the requirement of prior authorization existed, and a statement containing the information that would have been given in requesting prior authorization, shall be communicated immediately to the Attorney General and to the Director of Public Affairs.
>
> (m) In light of the intent of this section to protect freedom of the press, news gathering functions, and news media sources, this policy statement does not apply to demands for purely commercial or financial information unrelated to the news gathering function.
>
> (n) Failure to obtain the prior approval of the Attorney General may constitute grounds for an administrative reprimand or other appropriate disciplinary action. The principles set forth in this section are not intended to create or recognize any legally enforceable right in any person.

After hearing from the jailed reporter, the newspaper's editor and I flew to south Texas and asked the United States Magistrate Judge to release the reporter on his own recognizance and, over the government's objection, the request was granted. With the reporter out of jail but by no means out of trouble, how did we construct a defense and did the First Amendment have any role to play? The first issue for us, of course, related to representation. The newspaper had instructed the reporter not to violate any criminal law but did give sanction to the overall scope of the newsgathering activity. The paper retained a criminal defense lawyer to protect the reporter's interests while its regular counsel represented the corporation. There was initial consideration of a "substantive First Amendment defense" to the reporter's conduct. The thought was rejected recognizing that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

We knew of the United States Supreme Court's dicta in *Branzburg v. Hayes*, 408 U.S. 665, 691-92 (1972) which stated:

> It would be frivolous to assert…that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news.... The Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons.

We anticipated the holding of the court in *United States v. Sanders*, 17 F. Supp.2d. 141, 144 (E.D.N.Y. 1998), *aff'd*, 211 F.3d 711 (2d Cir. 2000), *cert. denied*, 121 S. Ct. 574 (2000), which stated that "the press may not use First Amendment protection to justify otherwise illegal actions."

We did think, however, that we could require the prosecutor and the judges to employ stricter procedures in measuring the reporter's conduct as compared to the actions of the other (non-First Amendment) defendants. We argued that Part 50.10 was a constitutionally compelled recognition that:

> courts have . . . come to realize that procedural guarantees play an equally large role in protecting freedom of speech; indeed, they 'assume an importance fully as great as the validity of the substantive rule of law to be applied.' Responding to this realization, courts have begun to construct a body of procedural law which defines the manner in which they and other bodies must evaluate and resolve first amendment claims - a first amendment "due process," if you will.

Henry P. Monaghan, *First Amendment "Due Process"* 83 Harv. L. Rev. 518 (1970).

Our first strategy decision was whether or not to allow the reporter to write about his experiences. We were worried that he might publish something to incriminate himself and possibly the newspaper. On the other hand, if his defense was that he was only working as a reporter what would be more natural and expected than to write about the events he was assigned to cover. He was just there, after all, to report on an important story and not participate in a crime. We decided to let him write an accurate but exculpatory article which contained the sentence: " I was on the scene *solely* as a reporter."

The next step was to demand an examining trial and ask the United States Magistrate Judge to find "no probable cause" to proceed against the reporter. It was argued that Part 50.10 had not been followed and further that First Amendment due process required the judge to apply "strict scrutiny" to the evidence and, under that standard, no probable cause existed. The reporter did not testify but his editor did and emphasized the instructions from the paper were not to violate any criminal law. The Assistant U.S. Attorney told us later that this testimony kept him from seeking an indictment against the newspaper corporation, as he had been intending.

The border patrol agent testified that the reporter had been sitting in the front seat of the car, apparently directing the driver and that various documents, including the map which highlighted ways around the border control checkpoints, contained the reporter's fingerprints. The reporter's article about the incident was introduced and the government agent conceded that the sentence: "I was on the scene solely as a reporter" undercut its position. The Magistrate Judge found probable cause to proceed even though she accepted our argument that "strict scrutiny" should be applied to the evidence.

Our next move was to travel to Washington and speak with the Justice Department and with various officials at INS, the prosecuting agency. We emphasized both the legal and practical aspects of this proposed prosecution. First, we pointed out, again, that Part 50.10 had not been followed and we suggested that this was fatal to the government's case. A senior Justice Department official

promised us he would look into it. INS was not interested in the adverse publicity generated from prosecuting a reporter and was more concerned with the underground railroad; their people agreed to consider the matter. Despite pressure from Washington, the Assistant United States Attorney in Texas was determined to prosecute the journalist. As he complained to us, "You guys have had everyone but the president calling me, but who do you think I would rather go to trial against; a young innocent looking nun or a bearded, scruffy newspaper reporter?"

The Assistant U.S. Attorney told us that he could not wait for Attorney General approval under Part 50.10 because of Speedy Trial Act problems. The reporter then immediately waived his Speedy Act protections before a court reporter in the U.S. Attorney's office. The prosecutor was not, however, deterred and informed us that he was planning to present the reporter's case before a federal grand jury that morning. We then filed a civil injunction proceeding against the Justice Department and the U.S. Attorney relying upon First Amendment due process as, we said, articulated in 28 C.F.R. pt. 50.10. Our argument under 50.10 was simply that this regulation articulated what First Amendment due process required, citing the Monaghan article. The federal judge telephoned the prosecutor and told him not to proceed with the grand jury until arguments could be heard.

Leading up to these events, the newspaper and its parent corporation were contacting various members of the administration and the Justice Department asking them to exercise their prosecutorial discretion against indictment and/or trial of the reporter. The cumulative effects of all these efforts lead the Assistant United States Attorney to remove the reporter's name from the proposed indictment without waiting for the judge to rule on the request for injunctive relief. The government proceeded only against the nun and lay worker who were subsequently found guilty and sentenced. The nun entered into a plea agreement while the lay worker demanded a jury trial where she was convicted, and later, sentenced to jail. The reporter moved to San Diego, a free man.

Substantive First Amendment Defenses to Criminal Newsgathering Allegations Generally Do Not Work

There are certain lessons to be learned from this case. First, I doubt that a substantive First Amendment defense would have worked with any of our constituents: the prosecutor, the Justice Department officials, the INS, or the judge. To have even made the argument would have irritated the government and made matters worse. There has developed ample precedent for this view starting with the above quoted passage from *Branzburg*. Consider for example, the comments of United States District Judge Walter Smith who, when confronted with a substantive First Amendment defense in a suit by ATF Agents against the news media arising from the Branch Dividian incident in Waco, Texas wrote " it would be ludicrous to assume that the First Amendment would protect a reporter who negligently ran over a pedestrian while speeding merely because the reporter was on the way to cover a news story." *Risenhoover v. England*, 936 F. Supp. 392, 404 (W.D. Tex. 1996).

A substantive First Amendment defense did not work in the *United States v. Sanders*, 17 F. Supp.2d 141, 148 (S.D.N.Y. 1998), *aff'd*, 211 F.3d 711 (2d Cir. 2000) either. In *Sanders* a journalist employed his wife, a senior TWA flight attendant, to investigate the possible causes for the 1996 crash of TWA Flight 800. The crash killed all 230 persons on board, and provoked speculation about

possible causes. The journalist, with his wife's help, began talking confidentially with a TWA pilot who was participating in the official investigation by the National Transportation Safety Board and the Federal Bureau of Investigation.[1] The journalist persuaded the pilot to remove sample portions of seat cushions from the crash wreckage, received those samples from the pilot and subsequently published an article theorizing that a Navy missile had downed Flight 800.[2] Federal prosecutors and the FBI attempted to learn the journalist's confidential source (the TWA pilot) by threatening the journalist with criminal prosecution. After those negotiations broke down, federal prosecutors indicted and prosecuted the journalist and his wife under a federal statute prohibiting "the unauthorized removal, concealment, or withholding of 'a part of a civil aircraft involved in an accident, or property on the aircraft at the time of the accident.'"[3] A jury convicted the journalist and his wife and the convictions were affirmed by the United States County of Appeals for the Second Circuit.

The District Judge disposed of the substantive First Amendment defense as follows:

> As a preliminary matter, the court must address the defendants' contention that their conduct in obtaining the fabric from the wreckage was protected by a First Amendment "newsgathering" privilege. Under this privilege, defendants contend that the acts the defendants are charged with all relate to the constitutionally protected process of newsgathering because James Sanders was a freelance journalist and was investigating the crash of Flight 800 for newsgathering purposes. Elizabeth Sanders, in assisting her husband, was also engaged in the newsgathering process. While the court recognizes that there is a "reporter's privilege" with respect to certain information subpoenaed in civil and criminal proceedings, this privilege clearly does not apply as a shield against prosecution for violation of laws of general applicability…the press may not use First Amendment protection to justify otherwise illegal actions.
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> 17 F. Supp. 2d at 143-144.

The court then quoted from *United States v. Sanusi*, 813 F. Supp. 149, 155 (E.D.N.Y. 1992) to the effect that "because the press in certain circumstances may be able to resist the demands of a subpoena, does not mean the press may, simply by raising the cry of 'newsgathering,' exempt itself from all ordinary legal constraints."

The substantive First Amendment defense faired no better in *United States v. Matthews*, 209 F.3d 338 (4th Cir. 2000), *cert. denied*, 531 U.S. 910 (2000). In *Matthews*, a veteran, award-winning journalist, who had previously produced a radio series on the availability of child pornography via the internet, began actively investigating pornography for purposes of creating another report. The journalist maintained an on-line "chat room" with which he had sexually explicit discussions with allegedly minor females. He sent or received over the internet roughly 160 pictures depicting child

[1] *Sanders*, 211 F.3d at 715-16.

[2] *Id.* at 715.

[3] 17 F. Supp. 2d at 144.

pornography.[4] Two pictures showed a prepubescent minor female engaged in explicit sex acts with adults.[5] The FBI began monitoring the journalist's on-line activities and, eventually, commenced a prosecution against him for knowingly transmitting and receiving a "visual depiction . . . of a minor engaging in sexually explicit conduct."[6] Because the trial court would not allow him to explain his activities to the jury, the journalist entered a conditional plea of guilty that preserved all rights to appeal. The trial court sentenced him to 18-months in jail.

The Fourth Circuit affirmed, holding:

> The reporter admits that he traded in the pornography but maintains that he did so only to research a news story. He contends that when such acts are committed solely for a valid journalistic purpose, the First Amendment provides a defense to criminal conviction, and he appeals the districts court's refusal to permit him to present this defense to a jury. Because we conclude that the First Amendment provides no defense in these circumstances, and because we reject the reporter's other arguments, we affirm.

209 F.3d at 339.

The substantive First Amendment defense has also been repeatedly rejected in a recurring fact pattern where newsgathering arguably leads to trespassing. In *Stahl v. State*, 665 P.2d. 839 (Okla. Crim. App. 1983), *cert. denied*, 464 U.S. 1069 (1984) several journalists covering a protest by 339 demonstrators against nuclear power facilitates followed the demonstrators onto state-controlled property. The journalists and protestors were warned not to enter the property by way of signs and a loudspeaker announcement. The reporters were convicted of criminal trespass and each fined $25. The Oklahoma Court of Criminal Appeals upheld their convictions,[7] ruling that "the pivotal issue in this appeal is whether the First Amendment shields newspersons from state criminal prosecution in their news gathering function. We hold that it does not."

A recent decision from the United States Court of Appeals for the Fifth Circuit, however, serves as some precedent for a substantive First Amendment defense to trespassing although the case did not implicate newsgathering. In *Vasquez v. Housing Auth. of the City of El Paso* 271 F.3d 198, 206 (5th Cir. 2001), the Court held that a city regulation which prohibited door-to-door campaigning in a city owned, low income housing project violated the First Amendment. The regulation was a no trespassing rule which called for the arrest of violators. The Fifth Circuit held that "an outright ban on door-to-door political campaigning by nonresidents (places) an unreasonable restriction on the freedoms guaranteed by the first amendment." The 11th Circuit reached exactly the opposite conclusion in *Daniel v. City of Tampa*, 38 F.3d, 546 (11th Cir. 1994).

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[4] *Id.* at 340.

[5] *Id.* at 346.

[6] *Id.* at 340 & 342.

[7] 665 P.2d at 840.

Exception: A Substantive First Amendment Defense Works When the "Crime" Is Publishing and Only Publishing

A substantive First Amendment defense does work, however, when the statute makes the act of publishing a crime and where the reporter has not been involved in any other way with the underlying criminality. The leading case is the recent U.S. Supreme Court decision in *Bartnicki v. Vopper*.[8] *Bartnicki* followed a line of Supreme Court cases: *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979) and *Florida Star v. B.J.F.*, 491 U.S. 524 (1989). In *Bartnicki*, a reporter received a tape recording which was the product of an illegal wiretap.[9] The statute makes it a crime to disclose or use, i.e., publish, the contents whether or not the publisher has been involved in the original wire tapping.[10] The Court invalidated the statute, as applied, on First Amendment grounds holding: "First (the reporters) played no part in the illegal interception . . . . Second, their access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else. Third, the subject matter of the conversation was a matter of public concern."[11]

But this line of authority represents an exception to the general rule that there is no substantive First Amendment defense. Consider for example the two *Peavy* cases (*Peavy I* and *Peavy II*). In *Peavy I*,[12] an illegally obtained wire tap was transcribed and read at a school board meeting. A reporter asked for a transcript of the recording from the board pursuant to the state's open records act. *Id.* In a subsequent civil lawsuit against the reporter by Peavy, who relied on the civil remedies section of the wiretap act, relief was denied based upon a substantive First Amendment defense.[13] But in *Peavy II* – same illegal taping but different reporter – the journalist was accused of participating in the underlying wiretap and the substantive First Amendment defense was rejected. The Fifth Circuit in reversing the trial court wrote that:

> Primarily at issue is whether the First Amendment shields WFAA-TV, Inc., and its reporter, Robert Riggs, from liability for their "use" and "disclosure," in violation of the Federal and Texas Wiretap Acts, of the contents of the Peavys' cordless telephone conversations, illegally intercepted and recorded by the Harmans, with them providing the recordings to Riggs *and with Riggs and WFAA having some participation concerning the interceptions, at least as to their extent....* The district court granted summary judgment for WFAA and Riggs, holding ... even though defendants engaged in proscribed "use" and "disclosure," the First Amendment

[8] 121 S.Ct. 1753 (2001), 532 U.S. 514.

[9] *Id.* at 1757.

[10] *Id.* at n. 3 (citing 18 U.S.C. § 2511(1)(c)).

[11] *Id.* at 1760.

[12] *Peavy v. New Times*, 976 F. Supp 532 (N.D. Tex. 1997).

[13] *Id.* at 540.

trumps the two Acts. We ... reverse."

Peavy v. WFAA-TV, Inc., 221 F.3d 158, 163 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 2191 (2001).

Riggs' "participation"—telling Harmon to tape all of the conversation and not just a part—is easily explained on journalistic grounds. Reporters don't want their sources secretly editing things which could make the tape inaccurate. The Court found a more sinister potential in the instruction—participation in illegal activities.

Exception: Bad Faith Prosecutions

Substantive First Amendment concerns are at their apex when a prosecutor proceeds criminally against a press defendant in bad faith. This is especially true when there is evidence that the prosecution is in reaction to or anticipation of unfavorable coverage of the government or a government official.

In a case where there was some evidence of prosecutorial bad faith, the District of Columbia Circuit instructed a district court to consider substantive and procedural First Amendment remedies if the bad faith was proven. *See Reporters Comm. for Freedom of the Press v. American Tel. and Tel. Co.*, 593 F.2d 1030 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979). The Court wrote: "no harassment of newsmen will be tolerated. If the newsman believes that the grand jury investigation is not being conducted in good faith, he is not without remedy." The court remanded the case to the trial court to determine the scope of the remedy for a bad faith subpoena. The reporters sought prior notice of any third party subpoenas designed to expose the identity of a confidential news source. The court cautioned however that:

> [E]ven if ... the District Court finds, that there have been past instances of abuse, (that) does not necessarily mean that each plaintiff will be entitled to prior notice of future subpoenas. As already stated, in order to obtain the kind of anticipatory relief sought in this case, each individual plaintiff must show not only that he personally faces an imminent threat of harm but also that the threatened harm is irreparable. In addition, each plaintiff must show that his remedy at law is inadequate.

593 F.2d at 1067.

First Amendment Due Process

The substantive First Amendment defense is rarely effective and often counterproductive. But as the "True Story" indicates, First Amendment due process can help successfully defend a reporter accused of crime. "The history of American freedom is in no small measure the history of procedure,"[14] and there is little doubt about "the close relationship between procedure and substance in free-speech cases." *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1192 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986). There are few cases which discuss First Amendment due

[14] *Malinski v. New York*, 324 U.S. 401, 414 (1945). (Frankfurter, J., concurring).

process in the context of allegedly "criminal" newsgathering so the argument for First Amendment due process must rely primarily on authority from other areas of First Amendment jurisprudence and, of course, part 50.10. We outline below how the argument could be articulated.

A. Newsgathering Is Protected Under The First Amendment

Newsgathering is a First Amendment protected activity.[15] As long ago as *Branzburg*, the Court said that "without some protection for seeking out the news, freedom of the press could be eviscerated."[16] In *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978), the Court ruled that the "First Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." In *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), the Court found a First Amendment right for the public and the press to attend criminal trials thus giving constitutional stature to the right. The lower federal courts have recognized that newsgathering enjoys First Amendment protection.[17] The task for a court confronted with a claim that newsgathering has involved criminal conduct is to do so in a setting designed to discriminate between protected and unprotected activity.[18]

B. First Amendment Due Process Applies In Newsgathering Cases

First Amendment due process developed first in obscenity cases[19] but has since been extended to other areas of First Amendment jurisprudence such as mass demonstrations,[20] narrow application of The Foreign Agents Registration Act to exclude publications of a foreign agent[21] and even on burden of proof issues in tax cases.[22] New methods of communication continue to provide

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[15] Commentators note, however, that some courts question this. *See* Erwin Chenerinsky, *Protecting the Press, A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143 (2000).

[16] *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

[17] *See, e.g., Sherrill v. Knight*, 569 F.2d 124, 3 Media L. Rep. 1514 (D.C. Cir. 1977); *In re Express-News Corp.*, 695 F.2d 807, 9 Media L. Rep. 1001 (5th Cir. 1982); *Boddie v. American Broad. Cos.*, 881 F.2d 267, 271, 16 Media L. Rep. 2038 (6th Cir. 1989); *Daily Herald Co. v. Munro*, 838 F.2d 380, 14 Media L. Rep. 2332 (9th Cir. 1988); *United States v. Sherman*, 581 F.2d 1358 (9th Cir. 1978); *Journal Publ'g Co. v. Mechem*, 801 F.2d 1233, 13 Media L. Rep. 1391 (10th Cir. 1986).

[18] Stephen J. Friedman, *Mr. Justice Brennan: The First Decade*, 80 HARV. L. REV. 7 (1966).

[19] *See Freedman v. Maryland*, 380 U.S. 51 (1965); *City of Paducah v. Investment Entertainment, Inc.*,791 F. 2d 463, 470 (6th Cir.), *cert. denied*, 479 U.S. 915 (1986).

[20] *Carroll v. President and Cummr's of Princess Anne*, 393 U.S. 175 (1968).

[21] *Viereck v. United States, 318 U.S. 236 (1943).*

[22] *Speiser v. Randall*, 389 U.S. 241 (1967).

opportunity for application of First Amendment due process.[23] As Judge Posner explained in *Hudson v. Chicago Teachers Union*:

> Just the danger (as distinct from actuality) of depriving people of the freedom of expression guaranteed by the First Amendment has led courts to invalidate procedures that created the danger. This body of First Amendment law has a long historical pedigree. At common law, free speech meant freedom from prior restraints – a procedural right. The press could not be licensed although it could be punished, after the fact in a criminal proceeding, for "disseminating…bad sentiments." The present case, remote as it is from the classic prior restraint, illustrates in a new setting the close relationship between procedure and substance in free-speech cases.

743 F.2d at 1192 (citations omitted).

Hudson dealt with the First Amendment right of union employees to have fair procedure with respect to how their dues monies were being spent on political matters. In affirming the 7th Circuit's decision, the U.S. Supreme Court wrote that:

> [P]rocedural safeguards often have a special bite in the First Amendment context…(and) commentators have discussed the importance of procedural safeguards in our analysis of obscenity, overbreadth, vagueness and public forum permits. The purpose of these safeguards is to ensure that the government treads with sensitivity in areas freighted with First Amendment concerns.

475 U.S. at 303 n.12 (citations omitted).

The Supreme Court has thus recognized that "[l]ike the substantive rules [at issue in First Amendment cases], insensitive procedures can 'chill' the right of free expression. Accordingly, wherever First Amendment claims are involved, sensitive procedural devices are necessary."[24] It would seem especially so in the newsgathering context where the press is investigating newsworthy matters. After all the "press" is the only institution singled out in the Bill of Rights for protection[25] and "if the constitution requires elaborate procedural safeguards in the obscenity area, a fortiori it

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[23] *See* Bernard W. Bell, *Filth, Filtering and the First Amendment: Ruminations on Public Libraries' Use of Internet Filtering Software*, 53 FED. COMM. L.J. 191, 237 (2001); Allan Tananbaum, *"New and Improved": Procedural Safeguards For Distinguishing Commercial From Noncommercial Speech*, 88 COLUM. L. REV. 1821 (1988).

[24] Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 518 & 519 (1970).

[25] *See* Potter Stewart, *Or of The Press*, 26 HASTINGS L .J. 631 (1975), abstract published in 50 HASTINGS L J. 705, 707 (1999) ("It seems to me that the Court's approach to all these cases has uniformly reflected its understanding that the Free Press guarantee is, in essence, a *structural* provision of the Constitution. Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.").

should require equivalent procedural protection when the speech involved-for example, political speech—implicates more central first amendment concerns."[26]

i. Part 50.10 –Express approval from the Top Law Enforcement Official

The Justice Department regulation (parts 50.10), which has been in place for 25 years, sets out procedures which are, on their face, motivated by First Amendment concerns that "because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutional power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues." *Id.* The Justice Department regulation creates a procedure whereby the chief law enforcement officer of the country (the Presidentially appointed and Senate confirmed Attorney General) must grant "express authority" to subordinate members of the Justice Department before a reporter may be "interrogated, indicted or arrested."

Although the regulation expressly states that it is "not intended to create or recognize any legally enforceable right in any person" and one court has so held,[27] the First Amendment due process cases[28] powerfully argue that the regulation is constitutionally compelled. In attempting to insure that First Amendment due process is satisfied, it should be required that the chief law enforcement officer such as the Attorney General or District Attorney personally approve the prosecution so that the prosecutor's historically wide discretion be exercised with sensitivity to constitutional values.

ii. Strict scrutiny of the evidence on probable cause

The requirement that a top official of the executive branch must approve prosecution should be quickly followed by judicial review of the evidence. This is the holding of the obscenity cases like *Manual Enters., Inc. v. Day*, 370 U.S. 478 (1962) and *Freedman v. Maryland*, 380 U.S. 51 (1965) which requires judicial action, circumscribed by tight procedure before even suspected obscene material can be suppressed. It has likewise been applied by the Supreme Court in permit cases like *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) where a criminal prosecution was invalidated for, among other things, failing to provide prompt judicial review to the denial of a parade permit. In the newsgathering context the "express approval" by the Attorney General should be followed by a judicial review of that decision providing an elevated standard to the evidence or "strict scrutiny" if you will.

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[26] *See* Henry P. Monaghan, *First Amendment "Due Process"* 83 HARV. L. REV. 518, 519 (1970).

[27] *In re: Lewis*, 384 F. Supp. 133, 137 (C.D. Cal. 1974), *aff'd*, 517 F.2d 236 (9th Cir. 1975) ("[T]here exists no burden on the Government to show that they have adhered to their interdepartmental policy statements or guidelines such as the Policy Regarding Issuance of Subpoenas to, and Interrogation, Indictment or Arrest of News Media, 28 C.F.R. § 50.10").

[28] Collected in Henry P. Monaghan, *First Amendment "Due Process"* 83 HARV. L. REV. 518 (1970).

Conclusion

The application of First Amendment due process to allegedly criminal newsgathering has little direct precedent to guide it. However, several things are reasonably clear: (1) newsgathering is First Amendment protected activity; (2) a substantive First Amendment defense to allegedly criminal newsgathering activity works only in limited circumstances; (3) there is ample precedent for procedural due process protection derived expressly from the First Amendment; (4) the Justice Department recognizes that, because of these First Amendment concerns, the U.S. Attorney General should be involved and "expressly approve" the prosecution of a reporter based upon his/her newsgathering activities and (5) The First Amendment due process cases suggest that the Attorney General's decision to proceed against the reporter should receive prompt judicial review and strict scrutiny of the evidence.

CRIMINAL LIBEL LAW IN THE U.S.

By Jeffrey Hunt and David Reymann*

*Jeffrey Hunt is a partner and David Reymann an associate at Parr Waddoups Brown Gee & Loveless in Utah.

CRIMINAL LIBEL LAWS IN THE U.S.[1]

Criminal libel statutes have a long and checkered history in the United States. These laws were originally intended to punish those who, by their words, provoked a breach of the peace. The law was developed to prevent duels and other clashes over statements that were often true. As the use of civil libel remedies has increased, criminal libel laws which remain on the books of less than half the states have fallen into disuse. Many states' laws have been judicially struck down as unconstitutional or legislatively repealed. Those statutes that remain are either unused or capriciously enforced, often against unpopular voices or political also-rans.

In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the U.S. Supreme Court ruled that, in order to comport with First Amendment principles, criminal libel statutes must require the prosecution to prove that the defendant's statements about public officials or public figures were made with "actual malice," a constitutional term-of-art requiring knowledge or reckless disregard of a statement's falsity. The Court also held that criminal libel statutes that do not allow the truth of a statement to serve as an absolute defense to prosecution are unconstitutional.

For many people, the *Garrison* decision reflected an increasing recognition that remedies for defamation are more appropriately handled by private civil actions, and that the instances where speech should be criminally punished are few, if any. A significant number of states, however, have retained these anachronistic laws. Some states have made legislative attempts to update criminal libel statutes to comport with constitutional requirements; others have simply left the statutes untouched, but on the books, awaiting an appropriate judicial examination. The relative rarity and arbitrariness of criminal libel prosecutions has prevented a uniform consensus from developing among all states that would eliminate these statutes altogether.

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[1] The substance of this article has been adapted from the *amicus curiae* brief filed by the authors in *In re I.M.L.*, No. 20010159-SC (Utah Supreme Court). The *amicus* brief, filed on behalf of the Reporters Committee for Freedom of the Press, the Society of Professional Journalists, the Utah Headliners Chapter of the Society of Professional Journalists, and the Student Press Law Center, argues that Utah's criminal libel statute is unconstitutional on its face in violation of the First Amendment to the United States Constitution. The authors gratefully acknowledge the contributions of Lucy Dalglish, Gregg P. Leslie, and Daniel R. Bischof of the Reporters Committee for Freedom of the Press, as well as Edward Carter, a summer associate at Parr Waddoups Brown Gee & Loveless, in the research and preparation of the *amicus* brief and this article.

Of those state high courts that have examined criminal libel statutes post-*Garrison*, most have agreed that the statutes as drafted are unconstitutional.[2] Given the fact that so few criminal libel statutes expressly comply with the *Garrison* requirements, judicial challenges to criminal libel statutes have become, instead, battles over statutory construction. The fight, nearly 40 years after *Garrison* was decided, is no longer about the constitutional requirements for criminal libel statutes, but rather about the proper role of the courts in judicially grafting these requirements onto statutes that have not been redrafted in nearly 100 years.

One such fight is currently underway in Utah, where a teenage boy has been charged under Utah's criminal libel statute – a law that has not been substantively revised since Utah was a territory in 1876. This article examines the history of criminal libel laws in the United States, the impact of recent constitutional limitations imposed by the U.S. Supreme Court, and recent treatment of criminal libel statutes throughout the country, including the ongoing Utah prosecution of Ian Lake.

History of Criminal Libel in the United States

One court, in *Tollett v. United States*, 485 F.2d 1087, 1094 (8th Cir. 1973), has described the development and enforcement of criminal libel laws as an "ignominious history." Another court has noted, "criminal libel is notoriously intertwined with the history of governmental attempts to suppress criticism." *Fitts v. Kolb*, 779 F. Supp. 1502, 1506 (D.S.C. 1991). The law of criminal libel is the product of 16th century innovations in the English Star Chamber, which premised its law on the notion that libels caused breaches of the peace. Because true statements were at least as likely to cause breaches of the peace as false ones, criminal libel law punished both true and false statements. Thus, the rationale for criminal libel, according to *De Libellis Famosis*, 77 Eng. Rep. 250, 251 (1606), was that "libels, regardless of what actual damage results to the reputation of the defamed, may be penalized by the state because they tend to create breaches of the peace when the defamed or his friends undertake to revenge themselves on the defamer." So went the saying, "the greater the truth, the greater the libel." John Kelly, *Criminal Libel and Free Speech*, 6 Kan. L. Rev. 295, 297 (1958).

It was not until 1842 that evidence of truth was admissible in England. In the United States, truth was apparently always admissible, if not a defense, to a charge of libel. John Peter Zenger, who was famously charged with seditiously libeling the governor of New York, won an acquittal in 1735 when his counsel argued to jurors that they should be allowed to decide the case as if the allegedly defamatory statements were true. *See* Note, *Constitutionality of the Law of Criminal Libel*, 52 Colum. L. Rev. 521, 523-24 (1952). Several early state constitutions and even the Alien and Sedition Act of 1798, which was widely believed to be an unconstitutional limitation on speech, recognized the admissibility of the truth of the statement. Truth of the defamatory statement began to be seen as substantive evidence after Alexander Hamilton defended printer Harry Croswell in a prosecution for allegedly libeling Thomas Jefferson. *People v. Croswell*, 3 Johns. Cas. 337 (N.Y. Sup. Ct. 1804).

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[2] *Ivey v. Alabama*, 2001 Ala. LEXIS 264, 29 Media L. Rptr. 2089 (Ala. 2001); *Montana v. Helfrich*, 922 P.2d 1159 (Mont. 1996); *Gottschalk v. Alaska*, 575 P.2d 289 (Alaska 1978); *Weston v. Arkansas*, 528 S.W.2d 412 (Ark. 1975); *Pennsylvania v. Armao*,286 A.2d 626 (Pa. 1972); *Boydston v. Mississippi*, 249 So.2d 411(Miss. 1971).

By the mid-1950s, truth as a complete defense was written into 27 state statutes or constitutions, and the "breach of peace" requirement had mostly been removed.[3]

Criminal libel laws, enacted to avoid the "chivalrous satisfaction" of duels, began eroding as early as the 1800s:

> Changing mores and the virtual disappearance of criminal libel prosecutions lend support to the observation that ". . . under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation."

Garrison, 379 U.S. at 69 (*quoting* Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 924 (1963)).

When the Model Penal Code was drafted in 1961, the drafters were loath to include a general criminal libel section:

> It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security . . . . It seems evident that personal calumny falls in neither of these classes in the U.S.A., that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country. . . .

Garrison, 379 U.S. at 69-70 (*quoting* Model Penal Code, Tent. Draft No. 13, 1961, § 250.7, Comments at 44).

Less than half of the states have a criminal libel statute of any fashion remaining on the books.[4] Some of those statutes that remain have been completely invalidated by court decision,[5] while some

[3] *See* Note, Constitutionality of the Law of Criminal Libel, 52 COLUM. L. REV. 521, 525 n. 35 (1952). The Note also points out that 11 other states made truth alone a justification of most criminal defenses or required falsity as an element of the crime, *Id.* at 525 n. 36, while seven other states only provided that defendant could admit evidence of truth. *Id.* at 525 n. 37. Three states had no provisions on the subject. *Id.* at 525 n. 38. The breach of peace requirement was necessary in only two states: Alabama and Virginia. *Id.* at 526 n. 41.

[4] Ala. Rev. Stat. § 13A-11-163; Colo. Rev. Stat. § 18-13-105; Fla. Stat. ch. 836.01-836.11; Ga. Code Ann. § 16-11-40; Idaho Code § 18-4801-18-4809; Kan. Stat. Ann. § 21-4004; La. Rev. Stat. Ann. § 14:47; Mich. Comp. Laws § 750.370; Minn. Stat. § 609.765; Miss. Code Ann. § 97-3-55; Mont. Code Ann. § 13-35-234; Nev. Rev. Stat. § 200.510; N. H. Rev. Stat. Ann. § 644:11; N.M. Stat. Ann. § 30-11-1; N.C. Gen. Stat. § 14-47; N.D. Cent. Code § 12.1-15-01; Ohio Rev. Code 2739 et seq; Okla. Stat. tit. 21 §§ 771-781; Pa. Stat. tit. 18 § 4412; S.C. Code Ann. § 16-7-150; Utah Code Ann. § 76-9-501 et seq; Va. Code Ann. § 18.2-417; Wash. Rev. Code 9.58.010; Wis. Stats § 942.01.

[5] *Ivey v. Alabama*, No. 1001412, 2001 WL 755666 (Ala. July 6, 2001); *Boydstun v. Mississippi*, 249 So. 2d 411 (Miss. 1971); *Nevada Press Ass'n v. Del Papa*, CV-S-98-00991 (D. Nev. 1998); *New Mexico v. Powell*, 839 P.

states have had their criminal libel statutes both judicially invalidated, then later repealed.[6] There are several other states that never had a criminal libel statute, but punished criminal libel at common law; these states – Delaware, Kentucky, Maryland, Massachusetts, Rhode Island, Vermont and West Virginia – have not had a prosecution in the last 35 years. *See Libel Defense Resource Center 50-State Survey Media Libel Law 2001 – 2002*.

Many of the legislative repeal efforts came in the 1970s, but some were more recent. Indicative of the feeling of many state legislatures are the comments of the California Legislature upon repeal of its criminal slander statute:

> The Legislature finds and declares that every person has the right to speak out, to poke fun, and to stir up controversy without fear of criminal prosecution. The Legislature finds and declares that the continued existence of vague laws on the books is an invitation to their unconstitutional use, at the peril of civil liberties.

1991 Cal. Stat. 186 § 1.

Thus, in most states, criminal libel laws either do not exist, or have been repealed or relegated to the judicial dustbin. However, the criminal libel laws that remain on the books have been unfairly and unevenly applied to acts of the news media, even in the last dozen years. In 1988, the editor of a weekly newspaper in South Carolina was indicted for libeling two state legislators. Although the charges were later dropped, the editor spent two nights in jail and was ordered by the magistrate upon his release not to publish any further derogatory articles about the legislators. *See* "Criminal Libel Charges Dropped in South Carolina," *The New York Times*, p. 46 (July 2, 1988); "Column Puts Publisher in Jail," *The News Media & the Law*, pp. 3-4 (Summer 1988). In 1990, the publisher of a small Florida newspaper was charged with criminal libel after publishing an advertisement that claimed a police officer was unfit for his job. *See* "Publishers Charged with Criminal Libel," *The News Media & the Law*, p. 22 (Spring 1990).[7]

Criminal libel prosecutions in the 20th century also frequently have been brought against political contest losers and others disfavored by those in political power. Legal scholar Robert A. Leflar noted in 1956 that:

2d 139, 114 N.M. 395 (N.M. App. 1992); *Pennsylvania v. Armao*, 286 A. 2d 626 (1972); *Fitts v. Kolb*, 779 F. Supp. 1502 (D.S.C.1991); *and see Florida v. Shank*, 2001 Fla. App. LEXIS 13166 (Fla. Ct. App. Sept. 19, 2001) (appellate decision striking down a section (§ 836.11) of Florida's criminal libel statute).

[6] *Gottschalk v. Alaska*, 575 P.2d 289 (Alaska 1978); 1978 Alaska L. Ch. 166 § 21 (repealing Alaska Stat. § 11-15.310); *Weston v. Arkansas*, 528 S.W.2d 412 (Ark. 1975); Ark. Code Ann. § 41-2401 (repealed); *Eberle v. Mun. Court for Los Angeles Judicial Dist.*, 55 Cal. App. 3d 423, 127 Cal. Rptr. 594 (Cal. Ct. App. 1976); 1986 Cal. Stat. 141 § 1 (repealing Cal. Pen. Code § 248-57); 1991 Cal. Stat. 186 § 2 (repealing Cal. Pen. Code § 258-60); *Connecticut v. Anonymous*, 360 A.2d 909 (Conn. Cir. Ct. 1976); 1969 Conn. Pub. Acts 828 § 214 (repealing Conn. Gen. Stat. § 53-169).

[7] *See also* R. Hickey's *Compendium of Criminal Libel Prosecutions*, LDRC BULLETIN 2002 No. 2 at 95.

> half the cases from 1920 on can be classified as basically political. . . . Commonest among the political cases were those in which prosecutions were filed against an unsuccessful political candidate or his supporters for statements made during a campaign, now ended, concerning his now successful opponent. Of the same sort were prosecutions of persons, who feeling aggrieved, made disagreeable statements about persons firmly entrenched in public office or power. One may suspect that in such cases the law was being used by the successful personage or his friends as a means of punishing their less potent enemies.

Robert A. Leflar, *The Social Utility of the Criminal Law of Defamation*, 34 Texas L. Rev. 984, 985-86 (1956).

The fact that those holding political power have access to prosecutorial authority makes criminal libel an especially dangerous political weapon. It invites uneven application of the law depending on the momentary sways in political power and places political also-rans at the mercy of election victors.

Criminal libel statutes have also been applied recently to Internet publishers. The prosecution of Ian Lake in Utah stems from Lake's publication on a Web site of allegedly defamatory statements regarding his high school principal and classmates. A state criminal libel statute recently was invoked in a Florida investigation of an allegedly defamatory Web site. *See* Jennifer Farrell, "Parody Web Site: Offensive or Illegal?" *St. Petersburg Times/Hernando Times*, p. 1 (Dec. 18, 2000). In Wisconsin, a Waukesha County prosecutor filed criminal defamation charges against a man for posting nude pictures of his ex-girlfriend on the Internet. The prosecutor dropped the charges only because he had "serious concerns" that the state courts would declare the criminal defamation statute unconstitutional. *See* "News Summary," *The Milwaukee Journal-Sentinel* (May 27, 2001). In August of last year in the same county, a man was convicted of criminal defamation for posting false advertisements soliciting sex partners for his ex-boss. *See* Lisa Sink, "Man Convicted of Posting Ex-Boss' Name on Sex Site," *The Milwaukee Journal-Sentinel* (August 11, 2000). And, in Louisiana, a sheriff's deputy in Minden was sentenced for criminal defamation for posting information about another police officer on the Internet. *See* "Woman Sentenced for Internet Message," *The Baton Rouge Advocate*, p. 3B (September 22, 1999); "Deputy is Accused of Defamation on the Internet," *New Orleans Times-Picayune*, p. A4 (August 27, 1999).

The Growing Obsolescence of Criminal Libel Laws

The function of criminal law is maintenance of an acceptable minimum of order in society. Those few criminal libel laws that punished a breach of the peace upheld that goal as a rationale. Now, however, the criminal libel statues that remain on the books do little more than provide a separate remedy for those who believe themselves wronged, most often those who hold political power and seek to silence dissenting voices. Criminal libel statutes seek a public enforcement for what is a private – not a public – ill. The prosecution of a person for criminal libel may also provide an early and free litmus test for a potential civil plaintiff. If the prosecution is successful, evidence

of the defendant's conviction might then be used in a subsequent civil case.

Functionally, there is no deterrent effect of a criminal libel statute that is not equally satisfied by a civil libel cause of action. In fact, prosecution for criminal libel has significant social costs, including the high costs of investigating, arresting, and litigating criminal libel cases and the capricious manner in which such cases are prosecuted. As one court has noted, "one evil of a vague statute is that it creates the potential for arbitrary, uneven and selective enforcement. Nowhere is this more evident than in the area of criminal defamation, which is committed many times each day[.]" *Gottschalk v. Alaska*, 575 P. 2d 289, 294 (Alaska 1978). Another court has observed that, given modern civil remedies, the only remaining purposes served by criminal libel statutes are:

> (1) to circumvent the restrictions placed on civil libel litigation by [the U.S. Supreme Court] … or (2) to punish an indigent who could not be reached by a civil judgment for damages. The first is clearly an impermissible attempt to circumvent the First Amendment; the second, while not as obviously invalid as the first, raises quite serious problems of equal protection as well as the First Amendment ones.

United States v. Handler, 383 F. Supp. 1267, 1278 (D. Md. 1974).

That there are so many civil libel suits brought in the United States each year and so few criminal libel prosecutions is further evidence of the arbitrary manner in which criminal libel statutes are applied.

In light of the penalties associated with criminal libel convictions as compared to potential civil damages, criminal libel laws are generally considered less likely to be effective than civil damage awards. Dean Leflar concluded in his 1956 article that criminal libel laws had little to no effect, primarily because the statutes were infrequently applied and the penalties were minor. He also noted that in all criminal defense cases since 1920, "civil remedies would have been as available as the criminal prosecution was." Leflar, 34 Texas L. Rev. at 1025. The maximum penalty in the Utah statute, for example, is $1,000 and six months imprisonment. *See* Utah Code Ann. § 76-3-301(1)(d) (2000); Utah Code Ann. § 76-3-204(2) (2000).

Moreover, because of the disuse into which criminal libel prosecutions have fallen, the statutes have not been judicially challenged on a regular basis. Consequently, the speech protections afforded civil torts have not yet been legislatively extended to criminal provisions. Libel protections have increased since the landmark U.S. Supreme Court case *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), such as the requirement of greater proof of libel for plaintiffs to survive summary judgment. *See e.g. Anderson v. Liberty Lobby*, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). *New York Times* is just one in a series of U.S. Supreme Court cases expanding the constitutional protections afforded speech, but only two criminal libel cases have been decided by the U.S. Supreme Court in the last 37 years.

Further, as criminal libel statutes have fallen into disuse, civil remedies have been applied

liberally to cases where speech rights have been abused. Among these remedies are civil libel laws and other torts, including invasion of privacy and interference with business relations. Some have suggested that criminal libel was unnecessary in light of private causes of action:

> President Thomas Jefferson in 1802 wrote to his attorney general saying that he wished no prosecution against a [libel] contemnor, then added:
>
> > While a full range is proper for action by individuals, either private or public, for slanders affecting them, I would wish much to see the experiment tried of getting along without public prosecutions for libels. I believe we can do it. Patience and well-doing, instead of punishment, if it can be found sufficiently efficacious, would be a happy change in the instruments of government.

Leflar, 34 Tex. L. Rev. at 1035 (*quoting* Letter to Levi Lincoln, March 24, 1802, quoted in 9 Ford, *The Works of Thomas Jefferson* 357 (Fed. ed. 1905)).

In light of this history, "a strong argument may be made that there remains little constitutional vitality to criminal libel laws." *Tollett*, 485 F.2d at 1094.

The "Actual Malice" Requirement

In *Garrison*, the U.S. Supreme Court applied the principles it enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and held that criminal libel statutes must meet two constitutional minimum requirements: (1) the statute must provide that statements about public officials or public figures be made with "actual malice" in order to be criminal; and (2) truth must be an absolute defense to criminal libel prosecutions.

"Actual malice" is a constitutional term-of-art that has little to do with the common law meaning of "malice" as a speaker's ill will or improper motives. The application of "actual malice" to criminal libel began with the U.S. Supreme Court's landmark decision in *New York Times*, in which the U.S. Supreme Court created a qualified privilege to protect defamatory statements relating to the official conduct of a public official. The Montgomery, Alabama police commissioner sued *The New York Times*, alleging that he had been libeled by statements printed in a full-page advertisement in the *Times*. The U.S. Supreme Court reversed a finding of liability and ruled that the Constitution "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct *unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not*." *New York Times*, 376 U.S. at 279-80 (emphasis added). Thus, "actual malice" turns entirely on the speaker's knowledge of a statement's falsity. When a statement involves a public official or public figure, merely showing that a speaker had ill will or, as the Utah statute is phrased, "no justifiable motive," is not sufficient.[8]

[8] The actual malice standard established in *New York Times* was extended to "public figures" in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967).

The *New York Times* Court was concerned about the chilling effect that libel suits could have on constitutionally protected free speech. In adopting the actual malice standard, the Court recognized "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270.

The same year that *New York Times* was decided, the U.S. Supreme Court also decided *Garrison v. Louisiana*, 379 U.S. 64 (1964), a challenge to Louisiana's criminal libel statute. In *Garrison*, the District Attorney of Orleans Parish, Louisiana, held a press conference where he made statements disparaging the judicial conduct of the eight judges of the Criminal District Court of the Parish. He was subsequently tried and convicted of criminal defamation under the Louisiana Code.

In reversing the conviction, the U.S. Supreme Court found that "[w]here criticism of public officials is concerned, we see no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws, and therefore should not be subject to the same limitations." *Garrison*, 379 U.S. at 67. The Court ruled that the actual malice requirement set forth in *New York Times* therefore applied with equal force in criminal libel prosecutions, and that no libel prosecution could be constitutionally maintained where the statute did not provide such a standard:

> Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. And since ". . . erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive'. . . ," only those false statements made with the high degree of awareness of their probable falsity demanded by [*New York Times*] may be the subject of either civil or criminal sanctions.

Garrison, 379 U.S. at 74 (citations omitted).

The Court held that the prosecutor's statements involved a matter of public interest because "anything which might touch on an official's fitness for office is relevant," and therefore were covered under the constitutional protections. *Id.* at 77. The Court further found the Louisiana statute defined malice as common law malice, as adjudged by Louisiana court decisions prior to *Garrison*:

> [W]e hold that the Louisiana statute, as authoritatively interpreted by the Supreme Court of Louisiana, incorporates constitutionally invalid standards in the context of criticism of the official conduct of public officials. . . . The statute is also unconstitutional as interpreted to cover false statements against public officials.

Id. As a result, the Court struck down the Louisiana statute as unconstitutional.

The only U.S. Supreme Court case since *Garrison* to take up the constitutionality of criminal libel laws was *Ashton v. Kentucky*, 384 U.S. 195 (1966). The Court examined the Kentucky criminal defamation law, which was derived from the common law. The Court emphasized that where laws

impinge on First Amendment rights, "we look even more closely lest, under the guise of regulating conduct that is reachable by police power, freedom of speech or of the press suffer." *Ashton*, 384 U.S. at 200. The Court held that the Kentucky law violated the Constitution because its elements were so vague as to leave the actual standard wide open. Specifically, the Court was concerned that what conduct would constitute a breach of the peace was undefined.

Since *New York Times* and *Garrison* were decided, numerous state courts have examined their own antiquated criminal libel statutes, finding that these statutes are unconstitutional for failure to provide an actual malice standard for statements involving public officials or public figures.[9] In fact, no state high court has ruled post-*Garrison* that a criminal libel statute that lacks an actual malice requirement is constitutional for statements involving a public official or public figure.

In *Eberle v. Municipal Court of Los Angeles District*, 127 Cal. Rptr. 594 (Cal. Ct. App. 1976), the court struck down California's criminal libel statute because it failed to provide an explicit actual malice standard, providing instead that "[a]n injurious publication is presumed to have been malicious if no justifiable motive for making it is shown." *Id.* at 599 (*quoting* California Penal Code § 250). Also, the California statute allowed evidence of the statement's truth to be offered as a defense, but only if such statements were also made "with good motives and for justifiable ends." *Id.* Applying the constitutional requirements set forth in *Garrison*, the *Eberle* court found the lack of an explicit actual malice standard fatal to the statute, stating that "the presumption of 'malice' contained therein constitutes one of the elements of the crime and is not constitutionally permissible." *Id.* at 600.

Less than a year ago, the Alabama Supreme Court followed the same reasoning and struck down Alabama's criminal defamation statute for the failure to provide an actual malice standard. In *Ivey v. Alabama*, No. 1001412, 2001 WL 755666 (Ala. July 6, 2001), the court found that the use of the term "maliciously" in the statute could not be interpreted to mean "actual malice," since "[t]he terms 'actual malice' and 'maliciously' are not interchangeable." *Id.* at *6. Because the Alabama statute, like the Utah statute, had been enacted well before the U.S. Supreme Court created the actual malice standard, the *Ivey* court found that the statute failed to incorporate the necessary requirements of actual malice. Since the statute did not, "*on its face* state that 'actual malice,' as the term is defined in *New York Times* and *Garrison*, is required in a prosecution for criminal defamation when the alleged victim is a public official or public figure," the statute was struck down. *Id.* at *7 (emphasis added).

Virtually every other court to examine this issue has reached the same conclusion: that a criminal libel statute which fails to provide an explicit actual malice standard is unconstitutional under *New York Times* and *Garrison* and must be struck down. *See, e.g.*, *Weston v. Arkansas*, 528 S.W. 2d 412, 415 (Ark. 1975) (finding statute unconstitutional because "[n]owhere in the Arkansas

[9] *Ivey v. Alabama*, 2001 Ala. LEXIS 264, 29 Media L. Rptr. (BNA) 2089 (Ala. 2001); *Eberle v. Municipal Court of Los Angeles District*, 127 Cal. Rptr. 594 (Cal. Ct. App. 1976); *Weston v. Arkansas*, 528 S.W. 2d 412, 415 (Ark. 1975); *Gottschalk v. Alaska*, 575 P. 2d 289, 292 (Alaska 1978); *Pennsylvania v. Armao*, 286 A.2d 626 (Pa. 1970); *Fitts v. Kolb*, 779 F. Supp. 1502 (D.S.C. 1991).

criminal libel statute is there any exception for criticism of a public official"); *Gottschalk v. Alaska*, 575 P. 2d 289, 292 (Alaska 1978) (ruling that Alaska's criminal libel statute was unconstitutional on its face because it did not provide that a conviction could only be had if the statement was made with actual malice); *Pennsylvania v. Armao*, 286 A.2d 626 (Pa. 1970) (striking down criminal libel statute for failure to provide actual malice standard, and holding that the "negligence" standard in the statute was constitutionally inadequate); *Fitts v. Kolb*, 779 F. Supp. 1502 (D.S.C. 1991) (finding "malicious intent" element of criminal libel statute unconstitutional for failure to specifically provide actual malice standard).

"Truth as a Complete Defense" Requirement

In *Garrison*, the U.S. Supreme Court held that true statements, especially those about public officials, public figures, and public affairs, could not be subject to criminal sanctions. The *New York Times* rule, according to the *Garrison* Court, "absolutely prohibits punishment of truthful criticism." *Garrison*, 379 U.S. at 78. The Court in *Garrison* reasoned that, "where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth." *Id*. at 72-73. The Court further stated that public officials' private lives can be the subject of protected speech:

> Of course, any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation. The [*New York Times*] rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed. . . . [A]nything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation.

Many states, including Utah, retain statutes that allow truth to be only a partial defense, requiring the defendant to produce evidence that he also acted with "good motives" and "justifiable ends." This exact language was addressed by the *Garrison* court in its ruling on Louisiana's criminal libel statute. Finding that the statute could punish true statements if the defendant did not act with "good motives" and for "justifiable ends," the Court found that Louisiana's statute failed to provide truth as an *absolute* defense, in violation of the constitutional requirements of *New York Times*. *See Garrison*, 379 U.S. at 70-73.

Since *Garrison*, no state court has upheld a criminal libel statute without a provision for truth as an absolute defense. For example, in *Eberle*, 127 Cal. Rptr. at 600, the court struck down California's criminal libel statute because it placed explicit limitations on the use of truth as a defense in criminal libel prosecutions; namely, that the defendant show he also acted with "good motives and for justifiable ends." These limitations rendered the statute unconstitutional because "First Amendment principles require, with regard to publications involving public officials or public figures that state criminal libel statutes *guarantee that truth shall be a complete defense*." *Id.* (emphasis added).

On similar facts, other courts have also struck down criminal libel statutes for the failure to provide truth as a complete defense. *See, e.g.*, *Gottschalk*, 575 P.2d at 292 (striking down Alaska's criminal libel statute because it "limited truth as a defense to situations where publication was made with good motives and for justifiable ends"); *Weston*, 528 S.W.2d at 415 (finding criminal libel statute unconstitutional because it failed "to prohibit punishment for truthful criticism"); *Armao*, 286 A.2d at 632 (criminal libel statute unconstitutional because "[t]he statutory language makes no provision for truth being an absolute defense").

The New Battle Over Statutory Construction

The fight to retain criminal libel statutes has become, for prosecutors, an exercise in creative statutory construction. Many of the criminal libel statutes that remain have not been revised post-*Garrison*, and by their express terms they do not meet its requirements. Prosecutors have, therefore, asked courts to judicially graft the constitutional requirements of *Garrison* and *New York Times* onto these outdated statutes, relying on canons of construction that favor constitutional outcomes and give credence to legislative motives.

Most courts have refused this invitation to re-write and update criminal libel laws, leaving that task to state legislatures. As one court has noted, "the vast majority of courts which have addressed the constitutionality of criminal defamation statutes. . . have declined to judicially narrow the statutes and, therefore, have found such statutes to be unconstitutional." *Montana v. Helfrich*, 922 P. 2d 1159, 1161 (Mon. 1996). *See also Fitts v. Kolb*, 779 F. Supp. 1502, 1511 (D.S.C. 1991) ("The five state supreme courts that have reviewed the constitutionality of criminal libel statutes around the country have all refused to judicially limit them to meet federal constitutional requirements.").

In *Eberle*, 127 Cal. Rptr. at 600, which involved a statute virtually identical to Utah's criminal libel statute, the court refused to engage in judicial legislation to save the statute, holding that such a construction "requires a wholesale rewriting, and any attempt at draftsmanship on our part would transgress both the legislative intent and the judicial function. It would constitute a flagrant breach of the doctrine of separation of powers." *Id.* In addition, the court in *Gottschalk*, 575 P. 2d at 296 n. 18, explained that judicial re-crafting of criminal libel statutes could not address all of the various applications of the statutes and, therefore, would leave such statutes unconstitutionally vague:

> If we were to engage in the process of narrowing suggested by the State, after striking [the truth as partial defense statute] we would then have to decide whether [the defamation statute] should be limited to cases of private defamation or should apply to defamation of public officials, public figures or concerning public issues; whether truth should be an absolute or a conditional defense to private defamation; and, whether a private false defamation which is neither knowingly nor recklessly false should be criminal. The variety of these choices underscores the essentially legislative nature of the task of bringing our defamation statutes within constitutional bounds.

Id. at 296 n. 18. *See also Fitts*, 779 F. Supp. at 1511 (same); *Tollett v. United States*, 485 F. 2d 1087, 1099 (8th Cir. 1973) (refusing to judicially re-draft criminal libel statute due to numerous legislative choices involved in determining application of statute).

Virtually every other court to examine this issue has refused to re-write criminal libel statutes in order to avoid striking them down. *See, e.g., Ivey v. Alabama*, 2001 WL 755666 at *10 (refusing to add actual malice element to Alabama statute because "to add that element and to make those choices [concerning application of the statute to public and private figures] would constitute judicial legislation and would thus violate the separation-of-powers doctrine"); *Armao*, 286 A.2d at 632 ("To accede to this request would be to undertake a wholly inappropriate judicial activity amounting to judicial legislation"); *Weston*, 528 S.W. 2d at 416 ("Clearly this Court has no authority to legislate or to construe a statute to mean anything other than what it says, if the statute is plain and unambiguous").

Prosecutors' attempts at judicial reconstruction of criminal libel statutes have been complicated by the fact that these are criminal, rather than civil, statutes. Criminal laws are subject to heightened standards of clarity because violation of these laws can subject a person to loss of liberty. *See Gottschalk*, 575 P. 2d at 295 (striking down Alaska's criminal libel statute for vagueness). In addition, in the area of restrictions on speech, "the requirements of preciseness are most strictly applied as the government is permitted by the Constitution to regulate only with narrow specificity." *Fitts*, 779 F. Supp. at 1516. The *Fitts* court found that the South Carolina criminal libel statute was void for vagueness because an ordinary citizen would be unable to determine whether the statute provided an actual malice standard or a common law malice standard:

> To avoid chilling the exercise of vital First Amendment rights, restriction of expression must be expressed in terms which clearly inform citizens of prohibited conduct and in terms susceptible of objective measurement. To the extent that the South Carolina Statute uses the term "malice" the statute is void for vagueness. The ambiguity in the term malice creates the possibility of confusion between the common law use of this word and the *New York Times* constitutional definition.

Id. As Justice Brennan noted, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with *narrow specificity*." *Tollett*, 485 F. 2d at 1099 (emphasis added) (*quoting NAACP v. Button*, 371 U.S. 415, 432-33, 83 S. Ct. 328 (1963) (Brennan, J.)).

At least one court post-*Garrison*, however, has interpreted a criminal libel statute as constitutional, albeit on somewhat different grounds. In *Phelps v. Hamilton*, 59 F.3d 1058 (10th Cir. 1995), the court read an actual malice requirement into Kansas' criminal libel statute. The Court reasoned that Kansas legislators, who passed the law *after* the U.S. Supreme Court decisions in *New York Times* and *Garrison*, must have intended to include the actual malice standard. *Phelps*, 59 F.3d at 1071. That case, however, is not like most challenges to criminal libel statutes, since the vast majority of these statutes are holdovers from the decades before *Garrison*.

In the recent case of *Ivey v. Alabama*, the state admitted that while Alabama's criminal libel statute had not been substantively modified since *Garrison*, the legislature had renumbered and re-enacted the criminal code in recent years. As in *Phelps*, the state argued that it must be presumed the Alabama legislature was aware of *Garrison* at the time of this re-enactment, and that the statute should therefore be read to include an implicit "actual malice" requirement. The Alabama Supreme Court, instructively, looked to other statutes also retained by the Alabama legislature during this re-enactment, one of which criminalizes any oral statements imputing unchastity to a female. (Utah's code contains an identical statute). Because the statute regarding statements of unchastity was "unquestionably unconstitutional when the Legislature re-enacted the statute," the *Ivey* court held that "the fact that in reenacting the criminal-defamation statute the Legislature retained this unconstitutional gender-based provision rebuts any presumption that the Legislature intended to comply with the United States Supreme Court precedents." *Ivey*, 2001 WL 755666 at *7.

The ongoing prosecution of Ian Lake in Utah has spurred another creative attempt at judicial reconstruction by state prosecutors. In 1972, post-*Garrison*, the Utah legislature created a new crime, called "Criminal Defamation," which appears to require actual malice as an element of the crime. *See* Utah Code Ann. § 76-9-404. At the same time this statute was enacted, however, the Legislature retained verbatim Utah's criminal libel law, under which Lake has been charged, which does not require actual malice nor provide for truth as an absolute defense. *See* Utah Code Ann. 76-9-501 *et seq.* For the first time on appeal, the state has argued that Utah's criminal libel statute must be read in light of the new crime of "criminal defamation," and that this new statute implicitly redefined the term "defamation" throughout the criminal code. The effect of the state's argument would be to render Utah's criminal libel statute a useless subset of the new crime of criminal defamation, raising the question of why the Legislature did not simply repeal Utah's criminal libel statute.

Nevertheless, the Ian Lake case is a good example of the lengths to which state prosecutors have been required to go to save state criminal libel statutes, and its outcome will be informative as to the willingness of courts to assume a legislative role to save what many consider to be outdated and unconstitutional statutes. The Utah Supreme Court heard oral arguments on Lake's appeal on March 13, 2002.

A COMPENDIUM OF U.S. CRIMINAL LIBEL PROSECUTIONS: 1990 – 2002

By Russell Hickey*

*Russell Hickey is LDRC's 2001-02 Legal Fellow.

A Compendium of U.S. Criminal Libel Prosecutions: 1990 – 2002

Criminal libel laws have long been criticized as laws that were arbitrarily and unfairly enforced. Indeed looking at criminal libel cases from the 1920s through the 1950s legal scholar Robert A. Leflar reported that "half the cases from 1920 on can be classified as basically political."[1] By political, Leflar included prosecutions against unsuccessful political candidates and their supporters for statements made during a campaign as well as prosecutions against persons for making "disagreeable statements about persons firmly entrenched in public office or power."

This article reviews criminal libel prosecutions and threatened prosecutions since 1990. Based on a review of case law and news reports, there have been at least 23 criminal libel prosecutions or threatened prosecutions since 1990 (including two under a California statute that makes it a misdemeanor to knowingly file a false allegation of misconduct against a police officer). Over half (12) appear to fall within Leflar's category of political prosecutions, including four claims involving newspapers.

Last year, criminal charges were filed against the editor and publisher of a politically oriented alternative newspaper in Kansas City, Kansas after the paper ran stories critical of the mayor. Charges in that case are still pending. *See Kansas v. Carson et al.*, below. In 1998, after a Nevada district attorney cited the state's criminal libel statute in a letter mentioning possible legal action against a newspaper that had criticized her official conduct in an editorial, the Nevada Press Association filed a suit seeking a declaratory judgment invalidating Nevada's criminal libel law. Later that year, the Nevada Attorney General stipulated to a judgment declaring the statute unconstitutional. *See Nevada Press Ass'n v. Frankie Sue Del Papa*, below.

In 1991, a threatened libel prosecution against a newspaper for articles critical of local politicians and a high school principal and his wife led to an action striking down South Carolina's criminal libel statute. *See Fitts v. Kolb*, below. And in 1990, a criminal libel prosecution was threatened in Florida after a newspaper published an advertisement that criticized a local police officer as being unfit for his job. *See Florida v. Daniels*, below. While these actions against newspapers are few in number compared to civil libel suits against the press, they nevertheless illustrate the capricious if not biased nature of prosecutions.

Another paradigm political case was decided last year in *Ivey v. Alabama* where the Alabama Supreme Court struck down the state's criminal libel statute. At issue in the case was defendant's release of a videotape that charged the ultimately successful candidate for lieutenant governor with serious crimes. In another political case decided earlier in the decade, though, the Tenth Circuit upheld Kansas' criminal libel law in a case involving two political activists by reading into the statute the actual malice requirement. *Phelps, et. al. v. Hamilton*,

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[1] Robert A. Leflar, *The Social Utility of the Criminal Law of Defamation*, 34 Texas L. Rev. 984, 985 (1956).

The remaining cases involve private individuals accused of making offensive statements, including four cases involving high school students making statements about school officials or students, two of which involve the Internet. Five cases in total, all since 1999, involve Internet postings.

What follows is a narrative summary of the 23 criminal libel prosecutions and threatened prosecutions since 1990 followed by a compendium of the cases in chart form.

Summaries

California v. Stanistreet; ***California v. Atkinson***, 2001 Cal. App. LEXIS 855 (Cal. Ct. App., Oct. 2, 2001).

Shaun Stanistreet and Barbara Atkinson filed a complaint with the Oxnard Police Department claiming that an Oxnard police officer had acted in a lewd manner at a Police Activities League gathering. Stanistreet and Atkinson were arrested and charged with violating California Penal Code § 148.6, which makes it a misdemeanor crime to knowingly make a false accusation of misconduct against a peace officer.

In October 2001, the California Court of Appeals found that the section violated the First Amendment because it was impermissibly content specific. Under the California statute in question, it is not a crime to accuse anyone else of lewd behavior. This same section was held to be unconstitutional for the same reasons by a California federal district court in 2000, see *Hamilton v. City of San Bernardino*, infra. The California Supreme Court has recently granted a petition for review and will hear arguments in *Stanistreet* later this year.

Florida v. Shank, 795 So. 2d 1067, 29 Media L. Rep. 2532 (Fla. Ct. App. 2001).

In August 1999, Lloyd Shank was arrested and charged with violating Florida Statutes § 836.11 when he admitted to writing and circulating to the members of the Broward County Board of Commissioners an anonymous letter that included anti-Semitic comments. Under the heading "Publications which tend to expose persons to hatred, contempt, or ridicule prohibited," § 836.11 provides that it is unlawful to anonymously print publish distribute or cause to be printed, published or distributed by any means, or in any manner whatsoever, any publication, handbill, dodger, circular, booklet, pamphlet, leaflet, card, sticker, periodical, literature, paper or other printed material which tends to expose any individual or any religious group to hatred, contempt, ridicule or obloquy. A Florida Court of Appeals upheld the trial court's dismissal of the criminal charges, and held that the section violated the First Amendment because it was impermissibly content-based, overbroad, and vague. *See also LDRC LibelLetter*, December 2001 at 28.

Kansas v. Carson; ***Kansas v. Powers*** (Kan. Dist. Ct. Wyandotte Co. 2001).

In March 2001, the publisher and editor of *The New Observer*, a politically oriented

alternative newspaper in Wyandotte, Kansas, were charged with multiple counts of criminal defamation under Kan. Stat.§ 21-4004 for articles criticizing the mayor of Kansas City, Kansas and her staff. The Wyandotte District Attorney, Nick Tomasic, filed charges after *The New Observer* ran critical stories about Mayor Carol Marinovich during her re-election bid in 2000. Among the articles that gave rise to the charges was one that claimed the Mayor and her husband, a county district judge, did not live in Wyandotte County as required by law. *See also LDRC LibelLetter*, December 2001 at 27; March 2001 at 5.

In November 2001, a Wyandotte District Court, on motion of the defendants, disqualified the district attorney and his entire staff from the case because of a "history of contentiousness" and "extreme personal animus" between the prosecutor and the defendants. *Kansas v. Carson*, et al., Case No. 01 CR 301, A, B, & C (Nov. 20, 2001) (Klinginsmith, J.) (available at <www.kscourts.org/carson.pdf>). The Kansas Attorney General declined to assume the prosecution and the District Court thereafter appointed a lawyer to serve as an acting district attorney for the case. The acting district attorney decided to proceed with the case and a trial is preliminarily scheduled for April.

Ivey v. Alabama, 2001 Ala. LEXIS 264, 29 Media L. Rep. 2089 (Ala. 2001).

In July 2000, Garve Ivey, a former vice president of the Alabama Trial Lawyers Association, was found guilty of criminal libel by a jury and sentenced to 30 days in jail by the court pursuant to Ala. Rev. Stat. § 13A-11-163, Alabama's 125-year-old criminal libel statute. Ivey produced and distributed to the media a videotape in which a former prostitute and drug addict claimed that she had been raped and beaten by Steven Windom who was then running for Lieutenant Governor. The women later recanted her charges and claimed she was paid to make them by political opponents of Windom. (Windom was subsequently elected Lieutenant Governor).

In July 2001, the Alabama Supreme Court found that the statute unconstitutional on its face for failing to incorporate the actual malice standard as required by *Garrison v. Louisiana* and the court reversed Ivey's conviction. *See also LDRC LibelLetter*, July 2001 at 20; July 2000 at 8.

Colorado v. "Multiple Media Organizations" (2001).

In August 2000, Priscilla and Fleet White, Jr. asked Boulder, Colorado, police to investigate *The (Boulder) Daily Camera* for allegedly violating Colorado's criminal libel statute. The complaint followed the publication of an article on the unsolved murder of JonBenet Ramsey. In the article, a 37-year-old California woman, who claimed to know the Ramseys through the family of Fleet White, said she believed JonBenet was the victim of a child sex ring and may have been accidently killed when an "asphyxiation technique" "went too far."

After a special prosecutor was assigned to the case, she ended the investigation, saying she did so at the Whites' request. They denied making such a request and requested that a state appeals court reconsider the matter. The Colorado Attorney General's Office asked that the court of appeals to dismiss the Whites' appeal. The appellate court dismissed the case after the Whites' lawyer failed to file a response to a motion to dismiss. *See* Sandra Fish" Court Dismisses White Appeal,"*The*

(Boulder, Colo.)Daily Camera,at: <www.thedailycamera.com/extra/ramsey/2001/14lfleet.html> (visited Feb. 22, 2002).

Florida v. "Parody Web Site" (2000)

The State Attorney's office was asked to investigate for potential criminal violations after school officials received printed copies of web site and an offer from the web site operator to shut down the web site for $10,000. The web site parodied Springstead High School, and included doctored pictures and falsified stories. The web site's stories portrayed one teacher as a drunk, another as a pedophile, and claimed one teacher authored a sexually explicit book. The doctored photos portrayed school officials engaging in sex acts. A month later, the State Attorney's office concluded that the web site did not violate any laws. *See* "Parody Web site: offensive or illegal?," Jennifer Farell, *St. Petersburg Times*, Dec. 18, 2000.

Wisconsin v. Dabbert (2000).

David Dabbert, of Waukesha, Wisconsin, pleaded guilty to criminal defamation for listing his ex-boss on an Internet site for women seeking "sex on the side." Dabbert had recently been fired for stealing. See *LDRC LibelLetter*, September 2000 at 5. Dabbert was sentenced to 15 days in jail and two years probation.

Hamilton v. City of San Bernardino, 107 F.Supp.2d 1239 (C.D. Cal. Aug. 10, 2000)

La France Hamilton, an African-American, was twice stopped and roughed up by police while ridding his bike. On both occasions, Hamilton was deterred from filing a complaint with the San Bernardino Police Department because the California penal code makes it a misdemeanor crime to knowingly file a false complaint against a police officer. Hamilton challenged the section's constitutionality in federal court. The district court assumed without deciding that the statute only criminalized defamatory statements made with actual malice, but concluded that by singling out police officers for heightened protection the statute "impermissibly discriminates on the basis of the content of the speech which it criminalizes and, therefore, facially violates the First Amendment." *Id*. at 1246.

Utah v. Lake, No. 968716 (Utah 5th Dist. Juv. Ct. 2000).

During the 1999-2000 school year, Ian Lake (who was 16 at the time) created a web site on his home computer. The site contained disparaging remarks about the school officials and personnel. Among other things, Lake referred to his school principal as "the town drunk," referred to several female classmates as "sluts," and questioned the work ethic and competency of other school faculty. On May 18, 2000, the Beaver County Sheriff's office arrested Lake, who admitted that he created the web site in response to similar sites created by fellow students. He also told the police that he created the cite because he hated the high school principal. After confessing, Lake was transported to Cedar City Youth Corrections and was held in custody for seven days. He was subsequently charged with criminal libel – a statute that had been previously been used just twice and not once in the last 100 years. See *LDRC LibelLetter*, December 2000 at 10; July 2000 at 7.

On March 13, 2002, the Utah Supreme Court heard oral arguments in the case. Lake is appealing a December 2000 decision by a judge for the 5th District Juvenile Court in Utah that denied Lake's motion to dismiss. In front of the Utah Supreme Court, Lake's attorneys argued that the state's criminal libel law is facially unconstitutional for failing to include the actual malice standard required by *Garrison*. Utah Code Ann. § 76-9-502 requires only "malicious intent to injure" and presumes such intent if "justifiable motive" is absent.

Wisconsin v. Karnstein (1999).

Walter Karnstein, of Pewaukee, Wisconsin, was charged with criminal defamation for posting nude photographs of his former girlfriend and her new boyfriend on the Internet, along with "wording indicating a desire [to] engage in sadomasochistic behavior." See *LDRC LibelLetter*, September 2000 at 5. The prosecutor dropped the charges because he had "serious concerns" that the state courts would declare the criminal defamation statute unconstitutional.

Wisconsin v. Larry J Wolf; Wisconsin v. Belinda C. Wolf (1999).

In May 1998, the Wolfs were arrested in Chippewa County, Wisconsin, for distributing defamatory signs, letters and notes which claimed that two local stores were selling greeting cards that contained child pornography. The Wolfs were convicted after a bench trial and placed on probation. After the Wisconsin Court of Appeals affirmed their conviction, they failed to report to their probation appointments and were arrested. They spent sixteen and a half days in the county jail.

A summary of facts relating to the arrest and prosecution for criminal libel is set out in the defendants subsequent civil rights lawsuit. *See Wolf v. Scobie, et.al.*, 2002 U.S. App. LEXIS 1794 (7th Cir. Feb. 4, 2002) (affirming summary judgment dismissing the Wolfs civil rights claims against the district attorney and others).

Louisiana v. Patton (1999).

In 1999, Amy Patton, a sheriff's deputy in Minden, Louisiana, was charged and convicted of violating the state's criminal libel statute, La. Rev. Stat. Ann. § 14:47. Patton had posted a comment about another police officer to a local newspaper's web site from her father's computer. The posting was signed "A Concerned Parent" and reportedly contained highly damaging accusations. Patton's sentence is unknown. *See* "Deputy is Accused of Defamation on the Internet," *New Orleans Times-Picayune*, p. A4 (August 27, 1999).

Nevada Press Ass'n v. Frankie Sue Del Papa, CV-S-98-00991-JBR (1998).

In July 1998, after a Nevada district attorney cited the state's criminal libel statute in a letter mentioning possible legal action against a newspaper that had criticized her official conduct in an editorial, the Nevada Press Association filed a suit in federal court seeking to have the Nevada criminal libel statute declared unconstitutional on its face. The Press Association argued the statute was unconstitutional because the law vaguely defined libel and provided that truth was only a defense if the allegedly libelous statement was published "for good motive and for justifiable ends." The

definition of libel included expressions that tend to "blacken the memory of the dead" and the publishing of the "natural defects of a living person." Falsity was not an element of the definition. The Nevada Attorney General stipulated to a judgment declaring Nevada's criminal libel law unconstitutional. The judgment included a permanent injunction barring enforcement of the law originally passed in 1911. See also *LDRC LibelLetter*, October 1998 at 25.

Colorado v. "Fort Collins Student" (1998)

In 1998, a 15-year-old high school student was charged with violating Colorado's criminal libel statute for allegedly writing an anonymous underground newspaper that contained a satirical article about the school administration in Fort Collins, Colorado. The case was dismissed by State District Court Judge James H. Hiatt. According to a press release from the ACLU, Judge Hiatt dismissed the case because the writing could not reasonably be interpreted as making factual assertions. *See* "ACLU Enters Appearance in New Round of Previously Dismissed Criminal Libel Case," available at: <www.aclu_co.org/news/pressrelease/release_harass.htm> (visited Feb. 22, 2002).

Wisconsin v. Cardenas-Hernandez, 579 N.W.2d 678 (Wisc. 1998).

The defendant had previously pled no contest to drug charges and received a six-year prison sentence. After his conviction on drug charges, he filed a complaint alleging misconduct by the investigative detective and a sergeant. At the hearing for the complaint, the defendant testified that the sergeant had lied about pertinent evidence in the drug case, and that the detective had stolen money from his home during the execution of a search warrant. For this, the defendant was charged and convicted of perjury and criminal defamation.

The Wisconsin Appeals court reversed the criminal defamation conviction and the Wisconsin Supreme affirmed finding that an absolute privilege applied to the defendant's statements made in judicial proceedings. Wisconsin's criminal defamation statute Wis. Stat. § 942.01 (3) provides that it "does not apply if the defamatory matter was true and was communicated with good motives and for justifiable ends or if the communication was *otherwise privileged*." (emphasis added). Although the statute is silent as to what privileges apply, the Court found that legislative history made clear that the common law absolute privilege for statements made in judicial proceedings applies to criminal as well as civil defamation.

Florida v. "The Killian Nine" (1998)

In February 1998, five girls and four boys at a Miami-area high school distributed approximately 2,500 copies of a pamphlet that ridiculed people with "African diseases" and a weak grasp of English. The pamphlet, which was mostly hand-written, also included drawings depicting a rape, a head with a bloody fork sticking out of it, and the school's African-American principal impaled on a dartboard. In an article entitled "A Student's Complaint," the author wrote "What would happen if I shot [Principal Timothy] Dawson in the head?" The nine were arrested and charged with violating Florida's criminal libel statute that prohibits publications which "tend to expose persons to hatred, contempt, or ridicule."

The prosecutor in Miami dropped the charges reportedly because, in her opinion, *Garrison* had rendered the statute "unconstitutional and unenforceable." *See* "Felonious Speech," by Jacob Sullum, *Reason*, available at: <http://reason.com/sullum/030498.shtml> (visited Feb. 22, 2002). Liliana Cuesta, one of the nine students, later sued the Miami-Dade County Police Department and the school board over her arrest and strip search. On March 14, 2002 the 11th Circuit Court of Appeals held that jailers had a reasonable suspicion to strip search Cuesta "based upon the violent and threatening language and imagery contained in the pamphlet." *See Cuesta v. School Board of Miami Dade County*, 2002 U.S. App. LEXIS 4143 (11th Cir. Mar. 14, 2002). *See also Florida v. Shank, supra*, striking down a section of Florida's criminal libel statute.

Montana v. Helfrich, 922 P.2d 1159 (Mont. 1996).

In May 1994, the defendant distributed flyers alleging that a named individual had engaged in criminal conduct. The defendant was arrested and convicted for violating Montana's criminal libel statute, as well as for stalking. The Montana Supreme Court reversed the conviction for criminal libel, finding the statute to be unconstitutionally overbroad because the statute required any allegedly defamatory material to be communicated with good motives and for justifiable ends.

Phelps, et. al. v. Hamilton, 59 F.3d 1058, 23 Media L. Rep. 2121 (10th Cir. 1995).

During her campaign for district attorney of Kansas' Third Judicial District in 1992, Joan Hamilton made combating hate speech a central part of her platform. Fred Phelps and Edward Engel actively campaigned against homosexuality and homosexual rights. During Hamilton's campaign, Phelps allegedly made seven statements, including such allegations as a police officer had been caught having sex with boys in a city park. After her election as district attorney, Hamilton filed criminal libel charges against Phelps and Engel. The two men filed an action in federal court seeking to have the Kansas criminal defamation statute struck down as unconstitutional.

After a decision by the district court in favor of the plaintiffs, the 10th Circuit reversed. The 10th Circuit held that although the Kansas statute did not expressly require actual malice it could presume that the Kansas legislature knew of the constitutional requirements when it enacted the criminal defamation statute in 1970, and thus the statute could be considered to comply with the requirements of *Garrison*.

New Mexico v. Powell, 839 P.2d 139, 20 Media L. Rep. 1841 (N.M. Ct. App. 1992).

The defendant, a teacher at Western New Mexico University, was convicted of criminal libel for statements made about the university's acting vice-president for academic affairs. The New Mexico Court of Appeals declined to hold the statute unconstitutional on its face. Instead, the court held that First Amendment requirements impose an actual malice standard on private individuals where the speech in question relates to matters of public concern. Because the lower court did not impose the actual malice requirement to this case, the court held that the statute was unconstitutional as applied to the defendant.

Fitts v. Kolb, 779 F.Supp. 1502, 20 Media L. Rep. 1033 (D.S.C. 1991).

In separate articles, two of the plaintiffs authored articles critical of local politicians and a high school principal and his wife. One author was indicted on charges of criminal libel, a warrant was issued for the other. The state's solicitor dismissed both actions. The plaintiffs and the South Carolina Press Association filed an action seeking a declaratory judgment striking down the state's criminal libel statute. The district court struck down South Carolina's criminal libel statute because it did not comply with the requirements of *Garrison*.

Colorado v. Ryan, 806 P.2d 935, 19 Media L. Rep. 1074 (Colo. 1991).

The defendant was charged with criminal libel after he mailed copies of fictitious "Wanted" posters to several businesses, bars, and a trailer park in Fort Collins, Colorodo. The poster pictured and named an ex-girlfriend and said she was wanted for, among other things, fraud, conspiracy to commit fraud, various flimflam schemes, spouse abuse, child neglect, sex abuse, abuse of the elderly and prostitution. It also accused her of being at "high risk for AIDS" and implied she was sexually unchaste.

The court held the statute was invalid "only insofar as it reaches constitutionally protected statements about public officials or public figures on matters of public concern." The statute remained valid "to the extent it penalizes libelous attacks under the facts of this case, where one private person has disparaged the reputation of another private individual." Accordingly, the Colorado Supreme Court instructed the trial court to reinstate the charges against the defendant.

Florida v. Daniels (1990)

In January 1990, *The Eagle Lake (Fla.) Eagle* published an advertisement that criticized a local police officer as being unfit for his job. The advertisement was written by a former Eagle Lake Commission candidate, but closely resembled a news article. The text of the advertisement referred to the police officer only as "Roy," but accused the officer of, among other things, harassment and theft. The charges were dropped after a retraction and apology was printed by the former Commission candidate. *See* "Publishers Charged With Criminal Libel," *The News Media & The Law*, p. 22 (Spring 1990).

North Carolina v. Mangum (1990).

After the defendant was arrested and charged with working as a private investigator without a license and with illegally advertising his services, he wrote a letter to the editor of *The Banner Elk (N.C.) Banner*. In his letter, he accused the police chief of harassment. He was subsequently arrested for providing false information to a newspaper. The charges were later dropped as part of a plea bargain. *See* "Publishers Charged With Criminal Libel," *The News Media & The Law*, p. 22 (Spring 1990).

CASE NAME	Type of Defendant	Nature of Case	Medium	Outcome
California v. Stanistreet; California v. Atkinson, 2001 Cal. App. LEXIS 855 (Cal. Ct. App. Oct. 2, 2001) (under Cal. Penal Code § 148.6 prohibiting false statements about police officers).	Private	accusation of police misconduct (political)	Complaint	court of appeals struck down statute; state supreme court to hear an appeal
Florida v. Shank, 2001 Fla. App. LEXIS 13166 (Fla. Ct. App. Sept. 19, 2001).	Private	letters to government officials (political)	Letter	charges dismissed; statute struck down
Kansas v. Carson; Kansas v. Powers (Kan. Dist. Ct. Wyandotte Co. 2001).	Media	newspaper's criticism of government official (political)	Newspaper	case pending
Ivey v. Alabama, 2001 Ala. LEXIS 264, 29 Media L. Rep. 2089 (Ala. 2001).	Political Opponent	political operative's charges against opponent (political)	Videotape	conviction reversed; statute unconstitutional
Colorado v. "Multiple Media Organizations" (2001).	Media	family requested a prosecution for criminal libel after *The (Boulder) Daily Camera* printed an article on a JonBenet murder theory; the article connected the family to the Ramseys	Newspaper	no charges filed
Florida v. "Parody Web Site" (2000).	HS Student	website was designed as a parody of a Florida high school, it also included doctored pictures and fabricated stories about the teachers	Internet Posting	charges not filed
Wisconsin v. Dabbert (2000).	Private	Internet posting about ex-boss	Internet Posting	charges dropped
Hamilton v. City of San Bernardino, 107 F.Supp.2d 1239 (C.D. Cal. 2000) (under Cal. Penal Code § 148.6).	Private	accusations of police officer of misconduct (political)	Complaint	C.D. Cal. struck down the statute
Utah v. Lake, No. 968716 (Utah 5th Dist. Juv. Ct. 2000).	HS Student	student web site mocking principal and students	Internet Web Site	case pending
Wisconsin v. Karnstein (1999).	Private	defendant posted nude photographs of his ex-girlfriend online	Internet Posting	conviction
Wisconsin v. Larry J Wolf; Wisconsin v. Belinda C. Wolf (1999).	Private	defendants claimed local stores were selling greeting cards containing child porn	Signs & letters	conviction

Louisiana v. Patton (1999).	Police	Patton, a sheriff's deputy in Northern Louisiana was arrested after posting a message about another police officer (political)	Internet Posting	conviction
CASE NAME	Type of Defendant	Nature of Case	Medium	Outcome
Nevada Press Ass'n v. Frankie Sue Del Papa, CV-S-98-00991-JBR (1998).	Media	declaratory action by media after DA threatened prosecution (political)	Newspaper	stipulation declaring statute unconstitutional.
Colorado v. "Fort Collins Student" (1998)	HS Student	student's underground newspaper contained a satirical article about the school administration	Under-ground newspaper	charges dismissed
Wisconsin v. Cardenas-Hernandez, 579 N.W.2d 678 (1998).	Criminal Defendant	after conviction, filed a complaint alleging police misconduct (political)	Complaint	charges overturned
Florida v. "The Killian Nine" (1998)	HS Students	handwritten pamphlet ridiculed people with "African diseases" and a "weak grasp of English"	Under-ground newspaper	charges dropped
Montana v. Helfrich, 922 P.2d 1159 (Mont. 1996).	Private	flyers alleged that an individual was engaged in criminal conduct	Flyers	statute held unconstitutional
Phelps, et. al. v. Hamilton, 59 F.3d 1058, 23 Media L. Rep 2121 (10th Cir. 1995) (Kansas law).	Political Activists	declaratory action by anti-homosexual activists after DA filed criminal libel charges (political)	Signs, protests, faxes	statute upheld
New Mexico v. Powell, 839 P.2d 139, 20 Media L. Rep. 1841 (N.M. Ct. App. 1992).	University Professor	teacher complained of vice president of academic affairs	Complaint	statute held unconstitutional as applied
Fitts, et. al., v. Kolb, 779 F.Supp. 1502, 20 Media L. Rep. 1033 (D.S.C. 1991).	Media	two separate articles ridiculed politicians and a high school principal and his wife (political)	Newspaper	statute held unconstitutional
Colorado v. Ryan, 806 P.2d 935, 19 Media L. Rep. 1074 (Colo. 1991).	Private	fictitious "wanted" posters mailed to businesses, bars and a trailer park	Flyers	statute upheld as applied to defendant
Florida v. Daniels (1990)	Media	advertisement criticized a local police officer, referred to only as "Roy," of being unfit for his job (political)	Newspaper	charges dropped
North Carolina v. Mangum (1990)	Private	letter to the editor accused police chief of harassment (political)	Newspaper	charges dropped

CRIMINAL DEFAMATION: INTERNATIONAL REFORMS ADVANCE AGAINST A GLOBAL DANGER

By Jeremy Feigelson and Erik Bierbauer*

* Jeremy Feigelson is a partner and Erik Bierbauer an associate at Debevoise & Plimpton in New York, which regularly represents the Committee to Protect Journalists.

CRIMINAL DEFAMATION: INTERNATIONAL REFORMS ADVANCE AGAINST A GLOBAL DANGER

Introduction

The deaths of Daniel Pearl and other journalists in the post-September 11 conflict have shown all too vividly how stateless bandits can terrorize a free press. The lesser-known case of Nnamdi Onyenua shows just as vividly how governments, acting under color of law, can do the same.

Mr. Onyenua's magazine, *Glamour Trends* of Lagos, Nigeria, reported that Nigerian President Olusegun Obasanjo had received a $1 million allowance for each overseas trip he had taken in the last two years, amassing $58 million altogether. President Obasanjo retaliated. He immediately wrote to the Inspector General of Police, accusing Onyenua of publishing unsubstantiated allegations in violation of Section 392 of Nigeria's Penal Code, a criminal defamation statute. Armed police then stormed the magazine's offices, firing their guns in the air.[1] They forcibly arrested Mr. Onyenua and detained him for 11 days before arraignment (although Nigerian law requires arraignment within 24 hours of arrest – then held him two more days before releasing him on bail. The charge: publishing false information and defaming the president, which are crimes under Nigerian law.

The bad news is that Nigeria is hardly unique in bringing the weight of the criminal law down upon journalists. The Committee to Protect Journalists ("CPJ") reports that at the end of 2001, 118 journalists were imprisoned worldwide, dozens of them for alleged criminal defamation and similar offenses.[2] Many more faced prosecution and the possibility of imprisonment or fines. The risk falls upon foreign correspondents for United States-based news organizations as well as journalists working for local media. Reporters and writers for publications such as The New York Times, the Far Eastern Economic Review and The International Herald Tribune have been prosecuted or threatened with criminal charges in countries including Mexico, Malaysia and Singapore.

The good news is that the steady condemnation of criminal defamation statutes – by legal thinkers, national courts, human rights advocates and the press itself – has had a positive if limited effect. Courts and legislatures around the world have struck notable blows against these laws in

[1] *See* Letter from Ann Cooper, Executive Director, CPJ, to His Excellency Olesegun Obasanjo, President of Nigeria (July 2, 2001) (available at http://www.cpj.org/protests/01ltrs/Nigeria02jul01pl.html). CPJ, which is based in New York, documents and protests criminal defamation prosecutions. Our account of Mr. Onyenua's arrest and detention is based on CPJ's reports.

[2] CPJ, Attacks on the Press in 2001 at x. China has the dubious distinction of leading the world in imprisoning journalists, with 35 behind bars at the end of 2001. *Id.*

recent years. Those regimes that continue to prosecute and imprison journalists for the content of their work now sit clearly outside the mainstream of progressive nations and international law.

Nnamdi Onyenua's case is a reminder of how much work remains to be done. Particularly in Africa, the Middle East, parts of Asia, Eastern Europe and Latin America, laws often do not just punish false statements of fact (as defamation is typically defined in U.S. common law), but also punish statements that merely criticize the government, offend the dignity of public officials or purportedly dishonor symbols like the national flag. "Dangerousness" is a crime for journalists in Cuba, "demoralizing" the public is a crime for their colleagues in the Democratic Republic of Congo. Truth and opinion generally are not defenses. These statutes are weapons to quash dissent and prevent reporters from doing their core work. Investigating and reporting on the actions of the powerful should never land a journalist in jail.

Rationale Behind Criminal Defamation Laws

Once upon a time, courts held that criminal penalties for defamation were needed to keep the peace: If a defamed victim could not get satisfaction through the criminal law, the theory went, he would seek it through vigilantism or a duel.[3]

Today, with dueling a thing of the past and civil lawsuits a formidable means of seeking satisfaction, those who still favor criminal defamation laws cite different grounds. Most troubling is the notion that offending the government and its leaders violates "public order" – the rationale behind the *desacato* statutes prevalent in Latin America and other laws that impose criminal punishment for defamation of public officials or state institutions.[4] The mentality behind this reasoning—that "public order" is synonymous with loyalty to the existing regime—is reflected in the hundreds of criminal defamation prosecutions around the globe that are used to stamp out dissent.

It is sometimes also said that personal reputations are a public good that enables business and society to run smoothly, and that only the criminal law effectively expresses society's disgust for the spreading of lies about another person.[5] The U.S. Supreme Court has effectively rejected this notion. In its major statement on criminal defamation, *Garrison v. Louisiana*, the Court stopped short of voiding all criminal defamation laws but emphasized that criminal prosecution should be reserved for offenses that undermine the community's sense of security.[6] Reputational harm, of course, is strictly a personal injury that can be compensated and deterred by civil tort law.

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[3] *See* Garrison v. Louisiana, 379 U.S. 64, 68 (1964) (recounting history of English criminal defamation law).

[4] *See, e.g.*, Chile: State Security Law Art. 6(b) (repealed 2001) (translated in IAPA, Press Laws Database, Chile, Ch. 7 (available at http://www.sipiapa.org/projects/laws-chi7.cfm)).

[5] *See, e.g.*, R v. Lucas, [1998] 1 S.C.R. 439 (Can.). The Canadian Supreme Court also justified criminal defamation laws on the ground that some victims cannot afford to bring civil suits. *See id.*

[6] *See* Garrison, 379 U.S. at 70 (citing draft Model Penal Code).

Dangers and Reforms—A Region-by-Region Overview

There is a growing international consensus that it is wrong to prosecute and imprison journalists for the content of their work. The right to freedom of speech is guaranteed by international conventions such as the Universal Declaration of Human Rights, adopted by the U.N. General Assembly in 1948,[7] as well as the European Convention on Human Rights and the American Convention on Human Rights, which are binding on their signatory states.[8] Looking to these conventions, international tribunals and commissions have called for the abolition or reform of criminal defamation laws.

For example, the General Conference of UNESCO, in adopting a declaration on the promotion of independent and pluralistic media in the Arab world, stated that "arrest and detention of journalists because of their professional activities are a grave violation of human rights" and urged "governments that have jailed journalists for these reasons to release them immediately and unconditionally."[9] In November 1999, rapporteurs on free expression from the U.N., the Organization of American States ("OAS") and Organization for Security and Cooperation in Europe declared that criminal defamation laws "unduly restrict the right to freedom of expression" and urged governments "to review these laws with a view to bringing them into line with their international obligations."[10] As discussed below, the European Court of Human Rights and the Inter-American Commission on Human Rights, an arm of the OAS, have also taken steps to curtail criminal defamation laws in their member states.

Yet criminal defamation prosecutions continue. In recent months some nations, such as Algeria, actually have stiffened criminal defamation laws and related restrictions on the press. The rest of this article examines the nature and enforcement of criminal defamation laws, as well as efforts to reform these provisions, in various regions of the world.

A. Africa

A number of African governments use criminal defamation statutes to quash dissent despite being parties to the African Charter on Human and Peoples' Rights, Article 9 of which guarantees

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[7] The right to free speech is guaranteed by Article 19 of the Universal Declaration (available at http://www.un.org/Overview/rights.html).

[8] Free speech guarantees appear in Article 10 of the European Convention (available at http://www.echr.coe.int/Eng/BasicTexts.htm) and Article 13 of the American Declaration (available at http://www.cidh.oas.org/B%C3%A1sicos/basic3.htm).

[9] UNESCO General Conference, 29th Sess., Res. 34, Declaration of Sana'a (Nov. 1997); *see also* Mendel, supra note 19, at nn. 22-27 (listing publications in which U.N. Human Rights Committee and U.N. Commission on Human Rights have expressed concern about the threat of incarceration for defamation).

[10] U.N. Special Rapporteur on Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression, International Mechanisms for Promoting Freedom of Expression, Joint Declaration (1999).

freedom of speech and opinion.[11] For example, in Angola, journalists have been charged in recent years under criminal defamation laws that give special protection to high public officials and require the defendant to prove the truth of his statements to avoid conviction.[12] President Robert Mugabe of Zimbabwe brought criminal defamation charges against three newspaper journalists in early 2001 in connection with articles that reported allegations of government corruption. Morocco's government uses defamation laws to harass independent publications. Last year, two Moroccan journalists at a prominent weekly publication were sentenced to several months in prison and a total fine of $200,000 for an allegedly defamatory article about a real estate deal involving Morocco's foreign minister; they are free pending resolution of their appeal. Nnamdi Onyenua's arrest for defaming Nigeria's president, described in the introduction, is another example of how criminal defamation laws are used to deter aggressive reporting about government leaders.

Efforts to reform or abolish criminal defamation laws are making headway in some African countries. In Ghana, for example, the government began repealing criminal defamation laws in 2001. In post-apartheid South Africa, criminal laws are rarely invoked against the press, and court decisions in civil cases have held that defamation plaintiffs must prove falsity and fault.[13]

But elsewhere in Africa, criminal defamation laws are becoming an even greater threat to the press. In June 2001, Algeria's parliament passed a bill increasing the prison terms and fines that can be imposed for criminal defamation. Criminal defamation prosecutions are not uncommon in Algeria; in July 2001, an Algerian court convicted the editor of a daily newspaper in absentia and gave her a six-month suspended prison sentence for supposedly defaming the head of a trade association. In Egypt, press laws enacted in 1996 make defamation punishable by up to a year in prison—and twice that if the case is initiated by a public official. Between 1998 and 2000, Egypt jailed six journalists for defamation and other offenses.[14] Zimbabwe's government, meanwhile, enacted a new media law in January 2001 that imposes various restrictions on the press. While the new law does not address criminal defamation *per se*, it seems to signal a broad crackdown on freedom of the press.

B. Asia and Australia

In many Asian countries, criminal defamation laws are still enforced but their use is on the wane. In 1997, a trial court in Taiwan acquitted journalists, including a United States citizen working for a Hong Kong publication, who were charged with criminal defamation for reporting on alleged corruption by a leader of the ruling party. The court emphasized that the journalists had

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[11] Available at http://www.oau-oua.org/oau_info/rights.htm.

[12] *See generally* Article 19, The Legitimacy of Criminal Defamation Actions Protecting Government Officials Under International Human Rights Law (1999) (written comments submitted in the case of The Republic of Angola and Rafael Marques) (available at http://www.article19.org/docimages/514.htm).

[13] *See* National Media Ltd. v. Bogoshi, 1998 (4) 1196 (SCA); Holomisa v. Argus Newspapers Ltd., 1996 (2) SA 588 (W).

[14] *See* CPJ, Attacks on the Press in 2001 at 475 (forthcoming Mar. 26, 2002).

reported in good faith on a matter of public importance. This ruling was affirmed by Taiwan's appeal court in 2000.[15] In Japan, criminal defamation prosecutions are uncommon and imposition of prison sentences occurs only infrequently.[16] Prosecutions are rarer still in Australia.[17]

In South Korea "there has been a growing trend against [criminal] defamation actions" during the last 20 years.[18] Criminal prosecutions for defamation also are rare in the Philippines. The Philippines Court of Appeals rejected a criminal defamation suit initiated by former President Corazon Aquino. Relying on *New York Times v. Sullivan*, the court emphasized that "'debate on public issues should be uninhibited, robust and wide-open, and it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'"[19]

Despite these advances, there have been disheartening developments in the region as well. The New Zealand parliament is considering a bill, introduced in November 2001, that would criminalize defamation of political candidates even though New Zealand repealed its former criminal defamation laws almost ten years ago. In India, criminal defamation actions are rare. But in recent years the government has invoked laws designed to curb civil unrest and terrorism to censor supposedly inflammatory news reports and detain journalists with sources among militant groups.[20] In Jordan, penal code amendments enacted last year make defamation punishable by up to six months in prison and a $7,000 fine, as well as permanent censorship of the offending publication.[21]

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[15] *See* Liu v. Ying Chan, Taipei Dist. Ct., Republic of China (Taiwan), Apr. 22, 1997, at 10-11, 15, affirmed on Dec. 29, 2000 by Taiwan's High Court. In *Ying Chan* and certain other criminal defamation cases, the authors' firm has submitted amicus briefs on behalf of CPJ and various U.S.-based news organizations. These briefs and other materials related to CPJ's campaign against criminal defamation are available at http://www.cpj.org/defamation/defamation.html.

[16] *See* Ellen M. Smith, Note, Reporting the Truth and Setting the Record Straight: An Analysis of U.S. and Japanese Libel Laws, 14 Mich. J. Int'l L. 871, 882 (1993).

[17] In Theophanus v. Herald & Weekly Times Ltd, 124 A.L.R. 1 (1994), a civil defamation case, Australia's Supreme Court articulated a negligence standard of fault. A number of courts around the world have followed *Theophanus* in both civil and criminal defamation actions.

[18] Kyu Ho Youm, Libel Law and the Press: U.S. and South Korea Compared, 13 UCLA Pac. Basin L.J. 231, 247 (1995).

[19] Cory Aquino Loses Libel Suit Against Philippine Star, The Filipino Express, November 26, 1995, Vol. 9, No. 47, at 1; quoting New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1964).

[20] *See* CPJ, Attacks on the Press in 2000 at 185 (2001). In Rajagopal v. State of Tamil Nadu, A.I.R. 1995 S.C. 264, 277, a case that did not directly address criminal defamation but involved attempted government censorship of a news report that allegedly defamed public officials, the Supreme Court of India endorsed the actual malice standard. The court also suggested, however, that proof of common law malice would be sufficient.

[21] *See* CPJ, Jordan**:** Court Censors Opposition Weekly Over Corruption Coverage (available at http://www.cpj.org/news/2002/Jordan05march02na.html).

Authoritarian regimes in a number of Asian nations use criminal defamation laws as one of many weapons to squelch dissent. In April 2000, the government of Iran launched a crackdown on the press that led to the closing or suspension of dozens of reformist news organizations and the detention of several journalists. According to CPJ, many of the shutdowns and arrests have been for alleged offenses such as slander, publishing "insulting articles," and defaming public officials such as President Muhammad Khatami.[22] In China, according to CPJ, it is difficult to determine how often journalists are prosecuted and publications are shut down for alleged defamation. Journalists are routinely harassed and jailed for deviating from the Communist party line. Sometimes the charge is characterized as defamation and sometimes it is called something else.[23] In January 2000, China's official news agency reported that 27 newspapers had been punished for offenses such as fabricating stories, "political errors," illegally publishing supplements and sensationalizing the news.[24]

Criminal defamation laws are used to deter aggressive reporting on government affairs in somewhat more democratic nations as well. A conviction for criminal defamation carries a maximum six-year sentence in Indonesia. In May 2001, then-president Abdurrahman Wahid, beset by scandals, threatened prosecutions against representatives of Indonesian news organizations over stories about him that he claimed to be inaccurate, although he did not carry through with his threats. In 1999, Murray Hiebert, a Canadian journalist working for the Far Eastern Economic Review, served a six-week prison sentence in Malaysia for contempt of court for writing about the apparently preferential treatment given to a court case brought by a judge's wife. In 1994, an American professor teaching in Singapore, Christopher Lingle, was investigated by police for criminal defamation and subsequently fined for contempt of court over an op-ed piece he wrote for the International Herald Tribune, which stated that unnamed Asian regimes used a compliant judiciary to stamp out political opposition. The Singapore government's harassment of Mr. Lingle caused him to resign his teaching position and return to the U.S.

C. Central and South America

Most countries in Central and South America punish defamation with criminal sanctions.[25] They typically have two types of criminal defamation laws.

First, there are laws meant to protect the reputation of individuals. Like the criminal defamation laws of Europe (see below), these statutes allow a private citizen or public figure who

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[22] CPJ, Iran: Press Freedom Fact Sheet (Nov. 2001) (available at http://www.cpj.org/Briefings/2001/Iran_nov01/Iran_nov01.html).

[23] China's criminal defamation statute provides for up to three years' imprisonment for "serious" cases of "fabricating stories to slander others." Criminal Law of the People's Republic of China, Art. 246 (translated at http://www.qis.net/chinalaw/lawtran1.htm).

[24] *See* CPJ, Attacks on the Press in 2000 at 180 (2001).

[25] Exceptions include Jamaica, a common law country where defamation is generally treated as a civil matter, although criminal penalties of up to three years in prison remain on the books. *See* CPJ, Attacks on the Press in 2000 at 154 (2001).

believes he has been defamed to bring a criminal complaint instead of, or in addition to, a civil action. The government generally does not investigate these alleged defamation offenses on its own initiative.[26] A fine, not incarceration, is almost always the punishment.

Many of these laws define defamation broadly. In Mexico, a defamatory statement is one that "is liable to cause [a] person dishonor, discredit or harm or expose him to contempt."[27] Argentine law simply provides that "he who dishonors or discredits someone else" is subject to imprisonment or a fine.[28] Truth may be a defense only in limited circumstances (if at all), such as where the alleged defamation concerns a public official's performance of her duties or concerns a matter of public interest, or where the subject of the statement requests proof of its truth.[29]

The second type of criminal defamation law prevalent in Central and South America rests on the notion that defaming or criticizing the government or its high officials is an offense against "public order." These *desacato*, or insult, laws originated when monarchs ruled without regard to the consent of the people they governed and therefore saw no reason to permit them to question their decisions.[30] The very purpose of these laws is to shield the authorities from accountability by allowing them to prosecute journalists for reporting critically on government actions and official conduct.[31] In 1997, Mexican authorities did just that when they brought a *desacato* provision to bear against two reporters for The New York Times, Sam Dillon and Craig Pyes, for reporting allegations contained in official U.S. government documents that the governors of two Mexican states were involved in the drug trade. Mexico's attorney general eventually dismissed the charges. While the prosecution of foreign correspondents such as Mr. Dillon and Mr. Pyes under *desacato* provisions and other criminal defamation statutes is unusual in Latin America, the use of such laws against local journalists is all too common.

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[26] *See* Inter American Press Association ("IAPA"), Press Laws Database, Bolivia, Ch. 7 (available at http://www.sipiapa.org/projects/laws-bol7.cfm).

[27] Mexico: Penal Code for the Federal District, Art. 350 (translated in IAPA, Press Laws Database, Mexico, Ch. 7 (available at http://www.sipiapa.org/projects/laws-mex7.cfm)). The maximum penalty is two years in prison and a 300-peso fine.

[28] Argentina: Penal Code Art. 110 (translated in IAPA, Press Laws Database, Argentina, Ch. 7 (available at http://www.sipiapa.org/projects/laws-mex7.cfm)). The maximum penalty of one year in prison and a 100,000-peso fine.

[29] *See* Argentina: Penal Code Art. 111; *see also, e.g.*, Mexico: Penal Code for the Federal District, Art. 351 (allowing truth defense only where alleged defamation concerns a public official performing his duties or where the challenged statement "is declared to be true by irrevocable ruling" and the defendant "acted out of public interest or legitimate private interest").

[30] *See* Inter-American Commission on Human Rights, Annual Report 1994, Ch. V: Report on the Compatibility of "*Desacato*" Laws With the American Convention on Human Rights (Feb. 17, 1995) ("*Desacato* Report"), § II (discussing origin and characteristics of *desacato* laws).

[31] *See Desacato* Report § II.

Last year saw the repeal of perhaps the most infamous *desacato* law, Article 6(b) of Chile's State Security Law. Used liberally by the regime of General Augusto Pinochet and as recently as last year, Article 6(b) was representative of *desacato* laws throughout the region. Article 6(b) imposed criminal penalties on

> [t]hose who publicly insult the flag, the coat of arms or the national anthem, and those who defame, slander, or libel the President of the Republic, Ministers of State, Senators or Deputies, members of the superior courts, the Comptroller General of the Republic, Commanders-in-Chief of the Armed Forces, or the Director General of the National Police, whether or not this defamation, slander, or libel was committed by reason of the office of the victim.

As is typical of *desacato* laws, Article 6(b) did not require proof that a statement was false or that it was published with fault. [32]

Significant efforts have been made throughout Central and South America to eliminate *desacato* statutes and reform criminal defamation laws, but these efforts have not achieved complete success. Argentina made a great stride toward press freedom in 1993 when it repealed its *desacato* laws. More recently, the forces of press freedom in Argentina have led efforts to decriminalize completely the defamation of public officials and public figures, but legislative reforms have stalled.[33] Nonetheless, Argentina's Supreme Court has stated that a defamation plaintiff must prove that the defendant published a false statement with malice.[34] In Costa Rica, a bill that would have introduced the actual malice standard into criminal defamation prosecutions was rejected by a legislative committee in early 2000.[35] Bills to reduce the exposure of the press to criminal liability have also been introduced in Brazil, the Dominican Republic and Panama, but enactment is far from certain.[36]

Chile's repeal of Article 6(b) followed years of government inaction on proposed press law reforms. It also came amid intense international criticism of the prosecution of journalist Alejandra Matus for her *Black Book of Chilean Justice*, an exposé of judicial corruption. Ms. Matus fled Chile for the U.S. under threat of imprisonment. She also filed a petition before the Inter-American Commission on Human Rights, a unit of the OAS with authority to bring cases before the Inter-American Court of Human Rights. The Commission has long opposed *desacato* laws because they "repress[] the debate that is critical to the effective functioning of democratic institutions" and

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[32] *See* Human Rights Watch, Chile: Progress Stalled--Setbacks in Freedom of Expression Reform 18 (2001) ("Although [prosecutions under the State Security Law] are invariably initiated by government officials intent on defending their public reputations or honor, courts do not accept the defense of truth as a defense….").

[33] *See* CPJ, Attacks on the Press in 2000 at 134-36 (2001) (describing factors that have halted Argentina's reform bill).

[34] *See* Inter-American Commission on Human Rights, Report of the Office of the Special Rapporteur for Freedom of Expression, Ch. II, § B.1.a (1999)).

[35] *See* CPJ, Attacks on the Press in 2000 at 143-44 (2001).

[36] *See id.* at 137-39, 146-47, 158-59.

violate the American Convention on Human Rights.[37] Had Chile not repealed Article 6(b) and a companion provision (Article 16) which the government had invoked to confiscate copies of Ms. Matus's book, the Commission likely would have brought her case before the Inter-American Court, the decisions of which are binding on Chile by treaty.

Although Chile's repeal of Article 6(b) was a victory for press freedom, the Chilean government left in place other criminal defamation laws that can be used to prosecute statements that offend public officials. Moreover, the bill that repealed Article 6(b) included provisions limiting the definition of "journalist" to officially recognized journalists. Chile and other nations in the region continue to face strong internal and international pressure to reform their criminal defamation laws.[38]

D. Europe

Criminal defamation laws run the gamut in Europe. In Britain, the crime of libel is still on the books—it exists in Sections 4 and 5 of the Libel Act of 1843—but almost never has been prosecuted since the early twentieth century.[39] A few private plaintiffs have tried more recently to initiate criminal libel prosecutions. But procedural rules require plaintiffs to obtain leave of a High Court Judge to pursue a criminal libel action – a major obstacle to would-be criminal complainants.[40]

In some Eastern European countries, on the other hand, criminal defamation actions are relatively common and are used to stifle criticism of public officials and the government. In Romania, where criminal libel is punishable by up to five years in prison as well as fines and a ban on practicing journalism, fines reportedly were levied against 30 journalists and suspended prison sentences were imposed on 20 others during 2000.[41] Romania's criminal law proscribes acts such

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[37] *Desacato* Report.

[38] *See, e.g.* U.N. Human Rights Committee, Concluding Observations of the Human Rights Committee: Mexico, CCPR/C/79/Add.109 ¶ 14 (July 27, 1999) (calling upon Mexico to repudiate *desacato* provisions, contained in Articles 360(II) and 361 of the Penal Code for the Federal District, that criminalize "defamation of the State").

[39] *See* Toby Mendel, Article 19, Background Paper on Freedom of Expression and Defamation for the International Seminar on Promoting Freedom of Expression With the Three Specialised International Mandates (Nov. 29, 2000) (available at http://www.article 19.org/docimages/914.htm); J.R. Spencer, Criminal Libel—A Skeleton in the Cupboard, 1977 Crim L. Rev. 383, 383.

[40] *See* Mendel, *supra* note 35, at n.18. Mendel lists three attempts to initiate criminal libel prosecutions in Britain in the last few decades: Goldsmith v. Pressdram, [1977] Q.B. 83; Gleaves v. Deakin, [1980] A.C. 477; and Desmonde v. Thorpe, [1982] 3 All E.R. 268. He notes that all of these cases were refused leave to proceed or were discontinued before trial.

[41] *See* Article 19 and The Center for Independent Journalism, Romania, Statement to OSCE Supplementary Human Dimension Meeting, Vienna, Mar. 12-13, 2001, on Criminal Defamation in Romania ("Romania Statement") (available at http://www.article19.org/docimages/971.htm); LDRC LibelLetter, Nov. 2001 at 42 (observing that according to the Associated Press, one Romanian newspaper was defending about 100 libel cases).

as defaming the country or its national symbols.[42] In November 2001, the Slovak Parliament narrowly defeated the repeal of Slovakia's criminal libel provisions, and one Slovakian journalist faces prison time for criticizing a presidential speech.[43] Serbian law criminalizes both false statements about and "insults" directed at private individuals or public figures, also provides for the imprisonment for "anyone who publicly declares scorn" for the Serbian nation, its top leaders, or its national symbols like the flag.[44] These laws were used liberally during the rule of former Yugoslav President Slobodan Milosevic.

Nonetheless, the press has won victories against criminal defamation laws in Eastern Europe. Bulgaria repealed its criminal defamation law in January 2000. In October 2001, the Associated Press, relying on European Court of Human Rights precedents discussed below, convinced a Romanian appellate court to overturn a damages award in a defamation case that initially had been brought as a criminal prosecution.[45] In 1996, a trial court in Zagreb, Croatia dismissed the criminal indictments of two newspaper reporters for criticizing the Croatian president.[46]

The civil-law nations of western Europe recognize criminal defamation, but cases are brought as private actions rather than at the behest of the government. The process used in such cases, and the fines that may be levied, are essentially civil in nature. Arrest and pretrial detention do not occur. Post-conviction imprisonment is rare though not impossible.[47] In Austria, for example, Article 115 of the Criminal Code permits courts to sentence defamation defendants to prison time if they do not pay a fine.[48]

Decisions by the European Court of Human Rights are the most important standard-setter. The European Court takes appeals from the courts of nations that are parties to the European Convention on Human Rights. When addressing a possible infringement of, or "interference" with, the right to free expression, the European Court uses a three-part test. An interference violates the European Convention unless it is (1) "prescribed by law," (2) serves a legitimate purpose, and (3) is

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[42] *See* Romanian Criminal Code, Art. 236, *cited in* Romania Statement, *supra* note 37.

[43] *See* 147 Cong. Rec. 169 (daily ed. Dec. 7, 2001) (statement of Rep. Smith).

[44] Criminal Code of the Republic of Serbia, Arts. 92, 93, 98, *cited in* International Press Institute, Articles in Bad Faith: Criminal Defamation Laws in Serbia (Mar. 2001) (available at http://www.freemedia.at/r_serbialegislation.htm).

[45] *See* LDRC LibelLetter, Nov. 2001 at 41.

[46] *See* CPJ, Attacks on the Press in 1996 at 222 (1997); for full text of CPJ's amicus brief, see *id.* at 263.

[47] *See, e.g.*, Bonnie Docherty, Note, Defamation Law: Positive Jurisprudence, 13 Harv. Hum. Rts. J. 263, 282 (2000) ("In many European and Commonwealth countries, custodial sanctions remain on the books, but courts rarely impose penalties for criminal defamation other than fines.").

[48] Oberschlick v. Austria, [1998] 25 Eur. H.R. Rep. 357. The Austrian court whose judgment was being reviewed in *Oberschlick* sentenced the defendant to 10 days imprisonment if he did not pay the fine imposed. *See also* Mendel, *supra* note 35, at n.23 (citing September 1994 report of U.N. Human Rights Committee that expressed concern about possibility of imprisonment for defamation in Iceland and Norway).

"necessary in a democratic society." When the European Court has overturned defamation convictions, it has concluded that they violated the third element of this test. The European Court's rulings are binding on member nations, but not all member nations have tailored their criminal defamation laws to reflect the protections for journalists that the Court has espoused.[49]

In *Lingens v. Austria*,[50] the European Court overturned a criminal defamation conviction and held that politicians must carry a heavier burden than private individuals in proving defamation because politicians knowingly expose themselves to public scrutiny. In *Castells v. Spain*,[51] the Court held that government agencies must accept harsher criticism than either private individuals or politicians, but it stopped short of holding that a governmental body cannot initiate a criminal defamation prosecution. Subsequent cases have cemented the principle that journalists have wide latitude to report on public officials and matters of public concern.[52]

E. U.S. and Canada

Criminal defamation laws generally pose no practical problem for journalists in the United States and Canada. The U.S. Supreme Court struck down two state criminal defamation statutes as unconstitutional almost forty years ago,[53] and since then the doctrine of criminal defamation has been widely repudiated (though the Supreme Court has never declared it *per se* unconstitutional). Many state courts have voided criminal defamation laws. and legislatures have repealed others. Today about half of the 50 states still have criminal defamation statutes, but most have not enforced them in decades.[54] Criminal prosecutions rarely occur and when they do, they are usually short-lived and detention does not occur. For example, in March 2001, a newspaper editor and publisher

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[49] Romania, for example, continues to prosecute journalists under its restrictive criminal defamation laws even though the European Court in 1999 overturned a Romanian magazine editor's conviction for allegedly defaming a senator and the chief executive of a state-owned agricultural company. *See* Dalban v. Romania, 31 Eur. H.R. 39 (2001); *see also* Romania Statement, *supra* note 37.

[50] 8 Eur. H.R. 407 (1986).

[51] 14 Eur. H.R. 445 (1992).

[52] *See* Nilsen & Johnsen v. Norway, 30 Eur. H.R. 878, 912-13 (2000) (expert who took part in public debate about police brutality must tolerate criticism from police officials engaged in same debate, so defamation conviction of officials for statements about expert violated officials' right to free speech); Oberschlick v. Austria, 25 Eur. H.R. 357, 368 (1998) (reiterating, in the appeal of a journalist's conviction for defaming far-right leader Jorg Haider, that "the limits of acceptable criticism . . . are wider with regard to a politician acting in his public capacity than in relation to a private individual"); Thorgeirson v. Iceland, 14 Eur. H.R. 843, 865-67 (1992) (journalist could not have burden to prove truth of statements about police brutality).

[53] *See* Ashton v. Kentucky, 384 U.S. 195, 200-01 (1966) (invalidating criminal defamation statute as unconstitutionally vague); *Garrison*, 379 U.S. 64, 77 (1964).

[54] *See, e.g.*, State v. Powell, 839 P.2d 139, 143 (N.M. 1992) (striking down criminal libel statute as applied to statements on matters of public concern; "criminal libel laws serve very little, if any, purpose"); LDRC, 50 State Survey 2001-2002: Media Libel Law (2001) (criminal defamation statutes do not exist or have been repealed in Arizona, California, Delaware, New York and Texas, among other states); and J. Hunt & D. Reymann "*Crirminal Libel Laws in the U.S.*" LDRC BULLETIN 2002 No. 2, supra.

were charged with criminal defamation for articles about the mayor of Kansas City, Kansas.[55]

As in the U.S., defamation exists as a criminal offense in Canada but is rarely prosecuted.[56] Section 300 of the Criminal Code provides for imprisonment of up to five years for publishing libelous material with knowledge of its falsity. Section 301 provides for a prison term of up to two years even if the publisher of a libelous statement did not know it was false, but that provision has been held to be void for violating Canada's Charter of Rights and Freedoms.[57] In *R. v. Lucas*, a leading criminal defamation case involving protesters who carried signs accusing a police officer of abetting a sexual assault on a child, the Supreme Court of Canada upheld Section 300.[58] The Court stated that the government must prove that a statement is defamatory, and also must prove that it was published with intent to defame and with knowledge of its falsity.

Conclusion

It sometimes seems that for every step forward (legislative advances in Argentina, favorable court rulings in Taiwan) there is a disturbing step back (the arrest of Nnamdi Onyenua, the harsh new press laws in Algeria and Zimbabwe) - or at least sideways (the persistence of *desacato* laws across Latin America). So vigilance is the order of the day. Defenders of press rights should continue to fight individual cases and encourage the ongoing reform of criminal defamation laws. If they do, more and more reporters and editors will be able to cover news with the freedom that their colleagues in the United States now enjoy.

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[55] *See* LDRC LibelLetter, Dec. 2001 at 27 (discussing Kansas v. Carson; Kansas v. Powers (Kan. Dist. Ct. Wyandotte Cty. 2001). Seel also R. Hickey "*A Compendium of U.S. Crirminal Libel Prosecutions: 1990 - 2002*" LDRC BULLETIN 2002 No. 2, supra. In 1995, the Tenth Circuit Court of Appeals upheld the Kansas criminal defamation statute against a facial challenge to its constitutionality. *See* Phelps v. Hamilton, 59 F.3d 1058, 1072-73 (10th Cir. 1995).

[56] *See R v. Lucas*, [1998] 1 S.C.R. 439 (reasoning that rarity of criminal libel prosecutions does not mean that the law should ban them altogether).

[57] *See R. v. Gill*, [1996] 29 O.R. (3d) 250 (Ontario Ct. Justice); *R. v. Lucas*, [1996] 137 Sask. R. 312 (Saskatchewan Ct. App.).

[58] *Lucas*, [1998] 1 S.C.R. 439. The two defendants received sentences of 22 and 24 months, reduced to 12 months and 18 months on appeal.

JUDICIAL REGULATION OF THE PRESS?

Revisiting the Limited Jurisdiction of Federal Courts and the Scope of Constitutional Protection for Newsgathering

David A. Schulz*

*David A. Schulz heads the media law practice group at Clifford Chance Rogers & Wells LLP in New York, and is an adjunct professor of media law at the Fordham University School of Law. James Munoz, an associate at the firm, provided invaluable research assistance in the preparation of this article.

JUDICIAL REGULATION OF THE PRESS?

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Professor Thomas Emerson, in his masterful effort at a "general theory" of the First Amendment, warned of the "human propensity to curb unwanted criticism" and the strong innate drive of the "authoritarian personality" to suppress deviant opinion.[1] Judges are not immune from such tendencies. Lately they seem increasingly inclined to regulate by court-order the methods of newsgathering on stories about important trials, leading one trade journal to denounce editorially these "Bullies in Black Robes."[2] Professor Emerson would not have been surprised.

One aspect of this disturbing trend is a growing number of orders, in a variety of contexts and in a number of jurisdictions, limiting the ways journalists may gather news about juries – prohibiting reporters from describing what they see or hear about jurors in open court, barring reporters' access to the names of jurors, and enjoining reporters from even attempting to speak with jurors *after* they are discharged.[3] In southern New Jersey, four reporters face a hearing for contempt as this is written, for violating a blanket order prohibiting without exception "conducting interviews of any discharged juror."[4]

Although restrictions were occasionally imposed in the past when some special circumstance required judicial action,[5] in some jurisdictions the entry of orders regulating press coverage of jurors seems on the verge of becoming routine in any high-profile case. Various grounds have been advanced to justify the judicial impulse to shield jurors from the press – an asserted need to preserve the secrecy of juror deliberations, a desire to protect juror privacy, the right to prevent harassment of jurors. But, the jurisdictional authority for federal courts to enter orders broadly regulating the

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1 THOMAS EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 17 (Vintage Books 1963).

2 EDITOR & PUBLISHER, at 12 (Nov. 26, 2001).

3 *See, e.g., Texas v. Yates*, No. 880205, order (Tex., Harris Co. Sept. 18, 2001) (barring any attempt to interview a venireman); *State v. Neulander*, AM-216-O/TI, per curiam order (N.J. Sup. Ct., App. Div. Nov. 30, 2001) (affirming order that barred reporting the identity of or interviewing any discharged juror).

4 "Reporters Charged with Civil Contempt," PHILADELPHIA INQUIRER, Dec. 7, 2001 at B3.

5 *E.g., United States v. Franklin*, 546 F. Supp. 1133 9N.D. Ind. 1982) (court of appeals recognizes right of trial court to supervise post-verdict questioning of jurors to avoid harassment, but limits scope of post-trial orders barring all juror interviews).

future actions of reporters is rarely addressed, and the standard by which to resolve the competing interests of reporters and the courts is far from clear. This paper will highlight some of the significant, unresolved federal jurisdictional and constitutional questions raised by such judicial regulation of newsgathering, including the basic question of a federal court's authority to enter open-ended orders to regulate the conduct of non-parties after a case is concluded, and the First Amendment limitations on the types of restrictions a court may impose.

Troubling Fifth Circuit Experience

The nature of the current problem is nowhere more evident than in the Fifth Circuit. Two decisions by the Court of Appeals in that circuit in the early 1980's sympathized with the need to protect the secrecy of deliberations and the privacy of jurors, even after a case is closed, and emboldened district courts to take action.

In 1982, the Fifth Circuit found unconstitutional local rule 500.2 of the Western District of Texas, a rule that had prohibited any "interview" of a juror concerning a trial or jury deliberations without the express prior permission of the presiding judge. *In re Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982). The court noted that "newsgathering is entitled to first amendment protection," that "[t]he public has no less right under the first amendment to receive information about the operation of the nation's courts than it has to know how other governmental agencies work," and that the Ninth Circuit had already struck down a similar rule prohibiting juror contact.[6] The court thus held that Rule 500.2 violated the First Amendment as applied to a journalist engaged in newsgathering, because it was impermissibly "unlimited in time and in scope, applying equally to jurors willing and anxious to speak and to jurors desiring privacy, forbidding both courteous as well as uncivil communications."[7] However, the Fifth Circuit also suggested areas where a more narrow application of the rule might appropriately regulate newsgathering from jurors. For example, the court volunteered that asking "specific questions about other jurors' votes" might properly be prohibited "under at least some circumstances," and expressed the view that "jurors, even after completing their duty, are entitled to privacy and to protection against harassment."[8]

The suggested areas of "appropriate" regulation were revisited by the Fifth Circuit the following year in *United States v. Harrelson*, 713 F.2d 1114 (5th Cir. 1983), another case arising out of the same local rule. In an order that had been entered shortly before the Court of Appeals announced its holding in *Express-News Corp.*, the District Court in *Harrelson* rejected a press application under Rule 500.2 to interview the members of a jury that had just convicted three defendants of various crimes relating to the murder of a federal judge.[9] After the Fifth Circuit

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6 *United States v. Sherman*, 581 F.2d 1358 (9th Cir. 1978).

7 *Id.* at 809-810.

8 *Id*.

9 A writ of mandamus seeking to vacate the order was rejected by the Fifth Circuit only days before the opinion in *Express-News Corp* issued. *Id.*

handed down its decision in *Express-News Corp.*, on motion to reconsider, the District Court lifted the blanket prohibitions, but entered an order setting ground rules for any interviews of the jurors. Keying in on the specific concerns just identified by the Fifth Circuit, the new order contained four provisions: [10]

1. No juror has any obligation to speak to any person about the case and may refuse all interviews or comment.

2. No person may make repeated requests for interviews or questioning after a juror has expressed his or her desire not to be interviewed.

3. No interviewer may inquire into the specific vote of any juror other than the juror being interviewed.

4. No interview may take place until each juror in this case has received a copy of this order.

On appeal, the Fifth Circuit found this more "narrow" order entirely appropriate.

The Fifth Circuit first rejected as "extraneous" the concern raised by the press that the order singled out reporters for special treatment (in the court's view the order equally applies "to the lady next door, to other jurors, and to the rest of the world"), and the objection that no findings had been made or could be made that any threat of harassment existed to justify the restrictions (a judge need not "hold hearings to justify nor make fact-findings to support" orders aimed at the conduct of a trial).[11] The Fifth Circuit then found the specific provisions of the order "well within" the court's discretion because, even after discharge, jurors "are entitled to privacy and to protection against harassment."[12] Moreover, the specific restrictions imposed on reporters not to ask about the deliberations of the jury, in the court's view, were a valid means of protecting full and open debate during jury deliberations.

Over the intervening years, the Fifth Circuit has repeatedly upheld similar orders restricting post-discharge interviews of jurors. *E.g.*, *In re Freedom Texas Newspapers*, No. 01-41011, order (5th Cir. Sept. 24, 2001); *United States v. Brown*, 250 F.3d 907 (5th Cir. 2001); *United States v. Cleveland*, 128 F.3d 267, 269, (5th Cir. 1997).

Trend Toward Greater Press Regulation?

While there is not a great deal of precedent, other federal circuit courts have been less

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[10] 713 F.2d at 1116.

[11] 713 F.2d at 1116-17.

[12] 713 F.2d at 1117.

receptive to regulations aimed at reporters. Several years before *Harrelson*, the Ninth Circuit had reversed as "clearly erroneous" an order prohibiting reporters from asking jurors if they wished to be interviewed. *United States v. Sherman*, 581 F.2d 1358, 1361-62 (9th Cir. 1978). A few years after *Harrelson*, the Tenth Circuit invalidated a restraint on press interviews of jurors because "the court's power to impose prior restraints on first amendment rights is limited and . . . with few exceptions it must be exercised in response to specific compelling reasons." *Journal Publ'g Co. v. Mechem*, 801 F.2d 1233, 1237 (10th Cir. 1986). Subsequently, the Third Circuit also declined to accept the *Harrelson* approach, and struck down as unconstitutional an order that had limited juror interviews in the very same manner as the Fifth Circuit had approved. *United States v. Antar*, 38 F.3d 1348 (3d Cir. 1994). While one judge did express serious concerns about "protecting the secrecy of a jury's deliberations,"[13] the Third Circuit nonetheless unanimously found the restrictions on reporters unacceptable "in the absence of findings that jurors were being harassed or that a threat of undue harassment was impending."[14]

While not widely embraced by the federal courts of appeals outside the Fifth Circuit, orders aimed at regulating the relationship between reporters and jurors are increasingly being entered by state and federal trial courts. Typical of the recent press-regulating orders was the order entered by a federal judge sitting in Texas in the closely-watched civil case of *Rodriguez v. Bridgestone/Firestone*.[15] The *Rodriguez* trial in August, 2001 was the first personal injury suit to go to a jury involving a Ford Explorer sport utility vehicle equipped with Firestone tires. When the parties reached a confidential settlement during the fourth day of jury deliberations, U.S. District Judge Filemon B. Vela discharged the jurors and advised them not to discuss the case publicly. Five days later, Judge Vela entered an order directed at the press, prohibiting any "contact" by "any individual with any juror who served in this case without written application and specific approval by the Court."[16]

Two news organizations immediately moved to vacate this injunction, arguing that it unconstitutionally precluded legitimate newsgathering activities, without limit in time or scope, and that it constituted a prior restraint by barring reporters from speaking to jurors. The motions were not well received by the District Court. Judge Vela defended the order as necessary to protect juror "dignity" and to prevent the tainting of similar cases pending in other courts across the country. After denying the media's motions, the judge took the extraordinary step of circulating a questionnaire to each juror asking whether he or she actually wanted to be interviewed. Seven of the nine jurors responded. With the judge's prior admonition not to discuss the case obviously still in mind, all seven agreed they would not like to talk to the press.

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[13] 38 F.3d at 1365-66 (Rosenn J., concurring).

[14] *Id*. at 1363.

[15] No. M-01-165, Order barring contact with jurors (S.D. Tex. Aug. 29, 2001) (Vela, J.), motion to vacate denied (S.D. Tex. Aug. 31, 2001), *writ of mandamus denied, sub. nom In re Freedom Newspapers*, No. 01-41001 (5th Cir. Sep. 24, 2001).

[16] *Id.*

The news organizations promptly sought a writ of mandamus in the Fifth Circuit. They objected that the order improperly restricted newsgathering about "one of the most newsworthy trials in the nation this year," by prohibiting all interviews with "the most crucial observers of the trial – the jurors."[17] The media urged that Judge Vela's restriction on newsgathering was overbroad because it "prohibit[s] *all* communications by *anyone* with *any* juror on *any* topic," and that it unconstitutionally shifted the burden of proof to journalists to show good cause for contacting a juror. Finally, the press movants reasserted their contention that the order constituted a prior restraint on the speech of reporters, without identifying any "clear and present danger" or "serious and imminent threat" requiring such a severe sanction.[18]

The Fifth Circuit promptly denied the petition for a writ. In the full statement of its opinion, the court noted only that the "district court's order is narrowly tailored to avoid abuse of members of the trial jury, all of whom have told the court they do not wish to communicate with the media." End of story.

Similar injunctions directed at the press in recent months have proliferated in state courts. For example, in a highly publicized murder trial of a Philadelphia-area rabbi accused of arranging the murder of his wife, the trial court in advance of jury selection barred the press from identifying any juror in any way, without the prior permission of the court, even though all jurors were then allowed to be identified by name in open court during jury selection.

The court further barred all "media representatives" from contacting any juror. *State v. Neulander*, AM-216-O/TI, per curiam order (N.J. Sup. Ct., App. Div. Nov. 30, 2001). The jury deadlocked and was discharged on November 13, 2001. The next day, the judge took up motions that had been filed earlier by the press seeking to lift the restrictions on reporting descriptions or identities of jurors and prohibiting juror interviews. Although deliberations were over and the jurors discharged, the trial court refused to modify the order, instead reaffirming that the order "remains in full force and effect." Four reporters for the Philadelphia Inquirer were subsequently charged with contempt for violating this order, although the hearing on contempt was then stayed until the New Jersey Supreme Court could review the underlying order.[19]

Significant Issues Presented

The imposition by judges of press regulations on the press that extend long after a trial is over raise at least two significant questions which have yet to be fully addressed:

> First, in the case of federal courts of limited jurisdiction, by what authority can an order be rendered regulating the conduct of the

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[17] *In re Freedom Texas Newspapers*, No. 01-41011, Pet. For Writ of Mandamus (Sept. 5, 2001)

[18] *Id.*

[19] As this is written, a fully-briefed motion for leave to appeal remains pending before the New Jersey Supreme Court and the hearing on contempt is scheduled to proceed on February 25, 2002.

> world at large in the manner being done where jurors are concerned? Second, for all courts, by what standard should the First Amendment interests at stake be evaluated and protected in this context?

None of the federal courts that have entered or reviewed orders regulating press contacts with jurors have addressed the jurisdictional issue presented,[20] and no clear standard has yet been widely recognized to determine when, or if, such regulations are appropriate. It is beyond the scope of this article to review these issues exhaustively, but the outlines of positions that should be pressed by media lawyers confronted with such orders are becoming clear.

Limits of Federal Judicial Power

Federal courts are courts of limited jurisdiction.[21] Yet, in cases such as *Rodriguez,* the district court on its own motion purports to bind all individuals forever against any contact with any juror without obtaining the express prior permission of the court. No court has yet explained the basis for the exercise of such sweeping jurisdiction over the press and public at large -- non-parties to any proceeding -- entered after any "case or controversy" has ceased to exist. The only apparent base of authority for such an injunction rests in the All Writs Act, 28 U.S.C. § 1651 (a), but that Act does not support such expansive jurisdiction.[22]

The All Writs Act states, in pertinent part:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. §1651(a). The Act "does not vest plenary power in the federal courts. Rather, it provides them with the procedural tools necessary to exercise their limited jurisdiction."[23]

There is an established body of case law construing the Act, that makes clear that two fundamental limitations exist on the authority granted by the Act: (1) The purpose of any order "must be to aid the court in the exercise of its jurisdiction," and (2) the "means selected must be

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[20] Oddly, the issue of jurisdiction was briefed in the *Antar* appeal, but the Third Circuit elected not to address the issue in its decision reversing the District Court on the merits. *See U.S. v. Antar*, No. 93-5733, Brief of Appellant Associated Press at 9-13 (filed in the Third Circuit, Jan. 31, 1994).

[21] *Insurance Corp. of Ireland, Ltd. V. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982).

[22] Orders barring juror contact are not within the legitimate exercise of "[i]nherent power . . . to regulate the conduct of members of the bar," because they are directed at third parties. *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 561 (3d Cir. 1985) (en banc). Nor are such orders any part of the court's continuing jurisdiction over parties appearing before it, because the orders are not limited to conduct of the parties, the jurors, or other participants in the trial. *See EEOC v. Locals 14 and 15*, 438 F. Supp. 876 (S.D.N.Y. 1977).

[23] *In re Grand Jury Proceedings*, 654 F.2d 268, 275-76 (3d Cir.).

comparable to a common law writ."[24] Under the first limitation, a court's power under the All Writs Act extends only to those steps necessary to manage a case to judgment.[25] Before binding third parties, a court must first find that they are in a position to "frustrate the implementation of a court order or the proper administration of justice."[26] Where a court "is able to effect a full and complete resolution of the issues before it without resorting to the extraordinary measures contemplated under the Act, *then such measures cannot be employed.*"[27] Under the second limitation, any duties imposed by a court on third parties (non-litigants) must be reasonable under the circumstances.[28] Injunctions aimed at the press to preclude contact with jurors *after* they are discharged would appear to violate each of these jurisdictional limitations imposed on federal courts.

The Supreme Court has permitted All Writs authority to be invoked to protect the rights of third parties from unwarranted intrusion, holding that nonparties "in a position to frustrate the implementation of a court order or the proper administration of justice" may be subjected to duties pursuant to the All Writs Act. *United States v. New York Tel. Co.*, 434 U.S. 159, 174 (1977). However, concerns with the proper administration of justice are generally misplaced when a trial is over.

In *Rodriguez*, for example, the jury had been discharged and the case fully settled before the order restricting newsgathering was entered. On these facts, there is no sound basis for any contention that the order was "necessary" to protect the court's jurisdiction over the issues before it.[29] Rather, the district court seemed to believe the order would protect the "dignity" of the discharged jurors and the fairness of future cases raising similar issues in other jurisdictions. Such inchoate, future-looking concerns could not satisfy the case and controversy requirement of the

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[24] *Id.* at 276.

[25] Under this authority, courts undoubtedly have jurisdiction to issue those orders necessary to protect jurors from prejudicial outside influences during the trial and during their deliberations. *See, e.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 553 (1976) (endorsing various methods, including sequestration, for insulating sitting jurors from outside influences). Such orders directly aid the court in issuing a fair and impartial verdict.

[26] *United States v. New York Tel. Co.*, 434 U.S. 159, 174 (1977); *In re Grand Jury Proceedings*, 654 F.2d at 277.

[27] *ITT Cmty. Dev. Corp. v. Barton*, 569 F. 2d 1351, 1359 (5th Cir. 1978) (emphasis added); *see also, Callaway v. Benton*, 336 U.S. 132, 145 (1949).

[28] *New York Tel. Co.*, 434 U.S. at 172.

[29] Similarly, to justify a writ, as necessary to avoid "harassment," a threat of harassment should exist. *See U.S. v. Antar*, 38 F.2d 1348 (3d Cir. 1994). Even where a threat of juror harassment is shown to exist, any order should be tailored to enjoin harassment, rather than enjoining all communications with jurors. In *United States v. Franklin*, 546 F. Supp. 1133 (N.D. Ind. 1982), the Seventh Circuit directed the district court either to vacate an injunction barring all interviews of jurors after their discharge or to hold an expedited hearing to consider more narrow relief that might be required by the facts of the case. On reconsideration, the district court modified its order to: (1) forbid post-verdict interviews from occurring in the courthouse; (2) forbid counsel and the parties from conducting post-verdict interviews; (3) left to each former juror the question of whether to be interviewed by the press; and (4) stated that "conduct by anyone which constitutes harassment of any member of this jury panel in regard to such interviews will be handled appropriately by this Court." *Id.* at 1145.

United States Constitution,[30] let alone the statutory requirement of "necessity" imposed by the All-Writs Act. As Judge Posner has explained, the All Writs Act "does not empower a court to give itself jurisdiction it does not have."[31]

Further, the requirement that obligations imposed under the All Writs Act be "appropriate" prohibits a court from imposing an unreasonable burden on a third party.[32] Any order that amounts to an unconstitutional prior restraint (for example, barring a reporter from publishing what is seen or heard in open court) could not be considered "reasonable" where the constitutional standard for such relief is not met. Nor could an order that violates the constitutional right of access or other established constitutional rights be deemed "reasonable" under the All Writs Act. The unique concerns that arise out of the First Amendment interest in newsgathering suggest that the types of orders being entered to protect juror privacy or jury deliberations also exceed the requirement of the All Writs Act that an order be "appropriate."

Situations that have been held to be within the proper jurisdiction of a federal court illustrate, by contrast, the problems posed by the recent orders protecting jurors. In *Miller v. United States*, 403 F.2d 77 (2d Cir. 1968), for example, a sitting juror had been told: "unless you're very careful there is a bunch in Torrington who are going to get after you and beat you up. They don't want to kill you, but they don't like what is going on."[33] As a result, at least one juror sought police protection during the trial, and another juror armed himself. After the jury returned a guilty verdict, and while the defendant remained at liberty, defense counsel hired a private investigator to interview the jurors regarding the threat of violence.[34] Under those circumstances, when defense counsel began an inquiry designed to "impugn the validity of judicial action on the ground of misconduct." and when jurors had been physically threatened, the district court was vested with jurisdiction to supervise the defense inquiry.[35] Defense counsel's interrogation of the threatened jurors was a direct threat to the district court's verdict, and the court's order therefore was in aid of its jurisdiction over that verdict. Moreover, the order was directed to counsel for a party, not to the world at large.

All Writs authority has also been upheld as appropriate to enjoin litigants from repeatedly filing frivolous and vexatious civil actions.[36] In extreme circumstances, frivolous suits constitute

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30 *See, e.g., Los Angeles County v. Davis*, 440 U.S. 625, 632-33 (1979)

31 *In re Campbell*, 264 F.3d 730, 731 (7th Cir. 2001).

32 *New York Tel.*, 434 U.S. at 172.

33 *Id*. at 79 and 80 n.4.

34 *Id.* at 79-81.

35 *Id.* at 81-82.

36 *See Castro v. United States*, 775 F.2d 399, 408 (1st Cir. 1985); *Clinton v. United States*, 297 F.2d 899, 902 (9th Cir. 1961).

a "groundless encroachment upon the limited time and resources of the court and other parties."[37] Preventing such wastes of the court's own resources directly aids the court's jurisdiction. Preventing third parties from questioning jurors in a legal manner places no demands on the court's resources, and orders barring all contact with jurors do not serve to protect the court's jurisdiction in any meaningful sense.

In short, the All Writs Act does not appear to authorize broad injunctions issued against reporters in circumstances, where there is no finding of harassment or a specific threat to the court's jurisdiction.

Constitutional Limitations to Judicial Regulation of Newsgathering

Beyond this significant federal jurisdictional issue, attempts to regulate newsgathering raise thorny questions about the circumstances under which any court may appropriately restrict the actions of reporters.[38] The governing standard has yet to be widely addressed, and the circuit courts have taken different approaches in defining the constitutional issue. In *Express-News Corp.*, Fifth Circuit evaluated the limitation on post-discharge juror interviews as a restriction on newsgathering. While affirming that "news-gathering is entitled the first amendment protection," the Fifth Circuit stressed that this "right to gather news is not, of course, absolute."[39] Having framed the issue as a conflict between the right to gather news and the accused's right to a fair trial, the Fifth Circuit struck down the blanket order against all interviews on the grounds that it was not "narrowly tailored to prevent a substantial threat to the administration of justice."[40]

The Ninth and Tenth Circuit struck down similar prohibitions using a prior restraint analysis.[41] Indeed, an order that prohibits a reporter from asking certain questions of a juror can be construed as a prior restraint against the reporters' speech, and it is difficult to see how the heavy evidentiary burden to support such an injunction could be met where there is only a hypothetical concern about juror harassment or the disclosure of juror deliberations after a jury has been discharged. However, the prior restraint analysis does not always fit neatly, and some have argued that an order restricting the gathering of news should not be subjected to the same heavy burden as

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[37] *Castro*, 775 F.2d at 408.

[38] These concerns over constitutional limits are greatest when courts seek to enjoin the world at large to behave in a certain manner *after* a trial is over and the jurors are discharged. The analysis obviously will be quite different, and the constitutional concerns significantly diminished, when orders are entered during the course of a trial for the purpose of ensuring the fairness of the proceedings.

[39] 695 F.2d at 808, 809.

[40] *Id.* at 810.

[41] *See e.g., Journal Publ'g Co. v. Mechem*, 801 F.2d at 1236-37 (invalidating restriction on contacts with jurors as a prior restraint); *U.S. v. Sherman*, 581 F.2d at 1361-62 (same).

an order prohibiting the publications of news once it is in the hands of the press.

In *Antar*, the Third Circuit thus took a different approach. It viewed a restriction against post-discharge juror interviews as akin to a restriction on the First Amendment right of access to judicial proceedings, and applied the well established test used to determine when the qualified right of access may properly be limited.[42] The Third Circuit found several aspects of the order impermissible because they failed the threshold requirement for restricting the right of access – that specific findings of fact must establish the need for a restriction on access in order to "preserve higher values."[43] On this basis the Third Circuit concluded that prohibitions against "repeated" juror contacts were improper "in the absence of any finding by the court that harassing or intrusive interviews are occurring or intended."[44] Applying another prong of the standard governing access rights, the Third Circuit also held the restrictions improper because the lower court failed to consider alternatives that could have eliminated the threat of harassment without unduly interfering with press access to jurors.[45]

Given the limited authority, which approach should apply? Any order that bars reporters from describing what they have seen or heard in open court, or preventing them from speaking to jurors, is susceptible to attack as a "prior restraint," and should be challenged as such. In other situations, where an order restricts the process of gathering news from discharged jurors, the standards governing restrictions on First Amendment access rights may well be suited to the task of defining appropriate limits to such regulatory orders. The Third Circuit was on solid ground in requiring such orders to satisfy the same standard governing limitations on the First Amendment right of access. Jurors are an integral part of the judicial process, and the traditional Supreme Court analysis supports the conclusion that a First Amendment right attaches to the act of speaking with jurors after they have carried out their official governmental duties. As defined in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) and its progeny, the right of access must first be shown to attach to the circumstances presented, and if so, a four part test applies to determine whether this qualified right may appropriately be limited.[46]

1. Establishing the Existence of a First Amendment Right to Speak With Jurors.

To analyze whether the First Amendment right of access attaches to a particular proceeding or document, the Supreme Court has advanced an analysis that considers both the practice (or tradition) of openness, and the public policy (or interest) served by openness. This two part analysis suggests that a qualified First Amendment right does indeed govern a reporters' questioning of a

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[42] 38 F.3d at 1364

[43] *E.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*").

[44] *Id.*

[45] *Id.*

[46] *See, generally, Press Enterprise II*, 478 U.S. at 9.

discharged juror.

Practice. From the time of Blackstone to the present, members of the public, including the press, have apparently been free to discuss trials with former jurors after the verdict is returned. This follows from the fact that since at least the early sixteenth century jury selection in England was public, and this was also the "common practice in America when the Constitution was adopted."[47] Throughout the nineteenth century, the names and addresses of jurors in America were freely available to the people of the community.[48] With the fact of urbanization in the twentieth century jurors may have been less commonly known to the people of the community where a trial took place, but members of the public were still routinely allowed to learn about the juries who decided significant cases through the press.[49]

The practice thus has always been that people of the community are free to ask former jurors, their neighbors, about the deliberations. While the actual conversations between former jurors and their neighbors are difficult to document, history reveals that American jurors since long before the Revolution regularly discussed their deliberations after a verdict. Many examples exist in the annals of history.

For example, the foreman of the jury that convicted Bridget Bishop of witchcraft before the Special Court of Oyer and Terminer in Salem in 1692 felt free to explain that he and his fellow jurors had difficulty interpreting the defendant's testimony.[50] In fact, several jurors at the Salem witch trials later issued a public statement regretting their votes for convictions, and explaining that they had been "under the power of a strong and general delusion, utterly unacquainted with and not experienced in matters of that nature."[51]

The jury foreman from the famous *Scopes* "monkey trial" similarly discussed freely the juror's deliberations. "I feel a deep disappointment that the scientific witnesses were not allowed to testify. It would have been an opportunity to find out something about how we came into the world."[52]

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47 *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 507-08 (1984).

48 *See In re Baltimore Sun Co.*, 841 F.2d 74, 75 (4th Cir. 1988).

49 *See Understanding the Deliberative Process*, 17 PEPPERDINE L. REV. at 370.

50 1 PELEG W. CHANDLER, AMERICAN CRIMINAL TRIALS 110 (1841) (quoting jury foreman's discussion of the jury's deliberations).

51 *Id.* at 133.

52 RAY GINGER, SIX DAYS OF FOREVER? TENNESSEE V. JOHN THOMAS SCOPES 179 (1958) (quoting the jury foreman in support of the proposition that jury would not have voted to convict if they had been allowed to decide on the merits).

One of the jurors in the *Sacco and Vanzetti* case, John Dever, spoke about not only the issues considered during the jury's deliberations, but specific votes by the jurors. Dever recounted that once deliberations began he:

> Suggested that first of all they take an informal ballot, nothing binding, just to get an idea how they felt. Sitting around the table, each marked a slip of paper and handed it down to Ripley who, as foreman, occupied the end seat. Dever believed the defendants guilty but he voted for acquittal on the first ballot to open up a discussion. The vote was ten to two for conviction. "Then" Dever told a reporter long afterward, "we started discussing things, reviewed the very important evidence about the bullets, and everybody had a chance to speak his piece. There never was any argument, though. We just were convinced Sacco and Vanzetti had done what the prosecution had charged them with."[53]

The jurors from the *Rosenberg* trial also freely discussed their deliberations, including specific votes by specific jurors taken throughout the deliberations.[54] The jurors recounted, for, example, that on their first poll all twelve were for convicting Julius Rosenberg and eleven were for convicting Ethel Rosenberg. The sole dissenter was reluctant to render a decision that could mean the execution of a mother of two. Several jurors commented that the Rosenbergs' invocation of the Fifth Amendment gave a bad impression.[55]

These are, of course, only a few examples from noteworthy trials.[56] But it is unreasonable to assume that jurors in less noteworthy cases did not also discuss their deliberations, even if those decisions went unrecorded. Allowing the press to make such inquiries in modern America is "no more than an application of what has always been the law."[57]

Policy. The public interest also supports the recognition of a right of access to jurors. In its access cases, the Supreme Court identified at least six societal interests advanced by open judicial proceedings generally:

> [P]romotion of informed discussion of governmental affairs by

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53 FRANCIS RUSSELL, TRAGEDY IN DEDHAM: THE STORE OF THE SACCO-VANZETTI CASE 212 (1962).

54 RONALD RADOSH and JOYCE MILTON, THE ROSENBERG FILE: A SEARCH FOR THE TRUTH (1983).

55 Id. at 270-74.

56 *See also, e.g.*, WALTER F. MCCALEB, THE AARON BURR CONSPIRACY AND A NEW LIGHT ON AARON BURR 278-79 (1966) (discussing Congressional inquiry into reasons for acquittal of Burr); EDWIN KENNEBECK, JUROR NUMBER FOUR: THE TRIAL OF THIRTEEN BLACK PANTHERS AS SEEN FROM THE JURY BOX (1973) (detailed account of a juror's trial experience).

57 *In re Baltimore Sun Co.*, 841 F.2d at 75.

> providing the public with the more complete understanding of the judicial system; promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; providing significant community therapeutic value as an outlet for community concern, hostility and emotion; serving as a check on corrupt practices by exposing the judicial process to public scrutiny; enhancement of the performance of all involved; and discouragement of perjury.[58]

These same considerations weigh in favor of recognizing a right of access to former jurors.

Juror interviews promote the informed discussion of governmental affairs by providing the public with a more complete understanding of the judicial system. The public obviously benefits from increased knowledge of how juries actually decide cases. Juror interviews can reveal either that jurors take their civic obligations seriously and decide cases based on the evidence and the law, or the opposite. In either case, the public benefits from this window of insight into how its justice system is performing.

The acquittal of John Hinckley for the attempted murder of President Reagan provides a good example of how juror interviews can encourage informed public discussion. In that case, the trial judge released the names and addresses of the jurors at the commencement of deliberations so that subsequent press accounts could "play a large role in shaping public and legislative attitudes toward the insanity defense in the future."[59] Following Hinckley's acquittal, juror interviews indicated that the jurors felt compelled to reach their verdict based on the law as explained to them by the trial judge. Public displeasure with this state of affairs was then expressed, through elected representatives, in the form of the Insanity Defense Reform Act of 1984.[60]

It is not only the lay public who are aided in their discussion of governmental affairs by jury interviews. Juror interviews inform scholarly discussion as well.[61] Juror interviews provide information on how juries function in reality, how well jurors understand and follow the legal instructions they are given, and how seriously jurors take the critical responsibility entrusted to them. Such information is an invaluable aid to an informed discussion of the American justice system.

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[58] *Simone*, 14 F.3d 833, 839 (1994); *see also Richmond Newspapers*, 448 U.S. 555 (1980).

[59] *In re New York Times Co.*, Misc. No. 82-0124 (D.D.C. June 19, 1982).

[60] *See Understanding of the Deliberative Process*, 17 PEPPERDINE L. REV. at 367.

[61] *See id.; see also*, Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to the Central Meaning of the First Amendment*, 83 COLUM. L. REV. 603, 612-13 (1983); Mansfield, *Jury Notice*, 74 GEO. L.J. 395, 410 (1985) Note, *The Frye Doctrine and Relevancy Approach Controversy: An Empirical Evaluation*, 74 GEO. L.J. 1769, 1776-77 (1986).

Juror interviews also promote the public perception of fairness by permitting a full view of the judicial proceeding in question. This is particularly true in cases where the verdict is at first surprising to the public. Juror interviews can explain to the public that the jurors took their responsibility seriously, that they scrupulously followed the law as it was explained to them, and that they based their decision on the evidence as it was presented. Without such interviews, the public is left to speculate about possible illicit influences.

Juror interviews further provide a significant community therapeutic value as an outlet for community concern, hostility and emotion. In our system of justice, juries frequently return verdicts which elicit a strong emotional response from the public. That response is far more likely to be productively and peacefully channeled if all aspects of the trial – including the juror's deliberations – are open for discussion. If, on the other hand, the public is informed that its government has decided to block access to those jurors who are willing to discuss the case, frustration is much more likely to result. As former Chief Justice Burger observed, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[62] The same is true of juries -- people can accept that juries will occasionally make mistakes, but they cannot accept being prohibited from inquiring about when, how and why juries reach their decisions.

It is beyond dispute that post-verdict jury interviews serve to discourage corrupt practices by exposing the judicial process to public scrutiny. Jurors will obviously be less likely to engage in illicit conduct or attempt to hide a personal interest in a trial if they know that their illegal behavior may be subsequently discovered by the press and public.[63]

Juror interviews also enhance the performance of all involved. A deliberating juror is less likely to shirk his responsibilities if he knows that such behavior might later be disclosed to the public. Such a juror is much less likely to say during deliberations, "I don't care if the defendant is guilty or not. I just want to get home in time for dinner." Similarly, no attorney wants to read an interview indicating that the jury thought that he was not well prepared for trial.

Thus, the same societal interests advanced by open judicial proceedings are equally advanced by access to former jurors after a verdict is returned. Given both the advancement of relevant societal interests and the historic tradition of access to jurors, a solid basis exists to require the standards governing the constitutional right of access to be satisfied before post-verdict juror interviews are limited.

2. The Four-Part Test Governing Restrictions on Access.

If a qualified right of access to speak with jurors does exist, the Supreme Court has defined the standard governing restrictions on that right. Although the right of access is not absolute, before

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[62] *Richmond Newspapers*, 448 U.S. at 572.

[63] *See U.S. v. Simone*, 14 F.3d 833, 839 (1994).

abridging the right a court must weigh four distinct factors:

1. Whether preserving openness will actually prejudice some equally compelling interest;

2. If so, whether any alternative exists to avoid that prejudice without restricting the right of access;

3. If not, whether the proposed limitation of access is narrowed (in scope and time) to the minimum required to avoid the demonstrated prejudice; and

4. Whether the limitation on access will effectively avoid the prejudice that it is intended to address.[64]

Evaluating the types of restrictions that have been imposed upon the press within this framework suggests that many of the restrictions can not pass constitutional muster.

In imposing restrictions on juror access, courts primarily have cited two broad concerns: (1) a need to protect the secrecy of jury deliberations and (2) a need to protect juror privacy or avoid harassment. Both of these concerns raise threshold questions about whether they involve the type of "transcendent value" or equally compelling interest that is required before restrictions can be placed on press access to jurors.

With respect to the protection of jury deliberations, obviously steps appropriately can be taken to protect jurors from outside influence or concern during the course of deliberations. Once the jury has rendered its verdict, however, the value of preserving secrecy is far from apparent. As the historical examples above suggest, the opposite -- that often there is a significant public value served by allowing a full understanding of how a jury reached a verdict.

The articulated countervailing concern is that jurors may not participate fully in deliberations if they fear embarrassment from the subsequent disclosure of their actions. Even if this constitutes

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[64] Although not always stated as a four part test, each of these factors is evident in the Supreme Court's various reviews of the scope of the right of access. *See, e.g., Globe Newspaper v. Superior Court*, 457 U.S. 596, 606 (1982) (noting that a restriction on access must be "necessitated by a compelling governmental interest"); *Press Enterprise Co., v. Superior Court*, 478 U.S. 1, 14 (1986) (noting that access may be restricted only if "findings are made demonstrating that . . . reasonable alternatives" do not exist); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (requiring steps to narrow the adverse impact of closure on constitutional values); *In re Charlotte Observer*, 882 F.2d 850 (4th Cir. 1989) (where a restriction on access "is wholly in efficacious to prevent a perceived harm, that alone suffices to make it constitutionally impermissible").

The "effectiveness" factor flows also from the proposition that First Amendment rights will not be abridged for an idle purpose. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (rejecting a prior restraint, inter alia, as ineffective in accomplishing its intended goal); *Smith v. Daily Mail Publ. Co.*, 443 U.S. 97 (1979) (Rehnquest, J. concurring) (state law prohibiting newspapers from publishing names of juvenile offenders unconstitutional because not effective in protecting juveniles given that no similar restraint was imposed on broadcasters).

a sufficient concern to override the public's interest in knowing how justice is rendered, it is likely that alternative measures can adequately protect against such concerns, short of restricting the right of access. For example, in appropriate cases jurors can be instructed by the judge not to speak about statements made by other jurors during deliberations, while leaving each juror free to discuss with the press their own views if they so desire.

Concerns with juror privacy are similarly problematic. While it is true that jurors do not typically volunteer to be put into the role of exercising judicial authority, as jurors they are vested with the power of government and necessarily surrender some privacy with respect to their conduct in carrying out this official duty. The forced surrender of a degree of privacy is not unique to service as juror. Other privacy limitations necessarily exist in order to allow democratic institutions to function. For example, homeowners surrender their privacy interest in the value of their homes; this information routinely is made available to the general public to serve the interest in assuring that tax assessment among property owners is handled fairly and without discrimination. Similarly, voters typically surrender the privacy of their party affiliation; such information by law is publicly available in many states to allow those seeking office to identify and communicate with members of their own party. Judicial concern with juror privacy therefore should be tempered by the public's legitimate interest in the fair administration of justice. Again, the four-part test established to define the proper limits of First Amendment access seems well-suited to addressing the legitimate scope and expectation of juror privacy on a case-by-case basis.

Conclusion

The apparent trend toward increased judicial regulation of the press is cause for concern. The issues of limited federal jurisdiction and the constitutional interest in gathering and reporting news about the judiciary should be raised by media lawyers whenever judges yield to the "innate drive of the authoritarian personality," and seek to restrict full and complete news coverage of newsworthy trials.