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The Janet Jackson incident at the 2004 Super Bowl and the 2003 *Golden Globe Awards* have led to congressional and FCC moves to protect the viewing public from “indecent” on television and at the movies at the same time that the Supreme Court is overturning similar attempts to regulate the Internet and cable television.

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The Big Chill? Congress and the FCC Crack Down on Indecency

KATHERINE A. FALLOW

The infamous 2004 Super Bowl half-time incident—in which Justin Timberlake ripped open Janet Jackson’s bustier and briefly exposed her right breast to the millions of viewers watching the CBS broadcast—triggered an election-year political frenzy to “clean up the airwaves.” Calling the half-time broadcast a “classless, crass, deplorable stunt,” Federal Communications Commission (FCC) Chairman Michael K. Powell vowed to begin a “thorough and swift” investigation.¹ Television and radio executives summoned before congressional panels were grilled on what steps they would take to make the airwaves more suitable for family viewing. Congress hastened to act on legislation to toughen the FCC’s enforcement of its broadcast indecency rules, which prohibit the airing of indecent, obscene, or profane material between 6 A.M. and 10 P.M.

On March 11, 2004, by a vote of 391-22, the House passed its version of the Broadcast Indecency Act of 2004, which would increase the maximum statutory penalty for an indecency violation from \$27,500 to \$500,000 and authorize the FCC to begin license revocation proceedings against broadcasters with three or more indecency fines.² A similar bill pending before the Senate would authorize the FCC to consider extending its indecency rules to programming judged to be gratuitously violent.³ The proposed legislation would increase the scope of the FCC’s enforcement power by, among other things, authoriz-

ing the Commission to fine individual speakers as well as broadcast licensees.

Politicians and regulators have been nearly unanimous in their clamor for stronger indecency enforcement. Politics aside, the notion that the federal government can regulate the content of what is said on television and radio is widely accepted as a legal given. But such a content-based speech regime is an anomaly in First Amendment jurisprudence. Although the FCC has been given relatively wide latitude to censor broadcast programming, the U.S. Supreme Court has invalidated parallel government attempts to regulate indecency on cable television and the Internet. The history of the FCC’s indecency enforcement, notable for its vague standards and inconsistent outcomes, underscores why the courts should be concerned about allowing the government to police program content on the airwaves.

The FCC’s historical record on indecency is troublesome enough. In a radical departure from its previous indecency framework, however, the FCC in March 2004 issued a ruling that demonstrates its willingness to restrict program content even further. Reversing an earlier decision of its Enforcement Bureau, the FCC held that NBC violated the indecency rules when it broadcast live the 2003 *Golden Globe Awards* program, during which the singer Bono said “fucking brilliant” while accepting his award. Although it declined to fine NBC in light of the break from FCC precedent, the Commission held that Bono’s statements constituted actionable indecency and profanity.

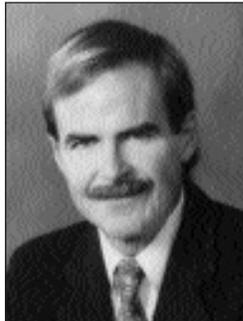
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Katherine A. Fallow (kfallow@jenner.com) is a partner in the Washington, D.C., office of Jenner & Block LLP.

Oh No! Here Comes a Celebrity Rape Trial!

THOMAS B. KELLEY

The relentless advances in communications technology have continually reshaped the challenges that media lawyers face in asserting First Amendment rights of the news media in the settings of libel defense, access, reporter's privilege, and, more recently, the emerging privacy and newsgathering torts.



Thomas B. Kelley

It all began for our generation with *New York Times v. Sullivan*:¹ the development of First Amendment rights of the media was energized by the civil rights movement, out of which the *Sullivan* case arose. In that era and its aftermath, we spoke credibly, in high tones, of the role of the press in the fabric of the republic. As the media have become, in the public's perception, more oriented toward the bottom line, and as the distinction between news and entertainment has blurred, our grandiloquence has lost much of its resonance. We have been forced to return to earth. In particular, the media theater, once a stage on which First Amendment rhetoric from the Burger Court carried the day, has undergone dramatic changes that have drastically redefined our practical burdens in advocating access to high-profile criminal cases.

My own state of Colorado, now home of the Kobe Bryant sexual assault prosecution, provides a good example. For some time now, Colorado has been the epicenter of debate over sexual assault and its prosecution. First, there was the Air Force Academy rape scandal and, more recently, the booze, sex, and rape uncovered in the University of Colorado football recruiting program. Both of these controversies promise to lead to important social progress in our society's response to sexual assault and its victims. The *People v. Bryant* case, however, threatens to move us backward in that struggle. *Bryant* also threatens a strong tradition of public access to criminal proceedings in Colorado.

Thomas B. Kelley (tkelley@faegre.com) is chair of the Forum on Communications Law.

Until *Bryant* came along, no pretrial hearing in a criminal matter had ever been closed here. The preliminary hearings in the massively publicized murder prosecution of an individual who dismembered his victim and deposited the parts in an outdoor privy remained open, as did a hearing on a motion to suppress the confession in the similarly notorious case of a defendant guilty of

the same M.O., except that he stored the dismembered corpus delicti in his refrigerator. Even in *People v. Claudine Longet*, in which a torch singer/actress accused of killing her boyfriend, ski promoter Spyder Sabich, asserted that she accidentally shot him with a gun she did not believe was loaded, all pretrial hearings remained open.

In the *Bryant* case to date, more time has been spent in pretrial hearings behind closed doors than in open court. Even hearings on issues having no relation to the victim's privacy have been closed. What's up with that? The simple answer: The proceeding is a celebrity rape trial.

Celebrity rape trial, how do I despise thee? Let me count the ways:

(1) Whenever a major celebrity is a criminal defendant, more media show up than for any other kind of case, not because of the nature of the crime but because of who the defendant is. To the presiding judge, this undoubtedly conveys the message that the media are more interested in entertaining their audiences than in fulfilling their constitutional role as a surrogate for the public in monitoring the operations of government. It doesn't help that many outlets cover the case in their sports pages or segments.

(2) At each court hearing, today's plentiful and competitive news and entertainment media "parachute" in and besiege the courthouse with a vast assemblage of satellite trucks, lights, tents, makeshift stages, boom mikes, and TV bodies with TV faces—quite a bit different from the media corps

that covered the Longet trial in January 1977. The space occupied by this troupe is severalfold the size of the footprint that is the tiny Eagle County Courthouse (a structure of architecture and materials that suggest a New England bowling alley), the site of the *Bryant* proceedings. On "opening day" (i.e., the advisement) outside the courthouse, hucksters hawked Lakers merchandise, and gangs of college-age women wore T-shirts bearing messages on the merits of condoms; all seemed to blend with the media encampment. The spectacle and resulting absence of solemnity no doubt enhance the appearance that the fourth estate is there because a celebrity is on trial, aggravating the angst felt by judges, lawyers, and witnesses involved in the process.

(3) The infinite "news hole" provided by new technology (cable and the Internet) adds to the lack of control felt by the parties and the judge. In an early decision in the *Bryant* case in which the court refused to unseal the search warrant affidavit, the judge quoted from an appellate opinion overturning a decision to unseal the search warrants in the *Scott Peterson* trial, now venued in Santa Mateo County:

Release of the Materials would undoubtedly be followed by their widespread dissemination and dissection in every sort of media medium, including daily television with parades of "experts" endlessly commenting about likely prosecution and defense strategies, opining about the strengths, weaknesses, and admissibility of the various factual tidbits disclosed by

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Anomaly or Trend? The Scope of § 230 Immunity Challenged by Two Courts

BY PATRICK J. CAROME AND C. COLIN RUSHING

Until very recently, the case law under 47 U.S.C. § 230¹ has been extremely predictable. Beginning with *Zeran v. America Online, Inc.*,² courts in at least eight circuits and five states have held that § 230 broadly immunizes providers and users of interactive computer services from most forms of liability arising from the carriage or transmission of allegedly harmful content that originated with someone else. Defendants seeking to avail themselves of the immunity from liability virtually always won. Indeed, until 2001, the only judicial criticism of *Zeran* and its progeny had come from the dissenting judges in the one § 230 case to reach a state supreme court, *Doe v. America Online, Inc.*³

This article examines four noteworthy decisions construing § 230, all within the last nine months. Two of these decisions, both from the Ninth Circuit, built upon the foundation of *Zeran* to uphold claims of immunity in circumstances where the key question was whether the defendant had been so involved with the content at issue as to be ineligible for statutory protection.

In *Batzel v. Smith*,⁴ the Ninth Circuit ruled that § 230 potentially protects an individual interactive service user who had been sued for intentionally disseminating an allegedly defamatory e-mail message sent to him by a complete stranger. In *Carafano v. Metrosplash.com, Inc.*,⁵ the Ninth Circuit held that the provider of a personal “matchmaking” website could not be held liable for an allegedly defamatory personal profile that the service generated based on a miscreant user’s bogus answers to multiple-choice questions.

Kevin W. Goering (goeringk@coudert.com) is a member of Coudert Brothers LLP. Damion Stodola (stodolad@coudert.com) is an associate in Coudert’s New York office. John C. Knapp (jcknapp@hotmail.com) expects to receive his J.D. from Brooklyn Law School in June 2004 and is the 2003–2004 editor-in-chief of the Brooklyn Journal of International Law. He plans to join Coudert Brothers this fall.

While the Ninth Circuit was embracing a broad view of § 230 immunity, however, two other appellate courts issued opinions that, for the first time, broke ranks with *Zeran* and its progeny. In *Doe v. GTE Corp.*,⁶ Judge Easterbrook of the Seventh Circuit issued an opinion suggesting, in unusually oblique dicta, that the part of § 230 that every other court has read as the statute’s principal grant of immunity might actually be nothing more than a definitional provision that has no independent operation. Because he concluded that the plaintiffs’ claims failed as a matter of state law, Judge Easterbrook’s ruminations on § 230 did not produce any decision on the statute’s scope.

In *Barrett v. Rosenthal*,⁷ a case of more potential significance, the California Court of Appeal for the First District (the intermediate appellate court for the region that encompasses San Francisco) issued an opinion containing an outright rejection of one of the central tenets of the *Zeran* progeny, namely, the holding that immunity remains available notwithstanding allegations or proof that the defendant knew or had reason to know of the defamatory or otherwise harmful nature of the third-party content at issue.⁸ Ironically, if followed by other courts, this ruling will have enormous implications for providers of interactive computer services, but the California Court of Appeal issued this ruling in a case where no service provider was named as a party and where the defendant was an individual claiming immunity in the capacity of a mere user of the Internet.

The *Barrett* and *Doe v. GTE* cases have garnered some attention because they depart so abruptly from what had seemed to be settled precedent, and they may rekindle the debate among academicians over whether *Zeran* was correctly decided. But as the recent Ninth Circuit decisions seem to underscore, *Barrett* and *Doe v. GTE* should not be read as suggesting that the tide is in any way turning against a broad

reading of § 230. Not only is there a large and well-developed body of cases from many jurisdictions that uniformly follow the *Zeran* approach, but also a congressional committee, in the final report accompanying a 2002 statute extending the reach of § 230, expressly endorsed the *Zeran* line of cases as being “correctly decided.”

Overview of § 230 and *Zeran*

Eight years ago, as the Internet and related online media were starting to revolutionize how people communicate, Congress enacted § 230 to resolve looming legal uncertainty over whether providers of interactive computer services could be held liable for tortious content that originates with third parties. Congress recognized that without a uniform national rule protecting service providers from such potentially crushing liability, the then-new electronic media could never achieve their full potential.

The provision of § 230 that has been at the center of nearly all of the litigation concerning the statute is § 230(c)(1), which states: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁹ The statute also contains another provision, § 230(c)(2), that is understood to provide a qualified immunity for activities relating to blocking of objectionable content. It states that “[n]o provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be . . . objectionable.”¹⁰ The statute further provides: “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”¹¹

In *Zeran*, the seminal case interpreting § 230, the Fourth Circuit held that § 230(c)(1) “creates a federal immunity to any cause of action that would hold computer service providers liable for

information originating with a third-party user of the service.”¹² *Zeran* held that America Online (AOL) was immune from claims of negligence arising from its alleged failure to remove and block a series of defamatory postings placed on AOL message boards by an unknown user of the AOL online service. The court reasoned that holding AOL liable would impermissibly treat it as the “publisher or speaker” of “information” (the defamatory postings) provided by “another information content provider” (the unknown user who posted the messages).¹³

Zeran specifically held that the statutory immunity applies even though the service provider had allowed the content at issue to remain available after being put on notice regarding its false and defamatory nature.¹⁴ The *Zeran* court carefully considered and rejected various arguments raised by the plaintiff to the effect that liability for a defendant who has knowledge or reason to know of the unlawful nature of the content treats the defendant as a distributor and not as a publisher or speaker.¹⁵ In particular, the court cast aside the claim that a defendant in a defamation case may be subjected to so-called distributor liability—that is, liability under the especially protective standard that as a matter of First Amendment jurisprudence applies to distributors such as newsstands and libraries that make available large quantities of third-party content—without at the same time also being treated as a publisher.¹⁶ *Zeran* determined instead that distributor liability is simply a subset of publisher liability.¹⁷

Zeran also concluded that a contrary reading of the statute would simultaneously undermine two critical goals that Congress expressed in the preamble of the statute: (1) a desire to promote vibrant free speech on the Internet and related online services and (2) a desire to remove disincentives on the part of service providers to voluntarily engage in responsible self-regulation of content flowing over their networks.¹⁸

Withholding immunity from providers who allegedly had actual or constructive notice of the harmful content would, according to *Zeran*, be of disservice to both of these goals. First, service providers handling huge quantities of third-party content would have little choice but to immediately remove such content virtually automatically whenever they received complaints, thus fundamentally undermining the free speech goal.¹⁹

Second, contrary to the second goal of removing disincentives to self-regulation, providers who otherwise would be inclined to attempt to limit objectionable content from proliferating on their networks would be discouraged both from engaging in any self-monitoring of their networks and from maintaining mechanisms to make it easy for their users to complain about harmful content (e.g., toll-free call-in numbers and well-publicized e-mail notification systems). Either type of activity would be sure to create the very sort of knowledge or notice that could later provide a basis for liability.²⁰

Since *Zeran*, many courts across the country have reached the same conclusions for the same reasons.²¹ Congress itself has explicitly endorsed *Zeran* and its progeny. In 2002, when passing the Dot Kids Implementation and Efficiency Act, a statute designed to establish a special zone on the Internet that would be free of content unsuitable for children, Congress specifically incorporated the protections of § 230 into that statute for the entities that would be responsible for operating that zone.²² Congress did this knowing full well how § 230 had been applied by the courts, and the definitive committee report accompanying the new statute proclaimed that the decisions in *Zeran* and similar cases had “correctly” encapsulated Congress’s intent:

The courts have correctly interpreted section 230(c), which was aimed at protecting against liability for such claims as negligence (See, e.g., *Doe v. America Online*, 783 So. 2d 1010 (Fla. 2001)) and defamation (*Ben Ezra, Weinstein, and Co. v. America Online*, 206 F.3d 980 (2000); *Zeran v. America Online*, 129 F.3d 327 (1997)). The Committee intends these interpretations of section 230(c) to be equally applicable to those entities covered by H.R. 3833.²³

Ninth Circuit Reaffirms *Zeran*

In a pair of defamation decisions issued last summer, the Ninth Circuit continued to chart the broad contours of § 230 immunity. In both cases, the court reaffirmed *Zeran*’s broad understanding of what it means to treat a defendant as a publisher or speaker of third-party content. The key inquiry in each case centered on the question of whether the party claiming immunity had played a role in the creation or development of the allegedly defamatory information, such that it could no longer be said that the information had been “provided by another information content provider,” a necessary prerequisite for immunity under § 230(c)(1). The statutory basis

for this inquiry is the definition of information content provider in § 230 as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”²⁴

Batzel v. Smith

In *Batzel v. Smith*, a divided panel of the Ninth Circuit announced a rule for determining when people who communicate on the Internet can enjoy immunity with respect to third-party content that they specifically and consciously select and then disseminate to a large online audience. According to the majority opinion, immunity is available as long as they reasonably understand that the original source provided the content with the intent that it be published on the Internet or other online service.²⁵ The dissent advocated a narrower approach that would deny immunity to a defendant who selects specific content for broader dissemination.²⁶

The defendant who asserted § 230 immunity in *Batzel*, Tom Cremers, single-handedly operated a website called the Museum Security Network and moderated a Listserv devoted to the subjects of museum security and stolen art. In this capacity, he received an e-mail from Robert Smith, whom he did not know, which contained statements about the plaintiff, Ellen Batzel. Smith’s e-mail stated that Batzel had told him that she may have been “the descendent of Heinrich Himmler” and that, as a result of this information, Smith believed “hundreds of older European paintings” in Batzel’s vacation home “were looted during WWII and are the rightful legacy of the Jewish people.”²⁷ Cremers made some minor edits to Smith’s e-mail and then posted it on his website and transmitted it through his Listserv. Although Smith later contended that he never intended for his message to be disseminated on the Internet, Cremers apparently understood that Smith wanted it to be disseminated.

Batzel sued both Cremers and Smith for defamation in the U.S. District Court for the Central District of California. Cremers then moved to strike the claims against him under California’s Anti-SLAPP statute, asserting that the claims constituted a “strategic lawsuit against public participation”²⁸ and that in light of § 230 Batzel could not “demonstrate a probability that she will prevail on the merits

of her complaint.” The district court denied this motion.²⁹

On appeal, the Ninth Circuit concluded that § 230 was designed to serve the twin goals previously identified in *Zeran*, namely, promotion of forums and mechanisms for robust and diverse free speech on the Internet and removal of disincentives to voluntary, private self-regulation of content.³⁰ The court considered and rejected criticism that *Zeran* had discerned a free-speech goal that, in the eyes of some commentators, Congress had not intended:

We recognize that there is an apparent tension between Congress’s goals of promoting free speech while at the same time giving parents the tools to limit the material their children can access over the Internet. As a result of this apparent tension, some commentators have suggested that the Fourth Circuit in *Zeran* imposed the First Amendment goals on legislation that was actually adopted for the speech-restrictive purpose of controlling the dissemination of content over the Internet. . . . These critics fail to recognize that laws often have more than one goal in mind, and that it is not uncommon for these purposes to look in opposite directions. The need to balance competing values is a primary impetus for enacting legislation. Tension within statutes is often not a defect but an indication that the legislature was doing its job.³¹

As a threshold matter, the *Batzel* court held that Cremers, as the operator of a website and the moderator of a Listserv, may claim the protections of § 230. Recognizing that § 230(c) (1) protects “providers or users” of interactive computer services, the court ruled that Cremers certainly should fit within the category of service user even if it might be argued (as the district court had held) that he is not a service provider.³²

The core question for the *Batzel* court was whether Cremers’ affirmative selection of Smith’s e-mail for broader circulation rendered Cremers an “information content provider” (along with Smith) with respect to the e-mail, a status that would deprive him of immunity. Although the district court had ruled against Cremers on this point,³³ the Ninth Circuit majority disagreed, holding that Cremers’ selection of particular content for dissemination did not transform him into an additional “information content provider.” The majority explained that § 230(c)(1), by its terms, applies to claims based on a “publisher’s” function, a function that necessarily includes choosing material for dissemination:

[T]he exclusion of “publisher” liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered

material and to edit the material published while retaining its basic form and message.

. . . Because [the individual] did no more than select and make minor alterations to Smith’s e-mail, [he] cannot be considered the content provider of Smith’s e-mail for purposes of § 230.³⁴

The *Batzel* majority nevertheless found it necessary to consider, as a final matter, “one twist on the usual Section 230 analysis,” which arose from the fact that the original author of the defamatory message (Smith) maintained that he never intended for his message to be disseminated to others via the Internet.³⁵ The majority concluded that, based on the “structure and purpose of § 230(c)(1),” a defendant may not enjoy that provision’s immunity unless the third party who provided him with the information “provided [it] for use on the Internet or another interactive computer service.”³⁶ From this proposition flowed the majority’s ultimate holding:

We therefore hold that a service provider or user is immune from liability under § 230(c) (1) when a third person or entity that created or developed the information in question furnished it to the provider or user under circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other “interactive computer service.”³⁷

This holding prompted dissents (first from Judge Gould, who was on the original panel,³⁸ and then from Judges Gould, Tallman, and Callahan) when the Ninth Circuit denied rehearing en banc.³⁹ Judge Gould reasoned that § 230 immunity simply should not apply to defendants who select specific information for publication:

If the defendant took an active role in selecting information for publication, the information is no longer “information provided by another” within the meaning of Section 230. . . .

A person’s decision to select particular information for distribution on the Internet changes that information in a subtle but important way: it adds the person’s imprimatur to it. The recipient of information that has been selected by another person for distribution understands that the information has been deemed worthy of dissemination by the sender.⁴⁰

Judge Gould asserted that a core policy concern reflected in § 230, i.e., that Internet intermediaries not be held liable for the thousands or millions of communications they facilitate, is not really at issue when an individual, by selecting specific content for redistribution, has the opportunity to eradicate defamatory material:

These policy concerns have force when a potential defendant uses or provides technolo-

gy that enables others to disseminate information directly without intervening human action. These policy concerns lack force when a potential defendant does not offer users this power of direct transmission. If a potential defendant employs a person to screen communications to select some of them for dissemination, it is not impossible (or even difficult) for that person to screen communications for defamatory content.⁴¹

Under the approach advocated by the dissenting opinions, “a person who receives a libelous communication and makes the decision to disseminate that message[] to others . . . would not be immune.”⁴²

Carafano v. Metrosplash.com

In *Carafano v. Metrosplash.com*, the Ninth Circuit held that a website operator was not an “information content provider” with respect to allegedly defamatory information and therefore was immune from liability, notwithstanding its active role in soliciting particular types of information from users and in formatting that information into uniformly structured personal profiles. The defendant in the case, now a subsidiary of Lycos, Inc., operates a subscription-based Internet website, called Matchmaker.com, that enables users to find and communicate with other people who have compatible romantic interests. Users of the service generate personal profiles about themselves by answering dozens of multiple-choice and essay questions, providing photos, and submitting personal contact information.⁴³ The Matchmaker system formats this diverse array of user-supplied information into detailed, searchable “personal profiles” that it displays on the website. Aside from screening the photos for obscenity, Matchmaker does not review or edit the user-supplied information before its system generates the profiles.

The plaintiff, Christianne Carafano, is an actress who was the victim of a *Zeran*-like hoax. An unknown user of the Matchmaker service created a bogus profile of Carafano that included her real name, address, and photograph and characterized her as licentious and promiscuous.⁴⁴ Carafano sued the website operator, Matchmaker.com Inc., for defamation and invasion of privacy.⁴⁵

In the district court, Matchmaker sought to defend itself both under § 230(c)(1) and on traditional First Amendment grounds, arguing that Carafano was a public figure and that it had not published the profile with “actual malice” as defined in *New York*

Times v. Sullivan.⁴⁶ On Matchmaker's motion for summary judgment, the district court held that Matchmaker was not immune under § 230, but the court upheld the First Amendment defense and dismissed Carafano's claims on that basis.⁴⁷ On the § 230 question, the district court preliminarily held that Matchmaker was a "provider . . . of an interactive computer service" and therefore was the sort of entity that could claim the benefits of the statute.⁴⁸ But the district court rejected the immunity claim because Matchmaker solicited particular types of information through specific questions and reformulated that information into uniformly structured personal profiles, a role that the court said amounted to "developing the information that gets posted."⁴⁹ Distinguishing the Matchmaker service from "bulletin board" services akin to the service at issue in *Zeran*, the district court reasoned as follows:

Matchmaker contributes to the content of the profiles by asking specific questions with multiple choice answers and specific essay questions. It is responsible, in part, "for the creation or development of information" contained in the profiles. . . . By contrast, a bulletin board and the other types of on-line forums [to which § 230 has been deemed applicable] merely provide the forums for the speech and do not contribute to the creation or development of information provided by the users of these services. This Court's determination would be different if Matchmaker simply acts as a conduit of the information, but it does not.⁵⁰

On appeal, a unanimous Ninth Circuit panel affirmed the district court's dismissal of the claims but reversed the district court's holding regarding the applicability of § 230. In so ruling, the court made clear that § 230 immunity should apply not merely to relatively basic online communications tools such as e-mail, bulletin boards, chat rooms, and instant messaging, but also to sophisticated, highly interactive communications tools such as Matchmaker's profile-creating website.⁵¹ According to the Ninth Circuit, the operative inquiry for determining whether the information was "provided by another information content provider" must focus on who supplied the actual harmful content:⁵² Even if "the questionnaire facilitated the expression of information by individual users," the court reasoned, Matchmaker "cannot be considered an 'information content provider' under the statute because no profile has any content until a user actively creates it."⁵³

The *Carafano* ruling, although breaking important new ground, clearly coincides with Congress's intent that § 230

further the goal of allowing the Internet and related electronic media to achieve their full technological potential. As the court reasoned, "[W]ithout standardized, easily encoded answers" derived from its multiple-choice questions, "Matchmaker might not be able to offer these services and certainly not to the same degree."⁵⁴ The ruling thus helps to ensure that concerns about liability for third-party content will not deter service providers from inventing and implementing new and more effective ways for people to find and communicate with one another.

Zeran Under Attack?

In sharp contrast to the otherwise uniform body of case law following *Zeran's* expansive reading of § 230(c)(1), and apparently without regard to or knowledge of the explicit endorsement of that case law in the 2002 congressional report, two appellate courts issued decisions articulating very different interpretations of that provision. In one of these cases, the Seventh Circuit's comments concerning § 230 radically departed from existing case law but were mere dicta. In the other, an intermediate appellate court in California issued a lengthy opinion that directly and expressly rejected *Zeran's* core holding that immunity may exist under § 230(c)(1) even if the defendant was aware of the allegedly tortious material.

Doe v. GTE Corp.

In *Doe v. GTE Corp.*, a group of college athletes brought an action in Illinois state court seeking to hold various defendants, including GTE Corp. and Genuity Inc. (referred to collectively as GTE), liable for damages stemming from a scheme in which other defendants created hidden-camera videotapes depicting the plaintiffs in various states of undress in athletic locker rooms and then marketed those tapes on websites. They sued GTE solely because the websites on which the videos were marketed had utilized web hosting and Internet access services provided by GTE. After removal of the case to federal court, the U.S. District Court for the Northern District of Illinois dismissed all of the state law claims against the GTE defendants based on § 230(c)(1).⁵⁵

The Seventh Circuit affirmed the dismissal but not on the basis of § 230. Instead, it held that the plaintiffs had failed to identify any source of state law

for their claims.⁵⁶ As a result, the Seventh Circuit did not need to reach the question of whether § 230 might provide an independent basis for dismissal.

Nonetheless, Judge Easterbrook, writing for a unanimous panel, took the occasion to ponder whether § 230(c)(1) provides any immunity at all. He recognized that four other circuits had ruled that § 230(c)(1) "blocks civil liability when web hosts and other Internet service providers (ISPs) refrain from filtering or censoring the information on their sites" and acknowledged that "[n]o appellate decision is to the contrary."⁵⁷ Nevertheless, wondering aloud whether § 230(c)(1) is really something entirely different, he offered two alternative constructions that bear little or no resemblance to any prior judicial treatment of the statute.

First, Judge Easterbrook posited that § 230(c)(1), rather than granting any immunity at all, might instead be a "definitional clause" that somehow clarifies § 230(c)(2), which he said affords protection to an entity, like a web host, "that does filter out offensive material."⁵⁸ He suggested that this reading of § 230(c) would avoid a perceived inconsistency between its text and its title, "Protection for 'Good Samaritan' blocking and screening of offensive material." He then rhetorically asked, "Why not read § 230(c)(1) as a definitional clause rather than as an immunity from liability, and thus harmonize the text with the caption?"⁵⁹ Under the "definitional" reading, according to Judge Easterbrook, "an entity would remain 'a provider or user'—and thus be eligible for the immunity under § 230(c)(2)—as long as the information came from someone else; but it would become a 'publisher or speaker' and lose the benefit of § 230(c)(2) if it created the objectionable information."⁶⁰

Second, Judge Easterbrook offered in a single sentence "yet another possibility" for what § 230(c)(1) might mean: "[P]erhaps § 230(c)(1) forecloses liability that depends on deeming the ISP a 'publisher'—defamation law would be a good example of such liability—while permitting the states to regulate ISPs in their capacity as intermediaries."⁶¹

After all this speculating, however, Judge Easterbrook ultimately threw up his hands, saying that "[w]e need not decide which understanding of § 230(c) is superior," thus underscoring that this entire detour was pure dicta.

Neither of Judge Easterbrook's suggested alternative constructions seems to withstand scrutiny. The notion that § 230(c)(1) is merely "definitional" makes no sense. That provision is not cast in the way that Congress ordinarily writes definitions. No term within § 230(c)(2) would logically seem to be defined by the language in § 230(c)(1). Section 230 contains its own separately designated set of "definitions."⁶² The role that Judge Easterbrook perceives the supposed "definition clause" might play, i.e., negating the protections of § 230(c)(2) in cases where the content that the defendant censors is content that the defendant itself created, is nonsensical because there are no situations in which a party is likely to be sued for censoring its own content.

The alternative that § 230(c)(1) might operate only with respect to causes of action such as defamation, where being a "publisher" is a formal element of the cause of action, also is unfounded. This reading contradicts the many other carefully considered decisions that have held that § 230 broadly immunizes against any cause of action that would hold a service provider liable for making available harmful content provided by someone else. It also fails to take into account the fact that the purposes of § 230 are not tied in any logical manner to concerns relating to defamation liability rather than to other forms of liability. Nor can it be squared with the fact that § 230 expressly carves out a number of categories of laws (such as intellectual property laws, any criminal federal statute, and any law similar to the Electronic Communications Privacy Act) whose enforcement is not affected by the statute's immunity clauses.⁶³ If operation of § 230(c)(1) were narrowly confined to only defamation and similar torts, these exceptions from the immunity scheme would be superfluous.

Barrett v. Rosenthal

In *Barrett v. Rosenthal*, the § 230 defendant also asserted immunity for third-party content contained in an e-mail that she had received from someone she did not know and that she thereafter intentionally posted on open Internet forums. But rather than following in *Batzel*'s path and focusing on whether the defendant had played a role in "creating or developing" the content and thereby had forfeited the protections available to more passive service providers such as AOL, the California Court of Appeal

instead issued a wholesale reinterpretation of the scope of protection available to any defendant under § 230(c)(1). In particular, the *Barrett* court rejected the previously well-settled proposition, set forth in *Zeran* and adopted in numerous other cases, that § 230(c)(1) protects defendants from liability even if they had knowledge or "notice" of allegedly tortious content when it was being disseminated.

In *Barrett*, the § 230 defendant, Ilena Rosenthal, was an outspoken supporter of various forms of alternative medicine who posted commentary about Dr. Terry Polevoy, a well-known critic of alternative health-care practices and products, on certain Usenet Newsgroups that focus on the topic.⁶⁴ One of her postings simply repeated verbatim the entire contents of an e-mail message that she had received from Timothy Bolen, an apparently like-minded individual whom she did not know. That message stated that, according to police reports, Polevoy had stalked a woman who had criticized him.⁶⁵ After Polevoy complained to Rosenthal that Bolen's message was false and threatened to sue her unless she withdrew it, Rosenthal posted additional Internet messages, accompanied by copies of Bolen's original message, describing Polevoy's threat.⁶⁶ Polevoy then sued both Rosenthal and Bolen for defamation.⁶⁷

Like the defendant in *Batzel*, Rosenthal moved to strike the claims against her pursuant to California's anti-SLAPP statute on the basis of § 230(c)(1), among other defenses. Citing *Zeran* and its progeny, the trial court held that § 230 provided her with a complete defense.⁶⁸

The California Court of Appeal reversed this aspect of the Superior Court's decision, holding that § 230 did not bar imposition of liability on Rosenthal for disseminating Bolen's message. This ruling turned entirely on the court's conclusion that § 230 immunity is not available to a defendant, either an individual "user" or a "provider" of an interactive computer service, if that defendant "knows or had reason to know" of the tortious nature of the third-party content.⁶⁹ According to the court, whenever a defendant can be said to have been "on notice" of the unlawful

material, a claim for defamation ceases to treat the defendant as a "publisher or speaker" of the content at issue and instead subjects the defendant to an entirely distinct treatment dubbed "distributor" liability.⁷⁰ The court sought to ground this conclusion on pre-§ 230 case law that distinguished between the standard for imposing liability on original publishers of material, such as newspapers, and the standard applicable to distributors of that material, such as newsstands: by virtue of their status as conduits for large quantities of content, and in light of fundamental First Amendment implications, distributors typically may not be held liable for information that they transmit unless they have notice of its tortious nature.⁷¹ According to *Barrett*, by enacting § 230, Congress intended to ensure that providers and users of interactive computer services would be subject to liability only under the heightened standards normally afforded to distributors.

The court's opinion in *Barrett* candidly acknowledged that its narrow interpretation of § 230(c)(1) is diametrically

The *Barrett* court candidly acknowledged that its narrow interpretation is diametrically opposed to the express holdings of *Zeran* and many other cases.

opposed to the express holdings of *Zeran* and many other cases.⁷² It cites no precedent whatsoever, from any jurisdiction, that contradicts or even questions *Zeran*. It entirely ignores, apparently because none of the parties mentioned it, the 2002 congressional report that explicitly embraced *Zeran* and its progeny as "correctly decided."

The *Barrett* court sought to draw support for its interpretation from academic commentaries that have criticized *Zeran*.⁷³ First, *Barrett* agreed with law review commentators who have contended that by using the word "publisher," Congress meant to exclude distributor liability from § 230's scope.⁷⁴ But *Zeran* and numerous other courts (including two other California appellate courts) had explicitly considered and rejected that exact

argument on the grounds that “distributor” liability is simply a “subset of publisher liability” and that such claims therefore “treat[]” the defendant as a “publisher or speaker” of the content at issue.⁷⁵

Second, the *Barrett* court concluded that *Zeran* overstated the free speech goal postulated by § 230. Like Judge Easterbrook in *Doe v. GTE Corp.*, Justice Kline “question[ed] whether a statute that encourages the restriction of certain types of online material . . . can fairly be said to reflect a desire ‘to promote unfettered speech.’”⁷⁶ In addition, the *Barrett* court disputed whether notice-based liability would in any event chill speech on the Internet, rejecting *Zeran*’s discussion of that effect as “speculative.”⁷⁷

The *Barrett* court’s discussion of § 230’s purposes reveals that it did not fully appreciate the contours of the problem. According to *Barrett*, notice-based liability may not unduly chill speech because Internet services would face market pressures not to censor users too casually.⁷⁸ But if it became uneconomical to allow user speech to flourish due to a flood of lawsuits based on that speech, then the service might well choose simply to shutter some or all of its communication services and forums.

The *Barrett* court also emphasized that it would be very difficult for plaintiffs to prevail on defamation claims; in addition to proving notice, plaintiffs would have to satisfy the other traditional elements of defamation, which is already a difficult tort on which to prevail.⁷⁹ But with millions of users, the potential for liability is not the only staggering factor; the potential of having to defend against numerous claims based on third-party content that proceed beyond the threshold stage, where § 230 defenses are often successfully raised, could itself be crippling.

Third, *Barrett* concluded that *Zeran*’s broad reading of § 230(c)(1) actually undermines Congress’s goal of self-regulation:

Immunizing providers or users from primary publisher liability advances this shared purpose because such liability would punish providers or users who tried to identify and remove offensive material but failed. But immunizing them as well from distributor liability would be inconsistent with that purpose, because it would protect providers or users who not only made no independent effort to identify and remove offensive material, but who failed or refused to remove it even when placed on notice of the injurious character of the third-party content they were distributing.⁸⁰

This ignores, however, an important factor that *Zeran* recognized: if a service

provider adopts and follows a policy of trying to identify harmful online content but then fails to remove something either because it overlooked the content or it did not make what a jury later decides was the right judgment call, the provider may be deemed to have “known or had reason to know” about the tortious content. As the Fourth Circuit explained, a regime of notice-based liability therefore discourages services from setting up the self-regulatory regimes that Congress wanted to encourage.⁸¹ If the court in *Barrett* were right, then § 230 would immunize only those providers who are successful in shielding themselves from gaining “notice” of tortious content on their services. Under the regime contemplated by *Barrett*, providers who police their networks for objectionable content or establish mechanisms for receiving consumer complaints would actually be increasing their exposure to liability.

Finally, the California Court of Appeal in *Barrett* asserted, incorrectly, that it was not departing from precedent decided by other California appellate courts that had endorsed *Zeran*.⁸² In fact, both *Gentry v. eBay, Inc.*⁸³ and *Kathleen R. v. City of Livermore*⁸⁴ expressly rejected the argument embraced by the *Barrett* court.

For example, in *Gentry*, the Fourth District held that § 230 barred a claim based on allegations that an interactive computer service provider “knew or should have known about the individual defendant’s illegal or fraudulent conduct [on the service] but failed to take steps to ensure they complied with the law”:

This claim seeks to hold eBay responsible for having notice of illegal activities conducted by others on its Website, and for electing not to take action against those third parties, including by withdrawing or somehow altering the content placed by them. This is the classic kind of claim that *Zeran* found to be preempted by section 230, as one that seeks to hold eBay liable for its exercise of a publisher’s traditional editorial functions. Such claims have been uniformly rejected by the courts that have considered them.⁸⁵

The *Gentry* court also explicitly rejected the argument, advanced by the state Attorney General in an amicus brief, that § 230 distinguished between “distributor” and “publisher” liability:

Urging us to consider the legislative history of section 230, the Attorney General argues we must reject *Zeran* and its progeny and hold it does not immunize interactive computer service providers who act as distributors, that is, who publish information that they know to be false, fraudulent, defamatory, obscene, unlawful or otherwise objectionable. We are of the view that

the very language used by Congress in stating section 230’s goals reflects the breadth of the statute’s purpose, i.e., “to promote the continued development of the Internet and other interactive computer services and other interactive media” and to “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulations” (§ 230(b)(1), (2)). Such language does not reflect the limitations proposed by the Attorney General.⁸⁶

Similarly, the First District in *Kathleen R.* rejected a claim against a city based on allegations that it offered a public Internet computer service that it knew could be used, and had been used, by minors to view obscene material. The Court of Appeal held that such notice-based claims were explicitly barred by § 230:

The *Zeran* case holds that section 230(c)(1) immunity extends to distributor, as well as publisher, liability for defamation, and thus that an interactive computer service cannot be held liable merely because it has notice of a potentially defamatory statement on its service. The *Zeran* court reasoned among other things that “liability upon notice [would] reinforce [] service providers’ incentives to restrict speech,” and thereby contravene section 230’s aim of promoting the continued development of the Internet. This same consideration precludes treating respondent as a distributor of obscenity or other harmful matter merely because it has notice that such matter may be transmitted through its library computers.⁸⁷

Trouble Ahead for *Zeran* and Its Progeny?

Although the *Barrett* and *Doe v. GTE Corp.* opinions are radical departures from the entire remaining body of case law construing § 230, there is little reason to believe that they signal any real change in the law. Given the depth and breadth of the precedents following *Zeran*, together with the fact that Congress in 2002 explicitly endorsed that line of cases as “correctly decided,” it seems extremely unlikely that other courts will accept either *Barrett*’s or *Doe v. GTE Corp.*’s invitation to join in a wholesale revision of the law. This is all the more so given that many other courts, like the Ninth Circuit, have given very careful thought to these issues and thoroughly considered the criticisms that have been leveled at *Zeran*, yet nevertheless independently determined that *Zeran*’s broad construction of § 230(c)(1) is the right one. Moreover, the fact that *Barrett* and *Doe v. GTE Corp.* themselves are wholly inconsistent with one another (one offering a new view of the immunity

provided by § 230(c)(1), the other ruminating that § 230(c)(1) is not an immunity grant at all) further negates any sense that they represent a trend. It is therefore hardly surprising that, since the decision in *Doe v. GTE Corp.* and the initial California Court of Appeal decision in *Barrett*, the body of case law following *Zeran* has only continued to swell.⁸⁸ And in the *Barrett* case itself, the California Supreme Court has granted review of the decision of the California Court of Appeal.⁸⁹

At least for now, then, it appears that *Barrett* and *Doe v. GTE Corp.* are very likely to amount to nothing more than aberrational outliers. But they are also important reminders that the law governing intermediary liability for third-party content, though largely settled, may still be subject to occasional judicial dissent. As a result, § 230 defendants, both users and providers, cannot yet take for granted that courts will always and automatically agree with them as to the section's scope. 

Endnotes

1. 47 U.S.C. § 230 (1996).
2. 129 F.3d 327 (4th Cir. 1997).
3. *Doe v. America Online, Inc.*, 783 So. 2d 1010, 1018–1028 (Fla. 2001) (Lewis, J., dissenting).
4. 333 F.3d 1018 (9th Cir.), *reh'g denied*, 351 F.3d 904 (9th Cir. 2003).
5. 339 F.3d 1119 (9th Cir. 2003).
6. 347 F.3d 655 (7th Cir. 2003).
7. 9 Cal. Rptr. 3d 142, 152 (Ct. App. 2004), *review granted, unpublished by* No. S122953, 2004 Cal. LEXIS 3044 (Cal. Apr. 14, 2004). The original version of the California Court of Appeal's decision in *Barrett*, issued on October 15, 2003, attracted some attention last fall on account of its novelty. *See Barrett v. Rosenthal*, 5 Cal. Rptr. 3d 416 (Ct. App. 2003). That decision was vacated following the grant of a request for rehearing. The final version of the decision was issued on January 21, 2004. Both the original and final versions were equally hostile to *Zeran's* broad interpretation of the immunity provision.
8. On April 14, 2004, the California Supreme Court granted Rosenthal's petition for review. In addition to the question that she presented, which addressed the appellate court's analysis, the California Supreme Court asked the parties to brief two additional questions: (1) the meaning of the word *user* in § 230 and (2) the relevance of "whether a user is engaged in active or passive conduct." *Barrett*, 2004 Cal. LEXIS 3044, at *1.
9. 47 U.S.C. § 230(c)(1) (1996). Section 230(f)(2) defines *interactive computer service* to encompass not only basic Internet access services, but also any service that "provides or

enables computer access by multiple users to a computer server." Section 230(f)(3) defines *information content provider* to include "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."

10. *Id.* § 230(c)(2).
11. *Id.* § 230(e)(3).
12. 129 F.3d at 330 (Wilkerson, J.).
13. *Id.* at 330.
14. *Id.* at 331–32.
15. *Id.* at 331.
16. *Id.* at 331–32.
17. *Id.* at 332.
18. *Id.* at 330–31.
19. *Id.* at 333.
20. *Id.*
21. *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003). *See, e.g.*, *Green v. America Online, Inc.*, 318 F.3d 465 (3d Cir. 2003); *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Doe v. America Online, Inc.*, 783 So. 2d 1010, 1013–17 (Fla. 2001); *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 718 (Ct. App. 2002); *Kathleen R. v. City of Livermore*, 104 Cal. Rptr. 2d 772, 779 n.3 (Ct. App. 2001); *Barrett v. Fonorow*, 799 N.E.2d 916, 924–26 (Ill. Ct. App. 2003); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 38–42 (Wash. Ct. App. 2001); *PatentWizd, Inc. v. Kinko's, Inc.*, 163 F. Supp. 2d 1069, 1071 (D.S.D. 2001) ("In enacting § 230, Congress meant to insulate distributors as well as publishers from liability for defamation."); *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998).
22. *See* 47 U.S.C.A. § 941(e)(1).
23. H.R. REP. NO. 107-449, at 13 (2002).
24. 47 U.S.C. § 230(f)(3) (1996).
25. *Batzel*, 333 F.3d at 1032–35.
26. *Id.* at 1036–41 (Gould, J., dissenting); *Batzel v. Smith*, 351 F.3d 904 (9th Cir. 2003) (Gould, J., dissenting from denial of rehearing en banc).
27. 333 F.3d at 1021 (quoting Smith's e-mail).
28. CAL. CIV. PROC. CODE § 425.16 (West 2001).
29. *Batzel*, 333 F.3d at 1023.
30. *Id.* at 1026–30.
31. *Id.* at 1028.
32. *Id.* at 1030–31.
33. *Batzel v. Smith*, No. CV 00–9590 SVW(AJWX), 2001 WL 1893843, at *8 (C.D. Cal. June 5, 2001), *rev'd*, 333 F.3d 1018 (9th Cir. 2003).
34. *Batzel*, 333 F.3d at 1031.
35. *Id.* at 1032.
36. *Id.* at 1033.
37. *Id.* at 1034.
38. *Id.* at 1036.
39. *Batzel v. Smith*, 351 F.3d 904 (9th Cir. 2003).
40. *Batzel*, 333 F.3d at 1038 (Gould, J., dissenting).
41. *Id.* at 1039.

42. *Id.*

43. *Carafano v. Metrosplash.com, Inc.*, 207 F. Supp. 2d 1055, 1060 (C.D. Cal. 2002), *rev'd*, 339 F.3d 1119 (9th Cir. 2003).
44. *Id.* at 1061.
45. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003).
46. 376 U.S. 254 (1964).
47. *Metrosplash.com*, 207 F. Supp. 2d at 1068, 1077.
48. *Id.* at 1066.
49. *Id.* at 1066–67.
50. *Id.* at 1067.
51. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124–25 (9th Cir. 2003).
52. *Id.*
53. *Id.* at 1124.
54. *Id.* at 1125.
55. *See Does 1-30 v. Franco Prods., No. 99 C 7885*, 2000 WL 816779 (N.D. Ill. 2000), *aff'd on other grounds*, *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003).
56. *Doe v. GTE Corp.*, 347 F.3d 655, 660–61 (7th Cir. 2003) (rejecting the plaintiffs' "negligent entrustment of chattels" theory, and noting that "[p]laintiffs do not cite any case in any jurisdiction holding that a service provider must take reasonable care to prevent injury to third parties").
57. *Id.* at 659–60 (emphasis removed).
58. *Id.* at 660.
59. *Id.*
60. *Id.*
61. *Id.*
62. 47 U.S.C. § 230(f) (1996).
63. *Id.* § 230(e) (listing exceptions).
64. *Barrett*, 9 Cal. Rptr. 3d at 145–46.
65. *Id.*
66. *Id.*
67. *Id.*
68. *See id.*
69. *Id.* at 152.
70. *Id.*
71. *See Smith v. California*, 361 U.S. 147, 152–53 (1959) (striking down ordinance that would hold bookseller liable for possession of book with obscene material without evidence that bookseller had knowledge of the book's content); *Zeran v. America Online*, 129 F.3d 327, 332–33 (4th Cir. 1997) (discussing higher standard of liability for distributors); *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) (pre-§ 230 case discussing applicability of distributor standard of liability to provider of interactive computer services).
72. *Barrett*, 9 Cal. Rptr. 3d at 152–53.
73. *Id.* at 154 n.8.
74. *Id.* at 155–58.
75. *See, e.g., Zeran*, 129 F.3d at 330, 332; *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 718 (Ct. App. 2002) (rejecting proposition that § 230 "does not immunize interactive computer service providers that act as distributors, that is, who publish information that they know to be false, fraudulent, defamatory, obscene, unlawful or otherwise objectionable");

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Why U.S. Law Should Have Been Considered in the Rwanda Media Convictions

KEVIN W. GOERING, DAMION K. L. STODOLA, AND JOHN C. KNAPP

On December 3, 2003, the International Criminal Tribunal for Rwanda (ICTR or Chamber) found Ferdinand Nahimana and Jean-Bosco Barayagwiza, founders of Radio Télévision Libre des Mille Collines (RTLM), and Hassan Ngeze, the owner and editor-in-chief of *Kangura*, guilty of genocide; direct and public incitement to commit genocide; and persecution, a crime against humanity.¹ The media speech of these defendants was considered to be the impetus for the genocide of approximately 800,000 Rwandans, mostly Tutsis. All three defendants were sentenced to life in prison. Although many applaud the defendants' incarceration in this case, other aspects of the opinion, which is the first major international pronouncement on the issue of media liability since the *Streicher* case at Nuremberg,² are troubling.

In rendering its judgment, the Chamber paid little attention to its choices regarding the available standards for media liability. The Chamber opened its discussion on direct and public incitement by declaring that "a review of international law and jurisprudence on incitement to discrimination and violence is helpful as a guide to the assessment of criminal accountability for direct and public incitement to genocide, in light of the fundamental right of freedom of expression."³

Yet the Chamber's review was remarkably selective. It appropriately paid considerable attention to prior United Nations tribunal cases on these charges, but the only other sources of law it reviewed were decisions of a regional court, the European Court for Human Rights (ECHR). Although the comparative weight of persuasion that tribunals should give to the decisions of regional

and domestic courts may be controversial, the U.S. law on incitement, surprisingly, was not actively considered at all. In fact, it was only in response to the request of a defendant that the tribunal gave U.S. law any consideration at all, and that which was given was more caricature than analysis.

The Chamber appeared to believe that only in the most extreme situations are restrictions to speech allowed under American law. Although it is true that the U.S. law on incitement is the most "speech protective," a more subtle reading would have revealed some agreement with the tribunal's ultimate decision on incitement. Crafting its decision without consideration of U.S. law, the Chamber not only ignored an opportunity to unite diverse elements of the international community, but also implied that the U.S. free speech standard does not have the "blessing" of the international community, a potential problem for future cases.

Is Causation an Element?

The Chamber began its review of the international jurisprudence on incitement with the conviction of Julius Streicher for the publication of anti-Semitic articles in his Nazi propagandist newspaper, *Der Stürmer*.⁴ The Chamber decided that although the judgment against Streicher did not "explicitly note a direct causal link" between his publication and specific acts of murder," the judgment did find the publication "was a poison injected into the minds of Germans which caused them to follow the National Socialists' policy of Jewish persecution and extermination," and this sustained a conviction of incitement.⁵

The Chamber then observed that several judgments rendered in disputes brought under the International Covenant on Civil and Political Rights (ICCPR) have also held that speech restrictions are permissible (if not required) when they are "intimately linked to . . . the right to be free from incitement to racism or anti-Semitism"⁶ and "it was reasonable to anticipate that there was a causal link

between the expressions of the author and the poisoned atmosphere."⁷ Thus, from *Streicher* forward, courts hearing cases under the ICCPR and its predecessors have not required that the inciting speech be the direct cause of any specific acts but have instead been satisfied if the targeted speech "poisoned the atmosphere" with some sort of "call to arms."⁸

Canvassing the jurisprudence of the ECHR on incitement, the Chamber discovered at least one instance where liability was imposed without any finding of causation. In that case, the mere dissemination of racial or anti-Semitic views was found to be sufficient to incur liability because the journalist had not "distanced himself from the racist views and condemned them."⁹ In other cases, the ECHR found that the "statement had to be regarded as likely to exacerbate an already explosive situation in that region,"¹⁰ but, again, no evidence of direct causation was required.

Concluding its survey, the Chamber identified purpose, context, and causation as the three elements of incitement. Regarding purpose, the Chamber was satisfied with the determinative question, "Was the language intended to inflame or incite to violence?" a question which it adopted from an ECHR case.¹¹ Regarding context, the Chamber noted only that this element should be considered in determining the content and intent of the speech and that the type of publication should be considered as well.¹²

After another review of the jurisprudence it deemed relevant, the Chamber concluded that proof of causation was not required for a conviction for incitement in the *Streicher* case and has not been required by the ECHR.¹³ Thus, the Chamber defined *incitement* as "a crime regardless of whether it has the effect it intends to have."¹⁴ However, the Chamber "consider[ed] it significant [in the case of Rwanda] that in fact genocide occurred. That the media intended to have this effect is evidenced in part by the fact that it did have this effect."¹⁵

The unanswered question is why the Chamber chose to include causation as

Kevin W. Goering (goeringk@coutdert.com) is a member of Coudert Brothers LLP. Damion Stodola (stodolad@coutdert.com) is an associate in Coudert's New York office. John C. Knapp (jcknapp@hotmail.com) expects to receive his J.D. from Brooklyn Law School in June 2004 and is the 2003–2004 editor-in-chief of the Brooklyn Journal of International Law. He plans to join Coudert Brothers this fall.

one of the elements of incitement when it went out of its way to explain that causation was not required. Interestingly, the only jurisdiction in which something like causation must be proven is the United States, where imminence is part of the incitement standard.

How is Persecution “Broader”?

The Chamber began its discussion of persecution by stating that “hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds . . . constitutes persecution under Article 3(h) of its Statute.”¹⁶ However, the Chamber also recalled that “there need not be a call to action in communications that constitute persecution. For the same reason, there need be no link between persecution and acts of violence.”¹⁷ Thus, publication with discriminatory intent, i.e., “poisoning the well,” is enough for persecution.¹⁸

Remembering that “persecution is broader than direct and public incitement,”¹⁹ it is possible that a charge for persecution could exist where an incitement charge would not, for example, where there was no call to arms. The mens rea for incitement to genocide is thus imported into the persecutory acts. This has not happened in application since persecution charges have generally been made in the context of genocide.²⁰ However, it is possible that persecution could be found for publication of discriminatory materials even though those materials are mere advocacy.²¹

Allowing discriminatory advocacy to trigger persecution charges is troubling. Consider, for example, a hypothetical situation in which two authors publish equally inflammatory and discriminatory works, neither of which extend beyond mere advocacy, but one of which targets group *B*; if group *A* was subsequently the target of genocide, the author of the work targeting group *A* would be subject to persecution charges, whereas the author of the work targeting group *B* would not.

Although persecution has not been charged outside of a genocidal situation, clearly there are dangers in the present and possible applications of a crime that is “a crime regardless of whether it has the effect it intends to have.”²² It is these dangers that the U.S. standard is able to guard against.

What Choices Did the ICTR Have?

The only time the Chamber discussed U.S. law on incitement was when Mr. Ngeze’s attorneys argued that “United States law, as the most speech-protective, should be used as a standard.”²³ Following a rather exhaustive discussion of a broad range of European case law and international conventions on the broader topic of freedom of expression, the Chamber dismissed American free speech concerns with the following:

The Chamber considers international law, which has been well developed in the areas of freedom from discrimination and freedom of expression, to be the point of reference for its consideration of these issues, noting that domestic law varies widely while international law codifies evolving universal standards. The Chamber notes that the jurisprudence of the United States also accepts the fundamental principles set forth in international law and has recognized in its domestic law that incitement to violence, threats, libel, false advertising, obscenity, and child pornography are among those forms of expression that fall outside the scope of freedom of speech protection.²⁴

It should be noted (as discussed more fully later) that U.S. law would not have provided any comfort to Mr. Ngeze, much less any other defendant, on any aspect of his defense to incitement (as opposed to persecution) in light of the factual findings in this case.²⁵

These failures disclose what may be an underlying agenda in the Chamber’s decision not only to comment on the proper standards for persecution and incitement to genocide, but also to decide the much more contentious issue of how free speech rights are to be interpreted generally in international law.²⁶ Whereas European courts (and others) balance constitutional or fundamental freedoms against one another, the United States begins with enumerated and absolute prohibitions and then proceeds by allowing exceptions in certain discrete situations. The Chamber’s extensive citation to European decisions on hate speech was not necessary for the proper determination of the defendants’ guilt of incitement or persecution. The Chamber, evidently faced with a choice between the American “absolutist” approach and the European “balancing” approach,²⁷ chose the latter.

The Chamber’s reliance on European decisions and its complete exclusion of U.S. jurisprudence also raises the question of whether international law really does “codif[y] evolving universal standards”²⁸ and whether any reconciliation of the various standards might be possible so that they may be truly universally

accepted. Fundamentally, many of the European decisions are troubling from an American perspective because they might potentially subject legitimate media sources to liability for dissemination of hate speech by others.²⁹

Parameters of the U.S. Standard

The constitutional history of the United States places a premium on free speech, and the First Amendment directs Congress to pass “no law” abridging free speech.³⁰ This approach contrasts with the balancing approach adopted in many non-U.S. jurisdictions, which protect free speech, along with a host of other rights, within the rubric of an individual’s right to expression.³¹ Rights of expression in non-U.S. jurisdictions therefore compete with other rights, and conflicting rights are often balanced against each other.

The U.S. approach to speech protections, anchored in the First Amendment, begins with the metaphor of the marketplace of ideas.³² This metaphor continues to provide a persuasive guiding principle and was elaborated in Justice Brandeis’s opinion in *Whitney v. California*:

The fitting remedy for evil counsels is good [counsel] . . . [N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.³³

It is only when the market fails, that is, when “more speech” is not possible to counterbalance the effect of the suspect speech, that restrictions should be considered. The quintessential example of when “more speech” is not possible is when the prohibited act (usually violence or the threat thereof) that the speech is inciting follows quickly (imminently) after the inciting speech and there is, therefore, no time for more speech. In such a situation, constitutionally protected free speech loses its foundational principle, and the restriction of such speech is permitted.³⁴

Justice Brandeis articulated the “time to answer” test as a way to prevent the state from punishing unpopular ideas as opposed to truly dangerous expression. Accordingly, in *Brandenburg v. Ohio*,³⁵ the Court overturned the conviction of a Ku Klux Klan leader convicted of criminal syndicalism for having assembled a group of Klan members, burned a cross, and made the following statements to the

group: “bury the niggers,” “niggers should be returned to Africa,” and “send the Jews back to Israel.” The Court held that the Ohio statute violated the guarantees of the First Amendment because it purported to punish “mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action.” The idea that “mere advocacy” is insufficient to justify a restriction on speech finds inspiration in Brandeis’s concurring decision in *Whitney*.³⁶

Likewise, in *Hess v. Indiana*,³⁷ the Court overturned the conviction of a demonstrator who was overheard by a police officer yelling, “[W]e’ll take the-----street later” or “We’ll take the-----street again.” The Court overturned Hess’s conviction on the basis that such acts were not imminent but planned for some future time. The protection of speech in the United States rests firmly on the belief that fear of undesirable results or even the tendency of speech to produce bad results cannot justify its punishment or suppression: “Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.”³⁸

How Would the U.S. Standard Have Been Applied?

The first important point of the Rwanda case, in terms of applying the U.S. standard, is that alternative media sources were not available. The government of Rwanda subsidized the production and distribution of radios, which were provided at no cost to members of the administration.³⁹ RTLM served as the primary and, eventually, sole means of communication in Rwanda and was used by the government to transmit instructions.⁴⁰ Once the government issued RTLM’s license, it denied licenses to all other applicants “who might have offered competing viewpoints.”⁴¹ Thus, RTLM was effectively the only means of communication and faced no competing media source in Rwanda for the relevant period.⁴² Of course, RTLM itself was not “an open forum for the expression of divergent points of view,”⁴³ and so the views expressed on it necessarily went totally unchallenged.

Under U.S. law, RTLM broadcasts would not have enjoyed broad constitutional protection because of the lack of a marketplace of ideas to counter RTLM speech.

The second important point of the Rwanda case, in terms of applying the U.S. standard, is that the speech was clearly intended to create imminent violence against a class of the population. RTLM broadcasts included rhetoric urging the Hutus to kill the Tutsis. Moreover, after the violence started, RTLM informed its listeners about the hiding places of Tutsis and the license plate numbers of their cars so the Tutsis could be found and murdered.⁴⁴

Had the U.S. standard been applied, the defendants unquestionably would have been convicted on the incitement charges.⁴⁵ Under U.S. law, the state cannot normally “forbid or proscribe advocacy of the use of force or of law violation,” but it can do so “where such advocacy is directed to inciting or producing *imminent lawless action and is likely to incite or produce such action*.”⁴⁶ Unlike the “poisoning the well” standard used by the Chamber, the imminence element would have required a showing of something like causation, but this would not have been difficult to prove. However, the charges for persecution would be considered attacking mere advocacy, and would not have been sustained in the United States.

Conclusion

The final result of the ICTR’s decision is obviously a welcome decision at a time when international law and organizations have provided little comfort to the family and friends of genocide victims. However, the decision missed an important opportunity to provide some international consensus at least on the type of hate speech involved in this case. Instead of seeking genuine consensus, the Chamber attempted to suggest consistency in international law in an area where national, regional, and other sources of law are still at odds.⁴⁷ The fear that American jurisprudence would have exonerated the defendants in this case seems misplaced, and the resulting attempt by the Chamber to cast its net beyond the facts only serves to further cloud the differences, real or imagined, between U.S. law and the free speech traditions of other nations and legal systems. In the end, this decision leaves little comfort for American free speech champions faced with increasingly aggressive European legislation and constitutional decisions affirming criminal restrictions on the dissemination of hate speech, especially when that speech does not produce immediate violence or discrimination against individuals.

One of the Rwanda prosecutors, an American, was quoted as saying that she “always thought the cure for hate speech was more speech, not less. But in the context of Rwanda, where not everyone has a platform, where there is no marketplace of ideas, international law should prevail and maybe First Amendment standard is not something you can impose.”⁴⁸ Her observation misses the mark. The First Amendment would not have protected these defendants from their incitement charges, but it would have kept this decision from being the troubling precedent it is. 

Endnotes

1. Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze, Judgement and Sentence ICTR, Case No. ICTR-99-52-T (2003).
2. Nazi Conspiracy and Aggression, Opinion and Judgment (October 1, 1946), Office of the U.S. Chief of Counsel for Prosecution of Axis Criminality 56 (1947). What distinguishes this decision from many other international opinions on the same crimes is that the defendants were facing criminal liability not only for their speech, but also as owners of media outlets that printed or broadcasted the speech of others.
3. Nahimana, Case No. ICTR-99-52-T ¶ 980.
4. *Id.* ¶ 981.
5. *Id.* (citing Nazi Conspiracy and Aggression, Opinion and Judgment (October 1, 1946), Office of the U.S. Chief Counsel for Prosecution of Axis Criminality (1947)).
6. *Id.* ¶ 989 (citing Robert Faurisson v. France, U.N. Doc. CCPR/C/58/D/550/1993 (1996) (concurring opinion by Elizabeth Evatt and David Kretzmer, joined by Eckart Klein)).
7. *Id.* ¶ 986 (citing *Ross v. Canada*, ¶ 11.5, U.N. Doc. CCPR/C/70/D/736/1997 (2000)).
8. *Id.*
9. *Id.* ¶ 993 (citing *Jersild v. Den.*, 19 Eur. Ct. H.R. 1 (ser. A) (1995)).
10. *Id.* ¶ 994 (citing *Zana v. Turkey*, 69 Eur. Ct. H.R. (ser. A) (1997)).
11. *Id.* ¶ 1002 (citing *Sürek v. Turkey*, 1999-IV Eur. Ct. H.R. 355 (1999)).
12. *Id.* ¶ 1006 (citing *Arslan v. Turkey*, 1999 Eur. Ct. H. R. No. 23462 (1999)) (noting that publication in mass media would have more impact than publication of a single book).
13. *Id.* ¶¶ 107–09.
14. *Id.* ¶ 1029.
15. *Id.*
16. *Id.* ¶ 1072.
17. *Id.* ¶ 1029.
18. *Id.*
19. *Id.* ¶ 1078.
20. *Id.* ¶¶ 1071–72.
21. Ameer F. Gopalani, *The International Standard of Direct and Public Incitement to Commit Genocide: An Obstacle to U.S. Ratification of the International Criminal*

Court Statute? 32 CAL. W. INT'L L.J. 87, 221 (2001).

22. Nahimana, Case No. ICTR-99-52-T, ¶¶ 980, 1029.

23. *Id.* ¶ 1010.

24. *Id.* ¶ 1010. The last statement of this quotation, although technically correct, conspicuously omits the rich history of First Amendment jurisprudence, which qualifies the Chamber's list of unprotected speech. Moreover, the juxtaposition of free speech with freedom from discrimination in the sentence immediately preceding the discussion of American case law has the effect of incorrectly implying that the U.S. approach to free speech involves the same balancing test between fundamental rights as is done in Canada and European countries. The United States approaches free speech from the presumption that speech cannot be abridged.

25. All defendants are found to have made statements and controlled through their media outlets the dissemination of statements that incited the immediate destruction of Tutsis and moderate Hutus. In a likely unintended nod to Justice Brandeis's decision in *Whitney v. California*, 274 U.S. 357 (1927), the Chamber even notes that there were no competing sources of news, the threat of violence was imminent, and there was collusion between the government's message and that broadcast on RTLM and printed in *Kangura*.

26. The Chamber places considerable emphasis not only on Article 19 of the ICCPR, which provides a right of free expression, but also on Article 20, which suggests that states prohibit "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence." Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze, Judgement and Sentence ICTR, Case No. ICTR-99-52-T ¶ 984 (2003). Likewise, the Chamber cites to Article 4 of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD), which requires states to criminalize "all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin. . . ." *Id.* ¶ 985. As discussed below, U.S. law conflicts with these prescriptions because it would not punish or prohibit speech that does not incite immediate violence.

27. As such, Canada has ruled that speech can be restricted. *See, e.g., R. v. Keegstra* [1990] 3 S.C.R. 697 (Can.) (finding provision of Canadian Criminal Code prohibiting the communication of statements that willfully promote hatred against any identifiable group distinguished by color, race, religion, or ethnic origin a constitutionally acceptable limit on free speech). South Africa's constitution excludes hate speech from constitutionally protected expression, the United Kingdom's Public Order Act of 1976 prohibits conduct intending to have or which is likely to incite racial hatred, and France's Gayssot Act

provides for imprisonment of up to one year for anyone who contests the existence of one or more crimes against humanity.

28. Nahimana, Case No. ICTR-00-52-T ¶ 1010.

29. *See* *Jersild v. Den.*, 19 Eur. Ct. H.R. 1 (ser. A) (1995). This decision is especially troubling from an American perspective: the trial decision basically requires legitimate media sources to disclaim opinions when those opinions are not even their own. Equally disturbing is the fact that a rather large number of dissenting judges would have denied the journalist's appeal.

30. U.S. CONST. amend. I.

31. Canadian Charter of Rights and Freedoms, I Constitution Act (1982), in *Canada Act, 1982*, c.11 (U.K.).

32. *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J.) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market"); *see also* *United States v. Rumely* 345 U.S. 41, 56 (1953) (Douglas, J., concurring) ("this publisher bids for the minds of men in the market place of ideas").

33. 33. 274 U.S. 357, 375-77 (1927) (Brandeis, J. and Holmes, J. concurring); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . .").

34. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (reversing the conviction of a KKK member who was advocating violence for political ends).

35. *Id.*

36. For those less familiar with the interrelationship of these cases, *Brandenburg* technically overruled *Whitney*. However, Justice Brandeis's opinion in *Whitney* was concurring in name only. It is largely undisputed that Justice Brandeis's opinion was, in all other respects, a stark contrast to the majority's vision of the First Amendment's proper ambit of protection. Justice Brandeis's emphasis on imminence as a necessary requirement for speech suppression was adopted in *Brandenburg*.

37. 414 U.S. 105 (1973).

38. *Whitney*, 274 U.S. at 376.

39. Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze, Judgement and Sentence ICTR, Case No. ICTR-99-52-T ¶ 342 (2003).

40. *Id.* ¶ 343.

41. Dina Temple-Raston, *Three Rwandan Media Executives Are on Trial for Inciting Genocide. Their Case – the First of Its Kind Since Nuremberg – Will Pressure International Courts to Crack Down on Free Speech*, LEGAL AFF., Sept./Oct. 2002, at 29.

42. Nahimana, Case No. ICTR-99-52-T ¶ 472.

43. Constitutional law expert Floyd Abrams opined that "even the First Amendment would not provide a basis for acquitting these defendants." Sharon LaFraniere, *Court Convicts 3 in*

1994 Genocide Across Rwanda, N.Y. TIMES, Dec. 4, 2003, at A1.

44. Dina Temple-Raston, *Journalism and Genocide—A Landmark Case in Rwanda Raises the Issue: Can Words Kill?*

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<http://www.cjr.org/issues/2002/5/rwanda-temple.asp>.

45. *Brandenburg*, 395 U.S. at 447-448; *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987).

46. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

47. Thomas Adcock, *U.N. Prosecutor Helps Convict Rwandan Trio; New Yorker Plays Role in History as Lawyer in Criminal Tribunal*, N.Y.L.J., Dec. 26, 2003.

Anomaly or Trend?

(Continued from page 9)

Kathleen R. v. City of Livermore, 104 Cal. Rptr. 2d 772, 779 n.3 (Ct. App. 2001) (agreeing with *Zeran* that "section 230(c)(1) immunity extends to distributor, as well as publisher, liability for defamation, and thus that an interactive computer service cannot be held liable merely because it has notice of a potentially defamatory statement on its service").

76. *Barrett*, 9 Cal. Rptr. 3d at 162.

77. *Id.*

78. *Id.*

79. *Id.* at 163.

80. *Id.* at 159.

81. *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

82. *Barrett*, 9 Cal. Rptr. 3d at 154 n.9 (attempting to distinguish *Gentry v. eBay*, 121 Cal. Rptr. 2d 703 (Ct. App. 2002); *Kathleen R. v. City of Livermore*, 104 Cal. Rptr. 2d 772 (Ct. App. 2001)).

83. 121 Cal. Rptr. 2d 703 (Ct. App. 2002).

84. 104 Cal. Rptr. 2d 772 (Ct. App. 2001).

85. *Gentry*, 121 Cal. Rptr. 2d at 718 (citation omitted).

86. *Id.* at 716 n.10.

87. *Kathleen R.*, 104 Cal. Rptr. 2d at 779 n.3.

88. *See* *Grace v. eBay, Inc.*, No. B168765, 2004 WL 214449 (Cal. Ct. App. Feb. 5, 2004)

(holding eBay immune from liability with respect to comments made by a user about another user in an eBay "feedback profile"); *Barrett v. Fonorow*, 799 N.E.2d 916 (Ill. Ct. App. 2003). *Grace*, which was decided by a panel of the California Court of Appeal for the Second District, came down shortly after the final version of the appellate decision in *Barrett v. Rosenthal* was issued. It is not clear whether the *Grace* court was aware of that decision. The plaintiff in *Grace* petitioned the court for rehearing, based in part on the decision in *Barrett v. Rosenthal*, and the court granted that petition on March 8, 2004. Although the *Grace* court has agreed to reconsider its decision and has asked for supplemental briefings, it has yet to issue a new ruling.

89. *Barrett v. Rosenthal*, No. S122953, 2004 Cal. LEXIS 3044 (Cal. App. 14, 2004).

First Amendment Reporter's Privilege Challenged in Privacy Act Case

JOEL KURTZBERG AND KAREN KAISER

In an unusual twist to reporter's privilege jurisprudence, former Los Alamos National Laboratory scientist Dr. Wen Ho Lee has questioned the scope of the reporter's privilege in the context of a Privacy Act¹ lawsuit against the U.S. Department of Energy (DOE), Department of Justice (DOJ), and Federal Bureau of Investigation (FBI).² In this litigation, Dr. Lee argues that five nonparty journalists should be compelled to identify the "place of employment" of their confidential sources—as opposed to the usual request for the "identity" of those confidential sources—on the theory that such information does not implicate the reporter's privilege.

When the district court addressed the inevitable motion to quash Dr. Lee's subpoenas, the court sidestepped Dr. Lee's novel legal theory and instead found that under the facts of the case, the reporter's privilege had been overcome. Thus, the court ordered the subpoenaed journalists to reveal the identity of all confidential sources if asked—even though Dr. Lee had not specifically asked for such relief.

In response, the journalists refused to provide information about their confidential sources, either their identities or where they work, and now face an application by Dr. Lee for an order finding the journalists to be in contempt. In his application, Dr. Lee has asked that the fines awarded be paid directly to him and not to the court.

The journalists expect to oppose Dr. Lee's motion and to appeal to the D.C. Circuit if they are found in contempt.

Joel Kurtzberg (jkurtzberg@cahill.com) and Karen Kaiser (kkaiser@cahill.com) are associates at Cahill Gordon & Reindel LLP, which serves as counsel to New York Times reporters Jeff Gerth and James Risen in the Wen Ho Lee case. The opinions expressed herein are those of the authors alone and do not reflect those of Cahill Gordon & Reindel LLP, Messrs. Gerth and Risen, or the New York Times.

The outcome of the case remains to be seen at this writing.

Background

Wen Ho Lee is a Chinese-American scientist who, from 1981 to 1999, worked on the design of U.S. nuclear weapons systems at Los Alamos National Laboratory in New Mexico, which is a DOE contractor. In the mid-1990s, Dr. Lee became the focus of a U.S. government investigation concerning, at first, possible espionage in transferring secret American nuclear technology to the People's Republic of China and, later, the possible illegal downloading of classified information. Dr. Lee was eventually indicted in December 1999 on fifty-nine counts of mishandling classified information. The indictment did not accuse Dr. Lee of passing on any information to the Chinese or to any other foreign government and did not include any charges of espionage.³

In September 2000, Dr. Lee pleaded guilty to a single felony count of the indictment, and the government dismissed the remaining fifty-eight counts. Dr. Lee was kept in solitary confinement while his case was pending, partially based on representations that prosecutors made to the court about the purported threat Dr. Lee posed to national security. Judge James Parker of the U.S. District Court for the District of New Mexico sentenced Dr. Lee to time served. At the sentencing hearing, Judge Parker stated that he felt he had been misled by the government in the case. He offered Dr. Lee an unprecedented apology "for the unfair manner you were held in custody by the Executive Branch."⁴

In 1999, Dr. Lee brought his Privacy Act case against the DOE, the DOJ, and the FBI. In the words of Dr. Lee's counsel, "the gravamen of Dr. Lee's complaint is that the defendants violated the federal Privacy Act by disclosing to the media information concerning the government's investigation of alleged Chinese espionage at America's nuclear laboratories and, later, alleged improper

downloading of information by Dr. Lee."⁵ Dr. Lee used the discovery process to seek information about government leaks to the media and served interrogatories, document requests, and requests for admissions. He also deposed several present and former employees from each of the three government-agency defendants.

In August 2002, Dr. Lee first began issuing subpoenas to journalists, requesting both the reporters' testimony and their newsgathering documents. The first subpoenas went to Jeff Gerth and James Risen of the *New York Times* and were followed by subpoenas to Bob Drogin of the *Los Angeles Times*; H. Josef Hebert of the Associated Press; and Pierre Thomas, who worked for CNN at the time of the broadcasts in question but now works for ABC News.⁶ The five reporters challenged the subpoenas in separate motions to quash, arguing that the information requested was fully protected by the reporter's privilege under the First Amendment, federal common law, and the D.C. Shield Law.⁷

In an October 9, 2003, Memorandum and Order, Judge Penfield Jackson of the U.S. District Court for the District of Columbia denied the motions and ordered the journalists to produce all documents responsive to the subpoenas and answer all questions about not only the places of employment of their confidential sources but also the identity of "any officer or agent of defendants, or any of them, who provided information to them directly about Wen Ho Lee."⁸

The reporters since have given deposition testimony. Each nonetheless has refused to answer questions that would reveal the identities or places of employment of their confidential sources. In each such instance, the reporter being deposed asserted his right not to respond based on a privilege grounded in the First Amendment, federal common law, and the D.C. Shield Law.

Dr. Lee has now moved for an Order to Show Cause seeking to hold the

reporters in civil contempt. He has argued that the reporters should be made to pay a fine directly to him to compensate him for losses allegedly sustained as a result of their violation of the court's initial order. The reporters plan to challenge the contempt motion and appeal any contempt ruling to the U.S. Court of Appeals for the District of Columbia.

Basis for Motions to Quash

The reporters moved to quash the subpoenas on the basis that the reporter's privilege under the First Amendment and federal common law prevented compelled disclosure because the information sought was not central to Dr. Lee's case, he had failed to exhaust all reasonable alternative sources of information, and the identities of his sources were subject to absolute protection from disclosure under the D.C. Shield Law.⁹

Reporter's Privilege in the D.C. Circuit

The reporters primarily relied on three cases, *Zerilli v. Smith*,¹⁰ *Carey v. Hume*,¹¹ and *Clyburn v. News World Communications, Inc.*,¹² to support their arguments that the law of the D.C. Circuit, based on First Amendment analysis, prevents journalists who are not party to civil actions from being compelled to disclose the information that they gather or rely upon in the course of their work.

Based on its reading of *Branzburg v. Hayes*,¹³ the D.C. Circuit has a long-established tradition of upholding and applying the reporter's privilege in civil cases. The court recognized the privilege for the first time in 1974 in *Carey*. The court did not set forth a standard for applying the reporter's privilege but rather concluded that courts, when they do apply it, should "look to the facts on a case-by-case basis in the course of weighing the need for the testimony in question against the claims of the newsman that the public's right to know is impaired."¹⁴

By 1981, the court more fully developed the justification underlying the reporter's privilege and set forth a standard for its application. In *Zerilli*, which was also a Privacy Act case, the court recognized that newsgathering requires the protections afforded by the privilege and that *Branzburg* "explicitly acknowledged the existence of First Amendment protection for news gathering."¹⁵ The court, however, distinguished the criminal context of *Branzburg* from

the civil context of *Zerilli* and the earlier case, *Carey*, holding that *Branzburg* "is not controlling" in civil cases.¹⁶ In reaching this conclusion and thereby barring the reporters' depositions, the *Zerilli* court recognized that "[e]very other circuit that has considered the question has also ruled that a privilege should be readily available in civil cases."¹⁷ The court concluded that "[e]fforts will be taken to minimize impingement upon the reporter's ability to gather news. Thus, in the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege."¹⁸

Following this precedent, the U.S. District Court for the District of Columbia has repeatedly recognized and applied the reporter's privilege in civil cases, protecting reporters from being compelled to divulge their confidential sources or disclose their newsgathering materials.¹⁹ Courts routinely have followed the declaration of the *Zerilli* court that "in the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege."²⁰

The Exhaustion Factor

Dr. Lee contended that the reporter's privilege should yield because he had satisfied each of the *Zerilli* factors, but the record revealed that none of the criteria, particularly the exhaustion requirement, was satisfied. The D.C. Circuit has recognized that the exhaustion requirement is "very substantial."²¹ In the words of the *Zerilli* court, "[e]ven when the information [sought] is crucial to a litigant's case, reporters should be compelled to disclose their sources only after the litigant has shown that he has exhausted every reasonable alternative source of information."²² That court further held that "appellants [cannot] escape their obligation to exhaust alternatives because they are willing to accept . . . [defendant's] statement that an internal investigation had not revealed any wrongdoing by employees."²³ Some courts, including the U.S. Supreme Court, have required parties to take as many as sixty-five depositions before finding that the exhaustion requirement has been met.²⁴

By the time the district court heard the reporters' motions to quash Dr. Lee's subpoenas, fact discovery—other than that of journalists—had closed. Dr. Lee had taken approximately twenty depositions of present or former government employees. The reporters submitted that

his efforts were inadequate to satisfy the strict exhaustion requirement and noted that Dr. Lee:

- Chose not to depose additional people who were named by the twenty witnesses whom he did depose. These people were identified, some by multiple deponents, as knowledgeable about the investigation of Dr. Lee, the alleged leaks, or both.
- Failed to depose all the individuals who were either quoted or referred to in the reporters' articles.
- Failed to follow up on potential sources of information, regarding the alleged leaks, that were identified in various responses to written discovery requests.
- Failed to seek information to which he was entitled under the Federal Rules of Civil Procedure, including deposing Rule 30(b)(6) witnesses from each government agency regarding the alleged government leaks.
- Failed to move to compel more complete answers to interrogatories and requests for admissions. Instead, he accepted without dispute what the reporters viewed as questionable assertions of privilege by the government defendants.²⁵

Finally, several reporters also pointed out that Dr. Lee completely failed to ask the few witnesses that were deposed any questions about the journalists or their articles concerning Dr. Lee. In short, the reporters argued that he had not even come close to meeting his burden of exhausting reasonable alternative sources.

Compelled Disclosure and the D.C. Shield Law

The reporters also argued that the court should take serious account of the D.C. Shield Law, which would afford them absolute protection from compelled disclosure. The law prevents courts from compelling journalists to testify about their sources, whether confidential or not, or about undisclosed information collected during the newsgathering process.²⁶ Section 16-4703(b) provides that "[a] court may not compel disclosure of the source of any information protected under section 16-4702,"²⁷ which, in turn, protects "[a]ny news or information procured by the person while employed by the news media in the course of pursuing professional activities that is not itself communicated

to the news media.²⁸ Thus, the reporters argued that, based on the law, they should not be compelled to disclose information about their sources' places of employment.

Although courts in federal question cases typically apply federal common law to questions of privilege,²⁹ federal courts frequently look to state shield laws in determining the scope of reporters' privileges. For example, in *Baker v. F&F Investment*,³⁰ the Second Circuit looked to the New York and Illinois shield laws in reviewing a decision on a motion to compel a reporter's testimony regarding a confidential source in a civil rights class action.³¹ The *Baker* court noted that, although the state shield laws were "not conclusive in an action of this kind," the laws reflected "a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters," and thus were clearly relevant to the inquiry as to the scope of the First Amendment privilege under federal common law.³² The reporters also noted that a number of other courts similarly have looked to state shield laws in determining the scope of the reporter's privilege in federal question cases.³³

Opposition to the Motions to Quash

Dr. Lee responded to the motions to quash by arguing that (1) the reporter's privilege protects the "identity" of a confidential source; (2) testimony regarding the place of employment of a source does not always disclose the source's "identity"; and (3) employment information of a confidential source sometimes is revealed although the source's name is not. Accordingly, reasoned Dr. Lee, the privilege does not protect disclosure of a source's identifying information, such as information about his or her place of employment.

Dr. Lee rooted this argument in an analysis of the principal cases relied on by the reporters. In those cases, Dr. Lee argued, because the employment information of the confidential sources had already been revealed, the protection of the sources' "identity" could only mean protection of the sources' names, not any other identifying information. For instance, Dr. Lee argued that in *Carey*, the journalist reported that eyewitnesses had seen the plaintiff removing records from his place of employment at the

United Mine Workers of America (UMWA). At his deposition, the journalist testified as to the number of eyewitnesses who were UMWA employees, but he refused to divulge their names.³⁴

The court ordered the reporter to reveal his sources' names, explaining that in a defamation case, "[k]nowledge of the identity of the alleged source would logically be an initial element" and that "the identity of appellant's sources is critical to appellee's claim."³⁵ Dr. Lee concluded from this discussion that because the court sought disclosure of the source's identity, notwithstanding that the reporter's testimony revealed his place of employment, the word *identity* can only be interpreted as referring to the source's name. Accordingly, he concluded, the reporter's privilege is meant to protect only the names of sources and not other information about them.

Similarly, Dr. Lee argued that in *Clyburn*, although the reporter had testified that two of his sources were a D.C. police officer and an FBI agent,³⁶ the court nevertheless referred to these sources as "confidential" and recognized "the reporter's privilege to withhold the source's identity."³⁷ Once again, Dr. Lee concluded that courts draw a distinction between identifying a source's place of employment and his or her name, arguing that the privilege protects only the latter.

Dr. Lee drew similar examples from other cases, some in other circuits, none of which actually explicitly held that the privilege did not cover the identity of a source's place of employment.³⁸ Relying on this analysis, Dr. Lee argued that his subpoenas did not implicate the reporter's privilege because they sought only the place of employment of the reporters' sources. He also argued that he had satisfied the *Zerilli* factors of importance of the information to the case and exhaustion of alternative sources. Finally, Dr. Lee also dismissed the reporters' reliance on the D.C. shield law, predictably arguing that privileges in federal question cases are determined only by reference to federal privilege law.

In sum, Dr. Lee argued that in certain cases in which a source's place of employment already had been revealed, the courts still relied on the reporter's privilege to protect against disclosure of the source's "identity"; and, there-

fore, those cases necessarily must distinguish between a source's place of employment and his or her name as two entirely different concepts and, further, must hold that the privilege can apply only to the latter of the two concepts.

The Reporters' Replies

In reply, the reporters argued that no court—in the D.C. Circuit or otherwise—ever has interpreted the reporter's privilege as applying only to the name of a reporter's confidential source. Rather, most courts in the D.C. Circuit had concluded quite the opposite—that the reporter's privilege protects journalists against compelled disclosure of any information (confidential or otherwise) concerning the details of the newsgathering process.

The reporters further argued that the only reported case to have analyzed expressly the question of whether the privilege should protect against compelled disclosure of a source's place of employment concluded that the privilege in fact does extend to such information.³⁹ In *In re Burns*, the Louisiana Supreme Court considered the applicability of the Louisiana Shield Law to a reporter who refused to answer questions about the place of employment of his confidential source.⁴⁰ The court concluded that the privilege extended to questions about the source's place of employment, holding that

[t]he trial court erred in holding the reporter's privilege inapplicable. . . . R.S. 45: 1452 includes within its protective scope not only the actual name of a confidential source of information, but any disclosure of information, such as place of employment, that would tend to identify him. Otherwise, through a series of indirect questions, the identity of the informant could be obtained without the need to ask for the informant's name directly, resulting in subversion of the reporter's privilege.⁴¹

The reporters further argued that Dr. Lee's analysis ignored several key points. First, in some cases, confidential sources expressly grant reporters permission to disclose certain identifying characteristics about them in news stories, such as their place of employment, but not their names. This permitted disclosure does not diminish the protections afforded to reporters pursuant to the First Amendment.

Moreover, the reporters explained that the cases cited by Dr. Lee do not discuss the circumstances of the reporters' testimony about their sources' places of employment. In *Carey*, for example, the

witness voluntarily testified that his sources were UMWA employees. The case provides no information regarding why the witness provided that testimony. It is not clear whether that information was already included in the story. Nor is it clear whether the sources expressly gave the reporter their permission to disclose such information. In *Clyburn*, similarly, the reporter volunteered employment information about his sources but refused to divulge their names.⁴² Although the court found that the privilege protected the “identity” of the confidential sources (even after disclosure of the sources’ places of employment), it did not hold that a reporter could be compelled to disclose a confidential source’s employment information when the source’s name was protected by the reporter’s privilege. The same is true of the other cases cited by Dr. Lee in support of his distinction.

The reporters here concluded that even though, for whatever reason, the reporters in those cases provided certain information voluntarily, in none of the cases did the court address the question of whether the privilege would have covered the reporters’ efforts to avoid disclosure of such information. That is, no case made the leap in logic suggested by Dr. Lee—that the reporter’s privilege is limited solely to the source’s name. Further relying on the D.C. Shield Law, the reporters also argued that the language of the statute illustrates that identity of a confidential source’s place of employment is covered by the shield law.

October 9, 2003, Order

After full briefing, including supplemental filings by the reporters in response to Dr. Lee’s decision to put all existing fact discovery in the record, the judge issued his Memorandum and Order and denied the reporters’ motions to quash. The order relied heavily on the *Branzburg* majority opinion’s critique of the underpinnings of the reporter’s privilege—without even mentioning Justice Powell’s concurrence in that case—and concluded that “many of the Supreme Court’s countervailing considerations [to the rationale underlying the reporter’s privilege] . . . in *Branzburg* are as valid today as they were when *Branzburg* was decided, and some are particularly apposite to this case.”⁴³

The court not only rejected the reporters’ argument that Dr. Lee failed to exhaust all reasonable alternative

sources of information, but it also cast doubt on whether a First Amendment interest even exists in Privacy Act cases where the sources unlawfully disclosed confidential information to the press.⁴⁴ The judge also rejected the reporters’ reliance on the D.C.

Shield Law, stating that the statute was inapplicable in federal question cases.⁴⁵ The court ordered the five reporters to testify and required them, if asked, to “truthfully answer questions as to the identity of any officer or agent of defendants, or any of them, who provided information to them directly about Wen Ho Lee, and as to the nature of the information so provided.”⁴⁶

What Is Protected?

The court’s order directing the reporters to testify is troubling on several levels. First, in ordering the journalists to disclose, if asked, information “as to the identity” of their sources, the court evaded the difficult and novel question of whether the reporter’s privilege protects against compelled disclosure of a confidential source’s place of employment in addition to the source’s name. This issue now remains unresolved.

What Is Necessary to Prove Exhaustion?

Second, the court’s conclusion that Dr. Lee had made a requisite showing of exhaustion of all reasonable alternative sources of information creates additional uncertainty as to what must be done to demonstrate reasonable exhaustion in defeating the qualified privilege, especially if potential alternative sources make assertions of privilege themselves. Given the palpable gaps in the discovery record due to the government’s assertions of privilege and denials of knowledge, the court’s conclusion that the exhaustion requirement cannot be read as a “literal absolute”⁴⁷ in essence excuses Dr. Lee’s categorical reliance on the government’s assertions as proof of exhaustion.

Even the court recognized the gaps in the record. The court indicated that Dr. Lee admitted that discovery had been complicated from the outset by certain factors, including the government’s simultaneous investigation into the leaks and the fact that the government defendants had, “at numerous

junctures in the course of discovery, asserted a law enforcement privilege to block plaintiff’s access to relevant information.”⁴⁸

The court further acknowledged that in response to Dr. Lee’s various methods

Federal question cases typically apply federal common law to questions of privilege.

of discovery, the government’s response may have been inadequate or incomplete. According to the court, in response to his complaint, the defendants asserted a “litany of denials and disclaimers of knowledge or information sufficient to form a belief.”⁴⁹ In response to Dr. Lee’s document requests, the court stated that the defendants’ documents were “apparently inconclusive.”⁵⁰ In response to Dr. Lee’s service of interrogatories, the defendants “interposed six pages of ‘objections’ to them. . . . The information was also said to be privileged in multiple respects.”⁵¹ Finally, in response to Dr. Lee’s requests for admissions, the defendants’ responses were typically that “information known or readily obtainable is insufficient for [the agency] to admit or deny the truth of the requested information.”⁵² The court did not explain how Dr. Lee’s failure to challenge or follow up on any of these discovery mechanisms could indicate reasonable exhaustion of alternative sources.

Diminished Protection In Privacy Act Cases

Third, the implications of the order reach beyond the bare conclusion that Dr. Lee had overcome the privilege on the facts of the case. Rather, the court’s statement that it doubted whether “a truly worthy First Amendment interest resides in protecting the identity of government personnel who disclose to the press information that the Privacy Act says they may not reveal”⁵³ suggests a diminished level of protection for journalists in Privacy Act cases—based specifically on the sources’ wrongful disclosure of information. The court thus, in essence, advanced a differing standard of journalistic protection in cases where maintaining confidentiality by definition means

“conceal[ing] from the plaintiff possible governmental complicity.”⁵⁴ This position is not supported by any case in the D.C. Circuit; to the contrary, it is squarely at odds with cases that limit the holding of *Branzburg* to the criminal context and apply the reporter’s privilege to Privacy Act cases.⁵⁵

Attempts at Interlocutory Appeal

The reporters next moved for an interlocutory appeal under 28 U.S.C.

§ 1292(b), arguing that the court’s order involved controlling questions of law as to which there were substantial grounds for differences of opinion and that immediate review would materially advance the conclusion of the litigation. Simultaneously, the reporters filed a notice of appeal under 28 U.S.C. § 1291 concerning the collateral order doctrine’s exception to the “final order” rule.

In opposing the reporters’ motion for an interlocutory appeal under § 1292(b), Dr. Lee’s counsel argued that the reporters could not properly appeal until they were held in contempt. In the motion papers, Dr. Lee’s counsel stated that the reporters were refusing to provide dates certain for depositions. This was clearly not the case as Dr. Lee’s counsel had indicated that dates could be set after the motion for interlocutory appeal had been resolved. The court denied the reporters’ motion before they could even submit a reply to Dr. Lee’s opposition papers; and, on the basis of the statements in Dr. Lee’s brief about the reporters’ failure to provide dates certain for depositions, ordered a status conference at which the court would set dates for depositions. At this point, the reporters agreed upon dates for deposition with Dr. Lee’s counsel, dropped their appeal under the collateral order doctrine, and depositions proceeded.

All of the reporters were deposed. None of them revealed the identity of any confidential sources or the place of employment of those sources.

The Contempt Motion

After the completion of the depositions, Dr. Lee filed an application for an order to show cause as to why the reporters should not be found in civil contempt.⁵⁶ In another novel twist, Dr. Lee argued in his application that the court should order the reporters to pay a compensatory contempt fine directly to him,

rather than to the court, on the ground that the reporters’ failure to testify has harmed him directly.⁵⁷ Dr. Lee requested that a sanctions award be made payable directly to him in order to “compensate him for the heavy costs and burdens thrust upon him by the journalists’ continued disobedience of the Court’s Order.”⁵⁸ The reporters have not yet responded to this motion but intend to oppose it and to appeal if an order of contempt is ever entered.

Conclusion

It is not clear what the court will do next. Some of the reporters appear to have particularly strong arguments for not being held in contempt. For example, Jeff Gerth of the *New York Times* testified that he did not know the identity of the confidential sources in articles that he co-wrote with James Risén, and he refused to respond to only a single question at his deposition.

Dr. Lee is not asking the court to impose any jail time in the event that it finds any of the reporters in contempt, and the court has indicated at a status conference that its present inclination is not to do so. But the court could impose jail time or a stiff fine payable either to the court or to Dr. Lee, if it does find the reporters in contempt. In such a case, the reporters would appeal, and the D.C. Circuit would likely be presented with the issue of whether privilege applies to both the identity of the confidential sources in both this case and their place of employment. Whether the appellate court will side-step the novel issue of the privilege’s possible application to the identity of a source’s place of employment, as the lower court did, remains to be seen. ☞

Endnotes

1. Privacy Act of 1974, 5 U.S.C. § 552(a) (2000).

2. *Lee v. Dep’t of Justice*, Civil Action No. 99–3380 (TPJ). Dr. Lee argues that his personal and professional reputation was damaged by the unauthorized release of information to the press identifying him as a prime suspect in the government’s investigation of espionage for the People’s Republic of China. He now seeks to verify that the source of the disclosure to the press stemmed from the government agencies.

3. *See* Indictment, *United States v. Wen Ho Lee*, Crim. Case No. 99–1417 (D.N.M.). Charges include alleged violations of 42 U.S.C. § 2276 (2000) (tampering, altering, concealing, and removing restricted data); 42

U.S.C. § 2275 (2000) (receipt of restricted data); 18 U.S.C. § 793(c) (2000) (unlawful gathering of national defense information); and 18 U.S.C. § 793(e) (2000) (unlawful retention of national defense information).

4. *See* James Parker, *Statement by Judge in Los Alamos Case with Apology for Abuse of Power*, reprinted in N.Y. TIMES, Sept. 14, 2000, at A5.

5. Letter from Heather Hersch Gilhooly, Counsel to Dr. Lee, to Jeff Gerth, Reporter, *New York Times* (Aug. 20, 2002).

6. A sixth reporter, Walter Pincus of the *Washington Post*, reached an agreement with Dr. Lee to defer his response to the subpoena until after the results of the motions brought by the other five journalists.

7. D.C. CODE ANN. §§ 16–4702, 4703(b).

8. *Lee v. U.S. Dep’t of Justice*, 287 F. Supp. 2d 15 (D.D.C. 2003).

9. D.C. CODE ANN. §§ 16–4702, 4703(b) (2001).

10. 656 F.2d 705 (D.C. Cir. 1981).

11. 492 F.2d 631 (D.C. Cir. 1974).

12. 903 F.2d 29 (D.C. Cir. 1990).

13. 408 U.S. 665 (1972).

14. *Carey*, 492 F.2d at 636. In *Carey*, the court found that the reporter’s privilege applied but had been overcome by the facts of the case.

15. *Zerilli*, 656 F.2d at 711 n.39.

16. *Id.* at 711.

17. *Id.* at 712.

18. *Id.* The D.C. Circuit has recognized that the reporter’s privilege protects both confidential and nonconfidential sources, as well as work product and material generated in connection with newsgathering. *See, e.g.,* *Maughan v. NL Indus.*, 524 F. Supp. 93, 95 (D.D.C. 1981) (“compelled production [of notes and other materials developed in preparing a news article] ‘is equally as invidious as the compelled disclosure of . . . confidential informants’”) (internal citations omitted); *Palandjian v. Pahlavi*, 103 F.R.D. 410, 412 (D.D.C. 1984).

19. *See, e.g.,* *Hutira v. Islamic Republic of Iran*, 211 F. Supp. 2d 115 (D.D.C. 2002) (holding that reporter’s privilege shields confidential and nonconfidential information from compelled disclosure); *Aetna Life Ins. Co. v. Greeson*, Misc. No. 95–003 (D.D.C. Oct. 6, 1995); *Grunseth v. Marriott Corp.*, 868 F. Supp. 333, 334 (D.D.C. 1994) (“*Branzburg* has since been interpreted by our D.C. Circuit in *Zerilli v. Smith*. The rationale of that case is both apt and eloquent . . .”); *Mgmt. Info. Tech., Inc. v. Alyeska Pipeline Serv. Co.*, 151 F.R.D. 471, 477 (D.D.C. 1993) (“The D.C. Circuit has made clear that in a civil case the reporter’s privilege is to be entitled to great weight.”); *Liberty Lobby, Inc. v. Rees*, 111 F.R.D. 19 (D.D.C. 1986) (denying plaintiff’s motion to compel identity of confidential source); *Palandjian*, 103 F.R.D. at 412 (holding that privilege protected reporter from compelled disclosure of nonconfidential notes; “the

overarching public policy is what the First Amendment qualified privilege is designed to protect, and not merely the component of confidentiality"); *Dowd v. Calabrese*, 577 F. Supp. 238 (D.D.C. 1983) (holding that First Amendment interest outweighed plaintiffs' need for evidence); *Maughan*, 524 F. Supp. at 93 (granting reporter's motion to quash subpoena).

20. *Zerilli*, 656 F.2d at 712 ("[I]f the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished."); see also *Aetna Life*, slip op. at 4.

21. *Zerilli*, 656 F.2d at 714.

22. *Id.* at 713.

23. *Id.* at 715.

24. See *In re Roche*, 448 U.S. 1312, 1316 (1980) (requiring plaintiff to depose sixty-five individuals); *Carey v. Hume*, 492 F.2d 631, 639 (D.C. Cir. 1974) (suggesting that taking sixty depositions prior to compelling disclosure is reasonable).

25. This, too, presented a novel legal question—namely, the degree to which a party that needs to satisfy the exhaustion requirement to overcome the reporter's privilege must challenge other assertions of privilege by possible alternative sources.

26. Section 16-4702 provides the following:

Except as provided in section 16-4703 [which exceptions do not apply], no judicial, legislative, administrative, or other body with the power to issue a subpoena shall compel any person who is or has been employed by the news media in a news gathering or news disseminating capacity to disclose:

(1) The source of any news or information procured by the person while employed by the news media and acting in an official news gathering capacity, whether or not the source has been promised confidentiality; or

(2) Any news or information procured by the person while employed by the news media in the course of pursuing professional activities that is not itself communicated in the news media, including any: (A) Notes; (B) Outtakes; (C) Photographs or photographic negatives; (D) Video or sound tapes; (E) Film; or (F) Other data, irrespective of its nature, not itself communicated in the news media. D.C. Code Ann. § 16-4702 (2001).

27. D.C. CODE ANN. § 16-4703(b) (2001).

28. D.C. CODE ANN. § 16-4702(2) (2001).

29. FED. R. EVID. 501.

30. 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

31. *Id.* at 780.

32. *Id.* at 782. See also *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987) (concluding court in federal question case should not "ignore New York's policy of giving protection to professional journalists" under shield law), *cert. denied*, 481 U.S. 1015 (1987).

33. See, e.g., *United States v. Cuthbertson*, 630 F.2d 139, 146 n.1 (3d Cir. 1980) (finding that state law was an "independent and congruent basis of authority" for the reporter's privilege under federal common law), *cert. denied*, 449 U.S. 1126 (1981); *Church of Scientology Celebrity Ctr. Int'l v. IRS*, 779 F. Supp. 273, 274 (S.D.N.Y. and C.D. Cal. 1991) (looking to New York Shield Law in federal question case and concluding that "[w]hile the federal law of privilege controls [in a federal question case], courts have also considered the applicable state law in the jurisdiction where the reporter's deposition was noticed"); *Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co.*, 455 F. Supp. 1197, 1200 (N.D. Ill. 1978) (looking to Illinois Reporter's Privilege Act in federal question case because in cases where "there is no controlling federal statute on the asserted privilege, the district court for its guidance may consider existing state law concerning the privilege").

34. 492 F.2d at 633.

35. *Id.* at 637.

36. 903 F.2d at 34-35.

37. *Id.* at 35.

38. See, e.g., *Dowd v. Calabrese*, 577 F. Supp. 238 (D.D.C. 1983); *Liberty Lobby, Inc. v. Rees*, 111 F.R.D. 19 (D.D.C. 1986); *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998).

39. *In re Burns*, 484 So. 2d 658 (La. 1986).

40. LA. REV. STAT. § 45: 1452 (1999). This statute protects reporters from compelled disclosure of "the identity of any informant or any source of information obtained by him from another person while acting as a reporter."

41. *Id.*

42. See *Clyburn*, 903 F.2d at 34-35.

43. *Lee v. Dep't of Justice*, 287 F. Supp. 2d 15, 23 (D.D.C. 2003).

44. *Id.* at 24.

45. The Court explained that

[w]hatever may be its force in the context of a civil common law action in a court of the District of Columbia the D.C. statute is inapplicable here. Congress has never enacted a federal counterpart to the D.C. Shield Law, and plaintiff's sole cause of action in this case is predicated upon a federal statute creating both the defendants' duty to act and the plaintiff's private right to enforce it in a federal district court. Evidentiary privileges in cases arising under federal substantive law in federal court are governed exclusively by the federal law of privilege." *Id.* at 17.

46. *Id.* at 25.

47. *Id.* at 23.

48. *Id.* at 20 n.5

49. *Id.* at 21.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 23.

54. *Id.* at 24.

55. See, e.g., *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Tripp v. Dep't of Defense*, No. CIV.A 01-157, 2003 WL 22239253 (D.D.C. Sept. 30, 2003).

56. Walter Pincus of the *Washington Post*, who had agreed to defer his response to his subpoena until the other reporters' motions to quash had been resolved, also gave deposition testimony and refused to identify his sources or their places of employment. Dr. Lee filed a motion to compel Mr. Pincus to respond to those questions to which he refused to respond, rather than a motion for contempt. Dr. Lee has requested that the Court put Mr. Pincus's case on the same track as those of the other reporters by not ruling on the Order to Show Cause until it has ruled on the motion to compel against Mr. Pincus.

57. See generally *United States v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1947).

58. Plaintiff Wen Ho Lee's Application for an Order to Show Cause why non-parties James Risen, Jeff Garth, Robert Drogin, Josef Hebert, and Pierre Thomas should not be found in Civil Contempt, at 24.

ABA on the Move

Effective May 17, 2004,
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Florida's Sunshine Laws, Media Scandals, and More Discussed at Ninth Annual Conference

ALAIN LAPTER, DOUGLAS J. STEINKE, AND LYNNORE LAWTON THAMES

The Ninth Annual Conference offered the potpourri that Forum members have come to expect: plenary sessions on privacy issues and the Internet, media scandals, and a retrospective of *Herbert v. Lando* (featuring all but one of the original players); and five concurrent workshops, known collectively as the "Hot Issues." The conference was held January 22–24, 2004, in Boca Raton, Florida. Law students Alain Lapter, Douglas J. Steinke, and Lynnore Lawton Thames attended the conference and submitted reports for *Communications Lawyer*. Lapter is the ABA Law Student Division liaison member to the Forum on Communications Law; Steinke and Thames received Forum scholarships.

The Internet, the Threat to Privacy, and Florida's Approach

Douglas J. Steinke

Who is George Freeman, anyway? Those who did not know before the Boca Raton conference but attended the panel discussion on Florida's sunshine laws may have learned more than they ever wanted to know.

Sally Kestin, an investigative reporter with the *South Florida Sun-Sentinel* and a panelist for the discussion, illustrated the power of Florida's liberal open records laws and the power of the Internet by rattling off a slew of lesser-known facts—all obtained from public sources—about Freeman, an assistant general counsel with the New York Times Co., immediate past chair of the Forum, and a member of the conference's planning committee. Thus, audience members learned Mr.

Alain Lapter (alapter@yahoo.com) is a third-year student at the University of Connecticut School of Law in Hartford. Douglas J. Steinke (dsteinke@att.net) is a second-year student at St. John's University School of Law in Jamaica, New York. Lynnore Lawton Thames (lthames@nyls.edu) is a fourth-year evening student at New York Law School and works full-time in ESPN's legal department as a contracts administrator.

Freeman's Social Security number and his birthday (which conveniently coincided with the conference itself). Kestin also revealed Freeman's political affiliation (Democrat), his father's profession (attorney), the color and make of his car (white Volvo), the style and location of his home (two-story colonial in Pelham, New York), the fact that his home has gone up in value (no specifics given), and the fact that Mr. Freeman was stopped for a traffic violation in 2001.

This lighthearted demonstration at Mr. Freeman's expense had a practical purpose. Kestin explained how, through similar resort to open public records and Internet data, she reported a story about foster children who were supposed to be under the state's care but who had instead fallen through the cracks. Using state records, Kestin's newspaper searched for twenty-four children who were unaccounted for and found nine of them. "I always say you don't even have to be good to be a reporter in Florida," Kestin quipped, citing the state's numerous open records laws.

Panelist David Bralow, an attorney with the Tribune Co., which owns the *Sun-Sentinel*, cautioned, however, that Florida is slowly whittling away at its open records policies. He pointed out that open records exemptions now apply to such matters as dog vaccination records and utility billing records. The state also enacted a new law restricting access to autopsy photographs as the result of public controversy concerning the autopsy photographs of NASCAR legend Dale Earnhardt.

Shortly after Earnhardt's death, the *Sun-Sentinel* had sought access to his autopsy photographs for an investigative piece about NASCAR safety practices and, in particular, to see whether a broken seat belt was a contributing factor. Bralow emphasized that the newspaper made clear from the start that it did not intend to publish the photographs. This did little to assuage the concerns of the Earnhardt family, which was opposed to publication of the photographs in a newspaper or on the Internet. The family was represented

by panelist E. Thom Rumberger of Rumberger, Kirk & Caldwell in Tallahassee, who characterized the dispute as being more about the desire to sell newspapers than about open records.

The Earnhardt family successfully lobbied the Florida state legislature to pass a law restricting access to autopsy photographs. Under the new law, which is directly contrary to most of Florida's open records laws, a party that wishes to see an autopsy photograph must petition the court to show cause, at which point the court may authorize that party to view or copy an autopsy photograph or video recording.

After litigation and mediation, the *Sun-Sentinel* succeeded in getting access to the Earnhardt photographs, but only by an expert who then reported back to the newspaper on his findings. A similar effort by the *Independent Florida Alligator*, a University of Florida student newspaper, was unsuccessful.

Meanwhile, in a separate action the *Sun-Sentinel* and the *Orlando Sentinel* jointly sought declaratory judgment striking down the state law as unconstitutional. The outcome of this separate litigation was tied directly to a case being heard before the Supreme Court at the time of the Boca meeting, *National Archives and Records Administration v. Favish*.¹

In *Favish*, a California attorney, questioning whether the 1993 death of Vincent Foster was a suicide, sought access to the Foster autopsy photographs under the federal Freedom of Information Act (FOIA). Federal officials argued that an exception to FOIA applied in this case, i.e., for disclosure that would cause a "clearly unwarranted invasion of personal privacy."²

Predictably, the panel was split on the desirability of the new Florida ban on autopsy photographs. Analyzing the new statute generally, some panelists decried the allocation of the burden of proof in the statute. "If you can make a good case for why you need to know, well sure, the judge will let you see it. But this is directly the opposite of what open records are about," said Jane E. Kirtley, the Silha Professor of Media Ethics and Law at the

University of Minnesota. Such provisions could “viscerate” access, said Kirtley, who noted that members of the general public, as opposed to journalists and reporters, are increasingly questioned about their rationale for seeking records under FOIA.

But Rumberger, in addition to opposing release of the Earnhardt autopsy photographs, also filed an amicus curiae brief in *Favish* arguing that the Foster photographs should not be made public. Similarly, panelist Marc Rotenberg, executive director of the Electronic Privacy Information Center in Washington, D.C., approves of the new law. He commented that although he advocates open government, he is also concerned about privacy. “To say there are limits on certain information is not to say there’s no open government,” Rotenberg noted.

Media Scandals: When the Press Is the News

Alain Lapter

Within the past few years, a number of media scandals have placed the institutions involved, and the media generally, under the microscope of a scandal-hungry public, a microscope usually reserved for subjects not related to reporters or their employers. The most recent scandal at the time of the conference was the manufacturing of “facts” in articles published in the *New York Times* and reported by Jayson Blair, a scandal that reminded the media that all institutions, no matter how venerable, are vulnerable to scandal.

The panelists in this plenary session used the following hypothetical, a scandal in the making, to discuss how media outlets should react to avoid creating a larger crisis:

A newspaper’s in-house counsel receives a call from the Associated Press (AP). An article published by the newspaper reported incorrect facts regarding the local mayor. The mayor now plans to sue. The AP wants a comment.

The initial gut reaction of the in-house counsel panelist was to adopt a neutral stance and say that “we’re looking into it.” That’s more than the AP needs to know, said the outside counsel on the panel, who said that the first task for the newspaper’s outside firm is to hunker down and make sure that its lawyers are not quoted in the AP article. Outside counsel represent their clients in the courtroom, not in the media, he emphasized. “We don’t comment on litigation” was the quote of choice.

The public relations panelists disagreed with the no-comment policy; they recommended a more aggressive stance. They discussed the importance of attacking the charges with an early comment that would allow the accused media outlet to control the story, instead of giving the AP sole charge of the story’s direction. More information, not less, is better, said the PR experts on the panel. Specifically, the newspaper under fire should give the AP reporter additional information about the article that launched the controversy in the first place. This may preclude the mayor’s office from using small mistakes to discredit the article as a whole or to attack the newspaper. The best way to avoid an uphill battle with the public is to discuss the problem with the newspaper’s reporter, prepare a statement for the AP’s story, and adopt a proactive stance instead of a reactionary, backpedaling manner. Speed is critical, if only because of a public that usually makes up its mind about a story during the first news cycle.

Not so fast, cautioned the attorneys on the panel. Privilege and discovery issues could preclude the in-house lawyer from discussing the potential suit with an outside reporter. Furthermore, the attorneys noted, even though a comment from the editor or publisher could stake out an aggressive position, an overly detailed comment could lead to a story of its own, one that could be interpreted as another potshot at the local mayor.

Another potential approach identified by the lawyers on the panel was that the beleaguered news outlet could decide, as a matter of institutional policy and faith in its reporter, to disregard the story regardless of the litigation. However, candor to the readers and undisrupted good faith, noted the panelists, is as vital to the paper’s integrity as candor to a court is vital to a lawyer’s reputation. Not only might it look bad to ignore the suit, but also a trusted news agency has the obligation to publish a story regarding the lawsuit.

Sharpened by the debate over the hypothetical, the panelists next turned to the Jayson Blair controversy. Some panelists felt that the initial reaction of the *New York Times*, a 14,000-word front-page article, was defensive and contributed to public questioning of the paper’s credibility. Others commented that, to the paper’s credit, the *Times* was able to restore the public’s goodwill with independent reports and internal action. The question remained, however,

whether the *Times* could have avoided a large part of the media scrutiny of the crisis (and perhaps the resignation of Executive Editor Howell Raines and Managing Editor Gerald Boyd) if it had reacted differently when the accusations first surfaced.

Internal tension clearly results from these divergent perspectives: counsel’s concern of managing the risks to his clients, the editor’s desire to retain the media outlet’s integrity, and the public relations experts’ goal of “managing” the crisis effectively. The panelists agreed that although each situation is unique and may require ad hoc responses, it would be useful to devise a strategy for handling such a crisis ahead of time and to make sure that such a strategy integrates the interests of the all parties (news outlet, lawyer, and public relations adviser) while hopefully avoiding additional liability, retaining control over the flow of information, and not jeopardizing either the paper’s or the reporter’s journalistic integrity.

Herbert v. Lando: The Rise and Fall of the Editorial Process Privilege

Lynnore Lawton Thames

What has happened to the editorial process privilege in the twenty-five years after the U.S. Supreme Court’s decision in *Herbert v. Lando*?³ Has there been a chilling effect? Are reporters and news executives more careful about the kinds of stories that they produce and the information that they share? These questions were addressed by the *Herbert v. Lando* panelists, a group that included many of the original actors.

Background

In the underlying litigation, Col. Anthony Herbert sued CBS for alleged defamation in a *60 Minutes* news segment. Herbert had served in Vietnam and had received widespread media attention for accusing his superior officers of covering up reports of brutality and other war crimes. In 1973, *60 Minutes* aired a report on Herbert, which was produced and edited by Barry Lando and reported by Mike Wallace.⁴ Herbert alleged that the report falsely and maliciously portrayed him as a liar who had fabricated the accusations against his superior officers to explain why he had been relieved from his command.

Because Herbert was a public figure, the actual malice standard applied. The

plaintiff accordingly sought discovery of Lando's notes and other evidence regarding the investigation and creation of the report. The defendants challenged the request on the ground that the First Amendment protected the "editorial process" behind the finished segment. The district court rejected this argument, finding nothing in the First Amendment or relevant case law that would permit the court to increase the weight of the plaintiff's already heavy burden of proof by creating a barrier "behind which malicious publication may go undetected and unpublished."⁵

The Second Circuit, including panelist Judge Oakes, overturned the district court's decision and concluded that the First Amendment lent sufficient protection to the editorial process to protect Lando from inquiry about his thoughts, opinions, and conclusions with respect to not only the material gathered by him but also his conversations with editorial colleagues.⁶

The Supreme Court disagreed. According to the Court, when a member of the press is alleged to have published defamatory falsehoods with the requisite culpability, there is no guaranteed First Amendment protection of freedom of speech or freedom of the press.

Their Thoughts: Then and Now

Defense attorney and panelist Floyd Abrams told the conference that at the time of the dispute, Herbert had sought detailed information concerning CBS's editorial discussions up to and including internal newsroom talk. Abrams argued that this type of information is protected speech and expressed concern that the editorial process could be damaged if these types of questions are subject to discovery. Abrams noted that over a discovery period that was prolonged even by today's standards,⁷ Lando already had answered a huge number of questions. In this scenario, Abrams argued, a limited degree of editorial process privilege should exist. Abrams further observed that he and his clients had not sought recognition of an absolute editorial process privilege.

Post-*Lando*, Abrams observed, *60 Minutes* is more likely to fight than settle pending litigation. However, these cases have become so expensive that journalists with fewer resources are forced to cut back or limit certain reports because of the potential costs of litigation. Abrams further added that as a result of *Lando*, he now advises his clients not to write any-

thing that might limit their ability to defend their ideas later on.

Panelist Barry Lando noted that after the Supreme Court decision, CBS turned over a number of internal memos to plaintiffs. He believes that allowing this type of discovery inhibits the accuracy and honesty of reporting. Lando acknowledged, however, that as a result of his experience, he has become much more thoughtful about the editorial and reporting processes. He posed the question, however, of whether other reporters actually operate with an understanding of how the law applies to them. He believes that many of his colleagues do not understand libel law and do not recognize how these decisions have impacted the journalism process.

Other panelists felt that the Supreme Court's refusal to recognize the editorial process privilege did not cause unreasonable harm to the press. Plaintiff's attorney Jonathan Lubell noted that there are many types of "little incidents" that have to be explored when actual malice is at issue, which is why, he emphasized, discovery has to be exhaustive (and expensive).

Judge Oakes observed that the Supreme Court's decision in *New York Times v. Sullivan* opened the door to the actual malice inquiry. He reasoned that it is very hard to prove actual malice, an unsolved dilemma left from *Sullivan* and its progeny; editorial process review thus serves a necessary function. He did express concern, however, that smaller newspapers now must worry about every single word they print. There is a real risk, said Oakes, that when a small newspaper is sued, it may not have the money to defend itself, even if it ultimately would be successful at trial.

Mike Wallace admitted that fairness should be at the root of what is going on in the newsroom and believes that the Supreme Court raised a reasonable question, i.e., "What's in the mind of the reporter?" He also downplayed the so-called chilling effect of the decision, calling this assessment vastly overstated. Wallace noted that *60 Minutes* has been sued repeatedly during the last twenty-five years but has yet to lose a case.

Hot Issue #1: Newsgathering

Douglas J. Steinke

A new wave of secrecy has shrouded both state and federal court proceedings, creating new business and headaches for media organizations and their attorneys.

This renewed move towards secrecy was the subject of the breakout group on "Hot Issues in Newsgathering."

A prime example of such secrecy is the case of an Algerian-born man identified in news reports as Mohamed Kamel Bellahouel. Bellahouel worked as a waiter at a Mediterranean restaurant in Delray Beach, Florida, purportedly patronized by some of the September 11 hijackers. After the attacks, Bellahouel was detained by the Immigration and Naturalization Service and the Federal Bureau of Investigation. He filed a habeas corpus petition, which immediately was sealed and kept so secret that it was not even listed on the docket of the federal district court.

Reporters uncovered Bellahouel's case by pure accident. When Bellahouel appealed an adverse decision by the district court, the Eleventh Circuit Court of Appeals inadvertently listed the case for a single day on its docket, where it was discovered by an enterprising reporter with the *Miami Daily Business Review*. After the reporter inquired about this case, the existence of which previously had been unknown, the Eleventh Circuit removed it from the docket. The newspaper reported on the incident, noting that Bellahouel had been detained for five months and released after he had been taken to Alexandria, Virginia, to testify before a grand jury.⁸

Although the extreme secrecy of Bellahouel's case is atypical, facilitators observed that courts have become more willing to cut off the media's access to information that was once taken for granted.⁹

Judicial access is a concern in state courts as well. For example, the *Arizona Republic* and a local NBC television affiliate attempted to obtain voir dire questionnaires in a recent Arizona state court case involving a bishop who had been charged with leaving the scene of a fatal hit-and-run accident. The trial judge initially closed the voir dire proceedings and sealed the questionnaires. After additional litigation of the issue, the court allowed access to redacted copies of the questionnaires but continued to exclude access to the potential jurors' answers to certain questions, particularly those concerning their experiences, if any, with sexual abuse. On these types of questions, the court reasoned that the prospective jurors' privacy interests outweighed the value of openness to the media and public.

Hot Issue #2: The Internet

Lynnore Lawton Thames

Legal issues surrounding the Internet continue to unfold at a record pace. Three specific issues were addressed by the Internet facilitators:

Intellectual Property Rights of Freelancers

What rights do freelance writers have in the electronic republication of their works by publishers? In *New York Times Co. v. Tasini*,¹⁰ the U.S. Supreme Court held that many types of electronic databases maintained by large publishers are in fact a form of republication in which freelancers have intellectual property rights independent of those associated with the initial print publication. At the time of the Boca conference, the parties to the *Tasini* class action were negotiating a settlement.

In contrast to *Tasini*, however, is the recent decision by the U.S. District Court of the Southern District of New York in *Faulkner v. National Geographic Society*.¹¹ In *Faulkner*, the court dismissed a freelancer's claim that a digital archive of past issues of *National Geographic* on CD-ROM and DVD infringed on the writer's copyrights. The court distinguished *Tasini* and held that the digital archive was not a new collection, but rather a package that included everything that made the magazine copyrightable as a collective work. Because the archive was readily recognizable as a variation of the original, the court found that it was no more than a revision of the magazine's individual print issues.

The facilitators recommended that publishers obtain the necessary clearance rights for electronic republication of all third-party content and photographs. In the absence of an agreement, publishers should anticipate negotiating a settlement if a claim is made.

Advertising for Internet Gambling

The Department of Justice (DOJ) has been examining the question of advertising for Internet gambling sites and may begin to crack down on such advertisements. The DOJ's rationale is that because no state permits Internet gambling, companies should be on notice that such advertising will not be condoned. As of January 2004, however, the DOJ had not taken any actions against online publishers.

Some session participants questioned how many "clicks" (or links) away to a gambling website would provide the practitioner some level of comfort. The facilitators observed that it would be difficult to draw a line before seeing how and to what extent the DOJ intended to prohibit such advertising.

Communications Decency Act

Finally, the protections afforded to online publishers under the Communications Decency Act of 1996 seem to have narrowed.¹² Until recently, the courts' interpretation of the Act as it applied to online publishers has been exceptionally broad—prohibiting liability against an online publisher for distribution of third-party content. The facilitators observed, however, that now some courts are finding that a publisher on notice of defamatory material has an obligation to remove that material to avoid liability.

Hot Issue #3: Libel and Privacy

Alain Lapter

The facilitators of the "Hot Issues in Libel and Privacy" session dealt with several issues related to libel and the right of privacy.

False Light and Defamation

The facilitators first addressed the interplay between actions for false-light invasion of privacy and claims for defamation. In a recent Michigan false-light case, the rapper Eminem was sued for his song "Brain Damage," which referred to his experiences with a childhood bully classmate.¹³ The classmate sued both Eminem and *Rolling Stone*, which had published an article regarding the song, for false-light invasion. The defendants moved to dismiss, relying on the defamation-related defense of substantial truth, i.e., that the substance of the statements were true despite minor inaccuracies in details. Over the objection of the plaintiff, the judge found that the substantial truth doctrine applied equally to claims for defamation and false-light invasion of privacy.¹⁴

Defamation by Implication

Claims for "defamation by implication" appear to be gaining ground. One facilitator noted a recent case involving a Florida newspaper that had reported on an accidental fatal shooting during a hunting trip; the victim was the wife of the shooter. The husband sued the

newspaper for defamation by implication on the theory that the information regarding the accidental nature of the shooting was positioned too far from the beginning of the article, which noted that he had shot and killed his wife. In December 2003, a jury awarded \$18.28 million to the plaintiff.

The facilitators suggested that lawyers for media outlets that are faced with claims for defamation by implication should argue that the court must look at the article as a whole rather than analyze editorial decisions about the sequence of events in the article.

When Is a Corporation a Public Figure?

The facilitators next noted an encouraging trend regarding the treatment of corporations as public figures. In the past, many courts have found that a publicly traded company is not a public figure, but a Minnesota court recently has held otherwise. Although this is an encouraging development, at least one facilitator noted that the analysis of whether a publicly traded corporation is a public or private figure may well vary based on such matters as the type of business conducted by the company or whether the corporation engages in public debate.

Defamation on the Internet

Finally, the facilitators noted a curious California ruling, *Varian Medical Systems, Inc. v. Delfino*,¹⁵ which held that Internet postings are libel, not slander. Under California law, plaintiffs are not required to offer proof of special damages in these types of cases.

Hot Issue #4: Ethics

Alain Lapter

For media lawyers, actual and potential conflicts of interest between news organizations and their employees raise serious ethical concerns. Facilitators led a discussion of a hypothetical situation in which an employee of a news company was personally subpoenaed, leaving the news company's in-house counsel to decide who is, in fact, the client.

In most situations, a news publisher wants to protect its reporters, a situation that eliminates any potential conflict of interest. The session facilitators pointed out, however, that if the reporter's actions were truly egregious and against company policy, the employer

might wish to distance itself. This unusual situation potentially leads to a lawyer's duty to sever a relationship with either the employee or the employer to avoid any conflict of interest.

When faced with such a situation, the lawyer must determine whether a conflict of interest actually exists before engaging substantively with either potential client. Even if the reporter is the only party to be subpoenaed or sued, the employer may nonetheless have interests that would preclude the attorneys for the company from representing the reporter.

The media attorney should consult Model Rule of Professional Conduct 1.7 and find out if it applies in the relevant jurisdiction. This provision states in pertinent part: "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation."¹⁶

The commentary to this rule articulates the test for assessing a potential conflict: "The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives . . . that reasonably should be pursued on behalf of his client."¹⁷

In addition, several factors must be considered when evaluating the potential for adverse effects: "duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that the actual conflict will arise and the likely prejudice to the client from the conflict if it does arise."¹⁸

If no conflict exists, the Model Rules require the lawyer to obtain from each party a written waiver that not only gives consent for dual representation but also evidences the clear understanding that if a future conflict should arise, the lawyer will recuse himself from representing the reporter, the publisher, or both.

The facilitators agreed that a lawyer, although not required to do so, should take preemptive action to avoid conflict issues later on. First, the lawyer should consult both the company and the reporter immediately upon learning of the subpoena in order to protect the interests of both potential clients without breaching the duty of confidentiality to either. This preliminary discussion could be especially

important if a conflict arises after the reporter has divulged confidential information to the lawyer based on the erroneous assumption that the lawyer would represent him.

What should happen if a conflict does arise? The Model Rules do not permit dual representation if the lawyer believes that the relationship with one client will adversely impact representation of the other.¹⁹ Clearly, an in-house lawyer's first duty is to its employer. Similarly, the New York Code of Professional Responsibility stipulates that in-house counsel must represent the corporation when the interest between that organization and an employee diverge.²⁰

If a conflict does arise, therefore, a lawyer should inform the reporter in writing and explain why the attorney-reporter relationship must be severed, emphasizing the attorney's obligation to represent the organization.

Hot Issue #5: Entertainment

Alain Lapter

The facilitators focused primarily on the legal implications of reality-based TV and cable shows, in which the line between fiction and truth may be precariously thin. The spectrum of reality-based shows runs the gamut of formats. On one end are *The Hughleys* and *Everybody Loves Raymond*, which are highly fictionalized and based very loosely on the lives of the shows' stars. In the middle is *Curb Your Enthusiasm*, the HBO comedy in which Larry David, the writer of *Seinfeld*, plays himself and films episodes involving other actors, also appearing as themselves. Although each episode's theme is developed before filming, the show is not scripted and the show's characters ad-lib through most of each episode.

Finally, on the far end of the spectrum is *K Street*, which stars real-life political consultants (such as James Carville) who run a fictional consulting firm. The show, which often features real-life politicians, is completely improvised. It also is filmed, edited, and aired on a very tight schedule, frequently without input from in-house counsel.

Some hot-button issues are associated with each of these formats. For example, a character on one of these shows easily could libel a person not on the show. Compounding the problem is the fact that most of the people featured on these programs do not sign releases. Finally, shows such as *K Street* do not

even follow a regular production schedule, making it difficult to anticipate and preempt situations where libel and defamation are possible.

You Didn't Really Take That Seriously, Did You?

A particularly topical case is *Allied Marketing Group, Inc. v. Paramount Pictures Corp.*²¹ In *Allied*, a sweepstakes company brought a defamation action, based on a segment reporting on sweepstakes scams, against *Hard Copy*. The segment at issue included a reenactment of a real-life scheme in which a man had been traveling around the country telling unsuspecting victims that they had won \$10,000. To receive the money, the victims had to write \$250 checks for "taxes" on the "prizes," which they never received. In the *Hard Copy* reenactment, the program named what producers mistakenly thought was a fictitious company, Sweepstakes Clearinghouse, as the alleged perpetrator.

Hard Copy offered three defenses: (1) the reenactment was not defamatory, (2) the news report was not "of and concerning" the plaintiff, and (3) viewers do not consider *Hard Copy* the purveyor of real news and therefore knew the reenactment was fiction. The trial court found for the defendants, but the appellate court reversed.

The appellate court found that despite the fact that *Hard Copy* did not know that Sweepstakes Clearinghouse was a real entity, the segment nonetheless was "of and concerning" the plaintiff. The court further found that genuine issues of fact existed regarding whether the show defamed the plaintiff. Regarding *Hard Copy's* final defense, the fact-or-fiction issue, the court emphasized that *Hard Copy* presents itself as a real news organization and that most people consider it to be such.

Who Owns That Building?

Another recent legal issue is whether the intellectual property rights of the owners of architecturally significant buildings are infringed when the building is depicted on TV or in the movies. A group of building owners brought a trade dress claim against the producers of the movie *Spiderman* for digitally altering the advertisements on the sides of the buildings appearing in various scenes of the film.

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Indecency

(Continued from page 1)

Apparently abandoning its previous contextual approach to indecency, the FCC held that the use of any variant of the objectionable word would essentially be considered indecent and profane per se and suggested a bright-line rule would be applied to other expletives. A wide range of media groups have attacked the FCC's decision, which is vulnerable on numerous fronts under the First Amendment.

The obvious result of the FCC's new approach to enforcement, and of Congress's consideration of tough legislation increasing indecency penalties by orders of magnitude, is to chill speech. Indeed, this effect could be felt immediately after the Super Bowl when several radio and television networks cancelled certain programming and implemented time-delay devices in an effort to protect themselves against potential indecency violations.

Super Bowl Fallout

The Janet Jackson incident provided a well-timed boost to the FCC's ongoing attempts to enforce indecency regulations more stringently. A week before the Super Bowl, the FCC issued a Notice of Apparent Liability for Forfeiture (NAL) against Clear Channel Communications, Inc., proposing to fine the broadcaster \$755,000 for airing indecent material on the *Bubba the Love Sponge* show.⁴ This fine, which was the largest single penalty for indecency in the FCC's history, followed an October 2, 2003, NAL in which the FCC proposed fining Infinity Broadcasting Operations, Inc., some \$357,000 for the broadcast of an *Opie & Anthony* radio show featuring a contest that awarded points for engaging in sexual activity in public places—one of which included St. Patrick's Cathedral in New York.⁵ On March 12, 2004, the FCC released an NAL in the amount of \$247,500 against Clear Channel for its broadcast of the *Elliott in the Morning* show.⁶ Other than the \$1.7 million paid by Infinity in 1995 to settle numerous indecency complaints related to Howard Stern's show,⁷ these recent fines represent far and away the largest forfeitures the FCC has ever sought for airing material found to be indecent.

The FCC has made clear that these recent large fines are part of a concerted

effort to increase the deterrent effect of its indecency rules on broadcasters. Several Commissioners have explicitly stated that the FCC's previous enforcement regime lacked any teeth and that radio and television broadcasters treated the fines as a "cost of doing business."⁸ As part of its recent effort to add muscle to its existing statutory authority, the FCC announced plans to impose forfeiture penalties for each individual indecent utterance instead of one fine per program.⁹ The pending Senate bill would give the FCC explicit statutory authority for such an approach.¹⁰

The FCC has also warned that repeat offenders will endanger their licenses if violations continue.¹¹ Individual Commissioners have also advocated greater consideration of a broadcaster's record on indecency during license renewal decisions.¹² Increasingly, the full Commission has ignored its own Enforcement Bureau and undertaken review of high-profile indecency cases in an effort to add further gravitas to the FCC's anti-indecency campaign.

The Commissioners are essentially united on the issue of a stricter indecency enforcement regime. Those who have disagreed with the FCC's recent indecency rulings have done so usually on the grounds that they believed the penalties were not stiff enough.¹³ Shortly after the Super Bowl, all five Commissioners testified at hearings before the House and Senate in support of the Broadcast Decency Enforcement Act of 2004.¹⁴

Chairman Powell has been especially vocal, touting the recent large fines imposed on Clear Channel and Infinity and promising to maintain an aggressive stance toward broadcast indecency.¹⁵ He also highlighted a recent ruling imposing the maximum statutory fine on Young Broadcasting in San Francisco for its broadcast of a morning news show featuring the performers from the theater production *Puppetry of the Penis*, in which one performer was inadvertently exposed for less than a second.¹⁶ Noting that this was only the second time in the FCC's history that it enforced an indecency fine against a television station, Powell said that the Commission's action "opened up a new front in our effort to protect children."¹⁷

Congress Jumps on the Indecency Bandwagon

Not to be outdone, Congress is also considering legislation that would adopt

many of the FCC's policy recommendations and—in several instances—go several steps further. Although the Commissioners asked for a tenfold increase in the current maximum statutory fine of \$27,500, H.R. 3717, the legislation passed by the House, would increase the maximum to \$500,000 for each indecency violation. The Senate version would increase the statutory maximum to \$275,000 for the first indecency violation with increasing fines up to \$500,000 for the third. The Senate would give the FCC explicit authority to fine violators for each obscene, indecent, or profane utterance, up to a maximum of \$3 million during any twenty-four-hour period.¹⁸

Both bills direct the FCC to consider specific factors in assessing fines for obscene, indecent, or profane utterances, including whether the material was live or scripted; whether the violator had time to review the recorded or scripted material, or in the case of live or unscripted programming, whether the violator had a reasonable basis to believe that it would contain obscene, indecent, or profane material; whether a time-delay mechanism was used; and whether the material was broadcast during programming directed at, or reasonably expected to include, children.¹⁹

In an obvious response to the Super Bowl incident, the proposed legislation contemplates that fines would increase in proportion to the size of the audience or market served.²⁰ The bills also authorize the FCC to fine individual artists and speakers in addition to licensees for willful or intentional obscene, indecent, or profane utterances.²¹ The proposed legislation directs the FCC to consider past indecency violations in license renewal decisions and directs the FCC to institute license revocation proceedings for licensees that have paid or been ordered by a court to pay fines in three or more indecency proceedings.²²

The Senate version of the Broadcast Decency Enforcement Act contains even more controversial provisions. One provision directs the FCC to investigate whether technologies such as the V-chip successfully block violent programming, and, if they are found to be deficient, authorizes the FCC to restrict violent programming in the same way it restricts indecent programming.²³ Another would roll back the recent controversial media consolidation rules for one year and direct the FCC to study

the relationship between media consolidation and indecent programming.²⁴

The Golden Globe Awards Decision

Although Janet Jackson received more media coverage, the FCC's Enforcement Bureau unleashed the current political and regulatory campaign to beef up the FCC's indecency regulations by holding that the singer Bono's use of expletives during the live 2003 broadcast of the *Golden Globe Awards* did not constitute actionable indecency. In an October 2003 decision, the Enforcement Bureau held that the broadcast of the U2 front man's use of the word "fuck" twice during his acceptance speech did not violate the FCC's indecency rules.²⁵ In so holding, the Enforcement Bureau relied on previous FCC decisions holding that "fleeting and isolated" profane remarks did not rise to the level of actionable indecency.²⁶

Politicians, however, seized upon the decision's statement that Bono used the word "as an adjective or expletive to emphasize an exclamation"²⁷ as an example of bureaucratic reasoning gone awry. Both Houses of Congress quickly passed resolutions urging the full Commission to reverse the Bureau's order, and a bill was introduced in the House proposing to amend 18 U.S.C. § 1464 to proscribe eight specific profanities in all their forms, "including verb, adjective, gerund, participle, and infinitive forms."²⁸

During the recent congressional hearings, several Commissioners vowed to overturn the Bureau's decision, making good on their promise when the FCC released an opinion and order on March 18, 2004. Rejecting the Bureau's argument that Bono used the expletive for nonsexual emphasis, the full Commission held that the word has an inherent sexual meaning—regardless of the context.²⁹ The FCC then overturned nearly twenty years of its own precedent holding that isolated or accidental use of the word "fuck" is not actionable indecency.³⁰ Following its decision, the FCC held that "broadcasters are on clear notice that, in the future, they will be subject to potential enforcement action for any broadcast of the 'F-word' or a variation thereof in situations such as that here."³¹ The Commission justified its action by pointing out that the problem could be easily fixed—broadcasters could implement a delay system to censor potentially actionable language.³²

The FCC also concluded that Bono's utterances constituted profanity, a separate offense under § 1464. Noting that its previous rulings on profane speech were limited to blasphemy, a revelation that surprised many broadcasters and media watchers, the FCC held that it was now extending profanity to cover "vulgar and coarse" language, including the word that attracted so much attention during the *Golden Globe Awards*.³³ Now,

[b]roadcasters are on notice that the FCC in the future will not limit its definition of profane speech to those words and phrases that contain an element of blasphemy or divine imprecation, but, depending on the context, will also consider under the definition of "profanity" the "F-word" and those words (or variants thereof) that are as highly offensive as the "F-word," to the extent such language is broadcast between 6 a.m. and 10 p.m. We will analyze other potentially profane words or phrases on a case-by-case basis.³⁴

Although the FCC found that Bono's statements constituted actionable indecency and profanity, the Commission did not fine NBC for the broadcast because its decision represented a departure from FCC precedent.³⁵

On April 19, 2004, a coalition of broadcasters and performers—including Viacom, the owner of CBS and MTV; News Corp.; the American Civil Liberties Union; the Screen Actors Guild; the Recording Industry Association of America; and others—petitioned the FCC for reconsideration of the decision.³⁶ The group argued that the FCC's reversal of scores of cases finding that "isolated" or "fleeting" expletives did not constitute indecency chilled broadcasters' speech and that the newly announced "profanity" regime was hopelessly vague. The group also asked the FCC to require complaints to be supported by credible evidence, to stop imposing fines on a "per utterance" basis, and to "seriously examine" whether the system of content regulation announced in the decision is compatible with the First Amendment.

Self-Censorship Takes Hold

The chilling potential of the FCC's existing indecency rules—and the current effort to make those rules even stricter—was made apparent in the immediate aftermath of the Super Bowl. In the week following that broadcast, NBC announced that it would not air a scene for an upcoming *ER* episode showing the exposed breast

of an eighty-year-old woman receiving medical care.³⁷ NBC made this decision even though the scene would not have violated the FCC regulations for most regions of the country, where it is aired after 10 P.M., during the so-called safe harbor period in which indecency is permitted. For its part, CBS removed Janet Jackson (but not Justin Timberlake) from the list of announcers for the Grammy Awards and implemented a five-second video delay to prevent the broadcast of any potentially risky images.³⁸ NBC also implemented a ten-second delay during the 2004 *Golden Globe Awards*. Similarly, ABC volunteered to institute a five-second delay during the broadcast of the *Academy Awards* show, to guard against any Bono-like moments—a first in the history of the traditionally live Oscars broadcast.³⁹ Clear Channel, the subject of several of the largest recent fines, immediately suspended or fired several of its disc jockeys, including Todd Clem, the host of *Bubba the Love Sponge*, and veteran shock jock Howard Stern.⁴⁰ Plainly, these events have been driven in large part by the FCC's increased enforcement activity and Congress's apparent intent to increase the penalties significantly.

The FCC and the Seven Dirty Words

Section 1464 of the federal criminal code, which traces its roots to the Radio Act of 1927, makes it a crime to utter any "obscene, indecent, or profane language by means of radio communication."⁴¹ Under 47 U.S.C. § 503(b), the FCC is authorized to impose a forfeiture penalty on broadcast licensees for each violation of § 1464, in an amount not to exceed \$27,500.⁴² Section 312 of the Communications Act further authorizes the FCC to revoke broadcast licenses for violations of § 1464.⁴³

The FCC's regulations prohibit radio and television licensees from broadcasting indecent material between 6 A.M. and 10 P.M.⁴⁴ The FCC defines "broadcast indecency" as "language or material, that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs,"⁴⁵ a standard that has remained essentially unchanged since the Supreme Court upheld the FCC's authority to enforce indecency restrictions in *FCC v. Pacifica Foundation*.⁴⁶

Pacifica involved the broadcast of George Carlin's "Filthy Words" monologue, in which the comedian discussed the "seven dirty words" that cannot be uttered on the airwaves. A man alleging that he had heard the monologue at 2:00 in the afternoon, while driving with his young son, filed a complaint with the FCC. The FCC found the monologue "patently offensive" and indecent and concluded that it had the authority to regulate indecent speech as a nuisance by "channeling" the times at which it could be broadcast.

By a five-to-four vote, the Supreme Court agreed, holding that the FCC's actions did not violate the First Amendment. Although recognizing that a content-based speech restriction on other media would trigger the strictest constitutional scrutiny, the Court held that the FCC's regulation of indecency on the airwaves was subject to a more lenient standard because of "special problems" associated with broadcasting.⁴⁷

First, according to the Court, the "uniquely pervasive presence" of radio and television in Americans' lives and homes meant that the First Amendment rights of the broadcast speaker must in some circumstances yield to the privacy interests of what the Court viewed as a captive audience.⁴⁸ Thus, "[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content."⁴⁹ Second, the Court concluded that the government was entitled to restrict indecent broadcast programming to protect children. "The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*"—the government's interest in helping parents keep indecent material from their children—"amply justify special treatment of indecent broadcasting."⁵⁰

Outright Ban Not Permissible

Despite the apparent breadth of its rationale, the Court took pains to emphasize that its holding was a "narrow" one.⁵¹ The Court's decision in *Sable Communications v. FCC* further clarified the contours of the FCC's authority over indecent programming, holding that although the FCC could regulate broadcast indecency, a flat-out ban on such material would not be permissible.⁵² In *Sable*, the Court

struck down FCC regulations implementing a federal statute banning all indecent telephone messages. Noting that "[s]exual expression which is indecent but not obscene is protected by the First Amendment," the Court applied strict scrutiny to the FCC's regulations. In holding that the FCC's total ban on so-called dial-a-porn services was not the least restrictive means to further the government's purported compelling interest, the Court rejected the FCC's argument that its regulations were consistent with the Court's decision in *Pacifica*. "*Pacifica* is readily distinguishable," the Court explained, "because it did not involve a total ban on broadcasting indecent material."⁵³

The precise scope of the FCC's existing indecency rules was hammered out in a series of D.C. Circuit rulings in the late 1980s and early 1990s. In 1988, in response to a D.C. Circuit decision vacating an FCC order that limited the broadcast of indecent programming to a safe harbor period of midnight to 6 A.M., Congress passed a law directing the FCC to restrict indecent programming on a twenty-four-hour basis.⁵⁴ The D.C. Circuit responded in kind, striking down FCC regulations that enforced a twenty-four-hour ban on indecent broadcast programming.⁵⁵ Congress reacted again, passing legislation requiring the FCC to restrict indecent programming to a safe harbor period between midnight and 6 A.M., but allowing public broadcast stations to broadcast indecent material beginning at 10 P.M.

In *Action for Children's Television v. FCC (Act III)*, the D.C. Circuit, ruling en banc, invalidated the special treatment for public broadcast stations but otherwise upheld the FCC's regulations banning the airing of indecent material between 6 A.M. and 10 P.M. Reiterating that the two "unique characteristics" ascribed to broadcasting—pervasiveness in the home and particular accessibility to children—justified more relaxed First Amendment protection, the court nonetheless purported to review the regulations under strict scrutiny, albeit a strict scrutiny that took into account the "unique context of the broadcast medium."⁵⁶ The court concluded that the government had two compelling interests justifying the regulations: an interest in supporting parental authority and an independent interest in the well-being of children. Applying what was essentially a less-than-strict scrutiny, the court held that the FCC's safe harbor

period was narrowly tailored to further the government's compelling interests because it adequately balanced the First Amendment rights of adults with the government's interest in protecting children from indecent speech.⁵⁷ Since *ACT III*, the FCC has enforced its indecency rule, 47 C.F.R. § 73.3999, which prohibits the broadcast of "any material which is indecent" between 6 A.M. and 10 P.M.

Chief Judge Edwards and Judge Wald authored separate dissents in *ACT III*. Believing that it is "no longer responsible for courts to provide lesser First Amendment protection to broadcasting based on its alleged 'unique attributes,'" Chief Judge Edwards would have invalidated the regulations under the same level of strict scrutiny applicable to cable.⁵⁸ As Chief Judge Edwards observed, television cannot rationally be distinguished from other media, especially cable, on the standard grounds advanced to justify reduced First Amendment protection for broadcast speech—spectrum scarcity, pervasiveness, and accessibility to children.

Judge Wald agreed with Chief Judge Edwards and separately emphasized that the FCC's contextual, fact-specific test for indecency was fraught with danger for would-be broadcast speakers:

Because the FCC insists that indecency determinations must be made on a case-by-case basis and depend upon a multi-faceted consideration of the context of allegedly indecent material, broadcasters have next-to-no guidance in making complex judgment calls. Even an all clear signal in one case cannot be relied upon by broadcasters unless both the substance of the material they aired and the context in which it was aired were substantially similar.⁵⁹

As discussed below, these concerns have been more than borne out in the FCC's indecency enforcement decisions.

What's the Difference?

It is difficult to reconcile the relatively lenient judicial treatment of the FCC's indecency restrictions with the Supreme Court's recent cases rejecting Congress's attempts to regulate indecent speech on cable and the Internet. In *United States v. Playboy Entertainment Group, Inc.*, the Court invalidated a section of the 1996 Telecommunications Act that required cable operators to scramble or restrict hours of access to cable channels primarily dedicated to sexually explicit or indecent programming.⁶⁰ Confirming that indecent speech is entitled to full First Amendment protection (at least as to adults), the Court held that the statute

imposed a content-based speech restriction subject to strict scrutiny. The Court then concluded that the law's flat ban on indecent speech during certain times—even given concerns about the speech's intrusion into the home—was not the least restrictive means to further the government's interest in promoting parental authority or protecting children.⁶¹

Further, in *Reno v. ACLU*, the Court struck down provisions of the Communications Decency Act of 1996 (CDA) that criminalized the transmission or display of “indecent” and “patently offensive” material.⁶² The Court held that the statutory definitions of *indecent* and *patently offensive*, which mirror the FCC's indecency definitions, were unconstitutionally vague and lacked the constitutional safeguards of the *Miller* obscenity standard. As a result, the Court concluded, enforcement of the CDA would chill constitutionally protected speech, a result that was not justified even by the government's interest in protecting children.⁶³ As the Court has frequently cautioned, “[t]he Government may not reduce the adult population to only what is fit for children.”⁶⁴ Although these concerns would appear to apply equally to regulation of indecency on the airwaves, the Court distinguished its holding from *Pacifica* on the “broadcast is different” theory.

Government As Censor

In 2001, the FCC issued a Policy Statement designed “to provide guidance to the broadcast industry” on the FCC's indecency regulations (the policy statement did not apply to obscenity or profane language).⁶⁵ The Policy Statement set forth a general test for indecency and gave numerous examples of the FCC's previous rulings in an attempt to provide benchmarks for broadcasters. In many ways, however, the Policy Statement itself illustrates the contradictions inherent in the FCC's indecency standard. Despite the stated intent to provide broadcasters with a map to navigate around potential indecency liability, the FCC's rulings before and after the Policy Statement have only served to muddy the waters.

The Policy Statement articulated the FCC's general framework for making indecency determinations. According to the FCC,

[i]ndecency findings involve at least two fundamental determinations. First, the material alleged to be indecent must fall within the sub-

ject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium.⁶⁶

In assessing allegedly indecent programming, the FCC explained that

[t]he principal factors that have proved significant in our decisions to date are (1) the explicitness or graphic nature of the description of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.⁶⁷

The FCC nonetheless cautioned that “[n]o single factor generally provides the basis for an indecency finding.”⁶⁸ To the contrary, the FCC emphasized that each indecency investigation is a highly fact-specific inquiry in which the context of the broadcast is key. As Judge Wald warned in her dissent in *ACT III*, however, this case-by-case, contextual approach is precisely what makes the FCC's indecency rules likely to chill protected speech. Rather than facing “the herculean task of predicting on the basis of a series of hazy case-by-case determinations by the FCC which side of the line their program will fall on,”⁶⁹ it is likely that many broadcasters will instead choose to “air” on the side of caution—a scenario that was borne out in the wake of the Super Bowl half-time show.

When Is Nudity Indecent?

The examples used by the FCC in the Policy Statement only serve to highlight the difficulties in applying the FCC's contextual test. For example, in the Policy Statement, the FCC noted that it had declined to sanction as indecent a prime-time broadcast of *Schindler's List*, which included full frontal nudity.⁷⁰ The FCC ruled that “full frontal nudity is not *per se* indecent” and concluded that, given the full context of the film and the warnings accompanying the broadcast, the nude scene was not indecent.⁷¹

By contrast, in its recent decision imposing the maximum statutory fine on a San Francisco television station for a segment on the *Puppetry of the Penis* production, the FCC held that a brief and apparently accidental exposure of a performer's penis was indecent.⁷² The show's hosts had informed viewers about the subject matter of the upcoming

segment, had warned that parents might want to prevent their children from viewing the interview, and issued several apologies after the accidental exposure. Rejecting the licensee's arguments that these actions, coupled with the extremely brief time of exposure, meant that the indecency complaint should be resolved in the same manner as the *Schindler's List* case, the FCC stated that “although the actual exposure of the performer's penis was fleeting in that it occurred for less than a second, the manner in which the station presented this material establishes, under the third factor, that, in its overall context, the material was apparently intended to pander to, titillate and shock viewers.”⁷³

The relative merits of *Schindler's List* and *Puppetry of the Penis* are certainly debatable. But the distinction drawn by the FCC appears to be based on an assessment of the quality of the programming—an approach for resolving indecency complaints that is highly subjective and extremely difficult to predict. The FCC candidly admits that the “merit” of a program is one of the factors that it considers in conducting its indecency analysis.⁷⁴ In many of its indecency determinations, therefore, the FCC's decision essentially boils down to whether the FCC believes the show is of high or low quality. The FCC makes this determination, moreover, without the safeguards of more stringent constitutional tests, like the “lacks serious literary, artistic, political, or scientific value” requirement of the obscenity standard.⁷⁵ If the FCC is permitted to sanction speech that it finds distasteful, the result will be a chilling of protected speech.⁷⁶

Supporters of the FCC's role in policing the airwaves cite to the most extreme examples of shock jock radio as justification for strict indecency rules. But even if such speech were somehow entitled to lesser protection—a view that ignores the value of such shows to the millions of people who listen to them—there is no guarantee that the FCC will be able to distinguish between high- and low-quality speech. More importantly, this view ignores that in some instances, so-called indecency “is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power.”⁷⁷

Even if it were permissible in theory to distinguish between “legitimate” and “illegitimate” programming, the FCC's

judgments in this area are often questionable. For example, in 1990 the FCC fined a radio station for indecency, based on a program in which the disc jockey read from an interview Jessica Hahn gave to *Playboy Magazine*, detailing her allegations that she was raped by the Reverend Jim Bakker.⁷⁸ After reading from the interview, the announcer stated, “‘This was rape. Yeah, don’t you ever come around here Jim Bakker or we’re going to cut that thing off.’” The licensee argued that the broadcast was “newsworthy” and thus not indecent. The Mass Media Bureau rejected this argument, concluding that even if the program concerned an event in the news, “the particular material broadcast was not only exceptionally explicit and vulgar, it was . . . presented in a pandering manner. In short, the rendition of the details of the alleged rape was, in context, patently offensive.”⁷⁹ Judge Wald cited this decision in particular when she observed: “As this one case exemplifies so well, in enforcing the indecency regulations the FCC takes upon itself a delicate and inevitably subjective role of drawing fine lines between ‘serious’ and ‘pandering’ presentations. And even a ‘serious’ presentation of newsworthy material is emphatically not shielded from liability.”⁸⁰

The FCC’s own confusion over where to draw the line between meritorious and sanctionable is also apparent in a recent case in which the FCC reversed itself on whether the material at issue was actionable indecency. First, in 2001 the FCC issued an NAL against a radio station for the broadcast of the rap song “Your Revolution” by poet and rap artist Sarah Jones.⁸¹ Ms. Jones described the song, which contained explicit as well as implied sexual references, as a parody of rap music that degrades women. The licensee defended the indecency allegation on the ground that the song was a political commentary that was not indecent. The Enforcement Bureau initially rejected that argument, holding that “considering the entire song, the sexual references appear to be designed to pander and shock and are patently offensive.”⁸² The Enforcement Bureau conceded that the song may have some value as social commentary, but relying on FCC precedent that social value “is not in itself dispositive” in an indecency investigation, issued an NAL for the song’s broadcast.⁸³

Two years later, however, the Enforcement Bureau rescinded its earlier ruling.⁸⁴ None of the underlying facts had changed during the intervening

time. Sarah Jones had sued the FCC in federal district court for violation of her First Amendment rights, but the suit was dismissed as unripe. The Enforcement Bureau struggled to explain its reversal: “While this is a very close case, we now conclude that the broadcast was not indecent because, on balance and in context, the sexual descriptions in the song are not sufficiently graphic to warrant sanction. For example, the most graphic phrase (‘six foot blow job machine’) was not repeated.”⁸⁵

The Enforcement Bureau’s later decision does a better job of respecting the First Amendment, but the reversal demonstrates the confusion and ambiguity created by the FCC’s current indecency test.⁸⁶

A Shift in FCC Policy?

The FCC’s recent decision in *Golden Globe Awards*, coupled with its other efforts to increase indecency enforcement, signals a stricter approach to indecency proceedings that favors bright-line rules over a multifaceted contextual test. In holding that the broadcast of Bono’s statements was indecent, the FCC explicitly rejected nearly two decades of its own precedent holding that an isolated or accidental utterance of an expletive, often made in the context of live programming, was not actionably indecent.⁸⁷ Now, “[t]he fact that the use of this word may have been unintentional is irrelevant; it still has the same effect of exposing children to indecent language.”⁸⁸ The FCC stopped just short of holding that any utterance of the word *fuck* is per se indecent, but given the breadth of the FCC’s ruling, it is difficult to conceive of a circumstance in which such an utterance would fall outside the rule.⁸⁹ In fact, the FCC warned that from now on, any licensee that broadcasts the word will be subject to an indecency proceeding, and suggested that licensees wishing to avoid any potential indecency liability should implement a delay/censoring system for all live broadcasts.⁹⁰

The precise scope of the FCC’s new rule is not clear. Although the Commission overruled prior decisions holding that fleeting or accidental utterances were not indecent, the FCC let stand another decision in which it refused to sanction intentional and repeated use of the word *fuck* during a news program. In that case, National Public Radio broadcast wiretap recordings from the John Gotti trial in which the defendant

used the expletive both as a noun and an adjective ten times in seven sentences. The FCC concluded that the newscast “was an integral part of a *bona fide* news story” and therefore was not gratuitous, pandering, or “patently offensive.”⁹¹

It is difficult to predict how a similar program would be treated in the wake of the FCC’s *Golden Globe Awards* decision. On the one hand, the FCC did not overrule the John Gotti decision; on the other hand, the FCC was careful to state that even a program with political or social value that contained the expletive may be found to be actionably indecent.⁹² Although the FCC brushed aside concerns about the potential chilling effect of its new bright-line rule, the uncertainty surrounding the FCC’s standard will almost certainly deter broadcasters from airing programs containing any of the “seven dirty words,” even if they form an integral part of important political, social, or artistic speech. This represents a radical departure from the Commission’s previous approach to indecency, a departure that raises serious constitutional problems.

Protecting Innocent Ears?

The FCC has justified its new bright-line approach as a way to protect children, noting that children are “harmed” by any exposure to indecent material, regardless of whether the word appears in a *bona fide* news program, an entertainment show, or works of significant social value.⁹³ Even accepting the empirical assumption that children are so injured, this justification is seriously, if not fatally undermined, by the fact that approximately 85 percent of American households get their television through cable or satellite.⁹⁴ As Chief Judge Edwards reasoned in his *ACT III* dissent, “[i]f exposure to ‘indecency’ really is harmful to children, then one wonders how to explain congressional schemes that impose iron-clad bans of indecency on *broadcasters*, while simultaneously allowing a virtual free hand for the real culprits—*cable operators*.”⁹⁵ Cable television is equally if not more invasive in the lives of Americans, and just as accessible to children. It is therefore difficult to discern any logical basis for treating broadcast and cable differently for purposes of content regulation.

The lack of any principled distinction between the two plainly could cut two ways, however. Although some may

argue that the “broadcast is different” rationale should be abandoned and the FCC indecency restrictions invalidated, others will claim that the lack of a real difference means that cable should be regulated as well.⁹⁶ Indeed, during the controversy over the Super Bowl, some politicians and Commissioners signaled that they might be willing to extend indecency regulation to cable, and have at the least urged cable operators to develop voluntary standards and offer cable packages limited to “family friendly” programming.⁹⁷ Yet even these proponents have acknowledged that extending indecency restrictions to cable would likely face a tough constitutional challenge.

Zero Tolerance Leads to Deep Freeze

The Commission has yet to rule in the Janet Jackson case. As the foregoing discussion makes clear, the FCC’s history of indecency enforcement makes it difficult, if not impossible, to predict the outcome of a particular indecency proceeding. Nevertheless, it seems likely—given the FCC’s vow to enforce its indecency rules more stringently, political pressure from Congress, and Chairman Powell’s personal commitment to shore up indecency enforcement—that the FCC will find the brief exposure of Janet Jackson’s breast to be actionably indecent. To reach this result, the FCC will have to work around its previous holding that nudity is not per se indecent. It would not be surprising if the FCC takes the same position as it did in *Golden Globe Awards* and adopts a bright-line rule that any nudity broadcast during the proscribed period will give rise to a potential enforcement action. As with the *Golden Globe Awards* decision, such an approach would impose stiff fines on even accidental or fleeting nudity and would call into question the viability of decisions like that in the *Schindler’s List* case, in which the FCC allowed a television network to broadcast the film in its entirety, including a scene featuring full frontal nudity.

The FCC’s new zero-tolerance approach to indecency will have a significant chilling effect on speech, an effect that will be magnified if Congress approves the proposed increases in the maximum fine for indecency violations. Coupled with the FCC’s intention to impose fines for each separate utterance, the increased maximum fine could translate to an enormous penalty for a single program. For widely broadcast programs,

the penalties could be staggering. If the Super Bowl half-time show were found to be indecent, the FCC could conceivably fine each of the nearly 200 television stations owned by or affiliated with CBS that broadcast the show. The deterrent effect of such an outcome would be enormous—which essentially is the result sought by the FCC. In its crusade to eradicate “smut” from the airwaves, the FCC has created a regime that will chill significant amounts of protected speech, as demonstrated in the wake of the Super Bowl. ☒

Endnotes

1. News Release, FCC, FCC Chairman Powell Calls Super Bowl Halftime Show a “Classless, Crass, Deplorable Stunt.” Opens Investigation (Feb. 2, 2004), available at 2004 WL 187406; see also News Release, FCC, FCC Commissioner Copps Deplores Outrageous Super Bowl Stunt (Feb. 2, 2004) (stating that thus far the FCC had failed in its duty to “slow down Big Media’s race to the bottom”); News Release, FCC, FCC Commissioner Martin Supports the Opening of Investigation Into Broadcast of Super Bowl Halftime Show (Feb. 2, 2004), available at 2004 WL 193087 (calling on the FCC to interpret its indecency rules more “stringently”).
2. H.R. 3717, 108th Cong. (2004).
3. S. 2056, 108th Cong. (2004).
4. *In re Clear Channel Broad. Licenses*, Inc., Notice of Apparent Liability for Forfeiture, FCC 04–17, 2004 WL 135980 (FCC rel. Jan. 27, 2004).
5. *In re Infinity Broad. Operations, Inc.*, Notice of Apparent Liability for Forfeiture, 18 F.C.C.R. 19954 (2003).
6. *In re AMFM Radio Licenses, L.L.C.*, Notice of Apparent Liability for Forfeiture, FCC 04–47 (FCC rel. Mar. 12, 2004).
7. Associated Press, *Congress Considers TV, Radio Indecency Fines*, CNN.COM, at <http://www.cnn.com/2004/ALLPOLITICS/01/28/congress.deceency.ap> (Jan. 28, 2004). According to the Center for Public Integrity, Howard Stern’s show has accounted for half of the \$3.95 million in indecency fines imposed by the FCC since 1990. Frank Ahrens, *FCC Says Bono Profanity Violated Standards, but Won’t Fine NBC*, WASH. POST, Mar. 19, 2004, at E1.
8. E.g., *In re Clear Channel*, 2004 WL 135980 (dissenting statement of Commissioner Copps) (“Cost of doing business fines’ are never going to stop the media’s slide to the bottom.”).
9. E.g., *id.* (separate statement of Chairman Powell).
10. S. 2056, 108th Cong. (2004).
11. See, e.g., *The Broadcast Decency Enforcement Act of 2004: Hearing on H.R. 3717 Before the House Comm. on Hearing of*

the Subcomm. on Telecommunications and the Internet of the House Comm. on Energy & Commerce, 108th Cong. (Feb. 11, 2004) [hereinafter *Feb. 11 House Hearing*] (statement of Chairman Powell); *In re Clear Channel*, 2004 WL 135980, ¶ 21 (“Particularly in light of Clear Channel’s history of violations of the indecency rules, we also take this opportunity to reiterate our recent admonition . . . that serious multiple violations of our indecency rule by broadcasters may well lead to the commencement of license revocation proceedings.”); *id.* (dissenting statement of Commissioner Copps) (“I believe the FCC should have designated these cases for a hearing on the revocation of these stations’ licenses.”); *id.* (separate statement of Commissioner Adelstein) (“[T]his is the type of serious repeated behavior that I believe would warrant initiation of license revocation hearings.”); *In re Infinity Broad. Operations, Inc.*, 18 F.C.C.R. 19954, ¶ 19 (“We reiterate our recent statement that ‘additional serious violations by Infinity may well lead to a license revocation proceeding.’”) (citation omitted); *id.* (dissenting statement of Commissioner Copps) (“I believe we should designate these cases for a hearing on the possible revocation of these stations’ licenses, as provided for by section 312(a)(6) of the Communications Act.”).

12. *Feb. 11 House Hearing*, *supra* note 11 (statement of Commissioner Copps).

13. E.g., *In re Clear Channel*, 2004 WL 135980 (dissenting statement of Commissioner Copps); *id.* (separate statement of Commissioner Martin); *In re Infinity*, 18 F.C.C.R. 19954 (dissenting statement of Commissioner Copps); *id.* (separate statement of Commissioner Martin).

14. *Feb. 11 House Hearing*, *supra* note 11 (statement of Commissioner Abernathy). Commissioners Martin and Copps also linked the increase in indecency with the recent media consolidation rules, stating that increased consolidation deprived local affiliates of the independence to reject programming they considered inappropriate for their communities. See *id.* (written statements of Commissioners Martin and Copps). All five Commissioners submitted substantially the same testimony during a hearing the same day before the Senate Committee on Commerce, Science, and Transportation. See *Protecting Children from Violent and Indecent Programming: Hearing Before the Senate Comm. on Commerce, Science, and Transp.*, 108th Cong. (Feb. 11, 2004).

15. *Id.* (statement of Chairman Powell).

16. *In re Young Broad. of San Francisco, Inc.*, Notice of Apparent Liability for Forfeiture, FCC 04–16, 2004 WL 135993 (FCC rel. Jan. 27, 2004).

17. *Feb. 11 House Hearing*, *supra* note 11 (statement of Chairman Powell).

18. S. 2056, 108th Cong. (2004); Jonathan Krim, *Senators Move Forward on Tougher Indecency Standards*, WASH. POST, Mar. 9,

2004, available at <http://www.washingtonpost.com/wp-dyn/A43113-2004Mar9.html>.

19. H.R. 3717, 108th Cong. (2004); S. 2056.

20. *Id.*

21. *Id.*

22. See H.R. 3717.

23. See News Release, Senate Committee on Commerce, Science, and Transportation, Committee Passes Broadcast Decency Enforcement Act, (Mar. 9, 2004), <http://commerce.senate.gov/newsroom/printable.cfm?id=218845> (summarizing and providing links to amendments to S. 2056 passed by Committee).

24. *Id.* Given the controversy concerning the consolidation rules, it is possible that the latter amendment may delay or even derail the Senate legislation. See Jeremy Pelofsky, *Sen. McCain Seeks to Resolve Indecency Bill*, FORBES.COM, Mar. 30, 2004, at <http://www.forbes.com/markets/newswire/2004/03/30/rtr1317470.html>.

25. *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 F.C.C.R. 19859 (2003).

26. *Id.* ¶ 6.

27. *Id.* ¶ 5.

28. H.R. Res. 482, 108th Cong. (2003) (resolution urging FCC to overturn the Golden Globes decision and step up its enforcement activities); S. Res. 283, 108th Cong. (2003) (same); H.R. 3687, 108th Cong. (2003) (profanity bill).

29. *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, FCC 04-43, 2004 WL 540339, ¶ 8 (FCC Rel. Mar. 18, 2004).

30. *Id.* ¶¶ 12, 17.

31. *Id.* ¶ 17. Although not quite clear, the "situations such as that here" appear to mean live broadcasts.

32. *Id.*

33. *Id.* ¶¶ 13, 14.

34. *Id.* ¶ 14 (footnote omitted).

35. *Id.* ¶ 15.

36. See Petition for Reconsideration of American Civil Liberties Union, et al., FCC File No. ED-03-1H-0110 (filed Apr. 19, 2004), available at http://www.pfaw.org/pfaw/dfiles/file_316.pdf.

37. Bill Carter, *After Furor, Janet Jackson Is to Be Cut from Grammy Awards*, N.Y. TIMES, Feb. 5, 2004, at C8.

38. *Id.*

39. Lisa de Moraes, *Flags Keep Dropping on Super Bowl Stunt*, WASH. POST, Feb. 5, 2004, at C1; see also Tom Shales, *A Clean and Boring Sweep*, WASH. POST, Mar. 1, 2004, at C1 (criticizing this year's Oscars broadcast as particularly boring, due in part to the political crusade against indecency unleashed by the Super Bowl: "That someone was sitting with a finger poised on a sanitizing switch suggests in itself that we are to have a new wave of heavy-duty censorship in

America and all caused by the exposure of one breast."); see also Bill Carter, *Pushed on Obscenity, Networks Turn to Delays, Even on Sports*, N.Y. TIMES, Mar. 15, 2004.

Although each of the major networks promised to begin time-delay on many live shows, CBS announced that it would present the NCAA men's basketball tournament live, after reports that CBS would delay broadcast by ten seconds in response to the FCC's increased indecency enforcement. *CBS Says No to Broadcast Delays*, N.Y. TIMES, Mar. 16, 2004, at <http://www.nytimes.com/2004/03/16/sports/ncaabasketball/16CBS.html>.

40. *Clear Channel Suspends Howard Stern's Show*, N.Y. TIMES, Feb. 26, 2004, at <http://www.nytimes.com/2004/02/26/business/media/26radio.html>. Stern's show remains on the air, however, and Infinity Broadcasting has announced that it will continue to broadcast his show on its roughly forty affiliate stations. John Maynard, *Infinity Stations to Keep Howard Stern on the Air*, WASH. POST, Feb. 27, 2004, at C1.

41. 18 U.S.C. § 1464.

42. 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(b)(1).

43. 47 U.S.C. § 312(a)(6).

44. 47 C.F.R. § 73.3999.

45. *In re Industry Guidance on the FCC's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 F.C.C.R. 7999, ¶ 4 (2001).

46. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

47. The Court also noted that it had previously sanctioned greater regulation of the airwaves based on the scarcity of broadcast spectrum. *Id.* at 731; see also *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969) ("Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984) ("The fundamental distinguishing characteristic of the new medium of broadcasting that, in our view, has required some adjustment in First Amendment analysis is that '[b]roadcast frequencies are a scarce resource [that] must be portioned out among applicants.'") (quoting *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973)) (alteration in original).

48. *Id.* at 748 ("Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."). Compare *Cohen v. California*, 403 U.S. 15 (1971); *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975). In dissent, Justice Brennan argued that the captive audience analogy was not tenable. A person who

brings a radio or television into their home has made an affirmative decision to expose himself or herself to broadcast speech. *Pacifica*, 438 U.S. at 765 (Brennan, J., dissenting) "[B]ecause the radio is undeniably a public medium, these actions are more properly viewed as a decision to take part, if only as a listener, in an ongoing public discourse." *Id.* Given the small burden imposed on an offended viewer by changing the channel, majoritarian tastes should not be permitted "completely to preclude a protected message from entering the homes of a receptive, unoffended minority." *Id.* at 766 (Brennan, J., dissenting). "I would place the responsibility and the right to weed worthless and offensive communications from the public airways where it belongs and where, until today, it resided: in a public free to choose those communications worthy of its attention from a marketplace unsullied by the censor's hand." *Id.* at 772 (Brennan, J., dissenting).

49. *Pacifica*, 438 U.S. at 748; see *id.* at 748-49 ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.").

50. *Id.* at 750.

51. *Id.*

52. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 127 (1989).

53. *Id.*

54. See *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc) (*ACT III*) (summarizing history of FCC's indecency regulations); see also *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (*ACT I*); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) (*ACT II*).

55. *ACT II*, 932 F.2d at 1509.

56. *ACT III*, 58 F.3d at 660.

57. *Id.* at 666-67. The majority in fact held that a midnight to 6 A.M. safe harbor was narrowly tailored, but then found that the government had failed to justify its disparate treatment for public stations, "leaving us with no choice but to hold that the section is unconstitutional insofar as it bars the broadcasting of indecent speech between the hours of 10 P.M. and midnight." *Id.* at 669. Chief Judge Edwards argued that the majority's holding in this regard was incoherent: "While a 6 A.M. to 10 P.M. ban is certainly less speech restrictive than a 6 A.M. to midnight ban, it seems absurd to suggest that they are both *the least restrictive means*." *Id.* at 683 n.36 (Edwards, C.J., dissenting).

58. *Id.* at 671 (Edwards, C.J., dissenting).

59. *Id.* at 685 (Wald, J., dissenting) (internal quotations omitted).

60. 529 U.S. 803 (2000); see also *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727 (1996) (invalidating FCC regulation that required cable system operators to segregate "patently offensive" programming and block such programming unless a viewer

affirmatively requested access.)

61. *Playboy Entm't*, 529 U.S. at 811–15; *id.* at 814 (“[E]ven where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative.”).

62. 521 U.S. 844, 858–59 (1997).

63. *Id.* at 874 (“Given the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection.”).

64. *Id.* at 875 (internal quotations, alterations, and citations omitted).

65. *In re* Industry Guidance on the FCC’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, Policy Statement, 16 F.C.C.R. 7999, ¶ 1 (2001) (Policy Statement).

66. Policy Statement ¶¶ 7–8 (citations omitted). The FCC’s “community standards” test does not take into account differences between local communities but instead applies a nationwide broadcast community standard that references the average broadcast viewer or listener. *Id.* ¶ 7; *see also* WPBN/WTOM License Subsidiary, Inc. (WPBN-TV and WTOM-TV), 15 F.C.C.R. 1838, 1841 (2000).

67. Policy Statement ¶ 10.

68. *Id.*

69. *Action for Children’s Television v. FCC*, 58 F.3d 125 (D.C. Cir. 1995) (Wald, J., dissenting).

70. *Id.* ¶ 21 (citing WPBN/WTOM License Subsidiary, Inc. (WPBN-TV and WTOM-TV), 15 F.C.C.R. 1838 (2000)).

71. *Id.*

72. *In re* Young Broadcasting of San Francisco, 2004 WL 135993. The licensee argued that the “very brief exposure was accidental and unintentional, and that the complained-of material was part of the *bona fide* news coverage of the ‘Puppetry of the Penis.’” *Id.* ¶ 4 (footnote omitted).

73. *Id.* ¶ 12.

74. *See In re* WPBN/WTOM License Subsidiary, Inc. (WPBN-TV and WTOM-TV), 15 F.C.C.R. 1838, ¶ 10 (2000); *In re* Industry Guidance on the FCC’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, Policy Statement, 16 F.C.C.R. 7999, ¶ 20 (2001) (“The apparent purpose for which material is presented can substantially

affect whether it is deemed to be patently offensive as aired.”).

75. *See Reno v. ACLU*, 521 U.S. 844, 873 (noting that the “societal value” prong “critically limits the uncertain sweep of the obscenity definition”).

76. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Cohen v. California*, 403 U.S. 15 (1971).

77. *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 805 (1996) (Kennedy, J., dissenting in part); *id.* (“In artistic or political settings, indecency may have strong communicative content, protesting conventional norms or giving an edge to a work by conveying ‘otherwise inexpressible emotions.’”) (quoting *Cohen*, 403 U.S. at 26) (Kennedy, J., dissenting in part). It is worth noting that humor in particular is a victim of the FCC’s indecency regulations. Comedy often relies on controversial subjects and uses subversion of dominant political and cultural norms, including sexual and scatological taboos, for comic effect (see Lenny Bruce, George Carlin, South Park). It is thus not surprising that many of the programs targeted under the FCC’s indecency rules have been humorous. The FCC has imposed fines on licensees for the broadcast of Monty Python’s “Sit on My Face” song, and a song known as the “Penis Envy Song.” *See* Policy Statement ¶¶ 16, 23. The FCC has explained, however, that “‘humor is no more an absolute defense to indecency . . . than is music or any other one component of communication.’” *Id.* ¶ 7 (quoting WIOD, Inc. (WIOD (AM)), 6 F.C.C.R. 3704 (MMB 1989)). The FCC is not kidding: in the case of the FCC’s indecency rulings, humor appears to be a significant liability.

78. *Id.*

79. *Id.*

80. *Action for Children’s Television v. FCC*, 58 F.3d 685 (D.C. Cir. 1995) (Wald, J., dissenting).

81. *In re* KBOO Foundation, 16 F.C.C.R. 10731 (EB 2001).

82. *Id.* ¶ 8.

83. *Id.*

84. *In re* KBOO Foundation, 18 F.C.C.R. 2472 (EB 2003).

85. *Id.* ¶ 9.

86. In a similar reversal, the Enforcement Bureau in 2002 reversed an earlier NAL based on the airing of the “radio edit” version of Eminem’s “Slim Shady” song. *In re*

Citadel Broad. Co., 17 F.C.C.R. 483 (EB 2002), *rescinding In re* *Citadel Broad. Co.*, 16 F.C.C.R. 11839 (EB 2001). In the NAL, the Enforcement Bureau found that the “edited version contains unmistakable offensive sexual references . . . that appear intended to pander and shock.” 16 F.C.C.R. 11838, ¶ 6. A year later, however, after reviewing the licensee’s response to the NAL “and having again reviewed the relevant case law,” the Enforcement Bureau disagreed with its original analysis and found that the same words that supported the earlier NAL were not indecent. In direct contrast to its earlier determination, the Enforcement Bureau found that the language in the radio edit version was “oblique,” not sufficiently graphic or explicit, and did not appear to be intended to pander to, titillate, or shock the audience. 17 F.C.C.R. 483, ¶¶ 10, 11.

87. *Id.* ¶ 17 (citing L.M. Communications of South Carolina, Inc. (WYBB (FM)), 7 F.C.C.R. 1595 (MMB 1992) and Lincoln Dellar, Renewal of License for Stations KPRL (AM) and KDDB (FM), 8 F.C.C.R. 2582, 2585 (ASD, MMB 1993)).

88. *In re* “Golden Globe Awards,” 2004 WL 540339, ¶ 9.

89. *Id.* ¶ 6.

90. *Id.* ¶ 17.

91. *Id.* ¶ 9 n.25 (citing Peter Branton, 6 F.C.C.R. 610 (1991)).

92. *Id.* (“This is not to suggest that the fact that a broadcast had a social or political value would necessarily render use of the ‘F-Word’ permissible.”).

93. *Id.*

94. *See Feb. 11 House Hearing*, *supra* note 11 (statement of Commissioner Copps).

95. *Action for Children’s Television v. FCC*, 58 F.3d 654, 672 (D.C. Cir. 1995) (Edwards, C.J., dissenting).

96. For example in *Denver Area Educational Telecommunications Consortium v. FCC*, several Justices observed that the “special characteristics” of television used to justify broadcast indecency regulation are present in the case of cable. 518 U.S. 727, 744 (1996) (Breyer, J., writing for the plurality); *id.* at 774 (Stevens, J., concurring); *id.* at 776 (Souter, J., concurring)

97. *E.g.*, *Feb. 11 House Hearing*, *supra* note 11 (statements of Chairman Powell and Commissioners Copps and Martin).

PAUL M. SMITH, JULIE M. CARPENTER, DEANNE E. MAYNARD, AND KATHERINE A. FALLOW

The Supreme Court issued decisions in two media-related cases

National Archives and Records Administration v. Favish

On March 30, 2004, the Court rejected a request under the Freedom of Information Act (FOIA) for several death-scene photographs of Vincent Foster who, at the time of his death, was the deputy White House counsel to President Clinton. The United States Park Police photographed Foster's body as part of its initial investigation into his death, which the park police concluded was a suicide. Several subsequent government investigations, including two by independent counsel, reached the same conclusion. Alan Favish, who doubted the accuracy and thoroughness of those government investigations, made a FOIA request for the photographs. The Ninth Circuit ultimately upheld his request for four of the photographs. In a unanimous decision, the Supreme Court reversed.

The case turned on the meaning of FOIA's Exemption 7(c). That exemption allows the government to withhold "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." The threshold question facing the Court was whether that language protected the personal privacy of a decedent's family members, as it was Foster's family who objected to the photographs' release. The Silha Center for the Study of Media Ethics and the Law filed an amicus brief supporting Favish's position that Exemption 7(c)'s protection of "personal privacy" applied only to the person named in the records and did not extend to the person's family.

Paul M. Smith (psmith@jenner.com), Julie M. Carpenter (jcarpenter@jenner.com), Deanne E. Maynard (dmaynard@jenner.com), and Katherine A. Fallow (kfallow@jenner.com) are partners in the Washington, D.C., office of Jenner & Block LLP. Ms. Maynard and Elaine J. Goldenberg of Jenner & Block filed the amicus brief on behalf of the Reporters Committee for Freedom of the Press and other media-related entities in the Favish case.

Otherwise, FOIA's general presumption of disclosure would be undermined. The Court rejected these arguments, however, holding that "FOIA recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images."

The Court then turned to the question of how to balance the family's privacy interest against the public interest in disclosure. It acknowledged that FOIA's ability to allow the citizens to know "what the Government is up to" was not "a convenient formalism" but was "a structural necessity in a real democracy." Therefore, as a general rule, "citizens should not be required to explain why they seek the information." However, where the privacy rights addressed by Exemption 7(c) are at issue, the Court held that "the citizen must show that the public interest sought to be advanced is a significant one" and that "the information is likely to advance that interest."

The Court then surmised that, with respect to photos and other information regarding an individual who died under "mysterious circumstances," the justification most likely to satisfy the public interest requirement is a claim that the information is necessary to show that government officials "negligently or otherwise improperly" performed their duties. It held that in such a case, "the requester must establish more than a bare suspicion"—"the requester must produce evidence that would warrant a belief by a reasonable person that the alleged government impropriety might have occurred." In announcing this standard, the Court explicitly rejected the more stringent standard proposed by the government, which advocated for a presumption of legitimacy of government conduct that could be overcome only by clear evidence of wrongdoing. The Reporters Committee for Freedom of the Press, joined by a number of other media-related entities, had urged the Court to reject the government's restrictive test. Applying its "less stringent standard," the Court rejected Favish's claims, noting that "[i]t would be quite extraordinary to say we must ignore the fact that five different inquiries into the Foster matter reached the same conclusion."

It is too soon to judge the long-term implications of this case. The government no doubt will attempt to use the decision in a wide range of situations to justify withholding documents that touch on privacy rights. The decision, however, should not be read broadly. With respect to the privacy interest at stake, the Court recognized that "the family is not in the same position as the individual who is the subject of the disclosure." And the Court limited its recognition of family privacy rights to death-scene images or similar "public intrusions long deemed impermissible under the common law and in our cultural traditions." Moreover, courts should interpret the balancing test to permit requesters to overcome privacy claims upon any reasonable showing of suspicion of government misconduct, without actual proof of wrongdoing. The facts of this case may well be *sui generis*—it will be the rare case where the government can counter a requester's suspicions with five previous government investigations.

Doe v. Chao

On February 24, 2004, the Supreme Court held that a plaintiff suing the government for violations of the Privacy Act must prove actual damages in order to obtain any relief under the Act. In so ruling, the Court rejected an argument that the Act's language permitted a plaintiff to recover the minimum statutory damages of \$1,000 upon proof of an intentional violation and consequent adverse effect, but without proof of actual damages. Nevertheless, the Court left unanswered whether proof of nonpecuniary emotional distress qualifies as "actual damages."

The Privacy Act regulates the government's use of personal information, and an individual who has suffered an "adverse effect" by virtue of an agency's violation of the Act may bring a civil action in district court. The provision interpreted by the Court states in relevant part that in the case of an intentional or willful violation of the Act, "the United States shall be liable to the individual in an amount equal to the sum of – (A) actual damages sustained by the individual as

a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of \$1,000;” and (B) costs and attorney’s fees. 5 U.S.C. § 552a(g)(4) (year).

Petitioner Buck Doe filed a claim with the Department of Labor (DOL) for black lung benefits. While administering Doe’s claim, the DOL used his Social Security number in public hearing notices, which were made available to others. The government conceded that this practice violated the Privacy Act. Along with several other claimants, Doe filed a putative class action lawsuit for damages against the DOL, alleging that he was “torn . . . all to pieces” and “greatly concerned and worried” about the unauthorized use of his Social Security number.

The Fourth Circuit rejected Doe’s claim, concluding that proof of actual damages was required for any relief under the Privacy Act. The Fourth Circuit declined to rule on whether proof of non-pecuniary emotional distress would qualify as actual damages, holding that Doe’s allegations were insufficient in any event.

Because the Fourth Circuit’s decision conflicted with the majority of circuits that addressed the issue, the Supreme Court granted certiorari. To some extent, the issue presented to the Court created a tension between privacy interests and free speech. The ACLU, the American Library Association, the Electronic Privacy Information Center, and others, filed a brief in support of Doe, arguing that the statute should be construed to protect individuals’ privacy rights. The Reporters Committee for Freedom of the Press, by contrast, urged the Court to reverse the Fourth Circuit, arguing that a limit on recovery under the Act was necessary to ensure that government officials were not pressured into refusing to release information under FOIA.

By a 6-3 vote, the Court affirmed. Writing for the majority, Justice Souter reasoned that the requirement of proof of actual damages was supported by a “straightforward textual analysis.” Noting the placement of the phrases *person entitled to recovery* and *actual damages* in the same paragraph, the Court concluded that the simplest reading of the provision was to limit the government’s liability to the class of plaintiffs who can show actual damages. The Court rejected the interpretation urged by Doe—that *person entitled to recovery* refers to a plaintiff

who has been “adversely affected” by an intentional or willful violation of the Act—as contrary to both the plain language and purpose of the statute, which the Court held was to retain the traditional requirement in tort that recovery requires proof of tangible injury.

The majority held instead that the “adverse effect” requirement merely establishes “injury in fact” for standing purposes. “That is, an individual subjected to an adverse effect has injury enough to open the courthouse door, but without more has no cause of action for damages under the Privacy Act.”

The majority rejected the suggestion that the number of cases with actual damages not exceeding \$1,000 was so small as to render the statutory minimum meaningless. Justice Souter gave examples of small costs, such as the fee for running a credit report or the charge for a Valium prescription, that may well suffice to prove actual damages. The Court was careful to note that it was not ruling on whether actual damages might include nonpecuniary harm for emotional distress, and thus any argument that the majority’s ruling would lead to unfair or illogical results was simply too speculative.

Justice Ginsburg, joined by Justices Stevens and Breyer, dissented. They would have ruled that under a plain reading of the statute, *person entitled to recovery* meant something broader than a person who has shown “actual damages.” Criticizing the majority’s holding as creating an illusory right of action for a plaintiff who suffered real, although nonmonetary, harm because of an intentional Privacy Act violation, Justice Ginsburg would have held that the Act was designed to afford such plaintiffs redress in the amount of the statutory minimum while protecting the government from frivolous suits through the requirements of willfulness and adverse effect. Justice Ginsburg also argued that the majority’s reasoning would encourage future plaintiffs to manufacture minor pecuniary outlays in order to qualify for the statutory minimum.

The effect of the Court’s decision on free speech rights and open government is not clear. To the extent that the threat of numerous \$1,000 statutory minimum awards would deter government officials from divulging material that should be disclosed under FOIA, as the Reporters Committee argued, the Court’s ruling sets the bar a little higher for would-be plaintiffs and, presum-

ably, increases the deterrent effect. The unanswered question of whether nonpecuniary emotional distress would qualify as actual damages, however, leaves the precise scope of the Court’s holding uncertain. ☐

Ninth Annual Conference

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The Second Circuit rejected these claims, finding that no trade dress issues existed. The court emphasized that the First Amendment protected the movie’s alterations of the buildings as long as they were artistically relevant to the scenes. The court further noted that the movies were not profiting from the buildings’ architecture.

Nevertheless, the cost of threatened litigation has led some studios to negotiate a fee with buildings’ owners as a cost of doing business. ☐

Endnotes

1. No. 02-409, 2004 U.S. LEXIS 2566 (Apr. 5, 2004).
2. In early April 2004, the Supreme Court issued an opinion holding that (1) Favish had not produced any evidence warranting a belief by a reasonable person that any alleged government impropriety had occurred and (2) the Foster family’s privacy interest outweighed the public interest in disclosure. See Paul M. Smith, Julie M. Carpenter, Deanne E. Maynard, and Katherine A. Fallow, *Courtside*, 22 COMM. LAW., Spring 2004, at 33.
3. 441 U.S. 153 (1978).
4. Lando also wrote a related article that was published in *Atlantic Monthly* magazine.
5. *Herbert v. Lando*, 73 F.R.D. 387, 394 (1977).
6. *Herbert*, 441 U.S. at 159.
7. Lando’s deposition alone continued intermittently for over a year, filling twenty-six volumes with a total of 3,000 pages and involving 240 exhibits. *Id.* at n.25.
8. Bellahouel’s attorney, a Miami federal public defender, filed a petition for a writ of certiorari with the Supreme Court last fall. In the petition, Bellahouel’s attorney asked the Court to consider whether the lower courts had failed to comply with First Amendment jurisprudence governing public access to court filings and proceedings. The Reporters Committee for Freedom of the Press and several news organizations filed amici curiae briefs in the case, but the Supreme Court denied certiorari on February 23, 2004. Meanwhile, the trial and appellate court proceedings remain sealed, and the Supreme Court petition was so heavily redacted that even the identity of the lower courts could not be identified from the edited filing.
9. In early February, the Second Circuit heard arguments on an appeal from an order in

the Martha Stewart prosecution that excluded the media from observing voir dire proceedings. The appellate court reversed the district court decision, finding that the lower court did not demonstrate a substantial probability that reporters would disrupt the proceedings or disclose proscribed information.

10. 533 U.S. 483 (2001).
11. 294 F. Supp. 2d 523 (S.D.N.Y. 2003).
12. 47 U.S.C.A. § 230 (1996).
13. *Bailey v. Mathers*, 31 Media L. Rep. 2575 (Mich. Cir. Ct. 2003).
14. *Collins v. Detroit Free Press*, 627 N.W.2d 5 (Mich. Ct. App. 2001).
15. 113 Cal. App. 4th 273 (Ct. App. 2003).
16. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2003).
17. *Id.*
18. *Id.*
19. *Id.*
20. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.28(1999).
21. 111 S.W.3d 168 (Tex. App. 2003).

From the Chair

(Continued from page 2)

the Materials, and venturing predictions about the probable outcome of the trial against petitioner. How a fair trial for both parties—and particularly how an untainted jury could be found anywhere—in the aftermath of such a frenzy escapes us.²

The same hysterical observation might have been made about the coverage trials of Timothy McVeigh and Terry Nichols for the murder of six of the victims of the Oklahoma City bombing, but the judge conducted all pretrial hearings in open session, which did not interfere with a fair trial. The biggest relevant difference between the OKBOMB cases and *People v. Bryant*: In the OKBOMB cases, the defendants were not celebrities (other than as alleged perpetrators of the heinous crimes charged). In a celebrity case, the intensity of the coverage just seems to make everyone involved jumpier than in any other kind of case.

(4) What I most despise about a celebrity rape trial is the seemingly inevitable assault upon the privacy of an alleged victim. In *Bryant*, the alleged victim's mother claims her daughter can go nowhere without encountering at best aggressive curiosity, in the middle outright hostility, and at worst death threats. The rape charge has also disrupted the defendant's life, but he is obviously less vulnerable. Even if the defendant is affected significantly, it is hard to believe that any bad behavior is being deterred. As things stand now, this case, regardless of

the outcome, will undoubtedly discourage rape victims from coming forward.

Victims' advocates and the prosecutor have responded by demanding that the court seal court records and close hearings that may disclose "sensitive" information about the victim. With few exceptions, the judge has obliged.

Have closures of pretrial hearings protected the alleged victim's privacy? Can they? Would keeping all hearings open have made it any worse?

Embarrassing facts have been reported about this victim, sometimes compassionately, sometimes not, depending upon which of the interested media (ranging from mainstream to tabloids to Internet chat rooms) is reporting them. The most "sensitive" of the facts reported to date have been that (1) the victim was the subject of two 911 calls for suicide attempts in the months before the incident; and (2) forensic tests of the underpants she wore for the "rape kit" exam given the day after the incident revealed the presence of DNA of a male other than Bryant. The first of these was published in a local newspaper immediately after Bryant was arrested; the second was disclosed during the preliminary hearing early in the case. These facts may or may not prove relevant in a case in which the only issue for trial is whether or not sexual intercourse was consensual.

The release of such bits of embarrassing data is inevitable. When it doesn't come out in court, it will be made public either through people outside the process or through leaks made either deliberately or inadvertently. Sealing of records, closure of hearings, and gagging of participants create a market for information from these other sources, who often disclose it with bias and spin. The undeniable fact is that this kind of information has wings that cannot be clipped. Attempts to hermetically seal the pretrial process in a celebrated case simply will not work in an open society.

What if the public, through the media, became familiar with the victim through her own words, accompanied by her name and facial identity, rather than knowing her only through data such as test results on underwear, thus receiving the overall impression that she is hiding under a rock or, worse, has something to hide? Might that not help debunk the rape mythology that victims are responsible at some level, a demon of a myth that no doubt prevents many rape trials from achieving just results? When damaging facts are likely to

become public anyway, any PR consultant will tell you that it's best to release your whole story as soon as possible so that it is not lost in a storm of controversy.

Victims' advocates bristle at the suggestion that more speech is better than less in this setting, but in a society in which freedom of expression is the norm, isn't it the only practical route to a fairer and compassionate public response? No doubt, the media are morally correct in permitting each victim to choose whether her identity will be published (most members of the public and some members of the media erroneously believe that the practice of not identifying victims without their consent is mandated by law), but should victims' advocates so readily encourage anonymity and silence?

What about the social cost of closing the courtroom to the public? As Chief Justice Burger wrote, "People 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."³ And would the public not be better able to raise legitimate questions about the process if it were conducted in the open?

The unfortunate bottom line is that the baggage that accompanies a celebrity rape trial today causes some judges to be more loyal to the immediate privacy and fair trial concerns of the court and the parties than the more abstract notions of civics that underlie the right of the public to observe the process. When media scrutiny is so intense, the social cost (not to mention the relative inefficacy) of kicking the public out of the courtroom is difficult to keep in focus. Hearings that should remain open under applicable standards of law are closed.

In a celebrity rape trial, the defendant loses, even if he wins. The alleged victim loses, even if the People win. To the extent that the process is secret, the public also loses. Access becomes more difficult in future cases, and the public is less informed about a process that may need change. Except in rare situations, secrecy avoids no harm. Isn't there supposed to be a winner somewhere in all of this? ☹️

Endnotes

1. 376 U.S. 254 (1964).
2. *Peterson v. Superior Ct.*, 31 Media L. Rep. (BNA) 2048 (Cal. Ct. App. 2003) (unpublished).
3. *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (Burger, C.J.).

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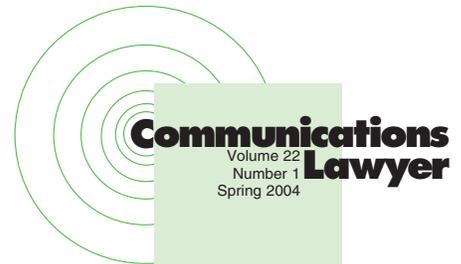
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