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Trial by Jury: Two-Edged Sword?

CHARLES L. BABCOCK

I once had a prospective juror tell me during voir dire that it would take two newspaper witnesses to overcome the testimony of one plaintiff witness in a libel trial. In another case, a woman said she could not be fair because the newspaper defendant had endorsed the candidacy of President Bush. Others have expressed distaste for the media during jury selection in a variety of ways. All of these people were excused from jury service for cause.

Then there are the "media haters" who do not reveal themselves, and quietly, sometimes eagerly, await their selection as jurors in order to, as one recent juror put it after the verdict, "keep the media from getting away with one." This comment came in a case brought by a public official where the *absence* of "actual malice" was overwhelming and there was no evidence approaching the clear and convincing proof that the First Amendment requires. We failed to spot this "media hater," who fortunately did not, ultimately, sway the jury.

On the other hand, we have seen jurors who have a profound respect for free speech and the role that the press plays in our society. One juror expressed the view during voir dire in a libel case between waste disposal companies that "everyone has the right to free speech, even garbage companies." During *The Cattlemen*'s case against Oprah Winfrey, a juror spoke eloquently during deliberations that he had seen many individual rights lost during his lifetime. The only right remaining, he said, was the right to free speech, and this right is the only way to recapture our lost liberties. His comment was influential in driving the jury to a defense verdict.

We have always seen this ambivalence about free speech and press, perhaps best articulated by the passage from Tom Stoppard's *Night and Day*: "I'm all for freedom of the press, it's newspapers I don't like." But in our early history, juries were thought to be the salvation of free speech and press. Indeed, the 1735 trial of John Peter Zenger saw a jury nullify the libel instruction provided by the court and exonerate a publisher who criticized the Royal Governor of New York. By 1996, however, we learned that separate juries in Texas, Florida, and North Carolina—all within a few months of each other—had awarded over $20 million in damages against the ABC network,[1] even though, as a juror in the Texas case said, "I couldn't find anything false in [the story]."[2]

The twin, uniquely American, rights to trial by jury and to free speech and press most often intersect in libel cases. Juries can promote free speech by checking the "chilling effects" of a libel judgment as occurred in the Zenger case. But the jury, just as easily and, of late, frequently reflects the majority sentiment in the community by punishing unpopular speech and sanctioning the press, not for what it says but for what the press itself is perceived to be—rich, powerful, and arrogant. To a large extent, juries no

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FROM THE CHAIR

Is Anything "Personal" in Cyberspace?

JERRY BIRENZ

Jerry Birenz

At the Forum's Annual Conference in January 2004, Sally Kestin, an investigative reporter for the *South Florida Sun-Sentinel*, demonstrated how much information about individuals is available on the Internet by explaining that she had searched for information about George Freeman, former Chair of the Forum, and reciting for the assembled audience the facts she found. The information included specific details about George's home, including its value and how long he has lived there; the political party with which he is registered; his Social Security number; a traffic violation he committed a few years before; and his and his father's professions. Many in the audience expressed surprise about how such information could be found on the Internet. George himself seemed taken aback by this.

Good thing George himself is not an avid Internet user. As I sat listening to Ms. Kestin recite the "publicly available" details of George's life and heard others express concern, I thought "That's it? That's all you found?" The fact is that the Internet contains far more specific and personal—and possibly embarrassing and harmful—information about people who use the Internet and, for those who know how to search it, can be an amazing source for journalists and litigators and investigators.

This personal information comes, for the most part, from the users themselves, who post information without thinking about how accessible it may be or of the long-term effects of revealing such information. The information is disclosed in a variety of fora, from discussion groups to photo albums to diaries. Of course, much has been written about the phenomenon of "blogging" and of the supposed millions of blogs kept by regular people, i.e., not necessarily journalists (and of the consequences of the revelations contained in some of these blogs). But the ways in which people reveal information about themselves go far beyond that.

Growth of Internet Communities

Internet communities, such as mailing lists, websites with forums, discussion boards, news groups, and other places allow people of a common interest to gather to discuss events and ideas and share information. The day is long past when the Internet may be considered as simply a passive source of information for the average user; rather, numerous people have discovered its utility and joy as a place to make "friends." And while people know intellectually that the environment in which they post is not "private," they often assume that their confessions and revelations will stay in their little group and will never see the light of day of the broader outside world. This assumption emboldens them to reveal more than they might tell even to their actual friends and associates.

People join Internet groups to be with other fans of their favorite music groups, sports teams, and movie stars. They gather together in discussion groups made up of adherents of similar religious beliefs and political philosophies. They share experiences and advice on sites devoted to travel and to hobbies of all sorts, from sewing to kite flying. They marvel at each others' pets and cars and artistry on sites devoted to those topics.

In becoming participants in such an Internet group, people often visit and read and contribute on a regular basis, often daily and often continually throughout the day. (We can only imagine the amount of productivity that has been lost to the average office because of the easy accessibility of Internet groups to office workers.) They check for the latest comments, add their own perspectives, think about them, and come back for more.

Fans of a music group, for example, might continually discuss the meaning of song lyrics, changes in the musician's style or technique or appearance, sightings of the musician on the street, availability of tickets to a concert, events in the life of the musician's family, their favorite concert experiences, or any number of other topics.

Sports fans may argue about statistics and trends, relive the glory days of a team, reminisce about great players, predict or bet on the outcome of upcoming games, admire photographs of their team, or recommend books.

In each area, there is much for the participants to share and to tie them together. They appeal to and feed off of each other's feelings and experiences and goals. In so doing, participants in these groups build a cameraderie and come to feel that they "know" each

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other. People sell or trade memorabilia with each other, buy tickets and products from and even for each other, and sometimes meet each other.

In addition, as in any other communty, the topics of discussion extend beyond those that initially brought the group's participants together. People tell jokes, talk about their other hobbies and interests, discuss or argue politics, and form likes and dislikes about others in the group. They share causes and contribute to charities others in the group support. They form a loyalty to the group, especially vis-à-vis other Internet groups devoted to the same topic. As people discuss more and more, the usual walls of awareness and self-protection fall away, more than they do in their "real world" (or "analog") relationships. Indeed, perversely, the very sort-of anonymity that exists in Internet communities fosters a willingness in people to confide in each other, to reveal more about themselves, because they feel there is a degree of anonymity to themselves also. (And lest the readers of this column think that the participants in such Internet communities are limited to only certain "types" of people, those more likely to be heedless of their personal self-interest, in fact they include people from all stations of society including, yes, lawyers. By the way, almost every example noted in this column is something I have personally observed from the Internet communities I frequent, or in a few cases I've been told about.)

OK, enough of my pop psychology. What am I getting at?

Intimate Details Revealed

People can reveal amazing things about themselves in these Internet communities. People talk about past and upcoming vacations, describing their activities and plans in great detail. People admit to driving drunk, perhaps with regrets, or to using drugs, ruminating on its effect on their lives or how they indulge in the present. People discuss being sexually abused as a child by a father or relative or teacher; they talk about relationships with girlfriends or boyfriends, a separation or divorce, a current or past affair, or secret longings. People disclose plans to quit a job, or to move, and why. People reveal extreme, and sometimes abhorrent, political views, or make racist jokes. And people ask advice—what do others think about a decision they made? What should I do in the following circumstance? What can I do to get into this or that college?

As these topics are discussed, intimate details of people's lives, and of other people's lives, are revealed, embarrassing admissions are made, personal agonies are laid bare. Information of this sort can be very valuable to journalists and litigators, and to other sorts of investigators, for a variety of reasons. Although the information is generally revealed in what the participant thinks of as a small group, even if the person understands that material posted on the Internet can be read by others not intended to be part of the audience, the immediate need to say what's on someone's mind, to make a point, to get advice, often overrides that understanding.

People often reveal information under their real names or under e-mail addresses that can be traced to them. Even if they don't, the information that they reveal, especially when consistently posted under the same pseudonym, as is common on many Web bulletin boards, may contain strong clues as to who they are, including their job and whom they work for, their role in a community, their physical description, the car they drive, etc.—as libel lawyers and journalists well know, a person can be identifiable by means other than their names. The common practice of trading and buying items, sending things (including gifts) to each other, getting together before events, and other direct communications "off list" or "off line" also enables one to learn the actual identity of other participants, if the person hasn't already revealed it online. Also, other participants may realize that something being revealed in their group may be of interest or value to a reporter or litigant, and may take it upon themselves to report it.

Pictures Worth 1,000 Words?

Another way in which people reveal details of their lives is by posting photographs on online photo albums, and making them accessible to others.

Needed: Mentors

The Forum is pleased to publicize a mentoring program for junior media law attorneys and law students. Mentees have the opportunity to post questions and concerns about career development and related issues to mentors via an e-mail Listserv of experienced media law attorneys, who will respond directly to the mentees. The Forum anticipates informal relationships will develop between mentees and mentors both on- and off-line.

Attorneys with less than four years of experience practicing media law, as well as law students with an interest in media law, are eligible to be mentees. Although the mentor program is open to all lawyers and law students who meet the experience requirements, attorneys of color are particularly encouraged to participate.

Experienced media law attorneys are encouraged to sign up to be mentors. Prospective mentors should agree to participate for a minimum of one year.

Prospective mentees should send an e-mail (please include "COMMLAW-MENTOR" in the subject line) to andrewmar@ dwt.com with their name, address, firm/organization/law school, year of law school graduation, and years practicing media law. After being added to the list, mentees can post messages at COMMLAW-MENTOR@ mail.abanet.org.

Prospective mentors should send an e-mail to andrewmar@dwt.com with their name, address, firm/organization, and particular areas of expertise or focus. After being added to the list, mentors will receive a limited number of e-mail messages from mentees and can respond to any message but will not receive responses sent by others. The Listserv is post-only (meaning all responses will go only to the individual who sent it, not the entire group).

The Forum looks forward to the development of mentoring relationships. For more information, please contact Paulette Dodson at pdodson@ tribune.com or Andrew Mar at andrewmar@dwt.com.

Many companies offer free online space for the public to store photographs; their goal is to make money if the person or any of his or her friends wants prints of the photographs. Thus, the people storing the photographs are encouraged to share the online photo album as widely as they want, and often they do want to share the photographs widely. A person returning from vacation may send an e-mail to all of his or her friends inviting them to see the wonderful pictures of the amazing time he or she had on vacation; a newly married couple may send the link to their online wedding photo album to all of the guests at the wedding; someone who attended a birthday party or reunion, an event at a church or synagogue or other place of worship, a town meeting or celebration, a concert, may want to share the pictures with others, as may someone who just went on a date with someone new, or just had a fender-bender accident, or is looking at a new house to buy.

Indeed, participants in Internet discussion groups, discussed above, may post the URL of their online photo albums to the group. These photo albums, including the "captions" or descriptions of the photographs and sometimes comments others may post about them, can provide much personal information about their keepers.

Wedding Plan Sites

The same is true for wedding planning sites. It is quite convenient and efficient for couples getting married to set up a website, often on space provided for free by a wedding registry or other service, in which they provide information about their upcoming wedding, where they are "registered" for gifts, details about their honeymoon, and the like. Such sites often include the names and relationships of everyone in the bridal party, the names of guests who are attending, cute stories about how the couple met and events in their relationship, pictures or video of their time together, and space for friends and relatives to share their experiences with either person in the couple, embarrassing stories from the past, and their wishes for the couple. (There is a potential safety issue here too: a wedding site that talks about a wedding in a place away from the geographic area of the wedding couple's home and that lists the guests who are attending may be revealing that peoples' homes will be unoccupied for a period of time.)

Dangers of Online Diaries

Particularly worrisome sources of private information are the online diaries kept by many young people. I'd bet that many of the readers of this column who have high school or even college age children might not be aware that their children keep online journals. Such journals can be kept with varying degrees of security—they can be open to all to read, or they can be restricted to those to whom the diary-keeper gives a password. Parts of the journal may be publicly accessible, and other parts may not. The contents of such journals may contain the intimate musings of their writers, from teenage angst about relationships with friends to recounting sexual or drug experimentation to stories of abuse to revelations about cheating on a test or in an application to college.

Worse, from one point of view, is that the journal keeper may reveal information about his or her parents—not just information about the journal keeper's own interactions with his or her parents or other family members, but things he or she heard in the home, such as strongly held political beliefs, cheating on taxes, feelings about the boss, and other information that parents understandably may not want to be revealed. (And again, here lies is a very serious potential safety problem: many children misunderstand how secure their journals are, and may think that even the "open" diaries are limited to signed-up members of the journal service, who they think are just other kids like them. In that belief, they post their names, ages, schools, towns, pictures . . . information parents generally would not want them posting.)

Tell One, Tell the World?

While the fact that the type of information that Sally Kestin gathered and revealed about George Freeman is readily available on the Internet is certainly of concern to many, so is the fact that other information about us is routinely gathered, such as by libraries vulnerable to demands by government agencies seeking information about our reading interests, EZPass tracking our travel, credit card companies and supermarkets possibly compiling databases of what specific products we buy, and the vast amounts of financial data kept by stores and financial institutions about which every week seems to bring another horror story about mistakenly released data.

But of growing concern should be what we reveal about ourselves—the intimate personal details of our lives. As the Internet continues to develop new means of communication that replace the old standards—telephone conversations, personal letters, paper diaries, and photo albums—it is important for all of us to realize that in using these means of communication we are not merely communicating with the specific people we intend to talk to, but we have each become broadcasters and publishers, transmitting our information into that hard-to-define, borderless place we call cyberspace—for all to see.

And we have unwittingly created a great source of information for journalists, lawyers, and others, including our personal adversaries. Perhaps even some people are keeping warehouses of information from the Internet communications devices described above for some future use, such as when young people grow up to become political or business leaders. Especially with sites such as the Wayback Machine, which stores a sampling of webpages for eternity, and the archiving of mailing lists on publicly accessible websites, and other easy, inexpensive means of retaining and spreading information, we have created our own database of information about ourselves, that many of us may one day regret.

Talk Show Torts Turn Deaf Ear to Plaintiffs

JOSEPH A. TOMAIN

In August 2004, a New York appellate court dismissed a lawsuit filed by Sheila C., a minor, who alleged that talk show host Maury Povich and the producers of *The Maury Povich Show* had negligently put her in contact with a limousine driver who later raped her.[1] This dismissal is the latest in a line of defense victories in cases involving "talk show torts"—claims based on appearances on popular television talk shows—illustrating that the talk show genre has provided less than fertile ground for plaintiffs.

This article reviews *Sheila C. v. Povich* and its predecessor talk show cases. As the cases demonstrate, the courts have been reluctant to impose duties on talk show producers that extend beyond the conduct of the talk show taping itself, and also have rejected claims of invasion of privacy and defamation on the part of talk show guests and those connected to them. At least for the time being, it seems unlikely that the talk show genre will be the next big hit for plaintiffs.

Sorry, Guests, Our Duty Is to the Viewers

Sheila C. and the well-known case against the producers of *The Jenny Jones Show*[2] reflect the judiciary's reluctance to impose a duty on talk shows to protect their guests from the tortious acts of third parties that occur after an episode has been taped and the guests have left the studio, even though the show may have played a role in stirring the tortfeasor to action.

In *Sheila C.,* a fourteen-year-old female guest of *The Maury Povich Show,* Sheila, sued Povich, the show, its producers, and its distributors, alleging that they negligently allowed a man who identified himself as "Maury's limo driver" to rape her hours after taping the episode, even though she had left the studio and had been released into the custody of her mother and grandmother.[3]

When *The Maury Povich Show* solicited guests to appear on an episode entitled "Out of Control Teens," Sheila's mother responded. Sheila's mother allegedly informed the show's staff of Sheila's age and told them that she was undergoing counseling, she was on medication for emotional illness, she recently attempted suicide, she recently lost an immediate family member, and she reported having sexual intercourse with one twenty-nine-year old man and five males who were under age sixteen. In exchange for Sheila's appearance on *Maury Povich,* the defendants offered to provide follow-up psychological counseling, send Sheila to a corrective "teen boot camp," make transportation and hotel arrangements, and pay related expenses.

Before taping began, a defendant and another staff member allegedly told Sheila to act sexually provocative and to wear only her thigh-length top without slacks so that she would appear "sexier," which would be "better for the show." As Sheila watched other guests being taped, a man introduced himself to her as "Maury's limo driver." He asked for her contact information in New York and offered to show her around the city later that night. Sheila gave him this information, taped the episode, and returned to her hotel with her mother and grandmother. When "Maury's limo driver" showed up at Sheila's hotel, her mother and grandmother turned him away, but he persuaded Sheila to sneak out. Allegedly, "Maury's limo driver" drove her to a dark area, climbed in the back of the limousine, and raped her.

Sheila sued for negligent retention and negligent supervision, both based on the limousine driver's conduct. The defendants contended that the negligence claims should be dismissed because they did not owe a duty of care to Sheila. After noting that negligence is a "matter of time, place, and circumstance,"[4] the trial court found that the following allegations established the existence of a duty of care: (1) the show solicited a minor for commercial purposes and brought her into the state; (2) it knew that she had emotional difficulties; (3) it represented itself as having expertise in remedying problems of "out of control" teens; (4) "Maury's limo driver" was able to approach Sheila on the set and gain her contact information; (5) after taping, the show permitted the minor to leave under the supervision of two adults who admittedly could not control her; and (6) no other precautions were taken to protect the minor.[5]

On the negligent hiring and retention claim, the trial court held that there were relevant facts exclusively within the defendants' control regarding "Maury's limo driver" that made dismissal at the pleading stage improper.

As to the negligent supervision claim, the defendants unsuccessfully argued that the show should not be responsible for the alleged rape because they were not directly supervising "Maury's limo driver" at the time of the incident. In response, the trial court stated: "A caretaker is not automatically exempt from responsibility merely because of a suspension of physical supervision of an injured minor where, as here, the conditions created by the caretaker are still in effect."[6]

The appellate court reversed the trial court on both claims. First, it dismissed the negligent hiring and retention claim because Sheila failed to allege that defendants knew or should have known of "Maury's limo driver's" propensity for the type of conduct that allegedly occurred.[7]

Second, the court dismissed the negligent supervision claim, finding that the defendants owed no duty to Sheila at the time of the alleged rape. Generally, the court noted, defining the orbit of duty is not the result of an algebraic formula. "Rather, [duty] coalesces from vectored forces including logic, science, weighty competing socioeconomic policies and

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sometimes contractual assumptions of responsibility."[8] Specifically, the question of duty in *Sheila C.* was "whether a temporary custodian has a continuing duty to protect a child from harm once that child has been returned to the custody of a parent or guardian or, as in this case, both a parent and a guardian."[9] The court answered this question in the negative, signaling that talk show producers' duties over their guests—even minors allegedly placed in risky circumstances—end at a taping's conclusion.

Courts have been reluctant to impose duties on talk show producers that extend beyond the conduct of the talk show taping itself.

Perhaps It's Better Left Unsaid

The appellate decision in *Sheila C.* was consistent with the final result in *Graves v. Warner Bros.,* a lawsuit against the producers of *The Jenny Jones* Show that attracted considerable publicity following a $29 million trial verdict in the plaintiff's favor and later reversed on appeal.

Graves arose from an appearance by Scott Amedure and Jonathan Schmitz on *The Jenny Jones Show* in Chicago. Although Schmitz knew that the episode was about secret crushes, he did not know the that episode was entitled "Same-Sex Crushes" because the producers intentionally withheld this information from him. During the taping, Amedure revealed his secret crush on Schmitz. Three days after taping, back home in Michigan, Schmitz killed Amedure and was subsequently found guilty of second-degree murder.[10] Amedure's personal representatives sued *The Jenny Jones Show* producers for wrongful death, alleging that the producers knew or should have known that "ambushing" Schmitz with Amedure's secret same-sex crush for the "sole purpose" of increasing television ratings would "unnecessarily and unreasonably expose [Amedure] to the risk of harm" and incite Schmitz to violence.[11]

In May 1999, a Michigan jury found the defendants liable to Scott's personal representatives for $29 million. The jury verdict was based on a finding that the producers "ambushed"[12] Schmitz with the surprise topic and revelation of a same-sex crush. The award raised concerns that a wave of lawsuits seeking to hold talk shows, their hosts, producers, and owners civilly liable might be next season's big trend. Multiple commentators addressed this decision, noting that the law of talk show torts "remains unsettled"[13] and that viewers should "stayed tuned"[14] to find out just how far this emerging trend of talk show torts would go toward expanding media liability.

In 2002, however, the Michigan appellate court reversed and granted summary judgment to the defendants, holding that the talk show owed no duty to Amedure to protect him from Schmitz. Specifically, the court found that no special relationship existed between the television show and its guest that created an obligation to protect Amedure from the criminal acts of a third party. Invoking a basic negligence standard, the court ruled that the only duty owed to Amedure was that of a business host to a business guest, an obligation that ended three days prior to the murder, hundreds of miles away in another state.[15]

Graves includes a strong dissent, which argues that the plaintiffs adequately demonstrated active misconduct on the part of the defendants.[16] According to the dissent, the defendants used lies, deceit, and outrageous behavior to ensure that Schmitz would appear on the show, while hiding the true nature of the episode—same-sex crushes. The dissent concluded that, for the defendants to be held liable for the consequences of Schmitz's actions, Schmitz's murder of Amedure did not itself need to be foreseeable. Rather, the dissent concluded more generally that

> as a matter of public policy, if defendants, for their own benefit, wish to produce "ambush" shows that can conceivably create a volatile situation, they should bear the risk if a guest is psychologically unstable or criminally dangerous by being charged with that knowledge in the context of any foreseeability analysis.[17]

The *Graves* dissent notwithstanding, both *Graves* and *Sheila C.* were ultimately resolved, as a matter of law, in the defendants' favor. Both courts found that a talk show does not owe its guests a duty of care for the intentional acts of a third party that occur away from the studio, whether that third party be the host's limo driver or another guest. A brief review of other talk show cases reveals a similar reluctance to impose tort liability.

That's None of Your Business!

In addition to negligence claims, talk show plaintiffs have attempted to rely on several other tort claims, including the four privacy torts. Interestingly, the invasion of privacy cases show that willing talk show guests are not the only plaintiffs who face difficulty in establishing these claims, but that family, friends, and "acquaintances" of guests, regardless of their consent, are also subject to having their dirty laundry aired before millions of viewers.

Anonsen v. Donahue[18] applies the First Amendment principle that precludes a claim for public disclosure of private facts when a logical nexus exists between a person's identity and a matter of public interest. While Miriam Booher and her ex-husband were still married, he raped and impregnated her eleven-year-old daughter, his stepdaughter. She gave birth to a son, who was raised as her half-brother, the "son" of Miriam. Many years later, the truth was told to the "son." Sometime after that, Miriam appeared on *Donahue* and revealed this story of rape, incest, and her own victimization resulting from these life-changing events. Miriam's daughter and grandson filed suit against her, Phil Donahue, the show's producer, the show's owner, and a local television station for invasion of privacy—public disclosure of private facts. The appellate court affirmed the trial court's summary judgment for the defendants, holding that Miriam's story was protected by the First Amendment.

Although Miriam did not reveal the identity of her daughter or grandson, she did reveal her own. The plaintiffs alleged that Miriam's revelations neces-

sarily led to the discovery of their identities, thereby invading their privacy. While the court acknowledged that such revelation was a likely outcome, Miriam was free to disclose her own identity. The court reasoned that there was a logical nexus between Miriam's identity and a matter of legitimate public interest, i.e., the rape, incest, cover-up, and eventual discovery. The court emphasized that "to hold otherwise would be to imply that one's autobiography must be written anonymously."[19] Thus, *Anonsen* signals that if there is a logical nexus between a matter of legitimate public interest and one's identity as revealed on a talk show, then a claim for public disclosure of private facts cannot trump the First Amendment right to free speech, even outside of a hard news context.

Judge Posner's "Final Thoughts"

Sixteen-year-old Tammy, her sister, and their stepmother and stepsister, volunteered to appear on *The Charlie Perez Show* when they learned that the show was planning to tape an episode about tensions between stepparents and stepchildren. Tammy joined her sister in making some sharp-tongued attacks directed at her stepmother, accusing her of beginning an affair with their father before he divorced their mother. The stepmother fired back by reading from a police report about Tammy that indicated that she exhibited violent, profane, and indecent behavior. The report also noted that Tammy had described herself as the biggest gangster in town. At this point, visibly pregnant Tammy wryly smiled at the engaged studio audience, did a full turn, and asked, "do I look like a gangster?"

Although the show was taped two weeks before airing, Tammy never requested that this segment of the show be removed. After the show broadcast, however, Tammy suffered unbearable teasing, had to change schools, and sued the show. In *Howell v. Tribune Entertainment Co.,* Tammy sued for invasion of privacy by public disclosure of private fact, alleging that either Perez "should have interrupted the program when he realized that the stepmother was reading from a police report or the defendant should have erased that part of the tape before the broadcast."[20]

The trial court dismissed Tammy's claims, and the Seventh Circuit affirmed. The court noted that reading from a police record may not even qualify as a private fact, but stated that it need not address this issue.[21] Instead, the court held that "a person whose character is assailed can respond with facts bearing on the character of her assailant that might otherwise be off limits."[22]

The Seventh Circuit also recognized that a talk show should not be liable for the acts of a third party: "It is one thing to impose liability on the press for invading someone's privacy, and another to prevent or take steps to rectify an invasion of privacy by another."[23] Moreover, the court stated that "the stepmother and derivatively the broadcaster were entitled to use private facts about the plaintiff to rebut her very public attack on the stepmother's own private character."[24]

While finding for the defense, the Seventh Circuit in *Howell* stopped short of expressing approval for the talk show from which the lawsuit arose. Rather Judge Posner offered his own "final thoughts" on the case: "[W]e do not mean to express approval of the practice of broadcasters of inviting teenagers to place themselves in embarrassing situations on television."[25]

Topless Dancers in a False Light?

In *Fronning v. Jones,* topless dancers unsuccessfully alleged that an episode of *The Jenny Jones Show* entitled "His Bachelor Party Ruined Our Marriage" gave rise to invasion of privacy.[26] During this episode, Mr. and Mrs. Busch appeared and told their story of how their marriage suffered due to the hiring of topless dancers for his bachelor party. As Mrs. Busch told the audience of her anger upon discovering photos of two topless dancers giving Mr. Busch a "lap dance," these photos were intermittently shown to the studio and television audiences. Although the dancers' names were not mentioned, their faces were identifiable in several of the pictures. The dancers, who were described as "home wreckers," received no advance notice that their images would appear on the show, and sued for misappropriation of likeness, public disclosure of private facts, and false light. The trial court granted summary judgment to the defendants on all three claims.

The dancers appealed the dismissal of their false light claim. The Sixth Circuit affirmed summary judgment on this claim, reasoning that "[a]lthough the title of the show was His Bachelor Party Ruined Our Marriage, the Busches—who are still married—appeared good-humored and at ease with each other throughout the broadcast."[27] Moreover, Mrs. Busch stated that she intended to remain married. Thus, the court held that no reasonable juror could conclude that the dancers' performance actually ruined the Busches' marriage or that they were "home wreckers."[28]

Bad Boys' Names Have No Intrinsic Value

Although *COPS* is not a talk show, *Reeves v. Fox Television Network*[29] follows a similar line of analysis to talk show cases, and illustrates the difficulty that a plaintiff is likely to encounter in establishing a claim for invasion of privacy if he or she has willingly agreed to appear on television.

On August 30, 1993, Willie Reeves was in an altercation with another man. When police and a *COPS* camera crew arrived at his home to investigate, Reeves answered the door and allowed them inside. After the incident appeared on *COPS,* Reeves sued Fox Television, the producer of *COPS,* as well as the police and the City of Cleveland, alleging that these defendants had committed all four privacy torts. The court granted summary judgment on all of Reeves's claims.

First, the court found that the "Cleveland Police Department's response to a call regarding a violent crime, their investigation and arrest of a suspect are all matters of legitimate public concern."[30] Further, the court held that Reeves's address, his physical description, and images of him being escorted in handcuffs were not private facts.[31]

Second, the court dismissed Reeves's misappropriation claim on the basis

that it requires more than the mere publication of one's name or likeness. Instead, a plaintiff must allege that his or her "name or likeness has some intrinsic value, which was taken by defendant for its own benefit, commercial or otherwise."[32] On this element, the court found that Reeves's name and likeness had no intrinsic value, notwithstanding the profit motive of the *COPS* producers: "[T]he fact that the defendant is engaged in the business of publication . . . out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness."[33]

Third, Reeves lost on his claim for false light because Ohio does not recognize this invasion of privacy tort.[34] Finally, Reeves's claims for intrusion upon seclusion and trespass failed. His own testimony, as well as videotaped footage of the arrest, show that he consented to the police and the camera crew entering his home.[35]

Talk show guests have not had any greater success with defamation claims than with other torts.

Apparitions Have No Claim to Privacy

Mineer v. Williams[36] is a story about a mother, a psychic, and a talk show. In October 1997, a teenage girl, Erica, disappeared. In September 1998, while Erica was still missing, a psychic appeared on *The Montel Williams Show* to help guests learn information about loved ones who were missing or dead. Erica's mother appeared on the show and asked the psychic whether anyone had information about her missing daughter. The psychic told her that Erica was murdered and that a man named Chris had information. Although the show edited the sound to eliminate the name "Chris," viewers could read the psychic's lips and discern the name. One day after the show aired, Chris Mineer, who knew Erica, shot and killed his girlfriend and then committed suicide. Four months later, the psychic appeared on *Montel Williams* again. Describing the psychic's "powers," Williams told the audience that the psychic had given Erica's mother Chris Mineer's name during the break of the September 1998 episode. Williams explained that Chris killed his girlfriend and himself in a panic, believing that he would soon be arrested for a crime that he committed.

Chris's mother sued Williams, the producers of *The Montel Williams Show*, and the psychic for false light invasion of privacy. The court granted defendants' motion to dismiss, applying the *Restatement* principle that, "'[e]xcept for the appropriation of one's likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded.'"[37]

Guest Pass for Defamation?

Talk show guests have not had any greater success with defamation claims than with other torts. As with other tort claims, defamation claims generally fail because talk show guests create or voluntarily participate in situations that they eventually regret.

When Everybody Knows Your Name

Reeves v. Fox Television, discussed above, rejected privacy claims based on an appearance on *COPS,* largely because the plaintiff permitted a camera crew to enter his home. Similarly, defamation claims arising from the talk show context have been dismissed as a result of the plaintiffs' voluntary conduct in appearing on television, which in some instances has been held to give rise to public figure status.

In *Anderson v. Rocky Mountain News*,[38] the plaintiff sued a newspaper based on the defamatory statement that he was jailed for violating a child custody agreement. The appellate court affirmed summary judgment for the newspaper because the plaintiff was a public figure—based on his prior appearance on a television talk show—who could not establish actual malice.

While in the middle of a custody dispute, the plaintiff crossed state lines with his daughter. In response to a request for guests, the plaintiff contacted *The Phil Donahue Show*, offering to appear on an episode concerning fathers' rights. He appeared on two episodes. Although he appeared in disguise, his wife recognized him and the plaintiff was apprehended. Shortly thereafter, the newspaper published an article on this custody battle, including a prior incident in which the Houston police asked the plaintiff to remain in a holding room. The plaintiff sued over the paper's characterization of the Houston incident as an arrest.

The court granted the defendants summary judgment, finding that the father was a public figure and that he could not establish actual malice. Citing *Gertz v. Robert Welch, Inc.*,[39] the court held that, when the father invited media attention by appearing on *Donahue* to discuss child snatching and fathers' rights, he thrust himself into a public controversy and became a public figure for these issues. This status and his inability to establish actual malice resulted in summary judgment for the defendants.

Similarly, in *Contemporary Mission, Inc. v. New York Times Co.*,[40] the U.S. Court of Appeals for the Second Circuit affirmed summary judgment for the New York Times Co., finding that the plaintiffs were limited-purpose public figures who could not establish actual malice. *The New York Times* reported on religious and business controversies concerning Contemporary Mission, Inc., and several of its priests. Specifically, the *Times* reported allegations that the priests forged proof of their ordinations and that the Mission was a front to attain tax-exempt status for its successful mail-order business. The priests and the Mission sued the newspaper for defamation.

During the underlying religious controversy, the Mission had formed a folk-rock group, The Mission Singers. In addition to performing hundreds of concerts, The Mission Singers "appeared on numerous television and talk radio shows, including television shows such as the Ed Sullivan Show, the Mike Douglas Show, and the Joey Bishop Show."[41] One of the priests composed a rock-opera, *Virgin*, which sold 20,000 copies.[42]

These public appearances, particularly the television shows, formed the basis of the court's finding that the plaintiffs were public figures. After citing *Gertz,* the court also cited the four-part test announced in *Lerman v. Flynt Distributing Co., Inc.*,[43] for determining limited-purpose public figure status:[44]

> A defendant must show the plaintiff has: (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media.[45]

Applying the *Lerman* test, the court found that the priests were limited-purpose public figures because they thrust themselves to the forefront of a public controversy, the religious controversy.[46] Seeking to avoid public figure status, the priests argued that because the religious controversy occurred almost twenty years earlier, they were no longer public figures. The court rejected this argument noting that "the passage of time will not necessarily change an individual's status as a public figure."[47]

The plaintiffs then argued that they were not limited-purpose public figures for purpose of the business controversy because they had not voluntarily entered into this controversy. The court agreed that the plaintiffs did not thrust themselves to the forefront of the business controversy because "they had not utilized the media to further their points or to sway public opinion on the matter."[48] Nevertheless, the court held that the plaintiffs qualified as limited-purpose public figures for the business controversy because it was "necessarily intertwined with the religious controversy."[49] Thus, when two public controversies intertwine, a party can become a limited-purpose public figure for both simply by thrusting itself, even on a television show, to the forefront of one of them.

Misty Tales Episode I

Misty Nicole Weber, a minor, and her mother sued Sally Jesse Raphael and the producers of her show for defamation based on the allegation that they induced Misty to portray a prostitute on the episode entitled "I Want My Teen Daughter Off the Street." Before the show, Misty claimed she was a prostitute, but in her lawsuit she alleged that she was not a prostitute and had only been induced by the show to portray one. To determine which statement was truthful, the defendants propounded interrogatories requesting the names of every person with whom Misty had a sexual relationship, and every person who provided Misty with illegal drugs.[50]

The plaintiffs sought to limit the scope of these interrogatories to whether she was a prostitute and, if so, the names of her customers. The court found that the defendants were entitled to the interrogatory responses requested, noting that the defendants were "not required to accept plaintiff Weber's self-reporting on this issue."[51] The court further explained that not only was the information relevant to whether Misty was a prostitute but it was also relevant to her claim for damages for injury to her reputation. But this decision is only a small part the Misty Nicole Weber legal saga.

Misty Tales Episode II

In addition to asserting a defamation claim, Misty claimed that the show misappropriated her image for commercial purposes by portraying her as a prostitute, even though she told the show before taping that she was one and that her appearance was voluntary. The defendants moved to dismiss Misty's claims for misappropriation, arguing that the newsworthiness privilege applied.[52]

The court rejected Misty's argument that *The Sally Jesse Raphael Show* is "unworthy" of the newsworthiness privilege "because of the nature of the forum, a television talk show."[53] In a passage unlikely to amuse print journalists, the court observed that "television talk shows are the equals of *The New York Times* in the eyes of the law."[54] Based on that finding, plus the plaintiffs' concession that the show's topic—teen runaways and teenage prostitution—was a matter of public concern, the court found that the newsworthiness privilege can apply to talk shows.

Nonetheless, the court denied the motion to dismiss based on a factual dispute: "If the defendants knew that Weber was not a prostitute, then the Show was riddled with substantial falsification and fictionalization."[55] Thus, this invasion of privacy claim survived dismissal because the court found that substantial fictionalization of Misty could trump the newsworthiness privilege.

Misty Tales Episode III

Although the misappropriation claims survived the motion to dismiss, they were defeated on summary judgment.[56] As noted, the court previously sustained the misappropriation claims because the newsworthiness privilege would not apply if the show engaged in substantial fictionalization concerning whether Misty was a teenage prostitute. But, an unrelated case intervening between these two Misty opinions held that "there is no 'substantial fictionalization' limitation on the newsworthiness exception."[57] In the face of this holding, the court granted summary judgment on the misappropriation claims.

Misty's defamation and negligence claims also failed on summary judgment. The defamation claim failed for three independent reasons. First, Misty's voluntary appearance on the show claiming to be a prostitute barred her defamation claim. As the court

"There is no 'substantial fictionalization' limitation on the newsworthiness exception."

observed, "'there is no publication,' and therefore no liability, 'if the defamatory statement is exposed to a third party by the person claiming to be defamed.'"[58]

Second, under New York law, a party cannot be liable for defamation when a story is "'arguably within the sphere of legitimate public concern' . . . unless 'the publisher acted in a grossly irresponsible manner.'"[59] The court held that the talk show defendants did not act in a grossly irresponsible manner because they reasonably relied on the

expertise of a person hired to identify potential guests. Third, this person, to whom Misty allegedly said before the show that she was not a prostitute, was an independent contractor with expertise in finding potential guests for the show, was not an employee of the show, and his knowledge could not be imputed to the show's producers.

As a result of the elimination of the defamation claim, Misty's negligence claim necessarily failed. Because the negligence claim was merely a derivative of the defamation claim, it could not survive standing alone. The court noted that to hold otherwise would be a "transparent and impermissible attempt to evade the exacting requirements that New York has imposed on a claim for defamation."[60]

When Smoke Gets in Your Eyes

Even when a court allows a talk show tort case to survive dismissal, it can express its displeasure in doing so. Ahron Leichtman, a guest on a talk radio show, sued the host, the host's employer, and another guest (a talk show host from the same station) for battery, invasion of privacy, and violation of a city health regulation.[61] Specifically, Leichtman alleged that he was a nationally known antismoking advocate who appeared on Bill Cunningham's radio talk show on the date of the Great American Smokeout. During Leichtman's appearance, Cunningham's other guest, Andy Furman, repeatedly blew cigar smoke in his face, allegedly "for the purpose of causing physical discomfort, humiliation, and distress."[62]

The appellate court reversed the trial court's dismissal of the battery claim because, under Ohio law, smoke is a "particulate matter" capable of making contact, thus satisfying the physical contact element of the battery tort.[63]

The court did, however, affirm the dismissal of the invasion of privacy and city smoking regulation claims. The court found that the invasion of privacy claim could not withstand dismissal because Leichtman "willingly entered the WLW studio to make a public radio appearance with Cunningham, who is known for his blowtorch rhetoric."[64] Thus, there could be no claim for intrusion upon seclusion. The smoking regulation claim was dismissed because the regulation did not create a private right of action.

Although the court permitted the battery claim to survive, it spent two paragraphs expressing its disdain that such a case would clog a court's docket. The court noted that this "case emphasizes the need for some form of alternative dispute resolution operating totally outside the court system as a means to provide an attentive ear to the parties and a resolution of disputes in a nominal case."[65]

And Now . . . A Word from Our Sponsor

Barring the *Graves* dissent's viewpoint being adopted by a majority, the courts that have considered talk show torts offer scant reason for optimism among would-be plaintiffs. *Graves* and *Sheila C.* both hold that courts view the relationship between a talk show and its guests as one between a business invitor and invitees. Once this temporary relationship ends, so does the duty of care. In *Graves,* that relationship was clearly over when three days had passed since the taping and the guests were hundreds of miles away in another state before the incident giving rise to the suit occurred. In *Sheila C.,* that duty ended at the time the guest left the physical custody of the talk show and was released into the custody of her mother and grandmother, even though the incident occurred the same night of taping and involved the host's limo driver.

Courts considering claims of defamation and invasion of privacy have shown a similar reluctance to impose liability on talk show producers. On those claims, the courts have emphasized that a plaintiff's voluntary appearance and disclosure of personal information, or the public significance of a talk show's topic, likely will defeat claims based on reputational or privacy interests.

On the whole, talk show cases and their outcomes strongly suggest that the safest place for talk show fans is at home watching television, rather than on the stage of this still-evolving form of broadcast entertainment.

Endnotes

1. Sheila C. v. Povich, 11 A.D.3d 120 (N.Y. App. Div. 2004).
2. Graves v. Warner Bros., 656 N.W.2d 195 (Mich. Ct. App. 2002), *cert. denied,* 124 S. Ct. 2884 (2004).
3. The trial court dismissed the negligence per se, slander per se, and intentional/negligent infliction of emotional distress causes of action. Sheila C. v. Povich, 768 N.Y.S.2d 571 (N.Y. Sup. Ct. 2003).
4. *Sheila C.,* 768 N.Y.S.2d at 575.
5. *Id.* at 576.
6. *Id.* at 577.
7. *Sheila C.,* 11 A.D.3d at 130.
8. *Id.* at 126.
9. *Id.*
10. People v. Schmitz, 586 N.W.2d 766 (Mich. Ct. App. 1998), *aff'd,* No. 222834, 2002 Mich. App. Lexis 71 (Jan. 22, 2002).
11. Graves v. Warner Bros., 656 N.W.2d 195, 198 (Mich. Ct. App. 2002).
12. Robin Famoso, *Note: Ambush TV: Holding Talk Shows Liable for the Public Disclosure of Private Facts,* 1998 RUTGERS L.J. 579 (1998).
13. Jason S. Schlessel, *Note: The Deep Pocket Dilemma: Setting the Parameters of Talk Show Liability,* 20 CARDOZO ARTS & ENT. L.J. 461, 486 (2002).
14. Richard M. Goehler & Jill Meyer Vollman, *Expansion of Tort Law at the Expense of the First Amendment: Has the* Jones *Court Gone Too Far? Stay Tuned to Find Out,* 27 N. KY. L. REV. 112, 115 (2000).
15. *Graves,* 656 N.W.2d at 202–03.
16. *Id.* at 207.
17. *Id.* at 211.
18. 857 S.W.2d 700 (Tex. App. 1993).
19. *Id.* at 706.
20. 106 F.3d 215, 219 (7th Cir. 1997).
21. *Id.* at 220.
22. *Id.*
23. *Id.* at 221.
24. *Id.* at 222.
25. *Id.*
26. Fronning v. Jones, No. 94–2205, 1996 U.S. App. Lexis 5725 (6th Cir. Feb. 23, 1996).
27. *Id.* at *5.
28. *Id.*
29. 983 F. Supp. 703 (N.D. Ohio 1997).
30. *Id.* at 709.
31. *Id.*
32. *Id.* at 710 (citations omitted).
33. *Id.* (citing Zacchini v. Scripps-Howard Broad. Co., 351 N.E.2d 454, 459 (1976), *rev'd on other grounds,* 433 U.S. 562 (1977) (quoting with approval proposed RESTATEMENT (SECOND) OF TORTS § 652C (Draft No. 13, 1967))).
34. *Id.* (citations omitted).

(Continued on page 25)

10th Annual Conference Revisits Two Landmark Decisions

Editors' Note: The Communications Law Forum held its Tenth Annual Conference January 13–15, 2005, in Boca Raton, Florida. This year, the forum retrospective examined two landmark cases (*Richmond Newspapers v. Virginia* and *Milkovich v. Lorain Journal*). The conference also provided a post-game analysis of how the media performed during last year's presidential election and, as always, covered many of the hot topics affecting the media bar.

This article is based on reports from law students and Forum Scholarship winners Kevin R. Kemper (University of Missouri at Columbia), Casey Murray (University of Kansas), and Shannon Torgerson (Northwestern University), as well as Jacklyn E. Bruce, one of the 2004 Forum Scholarship winners and currently the ABA Law Student Division liaison to the Forum.

Journalism of Affirmation?

The answer to "how well did the media perform in the 2004 presidential election" depends on where you got your news and whom you voted for. Jonathan Alter, a writer for *Newsweek,* suggested that the biggest story coming out of the election was not the country's division into red and blue states, but the fact that more people received their news along ideological lines. Other panelists agreed. "People are seeking the journalism of affirmation," Jill Abramson, managing editor of *The New York Times* said, citing the Swift Boat Veterans for Truth story as an example.

She said that the *Times* wanted to publish both sides of the issue in as much detail as possible. Reporters were dispatched to talk to people who had actually served with presidential candidate John Kerry and to the sponsors of the Swift Boat ad campaign. However, because the *Times* did not jump on the story immediately after it surfaced, people attributed the delay to the newspaper's "bias."

The traditional, or mainstream, media have had a hard time adjusting to the widespread public reliance on Internet sites and partisan blogs, according to Thomas Fiedler, executive editor of the *Miami Herald.* "Newspapers are built around empirical reporting," he said. "It's becoming troubling that the value of this type of reporting seems to be declining with the voters. Any deviation from the center will cause questioning and skepticism from either side."

The defining moment for the post-modern media, according to Abramson, occurred because of the *Times*'s story about missing explosives from ammunition dumps in Iraq. Abramson said the reporters worked extremely hard to get documents showing that U.S. forces did not secure the dumps and concrete evidence confirming that those sites had been looted. Immediately after the story came out, the Bush administration tried to cast doubt on the timing of the disappearances that were reported by the *Times.* Bloggers began to attack not only the story but also the *Times.*

After Abramson's e-mail address was posted by conservative groups, "I was deluged by people asking when the paper would take back its bad story," she said. "What was truthful had very quickly turned murky and this made other news organizations slow and tentative to move on it." This response also showed the power of bloggers and the "new media" to change the way the stories are reported. "The [mainstream] media used to be the gate keepers for what is news and what isn't," Alter said. "Now there are no gates."

The panelists felt that cable news networks had replaced *The New York Times* and the *Washington Post* as news trendsetters. With continuous airtime and relatively low budgets, cable news tends to broadcast the basic facts and to set the stage for proponents of either side to debate the issue. The Swift Boat advertisements were a perfect example, according to Abramson. These ads, which only ran a few times in limited markets, ended up being one of the biggest stories of the 2004 election, primarily because of endless discussions on cable news programs.

The biggest lesson of the election, according to Fiedler, is that the traditional media needs to find a market for its type of reporting. "The biggest concern out of the election is whether there is still a market-value for public service, neutral reporting," he said. "If the mainstream media cannot find a business model that contains quality journalism, it could be in trouble."

Did *Milkovich* Change the Law?

Coach Michael Milkovich, Sr., says he holds no hard feelings toward reporter Ted Diadiun, who wrote a critical op-ed article in the *Lorain* [Ohio] *Journal* about Milkovich that ended up in the U.S. Supreme Court. Diadiun's column implied that Milkovich lied under oath during his testimony before the Ohio High School Athletic Association about a fight between competing high school teams. In its landmark 1990 decision, *Milkovich v. Lorain Journal,* the Supreme Court held that the First Amendment did not prohibit application of state libel law to opinion articles. Today, though, Coach Milkovich says that "Ted and I are still friends." "I told him, 'Let's get another case like this and next time we'll split the money.' "

The pressing issue for those who promote and defend media still may be whether "another case like this" would cause more trouble for the media. The panel was unable to answer the question in the panel's title, "Has the Supreme

Court Been Overruled?" Despite the holding in *Milkovich,* the debate continues over whether opinion is a defense in a libel action.

"I'm not sure that *Milkovich* really caused a great change in the law," said panelist Laura R. Handman, Davis Wright Tremaine LLP, arguing that "context" is still an important factor in determining whether opinion is libelous. Handman pointed to Justice Brennan's dissent, among other opinions, for her conclusions.

George Freeman, assistant general counsel of the New York Times Co., disagreed, saying that he tells his newsroom, "If you say, "Freeman is the worst lawyer in New York," the reader assumes—without more information—

Despite what may seem like prudent caution given *Milkovich*, the extent of protection of opinion remains unclear.

that the statement is true." His advice? "Give some supporting facts to go with your opinion."

Despite what may seem like prudent caution given *Milkovich,* the extent of protection of opinion remains unclear. "We still have opinion in Ohio, and the case is not followed in state courts," said Richard Panza, who represented the *Lorain Journal* in the libel action. Milkovich's attorney, Brent English agreed.

What Do Martha Stewart and Michael Jackson Have in Common?
Both are celebrities who were tried on criminal charges. The global press seems to have an irrationally high interest in celebrity cases, a phenomenon that has reignited the controversy over public access to courtroom proceedings. That's according to Judge James F. McHugh of the Massachusetts Appeals Court, who was a panelist in a retrospective analysis of *Richmond Newspapers v. Virginia,* the 1980 case that confirmed the constitutional right of public access to criminal trials.

The instant global media and 24/7 cable news programs, Judge McHugh continued, have terrified judges that they will become the next Judge Ito (of O.J. Simpson fame), perceived as having lost control of their courtrooms. Courthouse doors have slammed shut in response, inadvertently contributing to the "barbarians at the gate" atmosphere as cable and TV news outlet satellite dishes pop up on the courthouse steps and adjoining property.

The panel, which included key players in two noteworthy public access cases, examined *Richmond Newspapers* from the viewpoint of attorneys who have fought for public access for the past twenty-five years. According to panelist David C. Kohler, who represented Richmond Newspapers, the case stemmed from the decision of a Virginia trial court judge to block media access to a murder trial. Although a state statute authorized judges to close courtrooms in the interest of ensuring fair trials, very few actually did, and the *Richmond Newspapers* case represented the first closure of its time.

Unlike today, where an immediate appeal of such a sealing order would be pro forma, Richmond Newspapers filed an appeal only after considerable discussion. At the same time, the U.S. Supreme Court decided *Gannett Co. v. DePasquale,* which established that no absolute right of public access existed for pretrial suppression hearings. A month later, citing *Gannett,* the Virginia Supreme Court denied the newspaper's appeal.

Due to the conservative nature of the Virginia courts and their general unwillingness to strike down statutes, lawyers for the paper intentionally avoided challenging the constitutionality of the Virginia statute. The interest in the case apparently extended to the U.S. Supreme Court when some Justices had expressed dismay over the Virginia court's overly broad interpretation of *Gannett.* Although the U.S. Supreme Court did not have appellate jurisdiction over the appeal (because the lower court had not reached the issue), it granted certiorari and ultimately reversed the Virginia Supreme Court's decision.

Shortly afterward, the Court, in *Globe Newspaper Co. v. Superior Court,* struck down a Massachusetts statute that appeared to limit access to sexual assault and rape trials with underage victims only to people with a direct interest. In the underlying litigation, three young female students at a local private school alleged that a tennis instructor had raped them. The identity of the defendant created considerable community interest and attention. Despite the fact that the victims did not object to an open courtroom, the trial court construed the statute as unwaivable and declined to reach any constitutional issues.

Judge McHugh was an attorney for the *Boston Globe* when the newspaper challenged the statute before the U.S. Supreme Court. At the time, McHugh argued that the statute failed as a protective device. The Court struck down the statute, holding that the state's strong interest in protecting minors, while compelling, did not justify mandatory closure of the trial.

The Jackson, Bryant, and other high-profile cases appear at the opposite end of the access spectrum than do *Richmond Newspapers* and *Boston Globe.* Closed courtrooms are bad enough in any situation, opined Lucy Dalglish of the Reporters Committee for Freedom of the Press, but at least the public is aware of celebrity cases. The trend toward closure becomes frightening, she said, in terrorism cases that are off-docket. There are people languishing in federal prisons with no record of how they got there. As a result, no one knows about them and thus no one can bring a challenge.

How to Diversity the Media Bar
"Our goal is to have our firm mirror our communities," James Klenk of Sonnenschein Nath and Rosenthal LLP told the group assembled for a lively discussion on attracting more people of color to the media bar. Klenk highlighted three reasons why law firms should support diversity. "It's the right thing to do, clients demand it, and diverse firms are more productive," he said.

Moreover, the media bar has a special obligation to diversify its ranks. "You have diverse reporters and diverse staff—you must have diverse lawyers."

After showing a video that focused on a media bar that looks more like the rest of America, Klenk discussed his firm's initiative to increase diversity among its workforce by targeting recruitment, retention, and career advancement.

In order to work, diversity training programs must be totally integrated into the firm's culture, added Jane DiRenzo Pigott. Pigott, who started her own consulting firm, R3 Group LLC, was the first woman equity partner at Winston & Strawn, where she created and ran the firm's diversity initiative. "Diversity needs to be something you do with the goal of achieving the strategic mission of your organization," she said.

The importance of diversity permeates the CNN culture, according to Senior Counsel Johnita P. Due, who presented a video created by Turner Broadcasting that features interviews with attorneys at the Turner companies, including some who do not practice law, and the impression of law school held by minority college students.

To counter the trend of declining minority student enrollment in law schools, Turner launched a minority outreach program that targets students at local colleges in the Atlanta area. "The program, which is supported by the top level at CNN, exposes college students to the kinds of things that they can do to get a law degree," Due said. "It increases their awareness of all of the opportunities out there in terms of the different fields of law."

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Not Soon Enough

College may not be soon enough. Evett L. Simmons, past president of the National Bar Association, discussed an outreach program that targets minority students through the Front Royal Camp. Students in the program, which is held each year at Howard University, participate in a mock trial, visit the U.S. Supreme Court, and network through a variety of social events. "We are seeing the results of the first camp. Some are now going into college and some are talking about law as a career," she said. "If you don't start in the pipeline now, there won't be any lawyers of color to serve a community that wants diversity.

Assistant Dean of Students Charlotte H. Johnson from the University of Michigan Law School talked about *Grutter v. Bolinger* and its impact on both her institution and the legal community at large. "The decision came down in 2003. Since then, the academic types have written and talked about it . . . one thing is clear, at least in the educational setting, diversity is a significant aspect in the constitutional landscape."

"The fact is that while we should be concerned about the numbers going down, there is still a significant pool of attorneys of color who are looking to break into fields like media law," Johnson added. In her evaluation of the case, she emphasized two of the decision's key messages: Excellence and diversity are both achievable without lowering standards, and *Grutter* reaffirms *Brown v. Board of Education* in terms of its emphasis. "When you bring in lots of different people from different backgrounds, the issue is not about assimilation, but about learning to work together," she said.

How to Avoid Burnout

What helps lawyers to succeed may also hurt them. Long hours are valued in the legal profession, Dr. Ellen Ostrow, a Washington, D.C., psychologist, told participants in a session on burnout. "In fact," she added, "you are not going to do very well without hard work and stress."

Stress initially leads to an adrenaline rush, increased effort, and better production but performance drops over time and people start to "lose their spirit," according to Ostrow. The early warning signs are well documented: "overwhelming exhaustion, cynicism, and reduced efficacy."

The pressure to get billable hours may be a factor, Ostrow admitted, but firms can make a commitment to helping their lawyers manage their own lives better and still enhance the bottom line. "The most effective preventive strategy [involves] changes in management practices and educational interventions for individuals," she wrote in a handout for participants.

Even if their firms do nothing, lawyers can help themselves by following the basics: eat right, get enough sleep, relax for short but intense periods of time, and learn how to say "no." She encouraged the participants to "do something greater than themselves . . . work for more than money . . . work for others." The opposite of burnout, according to Ostrow, is engagement, which leads to higher satisfaction, better client retention, and more profits, to say nothing of happier lawyers.

How to Build a Litigation Coalition

Carefully, Landis Best of Cahill Gordon & Reindel LLP told a workshop on coalition building. Briefs provide one of the most effective ways to build a strong coalition but they must be coordinated in advance, she added.

"Be organized, start early, and send out an outline of your brief so that the [amicus drafters] know your main points," Best said. Successful amicus briefs summarize the case and the arguments made and add some historical

viewpoints to the case. The most useful briefs supplement the material submitted by the lead litigators.

Fortunately, the communications bar is very well organized, according to Lee Levine of Levine Sullivan Koch & Schulz L.L.P. "There's a way of doing business that has emerged so most people now understand how all this works," he said. Levine likes to make a plan on how he will use the amicus briefs—who he wants to file and what he would like for them to say. Then he makes sure that he goes to the right people.

Participants in litigation coalitions also need to worry about access when multiple parties are involved. Media cases often involve megacorporations; all sides need to be aware of any potential conflicts of interest and keep all clients informed about the issues in the case. If a judge bars disclosure, for example, the participating lawyers need to move fast to inform every client and advise them about any potential problems.

Lawyers should provide reporters and their employers with guidelines for upfront discussions with sources.

Hot Topics

The Internet, confidential sources, privacy and libel, and the ethical problems tied to representing media conglomerates were just a few of the hot topics explored at the Tenth Annual Conference's popular breakout sessions. The hot topic programs are designed to encourage participation by everyone who want to share his or her experiences.

SLAPP v. CDA § 230

About the only thing in *Rosenthal v. Barrett* that is clear is to make sure that user agreements on Internet message boards are explicit and detailed. *Rosenthal,* which is currently pending before the California Supreme Court, involves the Alameda Superior Court's dismissal of a defamation lawsuit filed against a breast implant awareness activist on the basis that the suit was a meritless SLAPP (Strategic Lawsuit Against Public Participation). Echoing *Zeran v. AOL* and other decisions, the judge ruled that, even if Rosenthal defamed the plaintiffs, she was immune under § 230 of the Communications Decency Act (CDA), which provides in part that "[n]o 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."

Wrong, said the California Court of Appeal, in a signal that § 230 may apply differently to ISPs and other interactive computer services in their roles as "distributors" as opposed to "publishers." The increasingly murky dividing line between user and provider should be whether the defendant was the original content provider, suggested the panelists at the session.

Turning to the troublesome problem of Internet jurisdiction, the group had a lively discussion about recent cases in Australia, England, and Canada, in which foreign courts claimed jurisdiction over American publishers. After examining a number of stopgap measures, including the possibility of accepting a default judgment by a foreign court in some cases, one participant suggested that some sort of international treaty is the only long-term solution.

I've Got a Secret

The intertwined issues of reporter's privilege and confidential sources definitely qualified as "hot topics." At the time of the Boca meeting, Jim Taricani, a news reporter for a Providence, Rhode Island, television station, had just started a sentence of six months' house arrest for refusing to reveal his source of a leaked FBI video showing a local official accepting a bribe. Judy Miller, the *New York Times* reporter who is currently in jail on contempt charges in the Valerie Plume case, delivered a compelling speech during a luncheon that touched on many of the issues raised during this session. [*See* Judith Miller, *Why Confidential Sources Are Important and Why I Would Go to Jail to Protect Them,* 22:4 COMMUNICATIONS LAW., at 4 (Winter 2005).]

Although thirty-one states and the District of Columbia have shield laws that protect confidential sources and provide privileges against requiring journalists to testify or turn over their notes, these state laws do not apply to federal courts. The Free Flow of Information Act, currently pending in both the House and Senate, would extend an absolute privilege to reporters to maintain the confidentiality of their sources. It would not apply to freelancers or to bloggers, a matter of some concern to the hot topics group.

At the very least, the participants agreed, lawyers should provide reporters and their employers with guidelines for upfront discussions with their sources. Reporters should know the metaphors for confidentiality ("keep my fingerprints off this"), articulate provisions, and promise certain procedures (blurred features and distorted voices) but not results. They should ask questions such as "can I tell my boss if necessary."

This Just In . . . Near-Fatal Crash . . . Details at Six

At the hot topics session on libel and privacy, lawyers whose clients include cable and TV stations were reminded that local news programs may pose some problems related to consent and inadvertent disclosure of personal information.

In *Stratton v. Diann,* WJRT, a television station in Flint, Michigan, after obtaining permission from the local sheriff's department, covered an accident in which the injured driver refused to allow filming of her treatment in the emergency room. The station decided to air the broadcast with her features blurred but her name was decipherable from a shot of a paramedic's clipboard, and an E.R. nurse could be heard saying that the patient has "no allergies, on Prozac."

The plaintiff sued the television station and its reporters, the hospital, the doctors and nurses involved in her treatment, the county (which operated the

Did You Miss the 10th Annual Conference?

If you missed the Forum's 10th Annual Conference, it is not too late to start planning for next year. To attract more of the many Forum members who practice west of the Mississippi, the 11th Annual Conference will be held on the West Coast:

January 12-14, 2006
La Quinta Resort & Club
La Quinta, California

Stay tuned for details. As the program takes shape, additional information will be published in *Communications Lawyer* and on the Forum's website at www.abanet.org/forums/communication/programs/home.html.

Other upcoming events include the popular "Representing Your Local Broadcaster," held in conjunction with the National Association of Broadcasters meeting each spring:

April 23, 2006
Las Vegas, Nevada

Check the Forum's website for additional information in early 2006.

ambulance service), and the city (which owned the hospital) on the basis of negligence, defamation, intentional infliction of emotional distress, intrusion upon seclusion (privacy), and disclosure of embarrassing facts. The trial court granted summary judgment to all of the defendants.

Ten days before the Boca meeting, the Michigan Court of Appeals on January 5, 2005, affirmed judgment for the hospital defendants but reinstated two privacy claims (intrusion upon seclusion and disclosure of private facts) against the media defendants. The court said that WJRT may be liable because the media defendants filmed Stratton in the emergency room despite her refusal to sign a consent form and that her use of Prozac was private information not known to the public before the broadcast. Those two counts were reversed and remanded.

After viewing the underlying videotape, the hot topics panel concluded that the public interest and newsworthiness of the broadcast should protect the station at trial.

Gossip or Slander?

With *Condit v. Dunne,* the hot topics in libel and privacy panel turned to the ongoing court battle between former Congressman Gary Condit and commentator Dominick Dunne resulting from Dunne's widespread comments about Condit's involvement with Chandra Levy, the Bureau of Prisons intern who was kidnapped and murdered in Washington, D.C. At issue were Dunne's comments on the Laura Ingram radio program and Larry King Live, his conversation at two dinner parties, his writings in an online gossip column, and his comments in two newspapers.

In April 2004, the U.S. District Court for the Southern District of New York found that Condit had adequately pled slander per se in all of Dunne's revelations, except for the newspapers—because they did not constitute or imply statements of fact.

The participants focused on the facts leading up to the lawsuit and discussed possible defenses. The most likely approach is that Condit could not provide actual malice because Dunne did not know that the statements were false. He just was not sure that they were true.

Relationship Problems

Professor Jane E. Kirtley of the University of Minnesota and Bruce E.H. Johnson of Davis Wright Tremaine led the ethics discussion by posing a hypothetical written by Ron Minkoff and Lisa E. Davis of Frankfurt Kurnit Klien & Selz:

"Assume Eagle [a publishing firm] is a wholly owned subsidiary of World-Wide Media Corporation, a multinational entertainment conglomerate. Eagle's offices and legal department are in New York; WWM's main office and its legal department are in Miami. Eagle and WWM share a payroll system, benefit plan, and e-mail system (though Eagle employees rarely communicate directly with WWM executives."

> "After being contacted by Eagle, Cochran [an attorney] does a conflict check, and realizes that his firm is currently representing Angie Cosmetics in a lawsuit against WWM that is substantively unrelated to the Eagle problem. May Cochran still represent Eagle?"

The discussion focused on the ABA Model Rules of Professional Conduct, the use of waivers when conflicts of interest are identified, and the actual experiences of lawyers who practice in large firms and represent megaconglomerates. Some attorneys indicated their firms avoid these types of situations by simply refusing to represent clients with conflicts of interest while others were more comfortable with representation with the necessary waivers.

The discussion segued into a narrower issue. What if the attorney represents a publishing house and has privileged communication with the editor? Does the privilege extend to the freelancer? Some of the lawyers in the audience refuse to deal with freelancers in those situations while others do. Johnson suggested that the attorney's relationship with freelancers and other auxiliary personnel needs to be clarified; the lawyer may need to drop any contact with freelancers if a conflict of interest emerges.

REPORT FROM BOCA

Boot Camp for Media Advocates in Boca

For the eighth year in a row, the Forum co-sponsored the popular media advocacy workshop, one day before the opening of the Annual Conference. In 2005, the intensive eight-hour program was organized by the Forum's new Training and Development Committee (formerly the Law & Media Committee of the ABA's Young Lawyers Division).

The day-long workshop offers an unparalleled opportunity to get hands-on advocacy training in substantive areas of media law and receive feedback from experienced attorneys in the media bar, according to Training & Development Committee Co-chairs Jill Meyer Vollman and Pilar Keagy Johnson. The 2005 workshop attracted twenty-five attorneys and law students.

The day's challenges included preparation and presentation of two oral arguments in hypothetical cases involving issues such as actual malice, opinion, and reporter's privilege. The workshop faculty served as judges in the moot oral argument format. After each session, participants were critiqued on their oral argument skills and the merits of their arguments.

During the lunch presentation, participants and faculty heard tales from the front about fighting access battles in criminal celebrity trials. The program was titled "Let Us In: Fighting Access Battles In Celebrity Criminal Trials." Steve Zansberg, a partner at the Denver office of Faegre & Benson LLP, discussed the various access battles waged by media organizations seeking to cover the Kobe Bryant trial in Eagle, Colorado, and the atmosphere that large scale media coverage brought to that beleaguered county seat. Julian Poon, an associate with the Los Angeles office of Gibson Dunn & Crutcher LLP spoke about the Michael Jackson child molestation trial.

The participants also took part in a hypothetical prebroadcast review session of a reality TV show. Faculty easily assumed the roles of difficult clients (television executives and producers) while the workshop participants were asked to act as in-house counsel by identifying problems, explaining legal concepts and pitfalls, and giving advice about the legal risks of the hypothetical project.

The substantive panels concluded with a "Tips and Tales" practice development session presented by a panel of current and former in-house media counsel. The panelists were Chuck Tobin, partner at Holland + Knight LLP; Jerald Fritz, vice president of legal and strategic affairs, Albritton Communications; Stephanie Abrutyn, then senior counsel/East Coast Media for Tribune Company, and Pilar Keagy Johnson, senior counsel with Turner Broadcasting's The Cartoon Network. The panel addressed topics such as the priorities and peccadilloes of in-house counsel and how to make a favorable impression with media clients. Best and worst practices were shared to illustrate the panelists' points about how to make the most of the relationships between lawyers in private practice, their in-house counterparts, and the journalists they both represent. This session included a question and answer session.

Space Limited for 2006 Media Advocacy Workshop

The Training and Development Committee will host its next Media Advocacy Workshop on January 12, 2006, at the La Quinta Resort and Golf Club in La Quinta, California. Watch the Forum's website for registration information. Once again this year, the ABA's mailers about the Forum Conference and the Media Advocacy Workshop will be combined for ease of registration. Space is assigned on a first-come, first-serve basis.

Honor Roll

The Forum thanks the following firms for their generous support and sponsorship of the Media Advocacy Workshop in 2005:

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BOOK REVIEW

For Baby Boomers, an Icon of Media Law

Speaking Freely
Floyd Abrams
Viking (2005)
$29.95/hardcover

REVIEWED BY THOMAS B. KELLEY

They say that baby boomers have trouble thinking of themselves as adults. I certainly have trouble thinking of myself as old enough to be introducing Floyd Abrams to an audience of media lawyers. Like Floyd Abrams and others throughout the United States, I specialize in representing the media in their First Amendment problems. But none of us has ever done it like Floyd Abrams. Most of us in the First Amendment bar grew up listening to Floyd Abrams speak to us as a mentor.

Many of us belong to the Media Law Resource Center, which every year gives the William J. Brennan Award for extraordinary contributions in support of freedom of expression. There is an unwritten rule that the award does not go to any active members of our bar, mostly to avoid the lobbying that would likely result if it did. But in 2002, both the media organizations that sponsor the Brennan Award and the defense counsel that represent them agreed that Floyd Abrams is special. He's different than the rest of us. He's the "Dean," or our "daddy," to use an expression that came into vogue in the wake of last year's Yankees/Red Sox playoff series.

Of course, the Brennan Award is named after (the late) former Associate Justice William J. Brennan, author of the opinion in *New York Times v. Sullivan,* the first libel case in which the Court recognized breathing space for factual error under the free speech and press clauses of the First Amendment to protect robust debate in our open society.

Friendly Warning to Media

When Floyd accepted the Brennan Award, however, he gave the media and their lawyers a friendly warning, suggesting that the *Sullivan* doctrine was akin to a gift from a benevolent uncle. He reminded us that the media no longer have such an uncle on the Court, and, given the frightening proliferation of new media, the media's new boldness in the heat of competition, and their abandoning of old taboos about what's okay to discuss in public, the Court may have misgivings over having presided over the repeal of society's traditional notions of reticence in public speech. Even though the *Sullivan* case protects false speech, what Floyd suggested in accepting the Brennan Award was that the media's arguable fault is not in their role as truthtellers, which they perform relatively well, but in their role of choosing what is relevant in setting the agenda for public discussion.

"Brilliant Lawyer Telling Us Stories"

This brings us to Floyd's new book, *Speaking Freely.* In his latest work, Floyd does not speak from a bully pulpit; it's simply a brilliant lawyer telling us the stories of his trials and triumphs before the U.S. Supreme Court and in lower appellate courts and, interestingly, before juries in trial courts throughout the United States. Floyd describes his work that forged the U.S. Supreme Court's doctrines that protect the telling of truth, even against powerful arguments that the truth will harm interests such as national security and privacy.

The most riveting tale of the book is that of the Pentagon Papers case, fascinating because of the speed with which the case moved through the trial court of the Honorable Murray Gurfein in the Southern District of New York, the Second Circuit in New York City, and then to briefing and argument before the U.S. Supreme Court—all in a matter of weeks. The case involved a Pentagon study of military and policy strategy in Southeast Asia that the government claimed would seriously compromise current strategy in the region.

As Floyd describes the thinking and plotting that proved victorious for *The New York Times* and *The Washington Post,* one is struck by the resourcefulness that was demanded of Floyd and the other lawyers involved. Back then, there was no First Amendment bar and no circle of colleagues that deal with such issues every day, write articles about them, and share briefs. The account of scramble to the decision denying the government's request for a restraint against publication is fascinating as each move in the fast-paced chess game is examined. Floyd is also sensitive to the political underpinnings of the case in a nation torn by controversy over its military involvement in Southeast Asia, a fact that makes the story especially riveting for baby boomers.

***Daily Mail* Principle**

Floyd then recounts his involvement in a series of Supreme Court decisions that culminated in what is known as the *Daily Mail* principle, which holds that when a newsperson lawfully acquires truthful information of public significance, he or she is free to publish it unless censorship or after-the-fact punishment is inescapably necessary to

Thomas B. Kelley (tkelley@faegre.com) is a partner with the Denver office of Faegre & Benson LLP and the immediate past chair of the Forum on Communications Law. This review is adapted from the text of his introduction of Floyd Abrams to the assembled group that gathered at The Tattered Cover Bookstore in Denver on April 21, 2005, to hear Abrams.

protect the most compelling governmental interest. The accounts of *Land Mark Communications v. Virginia* and *Smith v. Daily Mail* are not only illuminating as to how winning arguments are put together, but are very honest as a self-critique. The author examines the transcripts of his arguments for key words or phrases that could have been better chosen, a process that becomes a learning experience for the reader as well as the author. We see from these chapters how Floyd's development during the 1970s led to the consummate advocate that he is today.

It is interesting that only after Floyd had achieved extraordinary success before the U.S. Supreme Court did he begin trying cases to juries. His first that I know of was the infamous Wayne Newton libel case against NBC, tried in Las Vegas. Floyd was chosen because the case was seen as a loser in Las Vegas, and Floyd thought that he would be the lawyer of choice to preserve the appropriate record for a successful appeal. Floyd put on a case that likely would have been a winner anywhere but in Las Vegas, but lost over $20 million to that jury (eventually reduced by the judge, then vacated on appeal).

But a year later, he won a major jury trial in a case arising from media work exposing the "Heroin Trail," also poignantly recounted in the next chapter. These libel trials say something about Floyd that is not nearly so widely known as is his advocacy before judges. Floyd has handled as many jury trials over media content as anyone in our bar, and has mastered the skill of simple storytelling in addition to that of effective, elegant legal argument.

Abrams v. Giuliani?

My favorite war story of them all is that of bringing the so-called secular saint, Mayor Rudolph Giuliani, a persistent enemy of the First Amendment, to his knees over his attempt to censor the controversial Virgin Mary sculpture in the Brooklyn Museum. The result was that he was required to not only back off his edict that city funding to the museum be curtailed, but the ultimate settlement of the case required the mayor to agree to never pull such a stunt again.

Like the rest of us, Floyd has lost an occasional case. But you'll find from this book why Floyd is largely successful with juries as well as appeals courts and the U.S. Supreme Court. Being brilliant, eloquent, and knowledgeable isn't everything, and it can be meaningless if you cannot express yourself in a manner that is easily understood by everyone and rings of honesty. Surprisingly for a book by a lawyer about his own cases, *Speaking Freely* is very honest, beginning with Floyd's account of his own transformation into something his very important colleague in early cases, Alexander Bickel, denied of himself —a "first amendment voluptuary." We also hear of his decision to represent the challengers of the McCain-Feingold campaign-finance legislation, a project of the political right with whom Floyd doesn't readily identify but for whom he advocated because he thought their position was correct under the First Amendment.

The Case of the Missing Sock

But my favorite anecdote was the scene in which Floyd had traveled to the District of Columbia on short notice for a meeting on the Pentagon Papers case, and woke up in a hotel room unable to find one of the socks that he had taken off the night before. We've all been there—something that was there the night before truly, completely disappears. He went through the day trying to conceal the one-sock look, wearing his pants low like the kids do today, down on the hips, preventing any glimpse of a bare ankle. I was so relieved to hear that such things happen to Floyd Abrams, although, unlike me, it probably happened to him only once.

Most of Floyd's stories of his cases are especially fun to read because they resulted in free speech victories (with the exception of *McCain-Feingold*, but this opinion, like the Court's other voting rights decisions, is unreadable by any person with a normal attention span). Actually, Floyd's first case before the Court was *Branzburg v. Hayes* (decided a year after the Pentagon Papers case was determined on an emergency basis), a mixed result at best. *Branzburg* is the only case in which the Court has addressed the reporter's privilege. Four justices voted for a broad qualified privilege for confidential communications between journalist and sources, four declined to recognize any such privilege (at least in the grand jury context), and a "swing vote" opinion by Justice Powell (concurring in the opinion of the "no privilege" group) seemed to stake out an intermediate position but in prose that is essentially inscrutable.

Since *Branzburg* was decided, judges have disagreed over the significance of the Powell opinion, and the meaning to be gleaned from it. Most courts have found that some form of privilege for confidential and unpublished information does exist, but recent decisions involving "leak" investigations have resulted in contempt sanctions against reporters for refusing to disclose confidential sources.

Observations on the Reporter's Privilege

Floyd observes in his final chapter that on the matter of the privilege of reporters not to disclose confidential sources, the law of the United States, which far exceeds that of all other nations in the world in its protection of public speech, offers far less protection than most foreign jurisdictions. Floyd suggests that the current proclivity of some justices to consult foreign law in deciding important questions may strengthen the case for a privilege the next time it is before the U.S. Supreme Court.

You'll also see from this book that Floyd Abrams has mastered the gift of storytelling as he dissects the transcripts of his arguments (a painful process, I can attest) before appeals courts and juries, and describes the thoughts that led to those arguments and the thoughts that he had later about how he might have made them even more effectively than he did. *Speaking Freely* is not only edifying, but very readable.

BOOK REVIEW

"Burning the Source": *Cohen v. Cowles Media*

Anonymous Source: At War Against the Media, A True Story
Dan Cohen
Oliver Press: St. Paul (2005)
$24.95 (hardcover)

REVIEWED BY KYU HO YOUM

Who is *the* "anonymous source" that has most defined the relationship between the news media and their sources in American law?

Deep Throat would be the most likely answer from many Americans who remember the *Washington Post*'s secret source in its coverage of the Watergate scandal. (We now know that Deep Throat was W. Mark Felt, the former Number 2 man at the FBI in the early 1970s, who recently revealed his identity.[1])

To communication law scholars and practitioners, however, Deep Throat is too obvious to be the answer. Indeed, although tremendously important in our nation's political history, Watergate did not set boundaries on the reporter-source relationship as a legal issue for the press.

The more discerning of us in media law should point to Dan Cohen as the once anonymous source who had the greatest impact on the law in this area, since he single-handedly forced the U.S. Supreme Court in the early 1990s to recognize the source's right to hold the media accountable.

Indisputably, the *Cohen* case of 1991 posed a fascinating and challenging question for the Supreme Court: Does the First Amendment immunize the press from a breach of contract claim when it breaks its promise to its confidential source in the name of the public's right to know the source's identity? (More on Cohen and his case later.)

Kyu Ho Youm (yuom@uoregon.edu), the Jonathan Marshall First Amendment Chair at the University of Oregon School of Journalism and Communication, has published law review articles about Cohen v. Cowles Media Co. *(1991) and has reviewed Elliot C. Rothenberg's* The Taming of the Press: Cohen v. Cowles Media Company *(1999).*

But Cohen's new book, *Anonymous Source: At War Against the Media, A True Story*, should be a bit of a disappointment, for it is insubstantial in providing insight into his high-profile legal quandary as an anonymous source who was "outed" by the media.

Regardless of whether there should be a fine distinction between anonymous and confidential sources in news reporting,[2] meanwhile, with reporter Judith Miller of the *New York Times* serving time behind bars for refusing to divulge her source(s) and reporter Matthew Cooper of *Time* magazine agreeing to testify to a grand jury,[3] the debate over source confidentiality has taken on heightened urgency.

Journalists and Protection of Confidential Sources

In April 2005, the District of Columbia Circuit refused to rehear en banc the court's three-judge panel decision to compel Miller and Cooper to testify before the grand jury in connection with the ongoing federal investigation of the illegal disclosure of a covert CIA agent, Valerie Plame.[4] In their brief filed in the U.S. Supreme Court, the attorneys general of thirty-four states and the District of Columbia asked the Court in May to accept the two reporters' petition for certiorari. On June 27, however, the Court rejected the appeals from the reporters.[5]

Further, the *Newsweek* controversy over a now-retracted story on the alleged desecration of the Koran at Guantanamo Bay has led several major media organizations to address the actual or perceived overuse of anonymous sourcing. *Newsweek,* for example, has adopted new policies on unnamed sources. It now assigns two of its top editors sole responsibility for approving the use of anonymous sources, and it no longer uses the phrase "sources said" to attribute confidential information in stories.

Throughout the history of American journalism, the key issue of anonymous sources for news reporting has revolved around how to protect those confidential sources when the government authorities seek to discover their identities.

Branzburg v. Hayes[6] is a case in point. In ruling for the first time on whether the First Amendment permits journalists to refuse to testify before a grand jury about their confidential sources, the U.S. Supreme Court in 1972 said "no." The Court held that the First Amendment does not exempt reporters from their obligations to respond to grand jury subpoenas as other citizens do and to answer questions relevant to criminal investigations

Nonetheless, the news media's widely accepted modus operandi in protecting or disclosing anonymous sources was: "Don't name your confidential source unless the source has provided false information."

"Burning the Source"

The news media's act of voluntarily revealing the identity of anonymous sources in violation of confidentiality promises was so rare that it became news itself in the 1980s. Hence, "burning the source" was aptly coined to illustrate the exceptionable flipside of the journalist's privilege.

Cohen v. Cowles Media Co.[7] was the defining case of burning the anonymous source. In this 1991 decision, the U.S. Supreme Court held that the First Amendment does not bar the general application of state contract law to the

news media's breach of a confidentiality agreement with the source.

The following includes some background on *Cohen*[8]:

Dan Cohen, a Republican Party activist, offered to provide four local news reporters, including those of the *Minneapolis Star Tribune* and the *St. Paul Pioneer Press*, with potentially damaging information about an opposition candidate in the 1982 Minnesota gubernatorial election. After receiving a confidentiality promise from the reporters, he provided them with the previously unknown information. The editors of the *Star Tribune* and the *Pioneer Press* independently decided to override their reporters' promises of confidentiality.

In their stories, the two newspapers identified Cohen as the source of the candidate information. Cohen was fired from his advertising job after the story was published. He sued the publishers of the newspapers, alleging breaching of contract and fraudulent misrepresentation.

The trial court rejected the newspapers' arguments that a contractual interpretation of confidentiality agreements between newspapers and sources would force the papers to censor the news in violation of the First Amendment. The court considered the First Amendment irrelevant to the case.[9]

The Minnesota Court of Appeals upheld the trial court's holding that the First Amendment does not protect newspapers from liability for breach of confidentiality promises to sources under contract. The court, however, reversed the jury's finding of liability for fraud.[10]

The Minnesota Supreme Court reversed the appellate court's ruling on Cohen's contract claims. In the context of that "special milieu of media newsgathering," the court determined contract law to be "an ill fit for a promise of news source confidentiality."[11] While refusing to recognize confidentiality promises as legally binding contracts, the Minnesota Supreme Court examined the promise under the promissory estoppel doctrine. Noting that "[t]he potentiality for civil damages for promises made in this [newsgathering] context chills public debate," the court found that enforcement of a confidentiality agreement under a theory of promissory estoppel would violate the First Amendment rights of the defendant newspapers.[12]

The U.S. Supreme Court reversed the Minnesota Supreme Court's decision. The U.S. Supreme Court held that the First Amendment does not prohibit news sources from recovering damages from newspapers that violate confidentiality promises. The Court held that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[13]

Cohen's Impact

No doubt the impact of *Cohen* as a landmark case is substantial. To date, *Cohen* has been cited in more than 100 cases, those of the U.S. Supreme Court included. While its implications are largely unsettled, the pro-and-con debate over the Court's holding and reasoning continues.

Journalism scholar Joseph Russomanno of Arizona State University considers *Cohen* a kind of blessing in disguise. While editors have lost some degree of their decision-making autonomy as part of their press freedom, "in the long run, the ruling may have actually enhanced the free flow of information." Russomanno continues: "By requiring media organizations to keep their word, potential sources who seek anonymity may be more willing to come forward, secure in the knowledge that a promise is legally binding."[14]

By contrast, Alan E. Garfield of the Widener University School of Law, noting the *Cohen* Court's cavalier dismissal of the news media's assertion that publication of truthful information should be protected, argues:

> This brusque treatment of the defendants' First Amendment arguments has become *Cohen*'s legacy. *Cohen*, in effect, has become a First Amendment neutralizer. It is the case parties use in a variety of contexts to convince a court that it need not bother with a searching First Amendment analysis. It is the case courts cite when laying the groundwork for dismissing a party's First Amendment defenses.[15]

Besides a legion of scholarly and nonscholarly articles in journalism and law journals, *Cohen* has already spawned an insider-look book by Elliot C. Rothenberg, who represented the plaintiff against the two newspapers in the Twin Cities in Minnesota.[16]

Anonymous Source

Anonymous Source is the second book that derives directly from the *Cohen* case. According to its publisher, the book is Dan Cohen's "new memoir" as the plaintiff in the U.S. Supreme Court case of 1991. The book's publication could not be more timely, since a reignited debate is raging over the journalist's privilege as a legal and ethical issue.

But the book is of limited value to many of us in communication law, who wish to gain a new and deeper understanding of the issues and the stakes involved in the debate.

As indicated by its title, the book aims to tell Cohen's first-person story of how he fought back for ten years beginning in 1982, when the *Star Tribune* and the *Pioneer Press* broke their promise of confidentiality to him as an anonymous source.

Cohen rarely delves into the First Amendment law underlying his case. He pleads no need for further regurgitation, for countless articles and several books have examined the legal significance of his case.

More tellingly, he notes in his preface to the book: "Even though I'm a lawyer, I never cared much about the legal issues. Neither did the defendants, the newspapers." To those interested in "lawyers' talk" on the legal issues, he suggests that the Harvard Law School Library should be the place to go for the complete record of his case.

The main focus of *Anonymous Source* is on Cohen's personal grudge against the two newspapers. He candidly acknowledges that his David v. Goliath-like lawsuit against the news media was not for making legal history: "For ten years, the Minneapolis and St. Paul dailies and I were locked in a battle that had little to do with Constitutional principles or money and had everything to do with strong mutual dislike—who could cause the greatest permanent damage and humiliation to the other side."

So, the book consists primarily of Cohen's telling his own version of his all-out legal battle with the *Star Tribune* and the *Pioneer Press.* It offers background details about why he decided to challenge the newspapers. The first dozen chapters of the thirty-three-chapter book showcase his human-interest attention to his case. Included in the chapters are the author's accounts of his pre-*Cohen* experience as an "occupational nomad." He tells about how he got involved in working as an anonymous source for a gubernatorial candidate in Minnesota in the early 1980s.

"Descriptive and Repetitive"

On the other hand, the book tends to be mostly descriptive and repetitive. It lacks analysis and selectivity in its choice of material. This is especially true of the author's discussion of the trial court proceedings of the case. The book is undoubtedly an overkill when it devotes two-thirds of its space to transcript-like descriptions of the witness testimonies.

Indisputably, the narratives from those involved in the *Cohen* case help us better appreciate the human drama behind the court opinions. Nonetheless, what does the author accomplish with his often disjointed effort to include nearly every witness testimony, whether substantial or tangential, in the book? A more judicious selection of the trial proceedings would have made the book less scattershot and more coherent.

The book's treatment of the post-*Cohen* decisions by state appellate court (chapter 32), the U.S. Supreme Court, and the Minnesota Supreme Court (chapter 33) tends to be cursory. Indeed, it is so sketchy that it makes the case anticlimactic. Consequently, it barely touches on the U.S. Supreme Court's redefinition of press freedom in *Cohen,* although the impact of the U.S. Supreme Court's ruling deserves a closer look nearly fifteen years later.

The post-*Cohen* era of "contract journalism"[17] did not turn out as worrisome as initially expected. A 2002 study of the *Cohen* case has concluded:

> First, fewer media organizations make confidential promises—and make them less often and with more selectivity. Second, journalists are more familiar with the ground rules, ethical and legal, for determining whether they can agree to keep their sources confidential and how far they can go in honoring (or dishonoring) the promises. Third, reporters are less freewheeling in making confidential agreements with their sources because they are more likely to be supervised by their managers when confidentiality arises as a newsgathering element. And finally, ethically and legally, journalists are made aware of the serious consequences of burning their sources even with professionally laudable motives and for justifiable ends.[18]

Cohen has also led the news media to practice defensive journalism with more vigilance. Hence, lawyers get more actively and directly involved in newsgathering. Two journalism and media law scholars propose the following journalistic do's and don'ts in handling confidential promises.

- Avoid making promises if possible unless compellingly necessary for your story;
- Don't promise more than you can deliver;
- Check first with your manager before making promises to sources;
- Embrace lawyers as guides, not intruders, in your newsroom.[19]

The two-page epilogue of *Anonymous Source* is a "Where Are They Now?" update on the key characters of the *Cohen* case, including Cohen himself, who were connected with his decade-long relentless pursuit of redress for what he suffered at the hands of the *Star Tribune* and the *Pioneer Press.*

Cohen saves the final word for an unqualified apology to Marlene Johnson, about whom he provided copies of a misdemeanor arrest record to the news media as an anonymous source. He writes: "Providing that stale, trivial record to the press was stupid and mean-spirited. I regret what I did."

The Value of the Book

Anonymous Source is hardly illuminating about the freedom and responsibility of the American press as a constitutional issue at the heart of *Cohen.* Nor is it enlightening about the complex relationship between a news reporter and his or her confidential source.

This should be particularly clear to those readers who have read Rothenberg's book, *The Taming of the Press*; the book chapter on *Cohen* in Russomanno's *Speaking Our Minds*[20]; and Rothenberg's *Cohen* chapter in Russomanno's 2005 book, *Defending the First.*

Meanwhile, *Anonymous Source* will not be easy reading to some lay readers who are unfamiliar with *Cohen* as the "burning the source" case in First Amendment law. It could have been more accessible if the author had provided more contextual background on the case. Others may find the book refreshing, however, because it is free of jargon and because of the author's seemingly cathartic venting of his avowed dislike for the news media in general and of the *Star Tribune* and the *Pioneer Press* in particular.

Still others look at *Anonymous Source* not as a vindictive lamentation by the author who is anxious to take revenge. Rather, it is a real-life story of a landmark First Amendment case, in which the American courts equalize the playing field for ordinary people like Cohen in confronting the powerful but abusive media.

As Cohen put it colorfully, "it was thrilling to be on equal footing with my [media] opponents, which is what the American judicial system in its wisdom and greatness not only promises but also delivers, and to have those arrogant bastards in our sights half the time, instead of always being in theirs."

Endnotes

1. *See* John D. O'Connor, *"I'm the Guy They Called Deep Throat,"* VANITY FAIR, July 2005.

2. "Anonymous sources" may be distinguished from "confidential sources" in that, according to the *Wall Street Journal*, the former refers to "those the *Journal* has agreed to leave out of the paper but whose identity may later be disclosed, as in defending against a libel suit," while the latter relates to one "whose identity the paper has promised to keep secret, even if it means losing a lawsuit or going to jail." DWIGHT L. TEETER, JR. & BILL LOVING, LAW OF MASS COMMUNICATION 622 (10th ed. 2001) (quoting *Wall Street Journal* managing editor Norman Pearlstine) (citation omitted).

3. *See generally* Adam Liptak, *A Reporter Jailed: The Overview; Reporter Jailed After Refusing to Name Source*, N.Y. TIMES, July 7, 2005, at A1.

4. *In re* Grand Jury Subpoena, Judith Miller, 405 F.3d 17 (D.C. Cir. 2005) (en banc).

5. Miller v. United States, 125 S. Ct. 2977 (2005).
6. 408 U.S. 665 (1972).
7. 501 U.S. 663 (1991).
8. For this background discussion I draw on my article on *Cohen. See* Kyu Ho Youm & Joseph Russomanno, *"Burning" News Sources and Media Liability:* Cohen v. Cowles Media Co. *Ten Years Later*, 24 COMM. & L. 69 (2002).
9. Cohen v. Cowles Media Co., 14 Media L. Rep. (BNA) 1460 (Hennepin County (Minn.) Dist. Ct. 1987).
10. Cohen v. Cowles Media Co., 445 N.W.2d 248 (Minn. Ct. App. 1989).
11. Cohen v. Cowles Media Co., 457 N.W.2d 199, 203 (Minn. 1990), *rev'd on other grounds,* 501 U.S. 668 (1991).
12. *Id.* at 205.
13. *Cohen,* 501 U.S. at 669.
14. Joseph Russomanno, *Editor's Introduction*, to Elliot C. Rothenberg, *Whose First Amendment?:* Cohen v. Cowles Media Co., *in* DEFENDING THE FIRST: COMMENTARY ON THE FIRST AMENDMENT ISSUES AND CASES 23 (Joseph Russomanno ed., 2005).
15. Alan E. Garfield, *The Mischief of* Cohen v. Cowles Media Co., 35 GA. L. REV. 1087, 1088 (2001) (citations omitted).
16. *See* Elliot C. Rothenberg, THE TAMING OF THE PRESS: COHEN V. COWLES MEDIA COMPANY (1999).
17. MARK SABLEMAN, MORE SPEECH, NOT LESS 74 (1997).
18. Youm & Russomanno, *supra* note 8, at 98.
19. *Id.* at 99.
20. *See Cohen v. Cowles Media Company*, *in* SPEAKING OUR MINDS: CONVERSATIONS WITH THE PEOPLE BEHIND LANDMARK FIRST AMENDMENT CASES 201–49 (Joseph Russomanno ed., 2002).

COURTSIDE

BY PAUL M. SMITH, KATHERINE A. FALLOW, DANIEL MACH, AND AARON A. BRUHL

As sometimes happens, the most dramatic development at the Supreme Court for First Amendment lawyers in recent weeks probably was the denial of review in reporter's privilege cases arising from the disclosure of the identity of Valerie Plame as a CIA operative—an action that resulted in the jailing of one prominent journalist.

Miller v. United States; Cooper v. United States

Turning away a request to rule on the viability of a federal reporter's privilege, the Supreme Court on June 27, 2005, denied *certiorari* in *Miller v. United States,* No. 04–1507, and *Cooper v. United States,* No. 05–1508. The petitioners—*New York Times* reporter Judith Miller, *Time* magazine reporter Matthew Cooper, and *Time*'s corporate publisher—had been held in contempt of court for refusing to disclose the identities of their confidential sources.

The case arose in the wake of President George W. Bush's statement, during the 2003 State of the Union address, that British intelligence had learned that Iraq had sought uranium from Africa. In July 2003, amid public controversy over the justification for the war in Iraq, former Ambassador Joseph Wilson published an op-ed reporting that in 2002 he had been dispatched to Niger to investigate the matter and had found no credible evidence of such efforts. Shortly thereafter, columnist Robert Novak wrote a piece revealing that "senior administration officials" told him that Wilson had been sent to Iraq on the recommendation of his wife, Valerie Plame, a CIA "operative." Critics of the Bush administration alleged that White House officials leaked the information in order to retaliate against Wilson. The Department of Justice began an investigation into whether administration officials had violated a federal law prohibiting disclosing the identity of a covert agent.

The special counsel heading the investigation opened a grand jury inquiry and subpoenaed several reporters in an effort to determine the source of the leak. Miller, Cooper, and *Time* refused to reveal their sources, claiming that they enjoyed a privilege under the First Amendment and federal common law. The district court rejected those arguments and held the petitioners in contempt, with imposition of sanctions stayed pending the completion of appellate proceedings. On appeal, the D.C. Circuit (Judges Sentelle, Henderson, and Tatel) affirmed the judgment. The court held that *Branzburg v. Hayes*[1] foreclosed the First Amendment argument. The court split three different ways on the common law argument but concluded that, if such a privilege existed at all, the government had made a sufficient showing to overcome it.

The petitions for *certiorari* argued that the lower courts are in disarray in their interpretations of *Branzburg* and in their rulings on the reporter's privilege. The petitions urged the Court to recognize a common law privilege under Federal Rule of Evidence 501 and to clarify or revisit the holding in *Branzburg.* The petitions also renewed the argument, rejected below, that the contempt proceedings violated due process because the courts relied on evidence to which the petitioners never had been given access. The petitioners were supported by *amicus* briefs from dozens of major media and journalists' entities, a libertarian advocacy group, and the attorneys general of thirty-four states and the District of Columbia. The brief of the attorneys general in support of *certiorari* was particularly striking in arguing that the *absence* of a federal privilege frustrated state policies because all of those states (in addition to almost every other state in the country) recognize some form of reporter's privilege.

The Supreme Court, however, declined to accept review. (Justice Breyer did not participate in the decision to deny *certiorari.*) Shortly thereafter, Miller was sent to jail in Alexandria, Virginia; Cooper testified before the grand jury after receiving a direct waiver from his source, Karl Rove; and *Time* released Cooper's notes to the special counsel. The future and scope of the federal reporter's privilege continues to be uncertain, thus prompting renewed efforts to enact federal legislation that will afford protection to journalists similar to that given by forty-nine states and the District of Columbia.

Johanns v. Livestock Marketing Ass'n

In one of the few merits cases last Term involving the First Amendment guarantee of freedom of speech, the Supreme Court in *Johanns v. Livestock Marketing Ass'n,* Nos. 03–1164 and 03–1165, reversed a lower court decision that had invalidated a federal program arranging for a beef promotional campaign funded via a mandatory assessment on all beef producers and importers. The Eighth Circuit, relying on the Supreme Court's prior decision in *United States v. United Foods, Inc.,*[2] had held that this mandatory assessment of fees to fund commercial speech on behalf of the beef industry constituted a form of coerced speech violating the First Amendment. The *United Foods* case, which barred a mandatory assessment to fund mushroom advertising, had in turn distinguished the earlier decision of the Supreme Court in *Glickman v. Wileman Bros. & Elliott, Inc.,*[3] which upheld a mandatory assess-

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ment on growers of California tree fruit on the theory that the generic advertising at issue was part of a larger regulatory program that in effect collectivized the operations of those growers.

In the *Livestock Marketing* case, the Court for the first time addressed the argument that these types of mandatory assessments do not implicate First Amendment concerns because the advertising at issue constitutes "government speech" and the Constitution allows the government to demand that the citizenry, or some subset thereof, fund government speech. (That issue had been raised in *United Foods* but too late to be addressed by the Court.) In an opinion written by Justice Scalia, joined by the Chief Justice and Justices O'Connor, Thomas, and Breyer, the Court accepted the argument that the advertising was really the government speaking and thus the beef producers who objected to funding it lacked a valid constitutional claim.

"Government Speech"

Responding to the argument that the Cattlemen's Beef Promotion and Research Board Operating Committee that actually receives the money and arranges for the advertising is not the government, the Court noted that its activities were comprehensively controlled by the Secretary of Agriculture. Half of the members are selected by the Secretary and every word uttered in an advertisement must be approved by the Secretary. The Court also rejected the argument that speech cannot be government speech if it is funded with a targeted assessment on beef producers. It left for another day the argument that specific advertising violates the First Amendment if it states that the message is being provided by beef producers, rather than the government.

Justice Ginsburg concurred in the result, rejecting the government speech argument and maintaining her prior position that this kind of program can be treated as a permissible form of economic regulation of an industry.

Justice Souter, joined by Justice Stevens and Justice Kennedy, dissented. They relied primarily on the argument that the government may not invoke the government speech argument unless it has revealed to the public its responsibility for the speech at issue—especially when the funding comes from a targeted assessment.

Rumsfeld v. FAIR

On November 29, 2005, the Supreme Court will hear argument in *Rumsfeld v. Forum for Academic and Institutional Rights ("FAIR"),* No. 04–1152, a challenge to a series of federal funding restrictions collectively known as the Solomon Amendment. The *FAIR* case raises several core First Amendment issues, including the contours of the unconstitutional conditions doctrine, the delineation between speech and conduct, and the constitutional limits on government-compelled speech.

In its present form, the Solomon Amendment denies federal funds to any institution of higher education that does not provide military recruiters with access to its campus and students on par with the access available to other employers. The statute not only covers funding from a wide variety of federal agencies—including, among others, the Departments of Defense, Labor, Health and Human Services, Education, Homeland Security, and Transportation—but also penalizes a parent university for the actions of any of its "subelements," such as its law school. Consequently, because the military's "don't ask, don't tell" policy openly discriminates against gays and lesbians, the Solomon Amendment presents schools with the choice of either abandoning their long-standing nondiscrimination policies, which cover recruiting as well other core campus activities, or foresaking hundreds of millions of dollars in federal funds.

A broad coalition of law schools, professors, and students challenged the Solomon Amendment, and in a two-to-one decision the Third Circuit enjoined enforcement of the law in November 2004.[4] As an initial matter, the Third Circuit held that the law is properly analyzed within the unconstitutional conditions doctrine, notwithstanding the government's efforts to shield the funding condition from constitutional scrutiny. The court then concluded that the Solomon Amendment interferes with the schools' constitutional rights in two related ways. First, the Third Circuit reasoned, the law dilutes the schools' First Amendment right of associational expression by requiring federally funded schools not only to permit, but actually to facilitate, activities the schools seek to condemn. Second, the court of appeals held, the Solomon Amendment effectuates a system of compelled speech, under which law schools must affirmatively aid military recruiters in disseminating their message. Addressing the government's asserted interest in seeking to raise and support a military, the Third Circuit deemed that interest to be a "vital" one, but noted that the government had offered "no evidence that would support the necessity of requiring law schools to provide the military with a forum for, and assistance in, recruiting."[5]

Potential Reverberations

In the Supreme Court, the government advances several arguments that, if accepted, likely would reverberate well beyond this case. For example, the government advocates a narrow view of the unconstitutional conditions doctrine, under which the First Amendment limits Congress's Spending Clause authority only when a funding condition aims "at the suppression of dangerous ideas"; all other speech-related funding conditions, the government argues, are wholly insulated from constitutional review. Under the government's theory, if a funding recipient objects to any given funding restriction, the recipient's only recourse is to decline the funds in question, regardless of the amounts involved or the relationship between the restriction and the funding scheme in question.

In addition, the federal petitioners challenge the basic premises underlying respondents' expressive association claim. Addressing the respondents' asserted associational rights, the government invokes the Court's seminal decision in *United States v. O'Brien,*[6] and argues that the schools' recruiting functions and nondiscrimination policies simply are not expressive conduct entitled to any constitutional protection. If accepted on its terms, the government's

argument could effectively narrow the class of conduct falling within the ambit of the First Amendment.

Finally, the government is pressing a limiting view of the compelled speech doctrine. Building on the Court's recent decision in *Johanns v. Livestock Marketing Association*[7] (discussed above), the federal defendants contend that the doctrine is inapplicable to the Solomon Amendment, because the expression in question is "government speech" and, therefore, entirely beyond the purview of the First Amendment. This case thus presents the Court with its first opportunity to elaborate on newly clarified "government speech" theory.

Whether the Court will accept the government's invitation to reshape free speech doctrine in the context of the *FAIR* case, of course, remains unclear. But given the complex, intersecting First Amendment issues at play in *FAIR,* the free speech bar undoubtedly will follow the case with great interest.

Tory v. Cochran

On May 31, 2005, the United States Supreme Court in *Tory v. Cochran*[8] vacated a broad injunction obtained by famed lawyer Johnnie Cochran preventing a former client from picketing and publicly speaking about Cochran, holding that the injunction lacked justification after Cochran's recent death and was an unconstitutional restraint on the client's First Amendment rights. The Court did so, however, without passing on the more significant First Amendment questions presented by the case.

The case grew out of a successful defamation action brought in California by Cochran against Ulysses Tory. The state trial court found that Tory had engaged in an extended campaign of unlawful defamatory activity, and further that he had used such defamatory speech in at attempt to coerce Cochran into paying him a monetary "tribute" to desist from his activities. The court issued an injunction preventing Tory and his associates from picketing Cochran's offices and from making any oral statements about Cochran in any public forum. The California Court of Appeal affirmed, and the Supreme Court granted certiorari to determine "[w]hether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment."

While the case was pending, and after oral argument, Cochran died. Counsel for Cochran and his widow, who was substituted as respondent, moved the Court to dismiss the case as moot. In a seven-to-two opinion, the Court vacated the judgment of the California Court of Appeal. Justice Breyer, writing for the majority, first held that the case did not become moot upon Cochran's death. Noting that no California law automatically invalidated the injunction, and that Tory could not know whether the injunction was void until a court ruled on it, the Court observed that the injunction continued to restrain Tory's speech and therefore presented an ongoing controversy.

But the Court went on to note that, although it did not moot the case, Cochran's death did make unnecessary any consideration of "petitioners' basic claims." "Rather," the Court explained, "we need only point out that the injunction, as written, has lost its underlying rationale," which was to prevent Tory from coercing Cochran to pay him a tribute. As a result, the injunction as written became "an overly broad prior restraint upon speech, lacking plausible justification." Justice Thomas, joined by Justice Scalia, dissented, arguing that the writ of certiorari should have been dismissed as improvidently granted, and criticizing the majority for "strain[ing] to reach the merits of the injunction after Cochran's death."

Endnotes

1. 408 U.S. 665 (1972).
2. 533 U.S. 405 (2001).
3. 521 U.S. 457 (1997).
4. 390 F.3d 219 (2004).
5. *Id.* at 245.
6. 391 U.S. 367 (1968).
7. 125 S. Ct. 2055 (2005).
8. 125 S. Ct. 2108 (2005).

Talk Show Torts

(Continued from page 10)

35. *Id.* at 713.
36. 82 F. Supp. 2d 702 (E.D. Ky. 2000).
37. *Id.* at 704 (quoting RESTATEMENT (SECOND) OF TORTS (1976) § 652I); *see also* KY. REV. STAT. §§ 391.170, 411.140 (2004).
38. 1988 U.S. App. LEXIS 19304 (10th Cir. July 7, 1988).
39. 418 U.S. 323, 345 (1974).
40. 842 F.2d 612 (2d Cir. 1988).
41. *Id.*
42. *Id.*
43. 745 F.2d 123, 136–37 (2d Cir. 1984).
44. *Contemporary Mission,* 842 F.2d at 617.
45. *Id.* (citing *Lerman,* 745 F.2d at 136–37).
46. *Id.* at 618.
47. *Id.* at 619 (citing Meeropol v. Nizer, 560 F.2d 1061, 1066 (2d Cir. 1977)).
48. *Id.* at 620.
49. *Id.*
50. Weber v. Multimedia Entm't Inc., 97 Civ. 0682 (PKL) (THK), 1997 U.S. Dist. Lexis 18592 (S.D.N.Y Nov. 24, 1997).
51. *Id.* at *4.
52. Weber v. Multimedia Entm't Inc., 97 Civ. 0682 (PKL), 1998 U.S. Dist. Lexis 2 (S.D.N.Y. Jan. 5, 1998).
53. *Id.* at *9.
54. *Id.*
55. *Id.* at *11.
56. Weber v. Multimedia Entm't Inc., 97 Civ. 0682 (JGK), 2000 U.S. Dist. Lexis 5688 (S.D.N.Y. May 2, 2000).
57. *Id* at *15 (citing Messenger v. Gruner + Jahr Printing & Publ'g, 727 N.E.2d 549 (N.Y. 2000)).
58. *Id.* at *20 (quoting Church of Scientology of California, Inc. v. Green, 354 F. Supp. 800, 804 (S.D.N.Y. 1973)).
59. *Id.* at *21 (quoting Chapadeau v. Utica Observer-Dispatch, 341 N.E.2d 569, 571 (N.Y. 1975)).
60. *Id.* at *35 (citation omitted).
61. Leichtman v. WLW Jacor Communications, Inc., 634 N.E. 2d 697 (Ohio Ct. App. 1994).
62. *Id.* at 698 (internal quotation omitted).
63. *Id.* at 699.
64. *Id.*
65. *Id.* at 700.

Trial by Jury

(Continued from page 1)

longer differentiate between "the press" and "the media," which are perceived as motivated solely by higher ratings and more revenue.

What explains the amazing statistic that since 1964 the press has failed before juries in libel, slander, and related cases at least 60 percent of the time? It is perhaps because public opinion polls show such little respect among the populace for free speech and press and little regard for the institutional media. Juries will continue to protect free speech and press rights in specific cases, but when they do not, our system of de novo appellate review provides a necessary and constitutionally compelled check on juries that reach the wrong result for the wrong reasons.

"I'm all for freedom of the press, it's newspapers I don't like."

—*Night and Day* by Tom Stoppard

Collision of Free Speech and Juries

There are at least two principles that distinguish jurisprudence in the United States from all others. First is our profound national commitment to free speech. In 1927, Justice Brandeis wrote of this principle:

> Those who won our independence believed that . . . freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . They recognized the risks to which all human institutions are subject. But they knew . . . that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[3]

The second is our constitutional right to a jury in civil and criminal cases. These two unique and important principles—free speech and juries—most often intersect in libel cases, and therein lies a potential tension. Juries can be a check on censorship by libel,[4] turning back efforts by government officials to punish speech. But juries can just as easily reflect majority sentiment ("governing majorities") in the community and punish unpopular thoughts published by the press or indeed punish the press because of its perceived or real arrogance and power. Indeed, it was this very concern that prompted the U.S. Supreme Court, in a case where a southern jury had found *The New York Times* liable for defaming a local public official, to require "independent appellate review" of actual malice evidence.[5]

The jury's role in civil and criminal libel cases was initially very limited in both England and the American colonies. Gradually, the jury received expanded duties in both countries to the point where in many state constitutions jurors were expressly empowered to decide both the facts and the law under direction from the court.[6] But in 1964, the role of juries in certain types of libel cases was sharply curtailed with the decision in *New York Times v. Sullivan.* In that case, the jury was instructed to return a plaintiff's verdict only when the plaintiff, a "public official," had proved by "clear and convincing evidence" that the false and defamatory statement at issue was published with "actual malice." Any such finding by the jury was to be reviewed de novo on appeal. How did this reversal of fortune come to be, and is it a good thing?

Slander of Big Shots

In England, libel, in its earliest form, was known as *scandulum magnatum* (slander of big shots) and first found its statutory form in 1275 during the reign of Edward I.[7] The statute provided

> [none] be so hard to cite or publish any false news or tales whereby discord or occasion of discord or slander may grow between the King and his people or the great men of the realm; and he that doth so shall be taken and kept in prison until he had brought him into court which was the first author of the tale.[8]

In essence, it was a crime to criticize the crown. The elements of this crime were (1) intentional (2) publication (3) of a writing (4) criticizing the government (i.e., its officers, laws, conduct, policies, etc.).[9] Truth was not a defense.[10]

Civil actions for libel were first reported during the reign of Edward III (1327–77) and primarily concerned spoken defamation (slander). During this period in England, it was considered a point of honor to assert and avenge one's good name and personal rights by the sword. In many instances, chivalry superseded the law[11] and civil actions for defamation (written and spoken) developed, in part, as a way to limit dueling. Lawsuits eventually came to replace sword fights, dueling, and outright brawls as the preferred method of vindicating one's honor and reputation.

The development of the printing press in 1450 brought an increase in the claims of written defamation and with it the development of libel. By the sixteenth century, the common law action for civil libel was firmly established.[12] The gist of the action was damage to the victim of the libel.[13]

The jury had an extremely limited role in criminal libel cases. It was to determine whether the accused published the statement. The question of law, whether the statement was libelous, was left to the judges.

The Trial of the Seven Bishops set the stage for the expansion of the role of juries in criminal libel cases. In 1688, James II, a convert to Roman Catholicism during his youth, issued an order requiring that his Declaration of Indulgences be read in all of the churches throughout England.[14] The declaration amounted to an announcement that "it was the king's pleasure, by the exercise of his royal prerogative, to dispense with the penal laws and acts of uniformity, leaving every man free to worship God according to his own conscience."[15] The king's motives were regarded with suspicion because he was not a member of the Church of England.[16] William Sancroft, the Archbishop of Canterbury, called a meeting with Thomas Ken, Bishop of Bath and Wells; John Lake, Bishop of Chichester; Jonathan Trelawny, Bishop of Bristol; William Lloyd, Bishop of St. Asaph; Francis Turner, Bishop of

Ely; and Thomas White, Bishop of Peterborough to discuss how to deal with the king's order.[17] The bishops agreed to petition the king, "praying to be excused from reading or distributing his late declaration for Liberty of Conscience," stating "that their objections proceeded neither from want of duty or affection to his service, but from motives of conscience, because [the declaration] was founded on a dispensing power which had been declared illegal by parliament."[18]

Not surprisingly, James II was not pleased with the bishops' response to his order and they were promptly charged with libel. During the trial, there was much debate among the judges as to whether the petition was in fact libelous.[19] Although the jury was to decide only the issue of publication, it returned a general verdict of not guilty.[20] The Seven Bishops case became precedent for jury nullification of the law[21] and directly led to the Glorious Revolution of 1688, the king's abdication, and the ascension of William III and Mary II to the throne.

Guardians of Free Speech

The increased role of the jury in libel actions became the law of England with the passage of the Fox Libel Act of 1792.[22] As demonstrated by the Seven Bishops case, prior to the Act, the element of publication was the only fact question for the jury; whether the statement was libelous was a question of law for the court. The Act gave juries the power to give a general verdict of guilty or not guilty "upon the whole matter put in issue," meaning that the jury could determine both the fact of publication and whether the statements were libelous.[23]

As a necessary corollary of being given the right to return a general verdict, the jury would thereafter have the right to apply the law regarding criminal intent and seditiousness.[24] The Fox Libel Act pertained to criminal libel. However, the rules regarding the role of judge and jury in civil and criminal proceedings eventually became one and the same.[25]

In England, this increased role of the jury survives to this day. Libel is one of a limited number of civil actions where citizens have a statutory right to jury trials.[26] The jury is still thought to be the primary protector of free speech against the assault of a libel case.

Jury Nullification

In the United States, the role of juries in libel cases was shaped by the case of John Peter Zenger. In 1731, William Crosby traveled from England to New York and became the colony's new governor. Regarded as the colony's rogue governor and described as a spiteful, greedy, and haughty man,[27] Crosby engendered almost immediate opposition.

James Alexander, one of the many colonists who opposed Crosby, decided to publish an independent political newspaper, the *New York Weekly Journal*, for the purpose of exposing Crosby's misdeeds.[28] Alexander asked John Peter Zenger, one of only two publishers in the colony, to execute the idea.[29] Although Zenger had primarily printed religious tracts, he agreed.[30] On November 5, 1733, the first issue of the *New York Weekly*, criticizing Crosby, was published.[31]

Crosby eventually became tired of the *New York Weekly*'s attacks. In January 1734, he tried to shut down the paper.[32] When that effort failed, Crosby had Zenger arrested and charged with libel.[33] Zenger was arrested on November 17, 1734, and was forced to remain in prison until his trial began on July 29, 1735.[34] Andrew Hamilton, one of the most prominent and eloquent attorneys of that time, came from Philadelphia to defend Zenger.

In a move shocking to everyone in the courtroom, Hamilton argued that Zenger had indeed published the alleged writings. However, he continued, "the words themselves must be libelous[,] that is false, scandalous, and seditious[,] or else we are not guilty."[35] Hamilton also argued that if innuendo is all that is needed for libel, almost anything that a man writes may be construed as a libel. Crosby's counsel argued that this position went against the common view of the law of libel in which the jury decides only whether a defendant published the alleged libel, because "the law had taken so great care of men's reputations that if one maliciously repeats [a libel], or sings it in the presence of another, or delivers the libel or a copy of it over to scandalize the party, he is to be punished as a publisher of a libel."

Hamilton responded that the jury had

> the Right beyond all Dispute, to determine both the Law and the Fact, and where they do not doubt of the Law, they ought to do so. This of leaving it to the Judgment of the Court, whether the Words are libellous or not, in Effect renders Juries useless (to say no worse) in many Cases. . . .[36]

For the first time in American jurisprudence, Hamilton, with those words, informed a jury on its option of "jury nullification." Until Hamilton's argument, the jury believed that its only option was to determine whether the defendant had published the statement and then the judge was left to decide whether the statement was libelous. This, after all, had been the common practice in libel cases since 1275. Hamilton artfully provided the jury with information on its right to fairly judge an alleged crime by determining the law and the facts. Hamilton told the jury that if they decided that there was no falsehood in Zenger's statement, then they had the right to say so.

In closing, Hamilton argued

> And has it not often been seen (and I hope it will always be seen) that when the Representatives of a free People are by just Representations or Remonstrances, made sensible of the sufferings of their Fellow-Subjects, by the Abuse of Power in the Hands of a Governour, they have declared (and loudly too) that they were not obliged by any Law to support a Governour who goes about to destroy a Province or Colony, or their Privileges, which by His Majesty he was appointed, and by the Law he is bound to protect and encourage. But I pray it may be considered, of what Use is this mighty Privilege, if every Man that suffers must be silent? And if a Man must be taken up as a Libeller, for telling his sufferings to his Neighbour. . . . No, it is natural, it is a Privilege, I will go farther, it is a Right which all Freemen claim, and are entitled to complain when they are hurt; they have a Right publickly to remonstrate the Abuses of Power, in the strongest Terms, to put their Neighbours upon their Guard, against the Craft or open Violence of Men in Authority, and to assert with Courage the Sense they have of the Blessings of Liberty, the Value they put upon it, and their Resolution at all Hazards to preserve it, as one of the greatest blessings Heaven can bestow.[37]

The jury returned a general verdict of not guilty. Hamilton was successful in characterizing Zenger's trial as an affront on the colonists' right to speak out against tyrannical governments and abuses of power. In finding for Zenger, the jurors took a stand on the value that

they placed on liberty and on freedom of speech and the extent to which they would go to preserve them. Hamilton skillfully played upon popular community prejudice against the government in the defense of free press and speech.

As we became a united government of states, these sentiments found expression in the individual state constitutions. Twenty state constitutions [see sidebar below] provide that ". . . in all indictments for libel, the jury shall have the right to determine the law and the facts. . ."—guaranteeing their citizens the right to a jury trial in libel cases.[38]

But what happens when the jury, as representatives of the community, sides with a popular government or a public official intent on suppressing unpopular speech or punishing an unpopular speaker? The issue arose in the 1960s in the Deep South where all white, all male jurors were asked to judge publications that were critical of the southern way of life and that threatened the political order of the day. The very same jury system that had protected Zenger was now a threat to publishers such as *The New York Times* and those "rising voices" speaking about the need to extend civil rights to everyone.

Preserving Precious Liberties

From the founding of the United States, the jury was seen as the protector of free speech. The jury, however, took on a different role in the 1960s.

In the Deep South, the civil rights movement threatened the so-called southern way of life. The antagonists were the large and elastic class known as the "outside agitators," which included the "liberal East Coast press," as personified by *The New York Times.* The southern majority reviled organizations such as the National Association for the Advancement of Colored People (NAACP) and the Southern Christian Leadership Conference, the latter of which was led by Martin Luther King, Jr., and Ralph Abernathy.

The established political order in the South fought Dr. King, the Rev. Abernathy, and their sympathizers, and sought to silence them with dogs, fire hoses, billy clubs, and libel suits. The parties came together in a remarkable lawsuit after *The New York Times* published an editorial advertisement entitled "Heed Their Rising Voices," which was sponsored by the NAACP and signed by Abernathy.[39] The advertisement ran on March 29, 1960, and stated in part:

> As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights. In their efforts to uphold these guarantees they are being met by unprecedented waves of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . .[40]

The advertisement went on to describe incidents in the "waves of terror," including expulsion of protestors from schools, truckloads of police officers armed with shotguns and tear gas surrounding the Alabama State College Campus, the campus dining hall padlocked when the student body protested, the bombing of Dr. King's home in which his wife and children were almost killed, and the numerous false arrests of Dr. King in an attempt to intimidate him.[41]

L.B. Sullivan, the commissioner of public affairs for Montgomery, Alabama, brought a civil suit against *The New York Times*,[42] alleging that he had been libeled by the statements in the advertisement.[43] Although Sullivan was not mentioned by name, he contended that the allegations that the police circled the campus implied a reference to him since his duties as public affairs commissioner included supervision of the police department.[44] He also claimed that the padlocking of the student dining hall, as well as the alleged false arrests of Dr. King, could be imputed to the police and hence to him, since the police are generally responsible for such actions.[45] According to Sullivan, since the police were implicated in the other acts of terror mentioned in the advertisement, the statements regarding the bombing of Dr. King's home could also be read as accusing the police and, by extension, the public affairs commissioner.[46]

A Montgomery County jury awarded Sullivan $500,000 in damages, even though he had made no attempt to prove actual damages. Furthermore, the bombing of Dr. King's home and three of his four arrests occurred before Sullivan became commissioner so those acts, as described in the advertisement, could not have been imputed to Sullivan.[47] Nevertheless, the jury award was affirmed by the Alabama Supreme Court.[48]

Libel cases against *The New York Times* cropped up all over the South. By the time *Sullivan* reached the U.S. Supreme Court, local and state officials in Alabama had filed eleven suits against the newspaper, seeking $5,600,000 in damages.[49] Without libel insurance, the paper's very existence was threatened by the numerous suits and potentially high jury awards.

Sullivan was appealed to the U.S. Supreme Court, where Justice Brennan's decision fundamentally changed the law of libel. Not only was a common law tort subject to constitutional limitations that require public officials to prove falsity and actual malice by clear and convincing evidence, the decision also strongly reflected a distrust of juries, reversing a 700-year trend wherein juries had been perceived as the protector of speech (or

Libel Trial by Jury

The constitutions of twenty states guarantee the right to trial by jury when libel is involved. The specific provisions are identified below:

Alabama (Art. I, § 12)
Colorado (Art. II, § 10)
Connecticut (Art. I, § 6)
Delaware (Art. I, § 5)
Kentucky (Bill of Rights, § 9)
Maine (Art. I, § 4)
Mississippi (Art. 3, § 13)
Missouri (Art. I, § 8)
Montana (Art. II, § 7)
New Jersey (Art. I, § 6)
New York (Art. I, § 8)
North Dakota (Art. I, § 4)
Pennsylvania (Art. I, § 7)
South Carolina (Art. I, § 16)
South Dakota (Art. VI, § 5)
Tennessee (Art. I, § 19)
Texas (Art. 1, § 8)
Utah (Art. I, § 15)
Wisconsin (Art. I, § 3)
Wyoming (Art. 1, § 20)

at least as neutral) in their adjudication of libel cases.

The U.S. Supreme Court held that the rule of law, as applied by the Alabama courts, was constitutionally deficient for failing to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.[50] According to Justice Brennan, the decision by the Alabama courts reflected "the obsolete doctrine that the governed must not criticize their governors."[51] The Court also held that actual malice is a required element in libel actions brought by public figures where the alleged libel concerns their public duties.[52]

The Court considered the case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."[53] According to the Court, it had already been established that constitutional protection of free speech did not turn "upon the truth, popularity, or social utility of the ideas and beliefs which were offered."[54] Based on the history of suppression of ideas and speech in the past, the forefathers had decided that "in spite of the excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."[55] Erroneous statements are inevitable in free debate; however, they too must be protected "if the freedoms of expression are to have the breathing space they need to survive."[56]

Expression of views critical of local government officials was protected, if at all, by juries during the pre-*Sullivan* era. But juries can easily turn against unpopular speech and this is exactly what happened in *Sullivan.* That the U.S. Supreme Court stepped in and "constitutionalized" state libel law is as remarkable as it was necessary to protect speech and the press.

After *Sullivan,* a widespread trend emerged of jury verdicts being overturned on appeal in order to protect the speaker. In Texas, the appellate court has the opportunity to review the sufficiency of the proof on an interlocutory appeal of denial of summary judgment. This device has proved remarkably effective for press defendants since it was enacted approximately eight years ago.

More courts also began treading the fine line between the First and Seventh Amendments, conducting independent appellate reviews in libel actions based on the rationale that

> [w]hether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."[57]

Courts, following the Supreme Court's lead, held the view that independent appellate reviews were necessary in order to "preserve the precious liberties established and ordained by the Constitution."[58]

First Amendment Survey Presents Troubling Disconnect

In 2005, the Media Law Resource Center reported on jury verdicts involving libel, privacy, and related claims against media defendants, arising out of their acquisition and publication of information, that went to trial during the last twenty-five years.[59] Since 1980, 506 cases reached a jury verdict. Plaintiffs won 307 (60.7 percent) of the cases reaching a jury.[60] Trial courts reversed thirty-one (10.1 percent) of the 307 cases won by plaintiffs on post-trial motions.[61] Of the 276 jury awards that survived post-trial motions, 132 (47.8 percent) were reversed or modified on appeal; sixty-four (23.2 percent) were affirmed on appeal; thirty-five (12.7 percent) were not appealed; seven (2.5 percent) had appeals still pending as of February 2005; thirty (10.9 percent) had post-trial settlements; and final disposition was unknown in eight (2.9 percent).[62] Since 1964, jury awards for plaintiffs in libel cases have been overturned on appeal in 80 percent of the cases.

Surveys on society's views on the First Amendment show a populace in constant debate over whether freedom should be limited and, if so, what kinds of restrictions should be permitted.[63] Public support for the First Amendment is not always stable.[64]

The 2004 State of the First Amendment Survey[65] once again reflected that: "*In the minds of many Americans, there is a troubling disconnect between principle and practice when it comes to First Amendment Rights and Values.*"[66] The results of the survey showed:

- 30 percent of adults believe that the First Amendment goes too far in the rights that it guarantees.
- 42 percent of adults think the press in America has too much freedom.
- 36 percent of adults agree with the statement that Americans have too much press freedom.
- 56 percent of adults think that newspapers should be allowed to freely criticize the U.S. military about its strategy and performance; 41 percent of adults think that they should not.
- 49 percent of adults believe that the media has too much freedom to publish whatever it wants; 34 percent of adults believe that there is too much government censorship.
- 11 percent of adults think Americans have too much freedom to speak freely; 28 percent of adults think Americans have too little; 60 percent of adults think we have just enough.
- 54 percent of adults think people should be allowed to say things in public that might be offensive to religious groups; 44 percent of adults think they should not be allowed to do so.
- 35 percent of adults think that people should be allowed to say things in public that might be offensive to racial groups; 63 percent of adults think that they should not.[67]

A recent study of high school students conducted by the John S. and James L. Knight Foundation in collaboration with the University of Connecticut showed:

- After the text of the First Amendment was read to students, 35 percent thought that the First Amendment went

too far in the rights it guarantees.

• 83 percent of students felt that people should be allowed to express unpopular opinions.

• 51 percent of students felt that newspapers should be allowed to publish freely without government approval of stories.

• 78 percent of students felt that musicians should be allowed to sing songs with lyrics that others may find offensive.

• 58 percent of students felt that high school students should be allowed to report controversial issues in their student newspapers without approval of school authorities.[68]

These views mirror the opinions of many jurors. The jury is a cross-section of the larger community and, in theory, the views of the jury reflect the views of the population at large and vice versa.[69] The jury has always been seen as a practical surrogate for popular decision making in a world in which it is impossible to put questions of individual liability or culpability to electoral referenda.[70] The size of jury awards during the past twenty-five years is not surprising when viewed in light of the survey results on societal views of the First Amendment and freedom of speech.

The Metamorphisis of Libel

Libel, as we know it today, has evolved over the last 730 years, starting in 1275 with *scandulum magnatum* and progressing to jury nullification in the Trial of the Seven Bishops in 1688, to juries being given the statutory right to determine the law and the facts with the passage of the Fox Libel Act in 1792, to the right to a jury trial in libel actions being granted in state constitutions, to years of juries being seen as the protector of free speech within the United States, and finally to the about-face in the 1960s where juries were no longer seen as the protector of speech. One result of *New York Times Co.* has been increase in independent appellate review in libel cases so as to guarantee constitutional protection of speech.

Juries in libel cases today are similar to the *Zenger* jury. Today's jury will take a stand against affronts to our ability to speak freely and express opinions. When faced with questions of libel, juries are more likely to protect the speaker when the issue is presented as not only the defendant's right to express his or her opinion but also as freedom of speech for all people, including the jurors. Even if the jury does not like the speech or it is unpopular speech, jurors tend to vote in favor of the speaker when they realize that cutting off one person's ability to express his or her views also silences them and their neighbors and stifles other viewpoints that they may support or at least not find offensive.

The 2004 State of the First Amendment Survey revealed an interesting distinction that many Americans tend to make. When asked whether "the press in America had too much freedom," 42 percent of adults responded affirmatively. But when the question was rephrased as whether "Americans have too much press freedom," only 36 percent said "yes." Speech of institutions or entities is not weighed the same in terms of worthiness of protection. Americans are more likely to be supportive of speech if the speaker is depicted in a more human light and not simply as an entity.

The approach to jury decisions in libel cases is unique in the United States. The courts in the first instance determine whether a case is worthy of going to trial. Juries then have the opportunity to exonerate the speaker, but if they do not, appellate courts are constitutionally compelled to independently examine the record to make sure that unpopular opinions or unpopular institutions are not being penalized without the requisite amount of evidence.

Endnotes

1. Food Lion v. Capital Cities/ABC, Inc., 194 F.3d 505, 511 (4th Cir. 1999); Levan v. Capital Cities/ABC, Inc., 190 F.3d 1230, 1238 (11th Cir. 1999); Dolcefino v. Turner, 987 S.W.2d 100, 109 (Tex. App. 1998).

2. NBC News Transcripts, *Dateline NBC*, Dec. 29, 1998, *Absence of Malice?* (court case involving Sylvester Turner, a candidate in the Texas 1991 mayoral race; Wayne Dolcefino, a local Channel 13 reporter, finds the TV station at fault for reckless reporting).

3. Whitney v. California, 274 U.S. 357, 375–76 (1927).

4. New York Times Co. v. Sullivan, 376 U.S. 254, 277–78 (1964).

5. *Id.* at 285–86.

6. *See infra* note 38.

7. The Law Reform Commission (Dublin, Ireland), *Consultation Paper on the Crime of Libel* (1991), *at* http://www.lawreform.ie/publications/data/volume10/lrc_65.html.

8. *Id.* at 3.

9. The elements of criminal libel are derived from case law as set out in Thomas Green, *The Jury, Seditious Libel, and the Criminal Law in* JURIES, LIBEL AND JUSTICE: THE ROLE OF ENGLISH JURIES IN SEVENTEENTH AND EIGHTEENTH CENTURY TRIAL FOR LIBEL AND SLANDER 40 [Papers Read at a Clark Library Seminar, 28 February 1981] (Los Angeles, 1984).

10. Trial of the Seven Bishops, 12 How. St. Tr. 183, 415 (1688), *at* http://press-pubs.uchicago.edu/founders/documents/amendI_assemblys6.html.

11. FRANCIS LUDLOW HOLT, ESQ., THE LAW OF LIBEL IN WHICH IS CONTAINED A GENERAL HISTORY OF THIS LAW IN THE ANCIENT CODES AND OF ITS INTRODUCTION, AND SUCCESSIVE ALTERATIONS IN THE LAW OF ENGLAND COMPREHENDING A DIGEST OF ALL THE LEADING CASES UPON LIBELS, FROM THE EARLIEST TO THE PRESENT TIME 34 (1818).

12. *Consultation Paper on Libel*, *supra* note 7, at 3. At that time the action was applicable to both written and spoken defamation.

13. *Id.* at 3–4.

14. Green, *supra* note 9, at 41–42; AGNES STRICKLAND, THE LIVES OF THE SEVEN BISHOPS, COMMITTED TO THE TOWER IN 1688 (1866), *available at* http://justus.anglican.org/resources/pc/nonjurors/strickland/sancroft3.html (visited Apr. 22, 2004).

15. STRICKLAND, *supra* note 14.

16. *Id.*

17. *Id.*

18. *Id.*

19. Trial of the Seven Bishops, 12 How. St. Tr. 183, 415 (1688), *at* http://press-pubs.uchicago.edu/founders/documents/amendI_assemblys6.html.

20. *Id.*

21. Green, supra note 9, at 42.

22. The passage of the Act was spearheaded by Charles James Fox.

23. Halsbury's Statutes of England and Wales, Fox Libel Act of 1792, Footnotes (4th ed. 2003).

24. Green, *supra* note 9, at 45.

25. In 1882, Lord Blackburn in the *Capital and Counties Bank, Ltd. v. George Henty & Sons,* 7 App Cas 741, 775 (1882), specifically stated that "it has been for some years generally thought that the law, in civil actions for libel, was the same as it had been expressly enacted that it was to be in criminal proceedings for libel."

26. Bella Louise Morris, *Jury Trials In Personal Injury Claims—Is There A Place For Them,* J.P.I. LAW 2002, 3, 310–15, 311;

County Courts Act 1984 § 66; Supreme Court Act 1981 § 69. The other civil actions in which English citizens have a right to jury trial are deceit, slander, malicious prosecution, and false imprisonment.

27. Douglas Linder, *The Trial of John Peter Zenger* (August 2001), *at* http://jurist.law.pitt.edu/trials20.htm.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. John Peter Zenger, *A Brief Narrative of the Case and Tryal of John Peter Zenger, Printer of the New York Weekly Journal* (1735) (Historical Society of the State of New York), *available at* www.courts.state. ny.us/history/elecbook/zenger_tryal/pg1.htm (visited Mar. 31, 2005).

36. *Id*. at 19–20.

37. *Id.*

38. Although use of the word "indictments" connotes a criminal trial, these provisions are viewed as justification for jury trials in civil libel actions. As discussed above, the rules for civil and criminal libel cases began to overlap and merge as the law of libel emerged over time. Moreover, the criminal libel statutes of at least seven states have been struck down as unconstitutional. *See* MLRC BULL. No. 4 (2004); MLRC BULL. No. 2 (2002).

39. New York Times Co. v. Sullivan, 376 U.S. 254, 256 (1964).

40. *Id.* at 305.

41. *Id.*

42. *Id.* at 256.

43. *Id.*

44. *Id.* at 258.

45. *Id.*

46. *Id.*

47. *Id.* at 256–59.

48. *Id.* at 256.

49. *Id.* at 295 (Black, J. concurring).

50. *Id.* at 264.

51. *Id.* at 272.

52. *Id.* at 283.

53. *Id.* at 270.

54. *Id.* at 271.

55. *Id.*

56. *Id.* at 271–72.

57. Bose Corp. v. Consumers Union, 466 U.S. 485, 511 (1984).

58. *Id.* at 510–11.

59. MEDIA LAW RESOURCE CENTER, MLRC 2005 REPORT ON TRIALS AND DAMAGES (Feb. 2005), *available at* http://www.medialaw.org.

60. *Id.*

61. *Id.*

62. *Id.*

63. Gene Policinski, *Commentary on the 2004 Report,* First Amendment Center, June 28, 2004, *at* http://www.firstamendmentcenter.org/commentary (visited Apr. 5, 2005).

64. *Future of the First Amendment, Executive Summary, at* http://firstamendment.jideas.org/findings/findings.php (visited Apr. 5, 2005).

65. The survey has been conducted by the First Amendment Center on an annual basis since 1996.

66. Paul McMasters, Analysis*: 2004 State of the First Amendment Survey Report,* First Amendment Center, June 28, 2004, *at* http://www.firstamendmentcenter.org/analysis (visited Apr. 5, 2005). This theme has been consistent throughout each survey over the last eight years.

67. *State of the First Amendment 2004 Survey, Final Annotated Survey,* First Amendment Center, June 28, 2004, *at* http://www.firstamendmentcenter.org/sofa_reports/index.aspx (visited Apr. 5, 2005).

68. John S. and James L. Knight Foundation's High School Initiative, *Future of the First Amendment, What High School Students Think About Their Freedoms, at* http://firstamendment.jideas.org/index.html (visited Apr. 5, 2005).

69. Frederick Schauer, *Symposium: New Perspectives in the Law of Defamation: The Role of the People in First Amendment Theory*, 74 CALIF. L. REV. 761, 768 (1986).

70. *Id.*

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