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Reporter's Privilege Fails to Protect Confidential Sources in D.C. Circuit

In his State of the Union address on January 28, 2003, President George W. Bush said: "The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa." These sixteen words have led to the one of the most significant confrontations between federal courts and the First Amendment in a generation.

In July 2003, former Ambassador Joseph Wilson published an opinion piece in *The New York Times* revealing that he was sent to Niger in 2002 by the CIA to investigate whether Iraq had been seeking to purchase uranium. Ambassador Wilson said that he found no credible evidence that it had. Shortly after that piece appeared, columnist Robert Novak published a piece in the *Chicago Sun-Times* stating that "two senior administration officials" told him that Ambassador Wilson had been sent to Niger at the suggestion of Valerie Plame, Ambassador Wilson's wife, who was an undercover CIA "operative." This column led to allegations that the Bush administration had compromised Ms. Plame's undercover status to punish Ambassador Wilson for publishing his viewpoints.

A special counsel was appointed to investigate these allegations, and numerous subpoenas to reporters were issued. Two reporters, *New York Times* senior writer Judith Miller and *Time* reporter Matthew Cooper, refused to reveal confidential source information and argued that the First Amendment and federal common law prevented the government from forcing them to do so.

On February 15, 2005, the U.S. Court of Appeals for the District of Columbia Circuit held that Ms. Miller and Mr.

Cooper must testify or be punished for contempt of court. *In re: Grand Jury Subpoena, Judith Miller*, No. 04-3138 (D.C. Cir. Feb. 15, 2005). As this issue goes to press, Ms. Miller and Mr. Cooper have sought *en banc* review of this decision. In addition, Representatives Mike Pence (R-Ind.) and Rick Boucher (D-Va.) and Senators Richard Lugar (R-Ind.) and Christopher Dodd (D-Conn.) have introduced the "Free Flow of Information Act of 2005," which would provide absolute protection for journalists' confidential sources.

In light of this extraordinary turn of events and the recent sentencing of Providence, Rhode Island, reporter Jim Taricani for criminal contempt for refusing to reveal a confidential source, *Communications Lawyer* asked two journalists with unparalleled experience with this First Amendment conflict to shed some light on why protecting sources is worth the profound personal risk that journalists are willing to take in refusing to comply with grand jury subpoenas. First, Judith Miller of *The New York Times* describes why she is willing to risk up to eighteen months in jail to protect her confidential sources in the Plame matter. Second, Myron Farber, a former *New York Times* writer with a celebrated and colorful career in investigative journalism, reflects on why his principles demanded him to spend forty days in a New Jersey jail rather than betray his confidential sources. We believe these two unique voices add authority and urgency to the debate on whether our system of justice is on a collision course with the First Amendment.

Coverage starts on page 4.

Tenth Annual Conference an Eye-Opener

JERRY BIRENZ

I learned a lot, even more than I usually do, at the Forum's Annual Conference, held this year in Boca Raton, Florida, in mid-January. While I always find the conference to be full of substantive and practical knowledge, as well as a wonderful opportunity for networking, making new acquaintances, and deepening friendships, this year it seemed especially enlightening.

First, I made it a point to see as many aspects of the Conference as I possibly could, especially portions I had not previously been exposed to.

For the first time, I attended the Media Advocacy Workshop on Thursday. Now in its eighth year, the Workshop this year was put on by the Forum's new Training and Development Committee. I saw the amount of hard work it requires of its teachers (experienced media lawyers who serve as judges and clients) and its students (less experienced lawyers who acted as litigators in two mock oral arguments in libel and subpoena cases and prepublication reviewers). I was especially impressed at the quality of the feedback the teachers gave the students—it was immediate, specific, and most important, honest. I am convinced that this is one of the best learning opportunities young litigators can get outside of actually handling litigation.

Attending the meeting of the Women In Communications Law group was an interesting exercise in perspective. The room was packed with more than fifty women, and I was one of only two



Jerry Birenz

males at the meeting (Immediate Past Chair Tom Kelley also attended), and I hope our presence did not inhibit their discussion at all. Based on some of the language and anecdotes I heard, I think not, but you never know . . . The meeting included a lively discussion of how gender affects how women lawyers are perceived

by judges, jurors, adversaries, clients, and even colleagues, and the group shared ways of tearing down gender misperceptions. It was particularly interesting to me because

I work with many female attorneys, in my firm and in other law firms and publishing companies, and I have never thought of female attorneys as being different professionally from male attorneys; yet almost every woman at the meeting, when asked whether she believed she was treated differently as an attorney because of her gender, responded yes, and many spoke eloquently about their experiences.

(Similarly, when minority women attorneys were asked at the meeting whether they believed they were treated differently because of their race, every one answered yes.) There is not space here to go into the details, but I will just say that I have always been a strong believer in trying to look at a situation through the other's person's eyes, and this meeting revalidated that belief for me.

At the "How to Diversify the Media Bar" workshop, I particularly appreciated, and hope to use in the future, a breaking-down-walls exercise in which a rapid series of questions were asked of the attendees about their likes and dislikes, backgrounds, and experiences, and people answered by raising their hands. One of the purposes of the exercise is to show in a short

period of time that despite obvious differences, we also have many things in common that can serve as connections between us. It also enabled us to see, based on looking around the room and seeing how people of different races and genders responded to questions, how racial and other exterior characteristics can play a significant role in our professional and personal lives and thinking. I came away believing that this is a workshop that everyone should make an effort to attend and learn from at future conferences.

A similar lesson was imparted at the "How to Avoid Burnout" workshop when more junior and more senior attorneys had an opportunity to hear from each other perspectives on the stresses of our profession and workplaces (especially large law firms), and to devise proposals for lessening that stress. I hope some of these suggestions make their way to law firm management.

Two Inspiring Luncheon Speakers

The Friday afternoon lunch was in and of itself a worthwhile, nay, inspiring, experience. I had the wonderful fortune of being seated between our two speakers, Judith Miller, a *New York Times* Mideast reporter, and Robert Grey, Jr., President of the American Bar Association, and had fascinating (well, at least

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to me) conversations with each of them. In my conversation with President Grey, I learned something about the ABA that I did not know and that really affected me: that the ABA sponsors lawyers going to places where war crimes and atrocities have occurred or are occurring, to gather evidence and help bring perpetrators to justice. Perhaps because of my family's background, there is no topic closer to my heart than the issue of the human rights of racial, ethnic, gender, or religious populations vis-à-vis those who seek to deny those human rights—and I asked President Grey to be sure to discuss this function of the ABA in his talk to the group. The main topic of President Grey's talk was a description of his initiative to reform the jury system in the United States, including how he approached organizing it. The Forum is studying the recommendations to see how they impact on press coverage of trials.

President Grey did briefly discuss the human rights work the ABA does, although without specifics, in order not to do anything to jeopardize that work. As I sat there fantasizing about trudging off to war zones, living in tents, and interviewing witnesses and helping victims, I wondered how a group like ours could, realistically, help in the efforts to defend human rights in such places, and at some point it occurred to me that some of us do. I remembered discussing with Forum members Roger Myers of DLA Piper Rudnick Gray Cary and Roslyn Mazer, then of Dickstein, Shapiro & Morin and now at the Department of Justice, how they had worked to create or reform a new legal system based on principles that are near and dear to us, including instituting press and speech freedoms where they had not previously existed—Jim in Kazakhstan last year and Roz in the Czech Republic in the early 1990s. I'm sure there are other media attorneys who have done so. Such efforts are the necessary corollary to the work being done by the attorneys described by President Grey, as hopefully the media attorneys' work will help prevent such atrocities from recurring. I'm proud that media attorneys are playing a real role in this effort, and need to think

more about how the Forum can support such efforts.

Judith Miller's talk was electrifying, and she received a lengthy standing ovation. Ms. Miller is one of two reporters facing jail time for refusing to disclose confidential sources in their investigation of the story about the leaking of the identity of CIA Agent Victoria Plame by someone in the Bush administration to reporter Robert Novak, who revealed it in a column. Ms. Miller gave an impassioned explanation of the need for the law to protect the ability of reporters to withhold the identity of confidential sources, and I dare say she had everyone in the room riveted. Ms. Miller's address to the Conference is recreated for the readers of *Communications Lawyer* elsewhere in this issue.

Here's a little bit of the "inside story" of her appearance at the Conference: Ms. Miller was a last-minute addition to the Conference program. The program's topics and speakers had already been set when the Victoria Plame story exploded, but it was suggested that the topic must be addressed, and through George Freeman's good offices, we were able to get this key player in the story to speak to us. We then had to decide where to place Ms. Miller in the program, and we decided to make her a second speaker at the Friday lunch, specifically so that ABA President Grey could hear her address. (We told President Grey's office in advance what we wanted to do and why.) It was our hope that if President Grey heard first-hand Ms. Miller's story, and saw the reaction of the hundreds of lawyers in the room, he could better understand the importance of the cause to this constituency of the ABA, especially if, as we expect, the issue of support for a federal shield law comes before the ABA. Based on his comments to me, I think our plan had the desired effect.

Plenary Sessions

Then, of course, there were the three plenary sessions. The first session on the Supreme Court decision in *Richmond Newspapers v. Virginia* discussed the history of the case and addressed the modern state of access to courts, especially as regards terrorism

and celebrity cases. One of the things that I believe most in attendance were surprised to learn is that there are hundreds of "secret docket" cases in the courts about which nothing—not even the existence of the case—is known by the press or general public.

The second plenary session discussed the performance of the media in the 2004 presidential election. Of particular interest was the discussion of how the much-maligned blogger community and cable television talk shows effectively set the national election news agenda, creating and keeping stories in the news cycle and forcing the more traditional media to follow them.

I particularly enjoyed the last plenary session, which at least three attendees described to me as the best plenary session in the ten years the Forum has been putting on an Annual Conference. The session discussed the *Milkovich v. Lorain Journal* case on the fifteenth anniversary of the Supreme Court's ruling in the case, and how the Supreme Court's decision has been treated by the

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Why Confidential Sources Are Important and Why I Would Go to Jail to Protect Them

JUDITH MILLER

When I joined *The New York Times* back in the Pleistocene, I never dreamed that I would be spending so much time with members of your profession. In fact, I've spent so much time with lawyers lately that I'm thinking of taking up golf.

While unpredictability has usually been the joy of my craft, nothing has prepared me for the legal ordeal of the last several months. And though I proudly display a "no whining" button above my computer, the experience has been, to put it mildly, challenging. I'm grateful to Jerry, George Freeman, the ABA, and to Robert Grey for letting me take some time this afternoon to discuss the important journalistic, as well as legal, issues at stake in this case.

The Gory Details

For those of you not familiar with the gory details, my need for a lawyer began several months ago after I received a subpoena to testify before a federal grand jury about my alleged conversations with alleged sources about who might have leaked the name of Valerie Plame, who may or may not have been a CIA undercover operative as the law defines it, to Bob Novak, the conservative syndicated columnist and TV talking head.

In July 2003, Bob Novak quoted two senior Bush administration officials as saying that Ms. Plame, or Mrs. Joe Wilson, was a CIA operative in Weapons of Mass Destruction and that she had helped get her husband his CIA assignment to travel to Niger to determine whether Iraq had been trying to buy uranium for a nuclear weapons program. Joe Wilson had infuriated the Bush administration by denouncing its

decision to go to war in Iraq in an op-ed page article in *The New York Times*. Soon after that essay was published, several papers and magazines reported that the Bush administration, to smear and punish Joe Wilson, had leaked Ms. Plame's name and position as a CIA agent to Novak, thus jeopardizing national security, to say nothing of her life.

I was being asked to testify about what I might know about who leaked her name—despite the fact that I had never written a word about Ms. Plame or Joe Wilson. The then-target of the special prosecutor's investigation had signed, at White House insistence, a document waiving the pledge of confidentiality that the reporters he had talked to had given him.

I decided not to testify. I did so because I felt strongly that first of all, such waivers were not really voluntary, and second, that violating such a pledge of confidentiality, for me, as a reporter who has specialized in intelligence and national security issues, would lead other people to doubt that I would protect them as I had vowed to do, and must do when reporting on sensitive national security topics.

Life's Blood of Investigative Journalism

Ladies and gentlemen, confidential sources are the life's blood of investigative journalism. Without them—whether they are in government, large or small companies, or nonprofit organizations—people like me would be out of business. We are only as good as our sources. So their confidence that we will not divulge their identity is crucial to their willingness to come to us with allegations of fraud or abuse or wrongdoing, or a dissenting view in their agency or company that might be critical to the American public.

Just look at a few of the groundbreaking stories that would never have

seen the light of day without such confidential sources: to start with, Watergate. I remind you that the identity of "Deep Throat" is not known to this day. One day, he or she may decide to reveal his or her identity, but Bob Woodward and Carl Bernstein have chosen not to do so, even after all these years. Or consider the Iran-Contra affair, in which senior Reagan administration officials offered to trade arms to Iran for the release of American hostages.

In 2000, I relied heavily on confidential sources in writing a series of articles published in January 2001 that described the Clinton administration's growing concerns about the then-underappreciated military Islamic group, Al Qaeda, which was doggedly pursuing nuclear, biological, and chemical weapons. That series, which won one of seven Pulitzer prizes for *The New York Times* that year, could never have been written without the pledges of confidentiality I gave to the government officials who were so worried about the threat of Al Qaeda—all too presciently, alas—that they were willing to discuss classified information with me to call attention to how little time and money were being spent countering what they considered the gravest of threats to our nation.

Nor could *Germes*, the book I co-authored with two *Times* colleagues, have been written without confidential sources.¹ That book, which discussed the history of biological warfare and what our government and other governments were doing to counter another growing menace from a potential weapon of mass murder, could never have been written without confidential sources.

This past year, Sy Hersh, a *New York Times* veteran now at the *New Yorker*, relied on confidential sources for his grisly revelations about torture at the Abu Ghraib prison in Iraq.²

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Judith Miller is a senior writer for The New York Times. A version of this article was presented at the ABA Forum on Communications Law Annual Meeting in Boca Raton, Florida, on January 14, 2005.

A Reporter's Reluctant Education in the Law

MYRON A. FARBER

Amid the recent strife between judges and journalists over confidential sources, especially in the Valerie Plame affair, *Communications Lawyer* asked me to comment on my own experience with such sources before and after my jailing as a *New York Times* reporter in 1978.¹ But first I want to put the matter, and my own travail a quarter century ago, in a larger context.

Last November, while Ukraine was in turmoil over its presidential election, an interpreter for the deaf on official state television defied the anchor's report on Prime Minister Viktor Yanukovich's claim of victory, saying in sign language that the results of the election were rigged and that she would no longer interpret lies. "I do not know if you will see me again," she said. Natalia Dimitruk may only have meant that she would be fired. But when reading of the incident, in comfort halfway round the world, my immediate reaction was that she might "disappear." I was riveted by her courage and her silent words, words that an increasing number of journalists, such as the unforgotten Daniel Pearl, have had occasion to think or utter.

When Paul Klebnikov, editor of the Russian-language *Forbes* magazine, was shot down in Moscow last July, he was the sixteenth journalist to be killed in that country in connection with work since 2000, according to the Committee to Protect Journalists (CPJ). In the last decade, CPJ claims, 337 journalists have died in the line of duty worldwide. In 2004, the deadliest year for the news media in ten years, fifty-six were killed. And it wasn't only in Iraq, where twenty-three died and a score of others were kidnapped. From the Philippines to Mexico, from Gambia to Brazil, jour-

nalists paid with their lives. And more than a few were jailed, in conditions far harsher and for periods more indeterminate than any I faced.

I don't want to belabor this; it is not what I was asked to write about. But I didn't want to write anything without paying tribute to these colleagues and acknowledging that, of the predicaments facing journalists around the globe, the collision over confidential sources, with all its potential damage to reporting in America, is not the most alarming.

The Strange Case of Dr. X

I was a reporter for *The New York Times* from 1966 to 1993. In 1975, after a tip to the paper, I was assigned to look into the sudden and unexpected deaths a decade earlier of numerous patients at a small hospital in Bergen County, New Jersey. Fearing that these patients had been murdered with the muscle relaxant tubocurarine (curare)—eighteen mostly empty vials of which had been found in the chief surgeon's personal locker—hospital officials brought the deaths to the attention of the county prosecutor in 1966. Curare had not been administered during surgery of the patients, who were operated on by doctors other than the chief surgeon. But after a shallow, confused investigation and an agreement by the chief surgeon to resign, the case was allowed to wither, and friends and relatives of the deceased remained unaware of the hospital's suspicions.

I spent months in 1975 reconstructing this complex case, trying to figure out whether these patients had died natural deaths or were, in fact, murdered and why the case was quietly dropped by the prosecutor and his first assistant, both of whom had become county judges. I began writing about the case in January 1976, initially identifying the suspect, who had ignored my requests for an interview, only as Dr. X.

To gain access in 1975 to records of the case from 1966, I had to go through the new county prosecutor. He had not

been in the office in the 1960s and was only vaguely aware, through a detective, of his predecessor's aborted probe; but for his own reasons, and independent of what I was doing, he launched his own investigation. Five bodies, including that of a four-year-old girl, were exhumed; curare was found in them by the prosecutor's forensic experts; and the former chief surgeon, Dr. Mario E. Jascalevich, was indicted for murder.

An Overly Broad Subpoena

Prior to trial in 1978, Dr. Jascalevich's lawyer served me with the broadest subpoena ever on an American reporter, asking for all notes of interviews and other materials relating to 193 potential trial witnesses. No distinction was made between confidential or nonconfidential materials. With strong and costly support from *The New York Times*, I appealed. But court after court chose to enforce this subpoena, denying me an opportunity to challenge its breadth or necessity before deciding whether to comply in any fashion.

The defense lawyer, Raymond A. Brown, argued that I had colluded with the prosecution in a frame-up and that, despite New Jersey's shield law for reporters, his client's Sixth Amendment rights overrode any of my First Amendment rights or statutory privileges. The Supreme Court's 1972 decision in *Branzburg v. Hayes*² was Brown's rallying cry (as, under different circumstances, it has been the cry of special prosecutor Patrick Fitzgerald in the Plame case).

Jailed for Contempt

In July 1978, I was held in civil and criminal contempt for refusing to turn over what was, in effect, my desk. "A reporter has only so many tools with which to work," I told the court. "His strength lies in his readiness and ability to reach out and listen to people on every side of an issue, people with greatly varying views of 'the truth' or the facts. But,

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sometimes, people who have done no wrong yet who have information that is useful to a rounded understanding of an issue are reluctant to speak out. They may be afraid of losing their jobs, or incurring the displeasure of a governmental agency, or drawing unaccustomed attention to themselves or to their families. They may agree to provide information only on a confidential basis. And if I, as a journalist, accept information on those terms, I cannot disavow that agreement later. Not without destroying my integrity. If I was willing to permit any devaluation of my ethical currency, I would soon find that

The reporter's strength lies in the readiness and ability to reach out and listen to people in every side of an issue.

my worth had eroded completely. And I could not work that way.”

After serving forty days of what could easily have been a year's sentence in the Bergen County Main Jail, I was released at the close of Dr. Jascalevich's eight-month trial, then the longest criminal proceeding in New Jersey history. My criminal contempt sentence was suspended and the fines on *The Times* halted at \$286,000. The trial had pitted a young, able prosecutor armed with scientific and other evidence but no record trying murder cases against a savvy, experienced defense lawyer who dominated the courtroom of an ineffectual judge from beginning to end. Dr. Jascalevich was acquitted in two hours by a jury that failed to examine any of the trial testimony or exhibits.

The defendant's troubles were not over, however. After his indictment for murder at the Bergen County hospital, the New Jersey Board of Medical Examiners charged him with malpractice at other hospitals in the state. In one case, he was alleged to have knowingly submitted a false diagnosis of cancer, and in another to have knowingly permitted a forged operative record of a patient to become part of her hospital file.

Attorney Brown again defended Dr. Jascalevich but, here, he met his match in an indefatigable deputy attorney general, Anthony F. LaBue. In 1980, Dr. Jascalevich was stripped of his medical license. He returned to his native Argentina and died there. I was pardoned of criminal contempt by the governor of New Jersey, as was my employer. Our purpose, the governor said, had not been “to insult or frustrate the judicial process, but to stand on a noble, if sometimes imperfect, principle.”

In line with a ruling by the New Jersey Supreme Court in my case, the state shield law was tightened. Although I had been denied a hearing on materiality, relevance, and breadth, reporters in the future were assured of one before having to turn over any notes, even to a judge.

A case quickly arose, involving reporter Robin Goldstein for the *Daily Register* of Shrewsbury, New Jersey. In a six-to-one decision written by the new chief justice, Robert N. Wilentz, the state supreme court held that the four subpoenaing defendants, charged with murder or racketeering, had failed to prove that Goldstein's information could not be obtained from someone other than her.³ The Sixth Amendment, the court ruled, could not override the shield law merely “upon a defendant's unsubstantiated assertion” that a reporter's information could help him.

Relying on Confidential Sources

The Dr. X case was hardly the first time I had made use of confidential sources. And it was nowhere near the last. The Paul Branzburg who lent his name to the Supreme Court's five-to-four ruling requiring journalists to testify before grand juries regarding their work was a *Louisville Courier-Journal* reporter who had turned to confidential sources to illustrate illegal drug use in Kentucky in 1969 and 1971. I could empathize with him because I had done the same for *The Times* in 1974 while covering the drug beat.

Confidential sources were crucial to other stories I wrote before my jailing. One that I vividly recall involved an

undercover agent in a major federal anticorruption investigation—an agent who ultimately admitted that, while serving as a New York cop, he had lied repeatedly on the stand about his own vast criminal activities. When phoning me, often in the wee hours, from one hiding place or another, he identified himself as “Dick Tracy.”

Confidential sources also figured importantly in a ten-week investigation in 1974 that enabled me to write effectively about illegal immigration into the New York area from the Caribbean. One evening in Port-au-Prince, an “entrepreneur” I had cultivated, and who insisted on anonymity, offered me \$500 every time I could get a U.S. senator to recommend a visa for a Haitian he named. “This would be a start,” he said, pulling from his baggy pockets the passports of thirty-two Haitians who already had been denied visas. “We would never run out of names.” His scheme, which he certainly pursued with more willing confederates, was instructive to me and, thus, to readers.

Confidential sources were part, too, of my inquiry in 1976 into the alleged kidnapping of twenty-one-year-old Samuel Bronfman II, an heir to the Seagram liquor fortune. And they were critical to my six-month investigation, in the turbulent post-Watergate period, into an allegation that the new president, Gerald R. Ford, may have accepted illegal cash payments from a maritime union when he was in Congress. I ultimately found no evidence to substantiate the charge, which was causing friction among various investigative agencies, by a federal informant. But I put away a sea of beer assessing the veracity of a well-connected government employee who drank, and drank, a better game than he talked. No drinks were served at the Justice Department, where I sat at night listening to a senior prosecutor explain why Ford was clean. Confidentially, of course.

A Reluctant Education in the Law

I am not a lawyer. In the years I was working on the above stories, and many others, I rarely, if ever, gave much thought to the Free Press Clause or to state shield laws; and I doubt many other reporters did, either. Until I was facing jail in 1978, I was unaware that

it was only twenty years earlier, in a defamation suit against CBS by singer Judy Garland, that a journalist felt the need to argue in court that she had a First Amendment right to refuse to identify confidential sources.⁴

But *The Times*'s editors, especially A.M. Rosenthal, and lawyers such as James Goodale, Floyd Abrams, and Eugene Scheiman, brought me up to speed. Rosenthal didn't want to pressure me (or, if he did, he did a good job camouflaging it), but he did want me to know the score. Although in the 1960s about a dozen subpoenas were served on reporters, some 500 had been served between 1970 and 1976, and a dozen journalists before me had been jailed for contempt in the 1970s.

As states responded with shield laws of varying strength for reporters (thirty-one states and the District of Columbia have them now), lawyers worked overtime, with some success, to get judicial recognition of at least a qualified testimonial privilege for journalists. Even Justice Potter Stewart, noting Justice Lewis F. Powell, Jr.'s brief, opaque concurrence in *Branzburg*, suggested the vote was really "4 ½ to 4 ½." That didn't spare Paul Branzburg, who, by 1972, had taken a job in Detroit. But when Kentucky authorities tried to get him back, the governor of Michigan refused to extradite him.

Life After Jail

I, of course, wasn't spared, either. After jail, in a sixty-eight-year-old lockup that had been declared "unfit for human habitation," I took a leave of absence to catch my breath and to finish a book on the case begun long before I became part of the story.⁵ When I went back to my old job, some things were different. I was, a journalist wrote to my delight, "the quintessential serious *New York Times* reporter." But whereas before I had been able to pursue long investigations without attracting the attention of competitors, now, from television coverage of my case, I was recognizable and my doings aroused curiosity. I had become "the man who said 'no,'" as a stranger labeled me, and, more than ever, I felt obligated.

But that prominence or notoriety, whatever you might call it, wasn't conducive to working in the shadows, as I

often did. I had always fretted about losing a story to others before it was ripe for publication; some editors, and certainly my wife, Sabine, thought I was paranoid. Now I worried all the more.

The flip side was my enhanced credibility with sources, old and new. "I never doubted for a moment that you meant it . . . when you said you'd go to jail if necessary to protect my confidence," wrote a former New York State official who, after much agonizing, had provided me with vital information on a story every New Yorker, indeed every American, deserved to know and ponder. Some people now received me, or cooperated with me, because I had gone to jail for a principle, whether they agreed with it. In any event, that's what they said, and many were in the field of law enforcement and had followed the Dr. X case closely.

I do not remember any specific story that came my way solely because I

had been jailed. But when I thought it could be helpful on stories, especially as time passed, I didn't shy from citing my proven willingness to adhere to confidences.

Confidential sources were important when a frequent collaborator, *Times* reporter Ralph Blumenthal, and I investigated the financial practices of a powerful New York City councilman, who then chose not to seek reelection. They came into play when we looked into allegations of sexual misconduct against the venerated creator and president of the Covenant House shelter for runaways, the Reverend Bruce Ritter, who was forced out of his position hours after our story broke. And they figured again when we and other *Times* reporters cast doubt on explosive rape charges by a black teenager, Tawana Brawley, who was later found by a grand jury to have engaged in a hoax;

The Free Flow of Information Act of 2005 (H.R. 581/S. 340)

The Free Flow of Information Act, which is pending in both the House and the Senate, would prevent the subpoenas against Judy Miller and Matt Cooper from being enforced. The Act provides an absolute privilege for reporters to maintain the confidentiality of their sources. In addition, the Act provides a qualified privilege to protect the integrity of journalists' work product. The legislation is based on the Department of Justice's internal guidelines for subpoenas to journalists, which have been in operation for more than thirty years. Specifically, the Act:

- Allows testimony and documents to be compelled from journalists in criminal cases only when there is "clear and convincing evidence" that such testimony or documents are essential to the investigation, prosecution or defense of a criminal case;
 - Allows testimony to be compelled from journalists in civil cases only when the testimony or documents sought are essential to resolving a dispositive issue in the case and all other sources have been exhausted; and
 - Provides additional protection for the identity of confidential sources, and prohibits the disclosure of information that would lead to the discovery of the identity of those sources, including information held by third parties such as telephone companies.
- In addition, thirty-one states and the District of Columbia have shield laws that protect, to varying degrees, confidential sources and provide privileges against requiring journalists to testify or produce newsgathering documents to courts. Moreover, a common law reporters' privilege has been recognized in forty-nine of the fifty states. But these state laws do not apply to the Plame investigation in which Ms. Miller and Mr. Cooper have become ancillary targets.

when I probed the murder of a score of black youths in Atlanta, where a gun was pointed at my stomach throughout an interview with a friend of the man subsequently convicted of some of the murders; when I profiled the tension-filled life of a New York City police precinct in an eighteen-part series; when I wrote a six-part series on where stolen property winds up; when I reviewed the life of a singular con man and government informant who almost certainly murdered a host of elderly women who fell for him; and even when I examined the failing infrastructure of the city subway system. One source in that last series was so fearful of being named and losing his pension that he needed almost daily reassurance. After a while even I was nervous.

All of these stories—scrupulously researched, accurate, and clearly attributed for the most part—could have been written without the aid of confidential sources, but they wouldn't have been as informed or coherent or on the mark, and the loser would have been less the reporter than the reader. I'm referring here to sources on factual matters, not people who are grossly overcited in the press, including *The Times*, rendering an opinion anonymously. One depressing but not unusual example, I thought, was a politico who, after the election in November, was given cover about potential Democratic presidential candidates in 2008 because of the "sensitive nature of the intraparty debate." Wow!

Many people think of a classic confidential source as someone like the mysterious and ubiquitous Deep Throat of the Woodward and Bernstein Watergate exploits. He, or she, was invaluable to the reporters, and without that source, they might have dead-ended. But, in my experience, there are few real Deep Throats, few Daniel Ellsbergs, who have universal knowledge of a controversial situation or are the sine qua non of a story.

Much more common are insiders who have a piece of a story, and then perhaps a flawed piece, but who can help lead a careful reporter to what Carl Bernstein himself once called "the best obtainable version of the truth," journal-

istically. Relatively few of these sources are looking for a reporter; the reporter has to find them and draw out what they know and, if they've got the goods for good reason or bad, capitalize on their ability to verify and substantiate. They may never be quoted, even anonymously, but they can contribute as much or more to a story as anyone who is. And if a reporter makes use of them, in confidence, he's ethically bound to them.

Keeping a Cool Head

Had I not been jailed in the Dr. X case, it might have been some other. Chance, it seems, is a large, maybe the largest, determinant of which reporters get subpoenaed; and, given the nature of my work, I was standing in a lot of legal traffic. I accept that, but I deplore it, too.

One of the first things I saw in jail, and one of the last, was a sign posted by a guard desk. "If you can keep a cool head in these times," it read, "perhaps you don't understand the situation." I try to keep a cool head when I see reporters threatened with jail, and jailed, for refusing to disclose confidential sources. Hot is useless. And I think I do "understand the situation," much better for having spent so many hours with Floyd Abrams and Gene Scheiman. For me, they were educators as much as lawyers.

They, and others like them, will continue to make their arguments in and out of court—arguments about everything from who is a journalist in this Web world to whether a reporter's testimonial privilege could equate with those for psychotherapists or social workers to whether a reporter has any responsibility to a source who lies or discloses his own identity. Round by round in an evolving process, and in a nation with already the freest press in the world, judges of differing mindsets will rule; and perhaps Congress will see the wisdom of a federal shield law, though I'm doubtful. Individual reporters, particularly those whose employers have the resolve and spirit of *The Times* and are willing to spend the money, will avail themselves of whatever the law allows at any stage, then do what they must.

I can only speak for myself. From decades of reporting, I have learned

there is no exaggerating the power of even well-intentioned authority, public or private, to conceal or manipulate information that properly belongs in the light and to the people. In *Richmond Newspapers v. Virginia*,⁶ reaffirming in 1980 the right of the public and press to attend criminal trials, both Chief Justice Warren E. Burger and Justice William J. Brennan, Jr., polar opposites on most matters, quoted the words of eighteenth-century English reformer Jeremy Bentham: "Without publicity, all other checks are insufficient; in comparison of publicity, all other checks are of small amount."⁷ I buy that.

I believe journalists, admittedly too timid in some quarters and too partisan in others, are indispensable to the well-being of a democracy and demonstrate it daily. I believe that the First Amendment confers on a reporter, while working, what Justice William O. Douglas called "a preferred position in our constitutional scheme . . . to bring fulfillment to the public's right to know."⁸ And I believe that, when the rubber hits the road, as it did for me a quarter century ago, a reporter must follow his conscience.

That's the situation. 

Endnotes

1. See *In re Farber* (State v. Jascalevich), 394 A.2d 330 (N.J. 1978), *stay denied sub nom.* New York Times Co. v. Jascalevich, 439 U.S. 1301 (White, J.), 439 U.S. 1304 (Marshall, J.), 439 U.S. 1317 (White, J.) and 439 U.S. 1331 (Marshall, J.), *cert. denied*, 439 U.S. 997.

2. 408 U.S. 665 (1972).

3. See State v. Boiardo, 416 A.2d 793 (N.J. 1980).

4. *Garland v. Torre*, 259 F.2d 545 (2d Cir.).

5. See MYRON FARBER, "SOMEBODY IS LYING": THE STORY OF DR. X (1982). During my appeals, a federal judge had excoriated me for writing the book, saying I had surely disclosed confidential information to the publisher that I was now withholding from Dr. Jascalevich. So I turned over the manuscript, which named no confidential sources, to the trial judge, and neither he nor Brown ever looked at it. It still had its seal when it was returned to me.

6. 448 U.S. 555 (1980).

7. See *id.* at 579 (Burger, C.J., for the majority); *id.* at 591 (Brennan, J., concurring).

8. *Pell v. Procunier*, 417 U.S. 817, 840 (1974) (Douglas, J., dissenting).

Confidential Sources

(Continued from page 4)

Even today, Eric Lichtblau, writing in *The New York Times*, relied partly on unnamed sources to reveal that the FBI was on the verge of scrapping its \$170 million computer overhaul that is considered critical to the administration's war on terrorism, because it can't overcome flaws in the system.³

Some press critics have argued that we reporters rely too heavily on such anonymous sources. It is true that the press has had its share of scandals and problems lately. We are not perfect. But in a post-9/11 era in which dramatically increased amounts of information are being classified secret, and hence, are no longer available for public review, confidential sources, particularly in the national security and intelligence arenas, are indispensable to government accountability. Try running a democracy without them, or a free press.

That, I believe, is what is at stake in

Miller and Cooper versus the United States Government. If we lose, and I hope we won't, it will be the public's right to know that is in jeopardy, not just my personal freedom. I do not want to go to jail. But I feel that the principles at stake here are so vital to a well-informed public that I must be willing to do so if my legal appeals do not prevail, or if Congress does not make federal law consistent with the laws and judicial decisions rendered by forty-nine out of our fifty states, which have decided that journalists should not automatically be forced to testify in such proceedings.

I am not a lawyer. But I do find it odd that if state or local prosecutors wanted me to appear before state grand juries in New York City, where I live, or the District of Columbia, where I often work, they would not be permitted to do so. I would have absolute protection against testifying before such panels because shield laws in these two places provide absolute protection of journalists from being coerced to appear

Representatives Pence and Boucher and Senators Lugar and Dodd have introduced legislation that would provide similar protection against appearing before grand juries that clergy, doctors, spouses, you in this room, and as of 1996, psychotherapists currently enjoy. [See sidebar on page 7.] Surely the health of our nation and access to reliable news are as important to our nation as the psychic health of an individual.

I seek your support in this important struggle. And I thank those of you who do battle each day for a free press, and a free country. It is an honor to be here with you. 

Endnotes

1. J. MILLER, W. BROAD & S. ENGELBERG, *GERMS: BIOLOGICAL WEAPONS AND AMERICA'S SECRET WAR* (2001).
2. See S. Hersh, *Torture at Abu Ghraib*, *THE NEW YORKER*, May 10, 2004.
3. See E. Lichtblau, *F.B.I. May Scrap Vital Overhaul for Computers*, *N.Y. TIMES*, Jan. 14, 2004, at A1.

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Boehner v. McDermott: Trafficking in Illegally Intercepted Information

PETER KARANJIA

On May 21, 2001, the U.S. Supreme Court held in *Bartnicki v. Vopper*,¹ that the First Amendment barred the government from imposing civil damages on the defendants under the federal and Pennsylvania wiretap statutes for disclosure of the contents of an illegally intercepted cell phone conversation. The conversation had been intercepted by an unknown third party and the defendants—two radio stations, a radio show host, and a nonmedia defendant—played no role in the illegal interception. However, the Court assumed for purposes of the appeal that they nonetheless “did know—or at least had reason to know—that the interception was unlawful.”² Ruling that the defendants’ dissemination of the tape was protected under the First Amendment’s “shield [for] speech about matters of public concern,” the Court applied the principle set forth in *Smith v. Daily Mail Publishing Co.*³ and *Florida Star v. B.J.F.*⁴—the so-called *Daily Mail* principle—that

if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order.⁵

In the wake of *Bartnicki*, courts, publishers, and media lawyers have struggled with defining the contours of the Court’s ruling and predicting the scope of its application. In particular, they have grappled with two thorny questions that *Bartnicki* left largely unresolved:

- How do publishers and reporters know whether the information they intend to publish is of sufficient public

concern to bring it within the constitutional protections of *Bartnicki*?

- What constitutes unlawful conduct for purposes of removing the protections afforded by the *Daily Mail* principle?

A pair of recent decisions by the U.S. District Court for the District of Columbia in a similar wiretap case, *Boehner v. McDermott*, go some way toward answering the second question.⁶ However, the gloss they add to the concept of unlawful conduct should be troubling to publishers and reporters, especially in the present climate of escalating resistance to the reporter’s privilege in many courts across the country, and mounting concerns about “leaks” of sensitive information to the media.

The *Boehner* decisions, both authored by Chief Judge Thomas Hogan, the same judge who denied recognition of a federal reporter’s privilege in the Valerie Plame leak investigation,⁷ adopt a surprisingly expansive reading of the type of conduct deemed “unlawful,” which destroys the “shield [for] speech about matters of public concern” under the *Daily Mail* principle. This broad reading severely undercuts the constitutional protections afforded by *Bartnicki* and is difficult to reconcile with either the spirit or letter of the Supreme Court’s ruling in that case or the prior case law on which it relied.⁸ This article addresses some of the implications of Judge Hogan’s decisions, currently on appeal to the D.C. Circuit, and several unanswered questions that they pose.

The Facts of *Boehner*

Like *Bartnicki*, *Boehner v. McDermott* involved an action for civil damages under the federal wiretap statute and a parallel state statute for the defendant’s dissemination of a tape recording of a cell phone conversation that had been illegally recorded by a third party, though in *Boehner* the defendant was not a member of the media.⁹

In this politically charged litigation, Republican Congressman John Boehner sued James McDermott, a Democratic member of the House of Representatives and then-ranking Democratic member of the House Ethics Committee, for damages under the federal and Florida wiretap statutes. In 1996, Boehner had participated in a conference call on a cell phone in his car while parked outside a restaurant in northern Florida. The other participants in the conference call included Speaker of the House Newt Gingrich and other House GOP leaders. At the time of the conversation, Gingrich was the subject of an investigation by the House Ethics Committee. The conference call concerned how the party leadership would respond to an expected announcement of Gingrich’s agreement to accept a fine and reprimand in return for the Committee’s promise not to hold a hearing. The call also revealed that Gingrich may have violated the terms of the agreement.

The conference call was intercepted by a Florida couple, John and Alice Martin, using a radio scanner. The Martins delivered a tape recording of the call to Democratic Representative Karen Thurman at her Florida office and Thurman advised the Martins to pass the tape on to McDermott. The Martins delivered the tape personally to McDermott in the anteroom of the House Ethics Committee in Washington, D.C. The tape was enclosed in an envelope with a cover letter explaining that it contained “a conference call heard over a scanner” and that the Martins understood they would be “granted immunity.”

McDermott subsequently leaked copies of the tape to *The New York Times* and *Atlanta Journal Constitution*, neither of which was named as a defendant in the case.¹⁰ Thereafter, the Martins held a press conference at which they confessed their role in the

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recording, prompting McDermott to resign from the House Ethics Committee. The Justice Department charged the Martins with misdemeanor unlawful interception of a cell phone call under the federal wiretap statute,¹¹ and they were each fined \$500 after entering guilty pleas. Boehner commenced this action in March 1998, alleging that McDermott knowingly disclosed the contents of an unlawfully intercepted communication in violation of the federal wiretap statute, 18 U.S.C. § 2511(c), and a parallel Florida wiretap statute.¹²

In an ironic twist of fate, it was announced at the end of December 2004 that the House Ethics Committee will conduct an investigation into whether McDermott breached House rules by leaking the tape to the media.¹³

Twisted Path to the Courthouse

This six-year litigation has had a tortuous procedural history. In his first dispositive ruling in the case, on July 22, 1998, Chief Judge Hogan of the U.S. District Court of the District of Columbia granted McDermott's motion to dismiss, ruling that the First Amendment "prevents the government from punishing the disclosure of truthful, lawfully obtained information of public significance."¹⁴ Judge Hogan evidently reached this conclusion with considerable reluctance, observing that

[t]he wiretap statutes appear to contemplate that the taped conversation in this case was unlawfully obtained, since it was stolen in a most unscrupulous, underhanded fashion. Logic suggests that a criminal cannot launder the stains off illegally obtained property simply by giving it to someone else, when that other person is aware of its origins.¹⁵

However, he acknowledged that "[t]he First Amendment case law does not seem to adopt this logic . . . and it suggests that information, even if initially garnered through illegal means, is lawfully obtained by anyone who did not himself break the law to obtain it"—an "interpretation" that Judge Hogan found "illogical" and, in his view, liable to undermine "the protection that wiretap statutes supposedly afford."¹⁶ Nonetheless, he felt constrained to "accept and follow" this precedent.¹⁷ Relying on the *Florida Star/Daily Mail* line of cases,¹⁸ Judge

Hogan concluded that Boehner's privacy interest in the conversation could not rise to the level of a state interest of the "highest order," as required by the *Daily Mail* principle. He therefore ruled that the punishment imposed under the statutes could not pass constitutional muster under the *Daily Mail* test, which he characterized as one of "strict scrutiny."¹⁹

On appeal, the D.C. Circuit reversed Judge Hogan in a two-to-one decision, with Judge Sentelle dissenting and Judge Ginsburg concurring in part.²⁰ In an opinion authored by Judge Randolph, the majority held that the disclosure provisions of the federal and Florida wiretap statutes were not unconstitutional as applied to McDermott. In portions of the opinion that Judge Ginsburg declined to join, Judge Randolph described the relevant sections of the statutes as "generally applicable content-neutral prohibitions on conduct" and characterized McDermott's delivery of the tapes to the media as "conduct," or at least as primarily conduct, rather than speech.²¹

Although they did so for different reasons, Judges Randolph and Ginsburg both agreed that the test of intermediate constitutional scrutiny applied pursuant to *United States v. O'Brien*,²² a significantly weaker test than the stricter standard of scrutiny under the *Daily Mail* principle.²³ They also agreed that the regulations passed constitutional muster under this test. Judge Ginsburg was prepared to assume, as a preliminary matter, that the *Daily Mail* principle applied, but, according to his reasoning, since McDermott did not "lawfully acquire" the tape, that principle, by its terms, offered him no protection.²⁴ Judge Randolph, on the other hand, did not believe that the *Daily Mail* principle was even implicated at the initial stage of analysis, instead regarding the *Florida Star/Daily Mail* line of cases as distinguishable. In his opinion, "the illegal activity of the Martins, of which McDermott was well aware when he took possession of the tape, [took] McDermott's actions 'outside of the *Daily Mail* principle' and the *Florida Star* line of cases."²⁵

On May 29, 2001, barely a week after handing down its decision in *Bartnicki*, the U.S. Supreme Court vacated the D.C. Circuit's decision in *Boehner* and remanded the case to be considered in light of *Bartnicki*.²⁶ On remand, the D.C. Circuit issued an unpublished decision deferring consideration of the "constitutional issues" to allow Boehner to amend his complaint and concluded that it "would benefit from having the district court pass upon the arguments that have taken on newfound importance after *Bartnicki*."²⁷

Judge Hogan's 2004 Decisions

On August 20, 2004, after discovery on cross-motions for summary judgment, Judge Hogan granted Boehner's motion for summary judgment on his claim under the federal wiretap statute, ruling that the First Amendment did not protect McDermott from liability for dis-

What constitutes unlawful conduct for purposes of removing the protections afforded by the *Daily Mail* principle?

closing the tape to the media.²⁸ Pivotal to Judge Hogan's decision was his conclusion that, based on the Martins' cover letter, "by the time [McDermott] disclosed the tape to the media, he knew or had reason to know that the tape had been obtained through the unlawful interception of communications."²⁹ Judge Hogan proceeded to equate such knowledge with unlawful conduct and concluded, like Judge Ginsburg in the D.C. Circuit, that this unlawful conduct removed the First Amendment protections reaffirmed in *Bartnicki*.³⁰

After a detailed discussion of the precedential value of the D.C. Circuit's decision, Judge Hogan agreed with McDermott's assertion that "the vacated Court of Appeals decision [was] not strictly bind[ing]" on him, but nonetheless, he invoked its "residual authority" and adhered closely to its reasoning. In particular, Judge Hogan largely followed the reasoning of Judge Ginsburg's concurrence, concluding that, because of

McDermott's knowledge of the illegal interception, "his actions and knowledge placed this case outside the *Florida Star* line of cases protecting disclosure of lawfully obtained information. Intermediate scrutiny would therefore apply."³¹ "The Court of Appeals's reasoning . . . continues to apply," Judge Hogan wrote, and McDermott's "claimed First Amendment defense fails in light of the applicable intermediate scrutiny."³²

Having granted Boehner partial summary judgment, on October 22, 2004, Judge Hogan awarded him \$10,000 in statutory damages and, in light of what he characterized as McDermott's "outrageous conduct," \$50,000 in punitive damages and reasonable attorney fees "and other litigation costs" in an amount to be determined.³³ As of this writing, McDermott currently has an appeal pending before the D.C. Circuit, and the House Ethics Committee has also started an investigation of his conduct.

As this article discusses below, Judge Hogan's efforts to reconcile the vacated appellate decision with *Bartnicki* are problematic and raise serious concerns that his rulings may interpret *Bartnicki* so narrowly—and "unlawful conduct" so broadly—as to eviscerate *Bartnicki*'s constitutional protections for publication of information on matters of public concern.

Lawfully Obtained? What Does That Mean?

By its terms, for the *Daily Mail* principle to apply so as to protect publication by the media of truthful information on a matter of public concern, the information must have been "lawfully obtain[ed]" by the media.³⁴ What counts as unlawful conduct? *Bartnicki* gave only a partial answer to that question. Viewing the facts of that case as presenting a "narrower version" of a vexed and "still-open question" that has consistently eluded resolution by the Supreme Court, the *Bartnicki* majority described the question before it as follows:

[w]here the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?³⁵

Writing for the majority, Justice Stevens's response to that question was clearly in the negative. As he wrote, "a stranger's illegal conduct does not suffice to remove the First Amendment shield from a matter of public concern."³⁶

Judge Hogan's August 2004 decision in *Boehner* provides a further gloss on the concept of unlawful acquisition of information. But the critical, and perhaps most disconcerting, aspect of that decision is Judge Hogan's readiness to equate knowledge of a third party's illegal conduct in intercepting a phone call with "unlawful acquisition." This reasoning is hard to square with *Bartnicki* or the precedents that formed the foundation for that case.³⁷

Does Knowledge Equal Unlawful Conduct?

Focusing on the cover letter from the Martins, which explained to McDermott that the tape they enclosed was of a conference call "heard over a scanner" and which expressed an understanding that they would be granted immunity, Judge Hogan reasoned:

It is clear that at some point McDermott knew that the tape was illegally obtained. Of course, the crucial question in this case is when did he learn it and, consequently, whether he participated in the illegal conduct of the Martins. If [McDermott] read the cover letter or the Martins related its relevant contents to him at the time [McDermott] received the tape, he would have possessed sufficient knowledge of the illegal transaction to have unlawfully obtained the tape as per the Court of Appeals's reasoning. On the other hand, if [McDermott] learned of the contents of the letter at some later time after taking possession of the tape, the Court of Appeals's reasoning no longer applies and the case more closely resembles *Bartnicki*.³⁸

Judge Hogan was clearly adopting the reasoning of the majority in the vacated D.C. Circuit's decision that McDermott's knowledge of the illegality of the interception at the moment he received the tape was equivalent to his "participation" in illegal conduct.³⁹ But this reasoning is not easily reconciled with *Bartnicki*'s conclusion, upholding the First Amendment shield for publication of truthful information on matters of public concern. Judge Hogan distinguished *Bartnicki*, contending that the defendants' actions in that case "did

not present a knowing acceptance scenario such as is alleged here" because "the Supreme Court merely 'accept[ed] respondents' submission' in that case on the assertion that the parties had lawfully obtained access to the intercepted information"⁴⁰

That is, of course, true but, as Judge Hogan had acknowledged earlier in his August 2004 opinion, alluding to the facts assumed by the *Bartnicki* Court for purposes of the appeal:

[d]espite obtaining the material lawfully themselves, [the *Bartnicki* defendants] at minimum had "reason to know" the original interception was unlawful presumably by the time of their respective disclosures The Supreme Court . . . presumably charged Yocum with knowledge of the illegality of the original interception at some point after receiving and listening to the tape but prior to disclosing it.⁴¹

This suggests that the *Bartnicki* majority had no difficulty in concluding that the defendants in that case "lawfully" obtained the illicit information, even though they knew of, or had reason to know of, the illegal interception. Evidently, they saw no necessary contradiction between those propositions.

Similarly, in *Florida Star*,⁴² on which the *Bartnicki* Court relied, the Supreme Court found that the newspaper had "lawfully obtained" the name of the rape victim, even though the newspaper's employees knew at the time that it was contrary to state law for the police to release that information to the public or the press. Indeed, Justice White's dissent (joined by Chief Justice Rehnquist and Justice O'Connor) expressly noted that

the [newspaper's] own reporter conceded at trial . . . [that] the crime incident report that inadvertently included [the rape victim's] name was posted in a room that contained signs making it clear that the names of rape victims were not matters of public record, and were not to be published The [newspaper's] reporter indicated that she understood that she "[was not] allowed to take down that information" . . . and that she "[was] not supposed to take the information from the police department."⁴³

Nevertheless, the majority ruled that the fact that the police department was neither required, nor permitted under state law, to publish such information did not "make the newspaper's ensuing receipt of this information unlawful."⁴⁴

Likewise, in *Landmark Communications*,⁴⁵ another precedent that laid the

foundation for the *Bartnicki* decision, the Supreme Court found that the newspaper had lawfully obtained the information that it published regarding confidential proceedings before a judicial disciplinary commission, even though it knew that the information had been unlawfully disclosed. The newspaper's editor testified that "he was aware that it was a misdemeanor for anyone participating in Commission proceedings to divulge information about those proceedings,"⁴⁶ and the record suggests that the newspaper received the information "voluntarily and freely" from a "participant" in the proceedings.⁴⁷ Nonetheless, the Court noted that "[w]e are not concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it," concluding that the newspaper's publication was protected by the First Amendment.⁴⁸

Given that actual or constructive knowledge of illegal conduct by a third party was not equated with illegal acquisition in *Bartnicki*, nor in two of the precedents that formed the basis for that decision, one might well ask why it should in the *Boehner* case.

When Was the Knowledge Disclosed?

One way in which Judge Hogan attempted to reconcile *Boehner* and *Bartnicki* was by characterizing the latter as "necessarily stand[ing] for the proposition that a defendant who anonymously receives illegally intercepted information without present knowledge of its illegality has obtained it lawfully," whereas, according to Judge Hogan, the vacated D.C. Court of Appeals decision in *Boehner* "concluded that a defendant who accepts information from a source *with present knowledge* of source's identity and the illegality of the source's disclosure has himself unlawfully obtained it."⁴⁹

Having characterized the respective holdings in this way, Judge Hogan found "no conflict" between "those independent propositions."⁵⁰ While his analysis primarily emphasizes a distinction based on timing—at what time the recipients of the tapes knew about the illegal interceptions—this seems to be a distinction without any meaningful

difference. If McDermott knew of the illegal interception at the time he received the tape, whereas the defendants in *Bartnicki* (at least Yocum)⁵¹ knew about it after receiving the tape, but before disclosing its contents, it is hard to see why such a fine distinction justifies a different legal result. That is especially so because the federal wiretap statute does not make unlawful (or criminal) the mere receipt of an illegal intercept (as distinct from disclosure and use) and, in both *Bartnicki* and *Boehner*, the defendants were deemed to have knowledge of the illegal interceptions after the interceptions occurred, but before disclosure. Why should it matter that McDermott knew of the interception at the moment he received the tape, but the defendants in *Bartnicki* had knowledge at some later point?

Who Is the Source?

Rather than focusing on timing, the real distinction applied by Judge Hogan appears to hinge on whether the tape was received from an anonymous source or a source whose identity is known. While McDermott knew that the tape he received had been recorded by the Martins using a scanner, the *Bartnicki* defendants (under the facts assumed by the Supreme Court) knew, or had reason to know, that the tape they received contained an illegally intercepted recording, but the source was an unknown person who had left the tape in Yocum's mailbox and they "never learned the identity of the person or persons who made the interception."⁵²

But this distinction is also problematic. The focus of the *Daily Mail* principle is on the truthful nature of the information disclosed and "the overarching 'public interest, secured by the Constitution, in the dissemination of truth.'" ⁵³ That overarching concern does not hinge on whether the identity of the speaker is known; the key issue is the nature of the information and the manner in which it was obtained, not the identity of the source. Further, an undue emphasis on the identity of the source invites dis-

parate and arbitrary results depending on the mere happenstance of whether the identity of the source is known.⁵⁴ Surely the law should not make constitutional protection of publication effectively turn on whether or not, for example, an unsolicited package sent to a newspaper enclosing an illicit recording bears the name of the sender.

The real distinction applied by Judge Hogan appears to hinge on whether the tape was received from an anonymous or known source.

The distinction posited above also has disturbing implications for newsrooms all over the country because it creates perverse incentives, contrary to what those editors and journalists would ordinarily want to exercise. Rather than encouraging them to investigate and verify the information received by inquiring into the identity of the source and the provenance of the information, under this approach, the rule of law announced in Judge Hogan's decisions would counsel journalists that less knowledge about such matters is better, and that information should be accepted on a "no questions asked" basis. It may also place publishers and broadcasters in an intractable predicament where the reasons pointing in favor of publication are compelling due to the great importance of the information—for example, a leaked recording concerning an investigation into misconduct by a senior public official—but there are also strong reasons counseling in favor of careful sourcing—for example, the recording contains statements that are potentially defamatory of the official.

Trafficking in Tainted Information

The logic that mere knowledge of a stranger's illegal conduct in acquiring information strips a defendant of the protections of the *Daily Mail* principle also undermines the central thrust of *Bartnicki* and, in particular, the Supreme Court's refusal in effect to

transfer culpability from the third party who made the illegal recording to the recipients of the recording. As the majority observed, “a stranger’s illegal conduct does not suffice to remove the First Amendment shield from a matter of public concern.”⁵⁵

Indeed, the logic underpinning Judge Hogan’s decisions (like the opinions of the D.C. Circuit majority) seems closer to that of the *Bartnicki* dissent. While the majority emphasized that the statutes did “not forbid the receipt of the tape itself,”⁵⁶ in dissent, Chief Justice Rehnquist argued that this fact “hardly renders those who knowingly receive and disclose such communications ‘law-abiding’ The transmission of the intercepted communication from the eavesdropper to the third party is itself illegal; and where, as here, the third party then knowingly discloses that communication, another illegal act has been committed.”⁵⁷

Significantly, the *Bartnicki* majority rebuffed the argument that the statute’s prohibition of disclosure was justified in order to “remov[e] an incentive for parties to intercept private conversations”⁵⁸ Responding to this so-called dry-up-the-market theory, which was relied on by Judge Randolph in the D.C. Circuit in *Boehner*, Justice Stevens pointed out that “[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. If the sanctions that presently attach to a violation of § 2511(a) do not provide sufficient deterrence, perhaps those sanctions should be made more severe.”⁵⁹

The notion of “wrongful acceptance,” which appears as an undercurrent in the reasoning of Judge Hogan, the D.C. Circuit majority, and the *Bartnicki* dissent, seems to draw force from other areas of the law that rely on the concept of “trafficking” in tainted information or goods. There are also conceptual analogues in the evidentiary doctrine of the “fruit of the poisonous tree”⁶⁰ and, indeed, the dissenting Justices in *Bartnicki* drew an explicit parallel between application of the “dry-up-the-market” theory in that case and “similar reasoning” justifying adoption of the exclusionary rule.⁶¹ But

these conceptual parallels have their difficulties and do not suggest that the “wrongful acceptance” notion is easily transplanted into the context of *Bartnicki*-type situations where a prospective publisher has received illegally obtained information from a third party, knowing that it was illegally obtained, but played no part in the illegal acquisition.

Analogies Are Problematic

Analogies with the exclusionary rule are problematic. As Rodney Smolla has pointed out in an interesting article comparing various areas of the law that treat information as “contraband,” this evidentiary principle is subject to an important exception providing that, “[w]hen an independent agent not connected to the government breaks the law and turns incriminating evidence over to law enforcement officials on a ‘silver platter,’ there is no violation.”⁶² Although he does not favor such an argument, Smolla suggests that this exception could be applied to the media by “linear analogy” and thus “cuts against holding the media responsible for dissemination of material illegally obtained by others, especially in light of the principle that the rule does not bar the introduction of evidence handed to the police by someone else who has engaged in private misconduct to obtain it.”⁶³ See, e.g., *United States v. Janis*, 428 U.S. 433, 455-56 n.31 (1976) (“It is well established . . . that the exclusionary rule, as a deterrent sanction, is not applicable where a private party or a foreign government commits the offending act.”)⁶⁴

Not only is the exclusionary rule subject to this significant exception, the policy rationale undergirding the rule also seems out of place in cases such as these. It is well established that the media must abide by the same criminal laws as everyone else, as the *Bartnicki* majority acknowledged.⁶⁵ That, of course, means that the media have no special license to violate the law in connection with newsgathering activities. But, where a media defendant plays no part in a third party’s illegal conduct, then the appropriate response is for the law to punish the third party. The information disclosed does not become tainted as a result.

Similarly, analogies with other laws prohibiting “trafficking” in tainted information or goods are problematic. Comparisons with laws penalizing knowing receipt of stolen goods are inapposite because, as the *Bartnicki* majority observed, such laws do not pose the same First Amendment concerns as they do not involve prohibitions on speech.⁶⁶ Similarly, analogies with copyright law are imperfect because “safety valves” already exist within copyright law (the fair use defense and the idea/expression dichotomy) that afford breathing room for freedom of expression.⁶⁷ While analogies may be drawn with the tort of disclosing intimate private facts (a subcategory of the tort of invasion of privacy), this cause of action generally allows a public concern/newsworthiness defense similar to the concept of “public concern” embodied in the *Daily Mail* principle.⁶⁸ Indeed, given that the public concern prong of the *Daily Mail* principle operates as a gatekeeping function similar to the newsworthiness defense to the private facts tort, it is doubtful that Judge Hogan’s narrow reading of the conduct deemed to constitute “lawful acquisition” of information obtained by third parties is either helpful or necessary.⁶⁹

Conduct or Speech?

When the D.C. Circuit revisits *Boehner* to review Judge Hogan’s decisions, it will be interesting to see how the panel grapples with these issues. Hopefully, in light of *Bartnicki*, it will feel less constrained than did Judge Hogan to adhere to its prior reasoning.⁷⁰ One interesting question will be whether the panel will continue to adopt Judge Randolph’s characterization of McDermott’s delivery of the tape to the media as “conduct” rather than “speech”—the analysis that permitted Judge Randolph to apply the weaker standard of intermediate review under the *O’Brien* test. On remand from the D.C. Circuit, Judge Hogan did not reach this issue.

This broad question raises several related subquestions: Does the dissemination of someone else’s message qualify more as conduct than speech? Should a nonmedia source (or “messen-

ger”) who discloses the contents of an illegally intercepted recording be in a different position from a media defendant that disseminates its contents?⁷¹ Does a ban on dissemination really operate as an incidental restriction on speech akin to the type of conduct-regulating laws that are generally subjected to the *O’Brien* test? Answers to these questions appear to depend on how to characterize the activity of the source (in this case, McDermott). Was he simply delivering a tape that happened to contain recorded information? Or was he delivering a tape to allow the media to disclose its contents? Clearly, the latter seems a more apt characterization, even if one adopts Judge Hogan’s findings that McDermott’s motive was to “politically harm the participants [in the conversation] through an invasion of their privacy.”⁷² For purposes of determining whether there is constitutional protection for publication (as distinct from any assessment of punitive damages if liability has been determined), motive should be not make any difference, just as proof of spite or ill will does not satisfy the exacting constitutional test requiring clear and convincing evidence of “actual malice” in libel cases and, absent such a showing, spiteful statements about a public figure on a matter of public concern will nonetheless remain constitutionally protected.⁷³

Further, even such a motive should not undermine the strong protection traditionally afforded to core “political” speech.⁷⁴

As applied to the facts of *Boehner*, the ban on disclosure therefore appears to be far more than a mere regulation of conduct with incidental speech impacts. Viewing the disclosure provisions of the federal wiretap statute from a broader perspective, in terms of their impact on speech in general, leads to a similar conclusion, as the majority in *Bartnicki* expressly found. While acknowledging that the statute “does not distinguish based on the content of the intercepted conversations, nor is it justified by reference to the content of those conversations,” the *Bartnicki* majority went on to point out that

the naked prohibition against disclosures is fairly characterized as a regulation of pure speech. Unlike the prohibition against the

“use” of the contents of an illegal interception in § 2511(1)(d), subsection (c) is not a regulation of conduct. It is true that the delivery of the tape might be regarded as conduct, but given the purpose of such a delivery is to provide the recipient with the text of recorded statements, it is like the delivery of a handbill or a pamphlet, and as such, it is the kind of “speech” that the First Amendment protects.⁷⁵

Again, motive should not change the analysis: if the “purpose” of the disclosing party is to convey information, this communicative purpose is surely not rendered any more a form of conduct than speech, simply because it was carried out with an improper or nefarious motive.

Finally, *O’Brien* itself tends to support this characterization. Justice Harlan’s concurring judgment in that case clarified that the criteria of the *O’Brien* test for conduct-regulating laws that have incidental effects on speech do not

foreclose consideration of First Amendment claims in those rare instances when an “incidental” restriction upon expression, imposed by a regulation which furthers an “important or substantial” governmental interest and satisfies the Court’s other criteria, in practice has the effect of entirely preventing a “speaker” from reaching a significant audience with whom he could not otherwise lawfully communicate.⁷⁶

Unlike the law in *O’Brien*, the total ban on dissemination of information under the disclosure provisions of the federal wiretap Act seems to be a paradigm instance of a restriction on speech.

Constitutional Protection for Illegally Obtained Information?

Like the majority in the vacated decision of the D.C. Circuit in *Boehner*, Judge Hogan essentially adopted the logic that, if the *Daily Mail* principle is inapplicable because the information disclosed was not “lawfully acquired,” then the only constitutional bulwark that remains against liability is intermediate scrutiny.⁷⁷ That guarantee, however, offered the defendant little cause for reassurance since Judge Hogan, like the majority of the D.C. Circuit, held that the disclosure provisions of the federal wiretap statute passed this relatively modest standard of constitutional scrutiny. Indeed, Judge Hogan concluded that “[w]here a defendant unlawfully obtains information, neither *Bartnicki* nor any other authority shields against liability for subsequent disclosure.”⁷⁸

One reason for questioning the assumption that intermediate scrutiny applies as the only default test where the stricter standard of review under the *Daily Mail* principle is inapplicable may be found in the concurring opinions in *Bartnicki*.⁷⁹ Specifically, Justice Breyer (joined by Justice O’Connor) proposed an ad hoc balancing test instead of the *Daily Mail* principle and preferred to “ask whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences.”⁸⁰ While this proposed test is somewhat amorphous and its application difficult to predict, it may nonetheless provide First Amendment protection for the media in situations where, but for the fact that the party wishing to publish illegally obtained information played some role in the illegal acquisition, the circumstances strongly favor publication. For example, where the information is on a matter of “unusual public concern,” to use Justice Breyer’s phrase, and the plaintiff had little legitimate reason to expect privacy (by, for instance, engaging in unlawful conduct), under Justice Breyer’s proposed analysis, the dissemination may be protected even when the publisher is deemed to have unlawfully acquired the information.⁸¹ In other words, although Justice Breyer’s approach generally appears to envisage somewhat narrower protection for publication, absent the “special circumstances” he identified in *Bartnicki*, under this balancing test, unlawful acquisition may be a relevant (and important) factor, but it is not an immediate ground for defeating constitutional protection.

It remains to be seen whether Justice Breyer’s concurrence gains any currency as did, for example, Justice Powell’s well-known concurrence in *Branzburg v. Hayes*.⁸² But at least in cases where the defendant may have participated in the unlawful acquisition in some way, and the information is of great public concern, it may prove to be helpful. □

Endnotes

1. 532 U.S. 514 (2001).
2. *Id.* at 517-18.
3. 443 U.S. 97, 102-03 (1979).
4. 491 U.S. 524, 533 (1989).

5. *Bartnicki*, 532 U.S. at 528 (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)).

6. *Boehner v. McDermott*, 332 F. Supp. 2d 149 (D.D.C. 2004); *Boehner v. McDermott*, Civ. No. 98-0594 (TFH) (D.D.C. Oct. 22, 2004).

7. *See In re: Special Counsel Investigation*, 332 F. Supp. 2d 26 (D.D.C. 2004); *In re: Special Counsel Investigation*, 338 F. Supp. 2d 16 (D.D.C. 2004); *In re: Special Counsel Investigation*, 346 F. Supp. 2d 54 (D.D.C. 2004). These decisions were recently affirmed by the D.C. Circuit in a consolidated appeal. *See In re: Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005).

8. Whether constitutional protection may exist under *Bartnicki* even in cases where the *Daily Mail* principle does not apply because the party disclosing the information is deemed to have acquired it "unlawfully" is a question discussed at the end of this article.

9. In contrast, in *Bartnicki*, three of the defendants were media entities—two radio stations and a radio show host. The radio host, Frederick Vopper, received a tape of an illegally intercepted cell phone conversation between two teacher union negotiators during the time heated collective bargaining agreement negotiations were in progress between a school board and the union. One of the negotiators made threats against the school board members during the call. The call had been illegally intercepted by an unknown person who left a tape recording of the call in the mailbox of the head of a local citizen's group opposed to the union, Jack Yocum. Yocum, in turn, forwarded the tape to Vopper, who played it several times on his radio show, which was broadcast by the two radio stations. In addition to the radio stations and Vopper, Yocum was added as a defendant in the union officials' action for invasion of privacy and breach of the federal and state wiretap statutes. 532 U.S. at 518-19.

10. *The New York Times* published a front page article about the contents of the tape, referring to the source (i.e., McDermott) as an unidentified "Democratic Congressman." *See Adam Clymer, Gingrich Is Heard Urging Tactics in Ethics Case*, N.Y. TIMES, Jan. 10, 1997, at A1.

11. 18 U.S.C. §§ 2511(a); 2511(4)(b)(ii).

12. FLA. STAT. § 934.03(1)(c) (containing substantially the same language as 18 U.S.C. § 2511(c)).

13. *See Carl Hulse, Ethics Panel to Investigate A Lawmaker*, N.Y. TIMES, Dec. 29, 2004, at A16.

14. *Boehner v. McDermott*, 1998 WL 436897, *7 (D.D.C. July 23, 1998), *rev'd and remanded*, 191 F.3d 463 (D.C. Cir. 1999), *vacated and remanded*, 532 U.S. 1050 (2001), *remanded*, 22 Fed. Appx. 16 (D.C. Cir. 2001).

15. *Boehner*, 1998 WL 436897, at *4.

16. *Id.*

17. *Id.*

18. *See Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (finding unconstitutional the imposition of civil liability on a newspaper for publishing the name of a victim of rape and robbery where the newspaper obtained the name from a publicly released incident report that inadvertently included the victim's full name); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979) (finding unconstitutional the indictment of two newspapers for violating a statute prohibiting the publication by newspapers of the name of any youth charged as a juvenile offender without written approval of the juvenile court, where the newspapers learned about a shooting by monitoring a police band radio and obtained the name of the juvenile from witnesses, the police and a local prosecutor); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (finding unconstitutional the criminal punishment of a newspaper for publishing truthful information regarding confidential proceedings before a judicial disciplinary commission); *Oklahoma Publ'g Co. v. Oklahoma County Dist. Court*, 430 U.S. 308 (1977) (finding unconstitutional a state court's pretrial order enjoining the media from publishing the name or photograph of a minor in connection with a juvenile proceeding that reporters had attended); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (finding unconstitutional a civil damages award entered against a television station for broadcasting the name of a rape-murder victim that the station had obtained from courthouse records).

19. Although Judge Hogan, like others, referred to the *Daily Mail* principle as a form of "strict scrutiny," it is not identical to the standard of constitutional review more commonly referred to by that term. Under the conventional "strict scrutiny" test, which is typically applied to content-based restrictions on speech, the government or state actor seeking to defend the restriction must show: (a) a compelling interest justifying the restriction; (b) narrow tailoring; and (c) use of least restrictive means to serve its interests. *See, e.g., United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812 (2000).

20. *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *vacated and remanded*, 532 U.S. 1050 (2001), *remanded*, 22 Fed. Appx. 16 (D.C. Cir. 2001).

21. *Boehner*, 191 F.3d at 467-68 (Randolph, J.). In contrast, Judge Ginsburg "assume[d] rather than decide[d] that (1) McDermott's delivery of the tape to the newspapers constitute[d] speech protected by the First Amendment to the Constitution of the United States—a proposition that no party to the case disputes; and (2) the holding of *Florida Star*, namely, that publication of 'lawfully obtain[ed,] truthful information

about a matter of public significance . . . may not constitutionally [be] punish[ed] . . . absent a need to further a state interest of the highest order,' . . . applies in principle to this case." *Id.* at 479.

22. 391 U.S. 367, 376 (1968).

23. In contrast with the exacting test of a governmental "need . . . of the highest order," the *O'Brien* standard invoked by Judge Randolph is more forgiving: "[A] government regulation is sufficiently justified if it is within the constitutional power of the [g]overnment; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Boehner*, 191 F.3d at 468 (Randolph, J.) (quoting *O'Brien*, 391 U.S. 367 at 377 (1968)). The debate over which standard of constitutional review applies is far from the sterile doctrinal debate it may, at first blush, appear to be. As commentators have noted, the standard of review is often outcome determinative. *See, e.g., Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (referring to strict scrutiny as "'strict' in theory and fatal in fact.>").

24. Judge Ginsburg reasoned that, "[b]ecause McDermott did not in fact lawfully obtain the tape," the *Daily Mail* principle (which, by its terms, posits "lawful" conduct), did not apply and that McDermott could nonetheless be "punished . . . if the statute as applied to him survives intermediate scrutiny." *Boehner*, 191 F.3d at 479. For the same reasons given by Judge Randolph, Judge Ginsburg held that the statute survived such scrutiny. *Id.*

25. 191 F.3d at 476 (Randolph, J.) (citing *Florida Star*, 491 U.S. at 534).

26. *McDermott v. Boehner*, 532 U.S. 1050 (2001).

27. *Boehner v. McDermott*, 22 Fed. Appx. 16 (D.C. Cir. 2001).

28. Judge Hogan dismissed the claim under Florida's wiretap statute on jurisdictional grounds. *Boehner*, 332 F. Supp. 2d at 153-55.

29. *Id.* at 157.

30. *Id.* at 163 ("Where a defendant unlawfully obtains information, neither *Bartnicki* nor any other authority shields against liability for subsequent disclosure.>").

31. *Id.* at 164 (citing *Boehner*, 191 F.3d at 479 (Ginsburg, J., concurring)).

32. *Id.* at 169.

33. *Boehner v. McDermott*, Civ. No. 98-0594 (TFH) (Oct. 22, 2004).

34. *See Bartnicki*, 532 U.S. at 528 ("if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information,

absent a need . . . of the highest order.”) (quoting *Daily Mail*, 443 U.S. at 103) (emphasis added).

35. *Id.* at 528 (citing *Boehner*, 191 F.3d at 484-85) (Sentelle, J., dissenting). The broader, unresolved question—which was left open in *Florida Star*, 491 U.S. 524, and *Landmark Communications*, 435 U.S. 829—is “whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well.” *Bartnicki*, 532 U.S. at 528 (quoting *Florida Star*, 491 U.S. at 535 n.8).

36. *Bartnicki*, 532 U.S. at 535.

37. The *Bartnicki* majority made a passing reference to the *Boehner* case—as well as a similar case, *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000)—but did not offer any opinion as to whether and, if so, why the case was distinguishable. The context of the Court’s statement was a brief explanation that it had granted certiorari to “resolve the conflict” between the majority and dissenting opinions of the Third Circuit in the decision below. The Third Circuit majority applied intermediate scrutiny to the disclosure provisions of the federal and Pennsylvania wiretap statutes and concluded that they failed to pass constitutional muster, while the dissent agreed with the analysis of the D.C. Circuit majority in *Boehner*. See *Bartnicki v. Vopper*, 200 F.3d 109, 120-23, 130-31 (3d Cir. 1999), *aff’d*, 532 U.S. 514 (2001); see also *Bartnicki*, 532 U.S. at 522 & n.5. In the Supreme Court, the *Bartnicki* majority noted the opinion of the majority of the D.C. Circuit in *Boehner*, that McDermott had “acted unlawfully in accepting the tape in order to provide it to the media,” but expressed no view on this reasoning. *Id.* at 522 n.5.

While attempts to read too much into denials of certiorari are often perilous, it is interesting that the Supreme Court distinguished between the decisions of the appellate courts in *Peavy* and *Boehner* when deciding whether to review those cases. Shortly after deciding *Bartnicki*, on the same day, the Supreme Court declined to review the decision of the Fifth Circuit in the *Peavy* case (even though the Fifth Circuit’s decision was rendered before the Supreme Court ruled in *Bartnicki*), but granted certiorari in *Boehner* and vacated the D.C. Circuit’s decision with directions for “further consideration” in light of its decision in *Bartnicki*. See *Peavy*, 532 U.S. at 1051; *Boehner*, 532 U.S. at 1050. One possible explanation for the Supreme Court’s contrasting approaches is that, in *Peavy*, the Fifth Circuit relied heavily on the media defendants’ participation in the unlawful taping, which went beyond mere knowledge of an unlawful interception by a third party. See *Peavy*, 221 F.3d at 179-80,

190-91 (denying defendants’ motion for summary judgment and referring to the defendant reporter, Riggs, as having “advise[d] the [interceptors] to record complete conversations.”); see also *Bartnicki*, 532 U.S. at 522 n.5 (noting that in *Peavy*, “the media defendant in fact participated in the interceptions at issue.”). It is possible that the Supreme Court questioned whether McDermott’s knowing receipt was sufficient reason for the D.C. Circuit to reject his First Amendment argument.

38. *Boehner*, 332 F. Supp. 2d at 165-66.

39. Compare Judge Hogan, 332 F. Supp. 2d at 169 (“McDermott played an essential role in the disclosure for which the Martins pleaded guilty and were fined. . . knowingly joining in the Martins’ illegal actions”) with Judge Randolph, 191 F.3d at 476 (“It is enough to point out, as *Boehner* does, that in receiving the tape, McDermott took part in the illegal transaction”) and Judge Ginsburg, 191 F.3d at 479 (“One who obtains information in an illegal transaction, with full knowledge the transaction is illegal, has not ‘lawfully obtain[ed]’ that information in any meaningful sense.”). Similarly, in this October 2004 decision awarding punitive damages, Judge Hogan repeatedly stated that McDermott “knowingly participated in an illegal transaction by accepting the tape from the Martins.” *Boehner*, Oct. 22, 2004 Mem. Op. at 5, 13, 14, 16.

40. *Boehner*, 332 F. Supp. 2d at 164 (citing *Bartnicki*, 532 U.S. at 525).

41. *Id.* at 158 & n.4.

42. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

43. *Id.* at 546 (White, J., dissenting).

44. *Id.* at 536 (Marshall, J.).

45. *Landmark Communications v. Virginia*, 435 U.S. 829 (1978).

46. *Id.* at 833.

47. See *Landmark Communications, Inc. v. Virginia*, 217 Va. 699, 702 (Va. 1977), *rev’d*, 435 U.S. 829.

48. *Landmark Communications*, 435 U.S. at 837, 838. For a recent case that adopted similar reasoning, see *People v. Bryant*, 94 P.3d 624, 626-27, 632, 635, 638 (Colo. 2004) (en banc) (upholding a prior restraint on publication of transcripts of in camera rape proceedings after the transcripts were mistakenly disseminated to the press by a court reporter, but noting that the recipients’ “acquisition of the transcripts was not illegal,” even though the transcripts were clearly marked with a confidentiality notice) (citing, *inter alia*, *Bartnicki*, 532 U.S. at 528).

49. *Boehner*, 332 F. Supp. 2d at 165 (emphasis in original).

50. *Id.*

51. Indeed, Judge Hogan read *Bartnicki* as presuming that Yocum was charged with such knowledge “at some point after receiving and listening to the tape but prior to disclosing it.” *Boehner*, 332 F. Supp. 2d at 159 n.4.

52. *Bartnicki*, 532 U.S. at 519-20, 525.

53. *Florida Star*, 491 U.S. at 533-34 (quoting *Cox Broadcasting*, 420 U.S. at 491). See also *Bartnicki*, 532 U.S. at 534-35 (referring to the “general proposition that freedom of expression upon public questions is secured by the First Amendment” and reaffirming “our ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open’”) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

In *Florida Star*, the majority listed three other rationales justifying application of the *Daily Mail* principle in that case. 491 U.S. at 534-36. While some have questioned the extent to which these rationales support application of the *Daily Mail* principle to a *Bartnicki*-type situation (see, e.g., *Bartnicki*, 532 U.S. at 545-47 (Rehnquist, C.J., Scalia and Thomas, JJ., dissenting)), the *Bartnicki* majority apparently concluded that the overarching rationale for the principle justified its application, even though the facts of *Bartnicki* were in some respects distinguishable from the prior line of cases applying this principle. Cf. *Boehner*, 191 F.3d at 483 (“I concede at the outset that there are distinctions between our case and the cases in the *Cox Broadcasting-Florida Star* line. However, I think none of the distinctions permits a difference in result.”) (Sentelle, J., dissenting).

54. In his August 2004 decision, Judge Hogan offered a policy rationale in support of a distinction hinging (in part) on knowledge of the identity of the source. He reasoned that: “the distinction drawn creates sound policy because a recipient’s present knowledge of illegality of a disclosure implicates the choice to condone it by accepting the information or to prevent it by declining to participate. In contrast, punishing a defendant who accepts an anonymous disclosure with no knowledge of the illegality of the disclosure can deter nothing.” *Boehner*, 332 F. Supp. 2d at 165. But this is a different distinction from the one Judge Hogan was *actually* drawing in distinguishing his ruling from *Bartnicki*. While the disclosure in *Bartnicki* was “anonymous” (as the second situation posited by Judge Hogan presumes), in contrast with Judge Hogan’s second hypothetical, the Supreme Court expressly assumed that the defendants knew or should have known that the interception was illegal. However, the fact that Judge Hogan’s deterrence-based rationale would not apply to *Bartnicki* did not militate against the application of the *Daily Mail* principle to protect publication of the disclosed interception in that case. As a result, the policy rationale Judge Hogan offered does not appear to support the distinction he drew between McDermott’s conduct and the conduct of the defendants in *Bartnicki*.

55. *Bartnicki*, 532 U.S. at 535.

56. *Id.* at 538.

57. 532 U.S. at 548. Judge Hogan's characterization of McDermott's conduct—that he “actively accepted the tape from the people who had illegally recorded it”—is confusing because it is hard to see how this acceptance was any more “active” than the acceptance by the radio show host, Vopper, in *Bartnicki*. In both cases, the defendants received the tapes unsolicited. While there was some evidence in *Boehner* that a colleague had discussed the possibility of immunity with the Martins, which the D.C. Circuit relied on to suggest some degree of participation in an illegal enterprise, this was not a significant factor in Judge Hogan's reasoning, which focused exclusively on knowing receipt. *See Boehner*, 332 F. Supp. 2d at 164-66, 169; Mem. Op. at 5, 13, 14, 16.

58. *Bartnicki*, 532 U.S. at 529.

59. *Id.*

60. One commentator has drawn an interesting parallel between laws that treat “information as contraband”—including the provisions of the federal wiretap act prohibiting disclosure—and exclusionary rule jurisprudence. *See* Rodney A. Smolla, *Information As Contraband: The First Amendment And Liability For Trafficking In Speech*, 96 Nw. U. L. Rev. 1099, 1133, 1150 (Spring 2002) (construing *Bartnicki* as leaving the door open to “the prohibition of privacy contraband”).

61. *Bartnicki*, 532 U.S. at 550-51 (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting).

62. Smolla, *supra* note 60, at 1134-35.

63. *Id.* at 1135.

64. Emphasizing the concerns of fair play expressed by the dissenting Justices in *Burdeau v. McDowell*, 256 U.S. 465 (1921), which fashioned this doctrine, Smolla (who construes *Bartnicki*'s reaffirmation of the *Daily Mail* principle somewhat narrowly) questions the fairness of such an application of this rule. But it is doubtful that the same fairness concerns are at issue where—unlike in a criminal context, where improperly obtained information is used by the government to convict someone—the question is whether the public may be informed of the existence of the information.

65. *See Bartnicki*, 532 U.S. at 532 n.19 (“It would be frivolous to assert . . . that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws.”) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972)).

66. *Bartnicki*, 532 U.S. at 530 n.13. Similar arguments were invoked by Judge Randolph in the D.C. Circuit in *Boehner*, 191 F.3d at 469-70, and by the *Bartnicki* dissent, 532 U.S. at 550-51 (Rehnquist, C.J., dissenting).

67. *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 560 (1985) (referring to the “First Amendment

protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use.”).

68. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS, § 652D (“One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that . . . (b) is not of legitimate concern to the public.”).

69. A recent example of a post-*Bartnicki* case that has adopted a narrow interpretation of the type of speech that may qualify for protection under the *Daily Mail* principle as speech on a matter of public concern is *Quigley v. Rosenthal*, 327 F.3d 1044, 1066-68 (10th Cir. 2003).

70. The panel may not necessarily be the same one that rendered the vacated decision, *Boehner*, 191 F.3d 463 (D.C. Cir. 1999).

71. In the D.C. Circuit's vacated decision, Judge Randolph distinguished McDermott's delivery of the tape from a newspaper's publication on the basis of the distinction he drew between conduct and speech. “When a newspaper publishes,” he wrote, “it engages in speech” whereas, in Judge Randolph's view, the basis for McDermott's liability was his “conduct in handing over the tape to the newspapers . . .” *Boehner*, 191 F.3d at 477-78. This analysis was consistent with Judge Randolph's view that “newspapers' sources do not publish; newspapers do,” *id.* at 473, and enabled him to conclude that newspapers that disclosed the contents of the tape may be in a different position from the source. *See id.* at 477-78 (“Whether the statute would be constitutional as applied to a newspaper who published excerpts from the tape—who, in other words, engaged in speech— . . . raises issues not before us.”). It remains to be seen whether the D.C. Circuit will continue to draw a distinction between McDermott and a media defendant in light of the *Bartnicki* Court's conclusion that Yocum, the nonmedia defendant, stood in the same position as the media defendants for purposes of the constitutional analysis. *See Bartnicki*, 532 U.S. at 525 n.8.

72. *Boehner*, Oct. 22, 2004 Mem. Op. at 14.

73. *See e.g.*, Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 666 (1989) (“It . . . is worth emphasizing that the actual malice standard is not satisfied merely through a showing of ill will or ‘malice’ in the ordinary sense of the term.”). The *Bartnicki* majority specifically referenced *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the case that created the constitutional test for actual malice, to hold that “parallel reasoning requires the conclusion that a stranger's illegal conduct does not remove the First Amendment shield from speech about a matter of public concern.” *Bartnicki*, 532 U.S. at 534-35 (citing

New York Times, 376 U.S. at 270).

74. *See, e.g.*, Meyer v. Grant, 486 U.S. 414, 425 (1988) (“the speech at issue is ‘at the core of our electoral process and of the First Amendment freedoms,’ . . . —an area of public policy where protection of robust discussion is at its zenith.”) (citations omitted); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.”).

75. *Bartnicki*, 532 U.S. at 526-27 & n.11. Writing for the majority in *Bartnicki*, Justice Stevens quoted with approval the dissenting opinion of Judge Sentelle in the D.C. Circuit, which rejected Judge Randolph's characterization of McDermott's delivery of the tape as conduct rather than speech, and noted instead that “[w]hat made his conduct punishable under the statute was the information communicated on the tapes What he is being punished for here is not conduct dependent on the nature or origin of the tapes; it is speech dependent upon the nature of the contents.” *Id.*

76. *O'Brien*, 391 U.S. at 388-89 (Harlan, J., concurring). Justice Harlan went on to note that “[t]his is not such a case, since O'Brien manifestly could have conveyed his message in many other ways than by burning his draft card.” *Id.*

77. Judge Hogan adopted the reasoning of the Court of Appeals that McDermott's “actions and knowledge placed this case outside the *Florida Star* line of cases protecting disclosure of lawfully obtained information. Intermediate scrutiny would therefore apply.” *Boehner*, 332 F. Supp. 2d at 164; *see also id.* at 169.

78. *Boehner*, 332 F. Supp. 2d at 163.

79. While he stated that he was joining the opinion of the majority, Justice Breyer (joined by Justice O'Connor) significantly recast the majority's opinion in two ways. *See Bartnicki*, 532 U.S. at 535. First, Justice Breyer emphasized what he characterized as its “narrow holding limited to the special circumstances present here.” *Bartnicki*, 532 U.S. at 535. These “special circumstances” he identified as follows: “(1) the radio broadcasters acted lawfully (up to the time of final public disclosure); and (2) the information publicized involved a matter of unusual public concern, namely, a threat of potential physical harm to others.” *Id.* at 535-36. Second, unlike the majority, Justice Breyer proposed applying an ad hoc balanc-

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Grosso v. Miramax Films Corp.: The Ninth Circuit Deals a Wild Card

ALLISON S. ROHRER

It is a story as old as Hollywood itself: The aspiring screenwriter submits an unsolicited script that promises to be the next big box office hit. Such Hollywood hopefuls rarely engage in negotiations with the sort of heavy hitters necessary to make a feature film. Some, however, try their luck in a less conventional way: when they fail to successfully market their scripts, they sue motion picture studios for using their ideas, however indirect the submission to the studio and however attenuated the use of the idea.

The Ante

Take aspiring screenwriter Jeff Grosso, the plaintiff in *Grosso v. Miramax Films Corp.*¹ He brought an implied contract claim against numerous defendants (collectively referred to in this article as Miramax) based on his unilateral submission of a script entitled *The Shell Game*, which he claims was used to create Miramax's motion picture entitled *Rounders*. The plots of both works involve the players in high-stakes games of Texas Hold'em, a popular form of poker.²

In *Grosso*, as in many such idea submission cases, Miramax argued that the Copyright Act preempted the implied contract claim. A successful preemption argument forces plaintiffs to litigate their claims under the strictures of the federal Copyright Act, which requires a plaintiff to prove similarity of copyrightable expression, in contrast to state law, which requires a plaintiff to prove only similarity of ideas.³ Until the deci-

sion of the U.S. Court of Appeals for the Ninth Circuit in *Grosso*, breach of contract claims arising from idea submissions were commonly preempted by federal district courts within the Ninth Circuit on the grounds that the claims were really no more than "dressed up" copyright claims for unlawful copying, the remedies for which Congress expressly limited to the Copyright Act.

Grosso departed from this pattern of preempting implied contract claims. In a truncated decision, lacking both a factual context and an extensive analysis of the law, the Ninth Circuit ruled that Jeff Grosso could pursue his state law claim for breach of implied contract, notwithstanding Miramax's preemption challenge. Initially designated a memorandum of disposition on April 7, 2004, *Grosso*, at that point, was not a published, precedential decision; its unpublished status nullified its potentially far-reaching effects.⁴

On September 8, 2004, however, the Ninth Circuit filed the decision for publication. Miramax petitioned for rehearing and telegraphing industry outrage, numerous motion picture studios, television broadcasters, and cable networks have filed briefs as amici curiae in support. On March 15, 2005 the Ninth Circuit denied the petition and amended the decision only to underscore that its reach is limited to the procedural posture of the claim. *Grosso* presents a sea change in the way idea submission cases will be litigated because *Grosso* is the first decision in which the Ninth Circuit has ruled on the specific issue of whether breach of implied contract claims are preempted by the Copyright Act. Studios, networks, entertainment lawyers, and writers and their agents are now grappling with the effects of *Grosso*.⁵

Before addressing the *Grosso* decision, this article will briefly survey the law governing the protection of ideas through implied contracts versus the protection of the expression of ideas under

the Copyright Act. The tension that emerges from the intersection of state law contract claims and the Copyright Act is evident in many federal court decisions, but the *Grosso* court's abbreviated ruling, as published, does not recognize this tension.⁶ Unless the Ninth Circuit modifies its ruling, *Grosso* may be perceived as a categorical referendum on preemption of implied contract claims.

A close reading of *Grosso*, however, reveals that aspiring screenwriters, known as "idea purveyors," may not always hold the winning hand in Ninth Circuit idea submission cases. The court ruled against preemption in *Grosso* because the plaintiff purportedly stated an actionable breach of implied contract claim under the seminal idea submission case of *Desny v. Wilder*,⁷ a decision that has paved the way for idea purveyors to litigate their claims under state contract law only when the circumstances of the idea submission give rise to a contractual relationship. If the language of *Desny* cabins *Grosso*, as the *Grosso* ruling suggests, then the Ninth Circuit may not have dealt defendants a losing hand in the preemption of implied contract claims.

Strategy No. 1: Implied Contracts

The California Supreme Court established long ago in *Desny* the protections afforded idea purveyors.⁸ In *Desny*, plaintiff Victor Desny telephoned the office of producer Billy Wilder, and Wilder's secretary insisted that Desny explain the purpose of his call.⁹ Desny shared with the secretary the "fantastic unusual story" of Floyd Collins "who was trapped and made sensational news for two weeks."¹⁰ Desny wanted to submit his account of the story to Wilder, but the secretary suggested that he instead send a synopsis.¹¹ Two days later, Desny called a second time, and the secretary requested that he read the synopsis over the telephone so that she could take it down in

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The Ides of March?

On March 15, 2005, a panel of the Ninth Circuit in San Francisco denied Miramax's request for a rehearing of the decision discussed in the attached article. *See* *Grosso v. Miramax Film Corp.*, No. 01-57255, 2005 U.S. App. LEXIS 4266 (9th Cir. Mar. 15, 2005). In its most recent ruling, the court amended its September 2004 decision only to explain that the decision is "compelled by the procedural posture of the *Desny* claim." The September decision otherwise remains intact. The panel made no comments on the merit of *Grosso*'s claim, underscoring that "we hold only that the First Amended Complaint states a *Desny* claim." As the article below discusses, construing the decision as applicable only to *Desny* claims may limit its potentially far-reaching effects. *Id.* at *2. According to the *Los Angeles Times*, "Miramax may still be able to have the case dismissed before trial if *Grosso* fails to prove that anyone at Miramax saw his script."

shorthand.¹² During this second conversation, *Desny* conditioned *Wilder*'s use of the story on *Wilder* compensating *Desny* for its reasonable value.¹³ When *Wilder* produced a motion picture allegedly similar to *Desny*'s idea, *Desny* brought a claim, not for plagiarizing his idea but for breach of an implied contract not to use his idea without paying for it.¹⁴

The California Supreme Court concluded that California contract law would not preclude a finding that the parties had reached an implied contract to pay for *Desny*'s story synopsis.¹⁵ The court reasoned that

if the idea purveyor has clearly conditioned his offer to convey the idea upon an obligation to pay for it if it is used by the offeree and the offeree, knowing the condition before he knows the idea, voluntarily accepts its disclosure (necessarily on the specified basis) and finds it valuable and uses it, the law will deem the parties to have made an implied contract.¹⁶

However, in oft-quoted language, the court cautioned, "The idea man who blurts out his idea without having first made his bargain has no one but himself

to blame for the loss of his bargaining power."¹⁷ Thus, no contract to pay for the idea was made during the first telephone call with *Wilder*'s secretary; but the second telephone call, during which *Desny* expressly communicated the terms of his offer, solidified the deal and provided the factual basis for a state law breach of implied contract claim arising from the submission of an idea, although *Desny* would still have to establish that *Wilder* actually used *Desny*'s idea.¹⁸

Over twenty years later, in *Faris v. Enberg*, the California Court of Appeal reinforced *Desny*'s caution against finding an implied contract based on no more than an unsolicited submission of an idea absent mutual assent to contractual terms.¹⁹ Plaintiff Richard Faris, the developer of an idea for a sports quiz show, telephoned KTLA studios and left a message regarding his idea for defendant Richard Enberg, a sports producer and announcer.²⁰ Enberg returned Faris's call and requested a meeting to discuss Faris's idea further.²¹ At the meeting, Faris discussed the possibility of Enberg's participation in the show, a business proposal that would earn them both money.²² Enberg requested a copy of the format for the proposed show.²³

When, shortly after his communications with Enberg, Faris saw Enberg hosting a show allegedly similar to Faris's format, Faris brought a claim for breach of implied contract.²⁴ In affirming the lower court's dismissal of the breach of implied contract claim, the California Court of Appeal held that "[i]t would be entirely inconsistent with *Desny* to hold that an implied-in-fact contract could be created because a telephone call was returned or because a request was made for an opportunity to read the work that was unconditionally submitted."²⁵

In recent years, courts have confronted the viability of similar idea submission cases in the face of the federal Copyright Act, which, as explained below, involves broad preemptive powers over state law claims not qualitatively different from copyright claims.

Strategy No. 2: Copyright Act

In contrast with state contract law and its protections of ideas, federal copyright law protects the expression of

ideas.²⁶ The line between ideas and their expression, however, is blurred when the defense of copyright preemption comes into play.

Section 301 of the Copyright Act of 1976 provides that all rights that are equivalent to any of the exclusive rights within the general scope of copyright, e.g., rights of reproduction and distribution, and that fall within the subject matter of copyright are governed exclusively by the Copyright Act.²⁷ Courts apply a two-part test for preemption under § 301.²⁸

The first prong of the federal preemption test is a determination of whether the subject matter of the claim falls within the "subject matter of copyright" as defined in §§ 102 and 103 of the Act.²⁹ Most federal courts agree that for the purposes of preemption analysis, subject matter includes not only copyrightable expressions that can be protected under the Act but also elements of expression that themselves cannot be protected, such as ideas and unoriginal expressions of those ideas when they are embodied in a tangible medium of expression.³⁰ The Sixth Circuit has commented that "the scope of the Copyright Act's subject matter is broader than the scope of the Act's protections."³¹

The second prong of the federal preemption test, sometimes called the "extra element" test, is a determination of whether the state law cause of action derives from something beyond the alleged unauthorized use of a copyrighted work, i.e., whether the cause of action presents rights qualitatively different from those protected by the Copyright Act.³² Unless the extra element is present, the state law cause of action is preempted.³³

In considering whether implied contract claims present the necessary extra element to evade a preemption challenge, reviewing courts have chosen the fact-specific inquiry method: courts have uniformly refused to establish a categorical rule of preemption and instead have expressly limited their holdings to the particular facts of the case.³⁴ The Seventh Circuit reasoned that "we think it prudent to refrain from adopting a rule that anything with the label 'contract' is necessarily outside the preemption clause: the

variations and possibilities are too numerous to foresee.”³⁵

In *Grosso*, the Ninth Circuit has now weighed in on the viability of implied contract claims based on idea submissions in the face of the Copyright Act’s preemptive sweep.

The Action

Grosso arises from Jeff Grosso’s submission of a screenplay that was allegedly used in an infringing motion picture released by Miramax, one of the named defendants. Grosso sued Miramax on the grounds that there were purported similarities between Grosso’s script *The Shell Game*, a film about Texas Hold’em and its high-stakes players, and Miramax’s motion picture *Rounders*, addressing the same general subject.³⁶

In the trial court, Miramax moved for dismissal pursuant to Rule 12(b)(6) on the grounds that the Copyright Act preempted Grosso’s state law claim for breach of implied contract.³⁷ Miramax also moved for summary judgment on the copyright claim on the grounds that there was no “substantial similarity” between *The Shell Game* and *Rounders*.³⁸ The district court agreed with Miramax’s arguments and granted the motions.³⁹ Its decision was not published or otherwise reported. Thereafter, Grosso appealed the dismissal of his breach of contract and copyright claims to the Ninth Circuit.

The Ninth Circuit Buys In

The appeal of the district court’s decision was argued and submitted to a three-judge panel on the Ninth Circuit on April 7, 2003.⁴⁰ One year later, on April 7, 2004, the panel issued its decision by way of a memorandum of disposition.⁴¹ The disposition was not intended for publication; accordingly, the unpublished disposition could not be cited as precedent.⁴² As is common with memoranda of disposition, the court did not set forth the facts, the procedural history, or the applicable law in great detail; instead, it included only information crucial to the result.⁴³

The Ninth Circuit reversed the district court’s dismissal of Grosso’s state law claim for breach of implied contract but otherwise affirmed the district

court’s summary judgment in favor of Miramax on Grosso’s copyright claim.⁴⁴ The court set forth three reasons for allowing Grosso to proceed with the implied contract claim:

Plaintiff’s complaint alleged circumstances that, if true, would sustain an action for implied contract: [1] Plaintiff submitted the idea, in script form, to Defendants, at least indirectly, through Defendants’ agents. [2] Plaintiff submitted the idea in response to a solicitation by Defendants. [3] Finally, it is alleged that “[t]he idea was submitted by Plaintiff to Defendants with the understanding and expectation, fully and clearly understood by Defendants, that Plaintiff would be reasonably compensated for its use by Defendants.”⁴⁵

The sole authority cited in the memorandum of disposition is the seminal idea submission case of the California Supreme Court, *Desny*. The court expressly included the holding of *Desny* that a contract exists where “the circumstances preceding and attending disclosure, together with the conduct of the offeree acting with knowledge of the circumstances, show a promise [to pay] of the type usually referred to as ‘implied’ or ‘implied in fact.’”⁴⁶

Raising the Bet

With this winning hand, Grosso’s attorneys requested publication of the disposition.⁴⁷ To turn a disposition into an opinion, the disposition must “establish[], alter[], modif[y], or clarify[] a rule of law . . . or involve a legal or factual issue of unique interest or substantial public importance.”⁴⁸ On September 8, 2004, the Ninth Circuit filed the opinion, and *Grosso* became a published, citable opinion.⁴⁹ The court’s decision to publish its disposition reflects the court’s probable recognition that *Grosso* was cutting new legal ground in the Ninth Circuit.

As set forth in the opinion, Grosso’s breach of implied contract claim was premised not on Grosso’s written script, but on the ideas embodied in it and allegedly contained in *Rounders*.⁵⁰ The opinion includes the same general allegations referenced in the memorandum of disposition, i.e., the plaintiff submitted his idea and there was an understanding that the defendants were to pay for use of the idea; however, the opinion omits the

allegation that the plaintiff submitted his script only after the defendants solicited the script.⁵¹

Desny remains the linchpin of the *Grosso* ruling. The court also cited *Faris v. Enberg*’s reading of *Desny*, as follows:

To establish a *Desny* claim for breach of implied-in-fact contract, the plaintiff must show that the plaintiff . . . disclosed the work to the offeree for sale, and did so under circumstances from which it could be concluded that the offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered and the reasonable value of the work.⁵²

Against the brief discussion of the elements of implied contract claims that the *Desny* and *Faris* decisions established, the Ninth Circuit concluded that Grosso “stated a *Desny* claim.”⁵³ The opinion, however, does not explain the factual basis for this pronouncement, nor does it give any indication of how the elements required under *Desny* and its progeny were satisfied.

The line between ideas and their expression, however, is blurred when the defense of copyright preemption comes into play.

The First Bluff: A *Desny* Claim?

Desny requires that a court determine whether the “circumstances preceding and attending disclosure” give rise to an obligation to pay for use of the idea; the idea purveyor’s mere unilateral acts are insufficient.⁵⁴ The *Desny* court held that an implied contract claim may only exist where the defendants knew the terms of the alleged agreement and had an opportunity to accept or reject the disclosure of the idea knowing the terms upon which the disclosure was conditioned.⁵⁵ For the plaintiff in *Desny*, it was not until actual contractual terms were discussed during the second telephone call that an implied contract arose.⁵⁶ If the plaintiff had not engaged in the second discussion and had failed to communicate the contractual terms, he would have had no viable claim.

In contrast, the Ninth Circuit’s decision, as published, provides no basis to

conclude that the “circumstances preceding and attending disclosure” of Grosso’s idea were any more likely to present a viable claim than *Desny*’s hapless idea man “who blurts out his idea without having first made his bargain.”⁵⁷ The plaintiff in *Grosso* argues only that the script was submitted to a production company that had a practice of accepting unsolicited material and that also happened to have offices in the same building as Miramax, with which the production company also had a “first-look” deal.⁵⁸ The allegations betray nothing more than the plaintiff’s unsolicited submission of his idea.

The opinion also fails to note whether there was any discussion of contractual terms between the parties, much less conduct evincing mutual agreement to those terms, as was the case in *Desny*. Instead, the only factual basis recounted by the *Grosso* court in the opinion was the bare allegation that the plaintiff

In sum, the *Grosso* court issued its opinion without much discussion, much less application, of the facts.

expected payment for his idea and the defendants knew it. This recitation of the facts leaves the reader with no way to determine whether there was any interaction between the plaintiff and the defendants. Assuming that there was none, the lack of communications severely undercuts a finding (in keeping with current law) of an implied agreement.

In short, the paucity of facts set forth in the opinion renders it impossible to conclude that the plaintiff in *Grosso* indeed established a *Desny* claim.

Second Bluff: Preempting a *Desny* Claim

Having nonetheless concluded that *Grosso* established a “*Desny* claim,” the Ninth Circuit framed the dispositive issue as being one of “whether the rights protected by a *Desny* claim are equivalent to the rights protected by copyright.”⁵⁹ The opinion thus skips the first part of the preemption analysis,

i.e., whether the work falls within the subject matter of the Act, and jumps straight to whether an implied contract claim under *Desny* presents the requisite extra element to withstand preemption.

Turning to *Landsberg v. Scrabble Crossword Game Players, Inc., (Landsberg II)*,⁶⁰ the Ninth Circuit explained that this case “supports treating the implied promise to pay required by *Desny* as an ‘extra element’ for preemption purposes.”⁶¹ Quoting *Landsberg II*, the *Grosso* court explained that a “‘contract claim turns not upon the existence of a [copyright] . . . but upon the implied promise to pay the reasonable value of the material disclosed.’”⁶²

In *Landsberg II*, the court affirmed the district court’s finding that the defendants were obligated to pay for the use of the plaintiff’s manuscript when the plaintiff disclosed his manuscript in connection with his expressed intent of using the manuscript commercially.⁶³ Although the

Grosso court relies on *Landsberg II* to distinguish a contract claim from a copyright claim, *Landsberg II* had nothing to do with copyright preemption under the current Copyright Act. The works at issue predated enforcement of the broad preemptive powers conferred by Congress under the Act.⁶⁴ Thus, the Ninth Circuit’s reliance on *Landsberg II* appears misplaced because that court was not faced with a preemption challenge.⁶⁵

The *Grosso* court coupled *Landsberg II*’s conclusion that a contract claim turns upon an implied promise to pay with another holding of the Ninth Circuit, *Del Madera Properties, Inc. v. Rhodes and Gardner, Inc.*⁶⁶ In *Del Madera Properties*, the court held that an unjust enrichment claim was preempted because it lacked the necessary extra element, which the *Grosso* court identified as a “‘bilateral expectation of compensation.’”⁶⁷ To satisfy this element, the court in *Del Madera Properties*, applying California law, explained that a plaintiff must show a relationship between the parties sufficient to justify an expectation of payment in the first place.⁶⁸

Without explanation, the *Grosso* court concluded that the plaintiff’s complaint for breach of implied con-

tract alleged an “extra element that transforms the action from one arising under the ambit of the federal statute to one sounding in contract.”⁶⁹ Thus, by the court’s conclusion, the plaintiff’s (conclusory) allegation of an implied promise to pay for use of his idea (even absent a showing of a relationship between the parties to support an expectation of payment) is what distinguishes the plaintiff’s implied contract claim from a copyright claim.

Third Bluff? Ignoring Case Law

The *Grosso* court undermines numerous district court decisions within the Ninth Circuit—decisions that have been driving this area of the law for the past several years and that were cited in the Civil Minutes of the district court in dismissing *Grosso*’s breach of contract claim.⁷⁰ These courts faced facts far more likely to give rise to an implied agreement to pay for the use of an idea (e.g., facts showing solicitation of an idea, ongoing communications regarding an idea, and discussion of actual contractual terms) than those few facts set forth in the *Grosso* opinion⁷¹; nonetheless, these courts ruled, also on Rule 12(b)(6) motions to dismiss, that such claims are no more than disguised copyright claims.⁷² The *Grosso* court also omitted discussion of decisions outside of the Ninth Circuit that have held that implied contract claims akin to the claim presented in *Grosso*, insofar as the facts reveal, were preempted by the Copyright Act.⁷³

Finally, the Ninth Circuit did not bolster its decision by referring to decisions of its sister circuits, with which some of the district court decisions referenced above have been at odds. For instance, the Fourth, Sixth, and Eighth Circuits have held that breach of contract claims are not preempted when the claims concerned solicited submissions of an idea, actual negotiations over payment, or express written contracts.⁷⁴ These decisions involve facts, unlike those few facts set forth in *Grosso*, that are likely to give rise to an implied contract under *Desny*.

In sum, the *Grosso* court issued its opinion without much discussion, much less application, of the facts. Nor did

the court hint that a preemption challenge at a later stage in the proceedings, once the facts were more fully established (e.g., on a motion for summary judgment), would be more successful. The conclusory analysis in *Grosso* is in sharp contrast to the fact-specific approach adopted by numerous courts both within and outside of the Ninth Circuit in determining whether state law claims are preempted.

The Kicker: *Desny* Claims Are Unique

One reading of *Grosso* is that the plaintiff's bare allegation that he submitted his idea and the defendants understood that they had to pay for it if they used it was alone sufficient to save the plaintiff's claim from copyright preemption. This reading would, in effect, create a categorical rule exempting breach of contract claims from preemption because breach of contract claims arising from idea submissions in the entertainment industry context routinely include general allegations regarding an obligation to pay for use of the work at issue. Such a result would be a coup for the idea purveyor, who could escape the heavy burden of a federal copyright claim by simply pleading, however generally, breach of implied contract.

But, as the court's amended decision underscores, *Grosso* need not be interpreted so broadly. The decision hinges on the plaintiff's claim being a *Desny* claim. A true *Desny* claim, under the facts of *Desny* itself, requires the requisite level of circumstances attending disclosure of the idea in order to conclude that the parties entered into an implied contract; and the Ninth Circuit's own reading of California law confirms the importance of a bilateral expectation of payment in reaching this conclusion. Whether courts will meaningfully apply the phrase *Desny* claim, thus differentiating allegations consistent with *Desny* from allegations that are no more than copyright claims recast as contract claims remains to be seen. Indeed, it will be up to litigants to test *Grosso*'s limits and up to the district courts and future Ninth Circuit panels to determine whether the preemption defense has been dealt a losing hand. ❑

Endnotes

1. No. 01-57255, 2004 WL 1977668, at *1 (9th Cir. Sept. 8, 2004).
2. See John Sacksteder, *Plot Summary for Rounders* (1998), IMDb, at <http://www.imdb.com/title/tt0128442/plot-summary> (last visited Oct. 11, 2004); Appellant's Brief, 2002 WL 32302494, at *5-6 (9th Cir.).
3. Green v. Schwarzenegger, 1995 WL 874191, at *12 (C.D. Cal. 1995).
4. *Grosso v. Miramax Films Corp.*, No. 01-57255, 2004 WL 785307 (9th Cir. Apr. 7, 2004) (mem.).
5. See Anne Thompson, *Ruling May Shift Power to Writers*, N.Y. TIMES, Oct. 13, 2004, at B1.
6. See Jonathan H. Anshell, Jennifer B. Hodulik & Allison S. Rohrer, *The Whole Enchilada: Wrench LLC v. Taco Bell Corp. and Idea Submission Claims*, COMM. LAW., Winter 2004.
7. 46 Cal. 2d 715 (1956).
8. *Id.* at 727.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 726-27.
13. *Id.* at 727.
14. *Id.* at 724, 728.
15. *Id.* at 738-41. Significantly, the *Desny* court determined that the secretary was authorized to enter into the contract and her knowledge of the terms therein was communicated to her employers. *Id.* at 745-46.
16. *Id.* at 739.
17. *Id.*
18. *Id.* at 744-46.
19. 97 Cal. App. 3d 309 (1979).
20. *Id.* at 314-15.
21. *Id.* at 315.
22. *Id.*
23. *Id.*
24. *Id.* at 315-16.
25. *Id.* at 319.
26. See 17 U.S.C. § 102.
27. 17 U.S.C. §§ 106, 301.
28. *Del Madera Props., Inc. v. Rhodes and Gardner, Inc.*, 820 F.2d 973, 976-77 (9th Cir. 1987); see also *Motown Records Corp. v. George A. Hormel & Co.*, 657 F. Supp. 1236, 1238-40 (C.D. Cal. 1987).
29. *Del Madera Props.*, 820 F.2d at 977; *Motown Records Corp.*, 657 F. Supp. at 1238-40; 17 U.S.C. § 301.
30. See, e.g., *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 455 (6th Cir. 2001); *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 849-50 (2d Cir. 1997); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453 (7th Cir. 1996); *accord Entous v. Viacom Int'l*, 151 F. Supp. 2d 1150, 1159 (C.D. Cal. 2001).
31. *Wrench LLC*, 256 F.3d at 455.
32. *Del Madera Props.*, 820 F.2d at 977; see also *Motown Records Corp.*, 657 F. Supp. at 1238, 1240.
33. *Del Madera Props.*, 820 F.2d at 976-77.

34. See, e.g., *ProCD, Inc.*, 86 F.3d at 1455; see also *Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l*, 991 F.2d 426, 432 (8th Cir. 1993); *Selby v. New Line Cinema Corp.*, 96 F. Supp. 2d 1053, 1061 (C.D. Cal. 2000).
35. *ProCD, Inc.*, 86 F.3d at 1454-55.
36. *Grosso v. Miramax Films Corp.*, No. 01-57255, 2004 WL 1977668, at *1 (9th Cir. Sept. 8, 2004).
37. *Id.*
38. *Id.*
39. *Id.*
40. *Grosso*, 2004 WL 785307.
41. *Id.*
42. See Ninth Circuit Rule 36-3(a), (b); Ninth Circuit, General Order Ch. 4, at 4.3a. (revised Mar. 24, 2004).
43. See Ninth Circuit, General Order Ch. 4, at 4.3a.
44. *Grosso*, 2004 WL 785307, at *1.
45. *Id.*
46. *Id.* (citing *Desny v. Wilder*, 46 Cal. 2d 739 (1956)).
47. *Grosso*, No. 01-57255, Docket Report.
48. Ninth Circuit Rule 36-2(a), (b), (d).
49. *Grosso*, 2004 WL 1977668, at *1.
50. *Id.*
51. Compare *Grosso*, 2004 WL 1977668, with *Grosso*, 2004 WL 785307.
52. *Grosso*, 2004 WL 1977668, at *1.
53. *Id.* at *2.
54. *Desny v. Wilder*, 46 Cal. 2d 739 (1956).
55. *Id.*
56. *Id.* at 744-46.
57. *Id.* at 739.
58. App. Brief, No. 01-57255, 2002 WL 32302494, at *5 (9th Cir.); see also Thompson, *supra* note 5.
59. *Grosso v. Miramax Films Corp.*, No. 01-57255, 2004 WL 1977668, at *2 (9th Cir. Sept. 8, 2004).
60. 802 F.2d 1193 (9th Cir. 1986) [hereinafter *Landsberg II*].
61. *Grosso*, 2004 WL 1977668, at *2.
62. *Id.*
63. *Landsberg II*, 802 F.2d at 1196.
64. See *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 487 (9th Cir. 1984) [hereinafter *Landsberg I*] (plaintiff's breach of contract and common law copyright claims arose from "undertakings commenced before January 1, 1978," and were thus not subject to preemption); 17 U.S.C. § 301(b)(2).
65. Moreover, the facts of *Landsberg II* appear more likely to give rise to an implied contract than the facts set forth in *Grosso*. In *Landsberg II*, the plaintiff expressed his intent to market his idea commercially and the parties engaged in actual negotiations, which together show the plaintiff reasonably believed that the defendants would not use his manuscript without payment. As these facts illustrate, it is clear that the "circumstances preceding and attending disclosure"

in *Landsberg II* were akin to a *Desny* claim, but the few facts recounted in *Grosso* do not lead to the same conclusion. See generally *Landsberg II*, 802 F.2d at 1193.

66. 820 F.2d 973 (9th Cir. 1987) (cited in *Grosso*, 2004 WL 1977668, at *2).

67. *Grosso*, 2004 WL 1977668, at *2 (citing *Del Madera Props.*, 820 F.2d at 978).

68. *Del Madera Props.*, 820 F.2d at 978.

69. *Grosso*, 2004 WL 1977668, at *2.

70. *Grosso v. Miramax Films Corp.*, No. CV 99-10930 (C.D. Cal. Oct. 18, 2000) (order granting defendants' motion to dismiss breach of implied contract claim (citing *Selby v. New Line Cinema Corp.*, 96 F. Supp. 2d 1053 (C.D. Cal. 2000) and *Worth v. Universal Pictures, Inc.*, 5 F. Supp. 2d 816 (C.D. Cal. 1997))).

71. See, e.g., *Entous*, 151 F. Supp. 2d at 1158-60 (studio encourages plaintiff to develop idea); see also *Metrano v. Fox Broad. Co.*, No. CV-00-02279, 2000 WL 979664, at * 6 (C.D. Cal. Apr. 24, 2000) (face-to-face pitch meeting); *Selby*, 96 F. Supp. 2d at 1062 (studio expresses interest in subsequent drafts of work); *Endemol Entm't B.V. v. Twentieth Television, Inc.*, 48 U.S.P.Q. 2d 1524, 1528 (C.D. Cal. 1998). (negotiations regarding licensing of idea); *Worth*, 5 F. Supp. 2d at 822 (negotiations between parties).

72. See, e.g., *Entous*, 151 F. Supp. 2d at 1158-60 (breach of implied contract based on the unauthorized use of plaintiff's ideas without compensation and credit preempted); see also *Metrano*, 2000 WL 979664, at * 6 (promise to compensate does not "regulate anything other than defendant's use of plaintiff's works[;] the rights conferred by the contract are equivalent to those under the Copyright Act"); *Selby*, 96 F. Supp. 2d at 1062 (promise not to "use" plaintiff's ideas does not prohibit any conduct beyond that prohibited by the Copyright Act); *Endemol Entm't B.V.*, 48 U.S.P.Q. 2d at 1528 (breach of implied contract based on submission of copyrightable materials as well as plaintiff's ideas fell "squarely into the category of contract claims that allege no additional rights other than promising not to benefit from the copyrighted work"); *Worth*, 5 F. Supp. 2d at 822 (breach of implied contract based on meetings and discussions between plaintiffs and defendants was a "species of quasi contract and is to be deemed an 'equivalent right' for determining preemption").

73. See, e.g., *Higher Gear Group, Inc. v. Rockenbach Chevrolet Sales, Inc.*, 223 F. Supp. 2d 953, 958 (N.D. Ill. 2002) (breach of contract claim preempted to the extent that plaintiff intended to show that the licensing agreement prohibited unauthorized copying and creation of derivative products); *Fischer v. Viacom Int'l, Inc.*, 115 F. Supp. 2d 535, 542 (D. Md. 2000) (when right asserted under state law arises "simply from an implied promise not to use another's ideas without paying for them, then the state law action is

qualitatively equivalent to an action for copyright infringement" and is therefore preempted); *Am. Movie Classics Co. v. Turner Entm't Co.*, 922 F. Supp. 926, 931 (S.D. N.Y. 1996) (breach of contract claim preempted because it involved no more than defendants' alleged breach of the exclusive exhibition rights pursuant to a licensing agreement).

74. See, e.g., *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446 (6th Cir. 2001) (expectation of payment that arose during ongoing contract negotiations removed implied contract claim from scope of copyright preemption); *Acorn Structures, Inc. v. Swantz*, 846 F.2d 923, 924-25 (4th Cir. 1988) (express written contract providing for payment if copyrighted materials were used saved from preemption); *ProCD, Inc. v. Ziedenberg*, 86 F.3d 1447, 1454-55 (7th Cir. 1996) (enforcement of shrink-wrap license not preempted); *Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l*, 991 F.2d 426, 427-28 (8th Cir. 1993) (express written contract including promises not to use copyrighted works in particular manner saved from preemption); *Firoozye v. Earthlink Network*, 153 F. Supp. 2d 1115, 1126-27 (N.D. Cal. 2001) (promise to pay for work at issue constitutes "extra element").

Boehner v. McDermott

(Continued from page 18)

ing test to resolve what he saw as two competing interests of constitutional dimension—freedom of speech and "personal privacy" that he characterized as an "interest . . . in fostering private speech." *Id.* at 536. He considered " 'strict scrutiny'—with its strong presumption against constitutionality" as "normally out of place where, as here, important competing constitutional interests are implicated" and preferred to "ask whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences." *Id.*

80. *Bartmicki*, 532 U.S. at 536.

81. See Paul Smith & Nory Miller, *When Can the Courts Penalize the Press Based on Newsgathering Misconduct*, COMMUNICATIONS LAWYER (Summer 2001) (noting that Justice Breyer's standard "may prove to be considerably more protective of the press than the categorical approach apparently adopted by Justice Stevens.>").

82. *Branzburg v. Hayes*, 408 U.S. 665, 709 (1972) (Powell, J., concurring).

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Changing Channels: The Story Behind the UCC Cases

KURT WIMMER

Changing Channels: The Civil Rights Case That Transformed Television by Kay Mills

University Press of Mississippi (2004)
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As lawyers, we know that great cases are often built on great stories. Writers, too, have long known that the epic struggles resulting in high-profile court cases are filled with stories of compelling human interest. Landmark cases have been springboards for exceptional non-fiction accounts, including *New York Times v. Sullivan*,¹ the *Pentagon Papers* case,² *Gideon v. Wainwright*,³ *Near v. Minnesota*,⁴ *Brown v. Board of Education*,⁵ and several high-profile environmental cases.⁶ Studies of these cases are prized because of their historical importance, as well as their continuing relevance to issues that we care about today. But even media lawyers deeply versed in a Federal Communications Commission (FCC) regulatory practice might not suspect that there could be similar jewels to be mined in administrative law.

Surprisingly, author and historian Kay Mills has found an administrative case with the societal importance, drama, and human interest needed to join the ranks of the celebrated cases that have generated compelling narrative histories.

CHANGING CHANNELS: THE CIVIL RIGHTS CASE THAT TRANSFORMED TELEVISION describes the sacrifices made by a small band of extraordinary citizens deter-

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mined to drive racism from the airwaves in a southern city at the height of the civil rights movement. Black viewers, who were nearly half of the station's audience, claimed that WLBT(TV), Jackson, Mississippi, was run by "sincere believers in segregation" who kept African-Americans off the air and refused to address issues of concern to the African-American community.⁷ After sixteen years of hard-fought and precedent-setting litigation in which both the station and the FCC opposed the petitioners at every turn, the petitioners finally prevailed and WLBT lost its license.

In the tradition of Anthony Lewis, Fred Friendly, and other masters of this genre, Mills has told the back story of this important court battle comprehensively—through sheer hard work and investigation. Mills also provides important context for understanding the current relevance of the case. As issues such as media consolidation and indecency continue to demonstrate the power that determined citizens' groups can wield at the FCC and in Congress, the very development of this right of public participation is an issue that is worth revisiting.

Most media lawyers will be familiar with the twin cases around which this story is built, the first two *United Church of Christ (UCC)* cases.⁸ In *UCC I*, Chief Justice Warren Burger, then the chief judge of the D.C. Circuit Court of Appeals, held that "some 'audience participation' must be allowed in license renewal proceedings" at the FCC "to safeguard the public interest in broadcasting." Almost incredibly, in 1966, five years after Newton Minow's famous comparison of the broadcast landscape to a "vast wasteland," citizens had no direct voice in FCC proceedings. The *UCC I* decision forever changed that calculus and invited the public into the "public interest" standard.

In *UCC II*, the last decision written by Chief Judge Burger before he was elevated to the U.S. Supreme Court, the court took the highly unusual step of finding that the FCC had failed to give the proper weight to the evidence presented by public interest petitioners. The court summarily reversed the FCC's renewal of a broadcast license for WLBT. It is one of the very few cases in the history of the agency where a broadcaster lost its license on account of programming issues and its failure to serve its community of license. The decision is similarly remarkable for the fact that the court did not remand the case to the Commission for reconsideration of its decision; the court simply required a new licensing proceeding. It thus put into place a process by which one of the key television voices in the Deep South switched from all-white ownership to operation by a coalition of broadcasters and viewer advocates.

WLBT Through the Viewer's Eyes

CHANGING CHANNELS contains a comprehensive record of the twists and turns of the WLBT litigation that led to both these cases, including personal interviews with those on both sides of the debate, decades-old hearing transcripts, eyewitness accounts of oral argument, and private correspondence among the key players; but its true genius lies in its ability to tell the story of WLBT from the highly personal perspective of television viewers in Jackson, Mississippi. The book opens with an account of black teenagers watching an all-white teen dance program on WLBT and, amid giggles about the participants' lack of dancing skill, recognizing for the first time that they were witnessing "an especially effective blackout of African Americans on southern TV stations."⁹

Although blacks were almost half of WLBT's audience, not a single black teenager was on that program. On Sunday mornings, moreover, the televised church services were 100 percent white. "WLBT, like other Jackson institutions, was controlled by whites for whites," Mills writes. "In those early days, blacks were invisible, except as troublemakers or criminals." One of

Dr. King was not alone in pointing to the overwhelmingly important role played by mass media in forming public attitudes about race issues.

those teenagers, Randall Pinkston, eventually would become the first regular black anchor on WLBT's evening news and an award-winning international reporter with CBS News.

But change wouldn't happen overnight. And, in the lens of the time, a mechanism for change was not obvious. The Supreme Court had held as early as 1943 that "the 'public interest' to be served under the Communications Act [was] the interest of the listening public in 'the larger and more effective use of radio.'" ¹⁰ It later held that "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount" in upholding the Fairness Doctrine against constitutional challenge. ¹¹ The FCC itself had repeatedly asserted, as early as 1963, that citizens "are the owners of the channels of television—indeed, of all broadcasting."¹²

The Public's Nonexistent Rights

Despite these proclamations of the importance of the public in broadcasting, when Randall Pinkston and others began noting the effects of exclusion in Jackson, the FCC refused to recognize any right of the public to participate in its processes. Other broadcasters that might suffer economic injury were welcome to participate, as were other stations that might suffer electrical interference from a new station and those whose applications were mutually

exclusive with a new application. But not the public.

Against this backdrop, it is remarkable that citizens in Jackson organized to oppose WLBT's license renewal. CHANGING CHANNELS describes the genesis of the challenge as a recognition by the Rev. Everett Parker, head of the Office of Communications of the United Church of Christ, of the strong connection between the civil rights movement and the power of television. Parker, along with Martin Luther King, Jr., Andrew Young, and others, had met in New York in the early 1960s to determine how to move the cause of civil

rights forward in the South. "Please do something about the television stations," King said to Parker, drawing on his experience of powerful white broadcasters distorting the message of nonviolent protesters. ¹³

Dr. King was not alone in pointing to the overwhelmingly important role played by mass media in forming public attitudes about race issues. As early as 1968, the Report of the National Advisory Commission on Civil Disorders identified the key role that television coverage plays in shaping racial attitudes. As the U.S. Commission on Civil Rights recognized, the type of invisibility experienced by black viewers of WLBT and other television stations had significant consequences for race relations: "To the extent that viewers' beliefs, attitudes and behavior are affected by what they see on television, relations between the races and the sexes may be affected by television's limited and often stereotyped portrayals of men and women, both white and non-white."¹⁴

Sorry, Cable Trouble

The actions taken by the licensee of station WLBT seem outrageous. According to the petitioners, the station's programming urged racial segregation, and the station had refused to provide an opportunity for those with opposing views, particularly African-American groups,

to air them. They also claimed that the station had gone so far as to flash "Sorry, Cable Trouble" on viewers' screens to override network coverage of Thurgood Marshall, then-general counsel of the National Association for the Advancement of Colored People (a hotly disputed issue in the hearings). ¹⁵

In light of the staggering practical and legal obstacles to taking on a major broadcaster, Parker faced a daunting task in the early 1960s. His first logical stop was the National Association of Broadcasters (NAB), where he proposed sending a letter to NAB member stations generally to suggest that they provide equal time to black groups; integrate children's programs; and use courtesy titles, such as *Mr.* and *Mrs.*, with blacks as well as whites.

When the NAB refused, Parker's focus turned to the FCC. He envisioned monitoring programming so that he could draw solid evidence, to present to the FCC, of the failure of at least one station, WLBT, to serve the entirety of its community of license, both white and black. The work would be dangerous: activist Medgar Evers had just been assassinated in Jackson, and civil rights workers were routinely jailed and intimidated.

The Plot Thickens

With the pacing and highly developed texture of a good mystery novel, CHANGING CHANNELS describes how a group of black and white activists gathered evidence at significant personal and professional risk, sought (with great difficulty) to find lawyers who would take their case, and, finally, crafted a litigation strategy for petitioning against WLBT's license renewal application. In 2005, it is sobering to consider that only a few years ago a community activist would consider seriously the potential that he might be killed by renegade Ku Klux Klan members in retaliation for signing an FCC pleading. ¹⁶ In the 1960s, the battle against the FCC, the majority of whose commissioners agreed with WLBT's attorneys at virtually every turn, clearly was less dangerous but just as daunting.

CHANGING CHANNELS adroitly describes the twists and turns on the

road to a final victory in federal court in Washington. Although those familiar with the *UCC* cases will know the eventual outcome, the lucid descriptions of the roadblocks along the way maintain a surprising degree of dramatic tension.

Mills documents the struggles in Jackson and Washington with equivalent clarity and evenhandedness. She provides the viewpoints of those who owned and worked at WLBT in the civil rights era, viewpoints that were garnered nonjudgmentally and fairly from personal interviews. With a clarity that rings true in today's broadcast marketplace, she assesses the impact of the northern press, the effect of the intervention of a large Washington firm on behalf of the station, the importance of the independence of federal courts, and the lasting importance of the victories won by the petitioners.

And, most importantly, she tells a story that has continuing significance. Some of the work, quite clearly, has been done; many of Parker's goals have been accomplished. Television stations throughout the South were integrated, in no small measure because of the work of the United Church of Christ and the petitioners in the WLBT case. WLBT now is an award-winning station owned by one of the top broadcasters in the United States and most recently has been in the news for successfully advocating the inclusion of television cameras in Mississippi courts.¹⁷ Public interest groups now have the potential to partici-

pate in the FCC's processes, although having the means and materials to do so effectively has been a challenge over the years since the *UCC* cases were decided.¹⁸ Questions such as fairness and balance continue to be pressing matters of public discussion. In particular, Sinclair Broadcasting Company's decision to air, during the presidential election season, an hour-long program critical of Sen. John Kerry brought these issues to the fore once again; and legislation has been proposed to reinstitute the Fairness Doctrine.

In light of the issues of the present, becoming reacquainted with the ghosts of our not-too-distant past is an important exercise. When history can be as compelling as fiction, as is the case with *CHANGING CHANNELS*, it can even be terrific reading. 

Endnote

1. See ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991).
2. See DAVID RUDENSTINE, *THE DAY THE PRESSES STOPPED* (1996).
3. See ANTHONY LEWIS, *GIDEON'S TRUMPET* (1964).
4. See FRED FRIENDLY, *MINNESOTA RAG: CORRUPTION, YELLOW JOURNALISM AND THE CASE THAT SAVED THE FIRST AMENDMENT* (1981).
5. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (2004).
6. See, e.g., GERALD M. STERN, *THE BUFFALO CREEK DISASTER* (1977); JONATHAN HARR, *A CIVIL ACTION* (1996).

7. *CHANGING CHANNELS* at 46.

8. *United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966), and *United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969). The Office of Communications of the United Church of Christ has, of course, played a leading role in public participation in the FCC's processes over the past forty years, including challenging many of the deregulatory actions taken by the Commission during the 1980s. It continues to play this role today.

9. *CHANGING CHANNELS* at 3.

10. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943).

11. *Red Lion Broad. v. FCC*, 395 U.S. 367 (1969).

12. *FCC, TELEVISION NETWORK PROGRAM PROCUREMENT*, H.R. REP. NO. 88-281, at 20 (1963).

13. *CHANGING CHANNELS* at 60.

14. U.S. COMM'N ON CIVIL RIGHTS, *WINDOW DRESSING ON THE SET: WOMEN AND MINORITIES ON TELEVISION* (1979); see also Kurt Wimmer, *Deregulation and the Market Failure in Minority Programming: The Socioeconomic Dimensions of Broadcast Reform*, 8 HASTINGS COMM. & ENT. L.J. 329 (1986).

15. See *United Church of Christ v. FCC*, 359 F.2d 994, 997-98 (D.C. Cir. 1966).

16. See *CHANGING CHANNELS* at 78-79.

17. See Associated Press, *Mississippi Justices Reaffirm Cameras in Court*, Jan. 24, 2005, available at www.firstamendmentcenter.org/news.aspx?id=14735 (last visited Feb. 8, 2005).

18. See generally Hagelin & Wimmer, *Broadcast Deregulation and the Administrative Responsibility to Monitor Policy Change: An Empirical Study of the Elimination of Logging Requirements*, 38 FED. COMM. L.J. 201 (1986).

From the Chair

(Continued from page 3)

courts. We had both of the adversaries in the case, Ted Diadiun, the sports writer, and Michael Milkovich, Sr., the wrestling coach criticized by Mr. Diadiun for "lying" at a hearing on a sports dispute (and their attorneys) discussing the case and giving us the "real life" background. Barbara Wall masterfully introduced Mr. Milkovich by listing his numerous accomplishments and dedications (including a "Mike Milkovich Day" in Maple Heights, Ohio), which had the effect of both putting Mr. Milkovich very much at ease in a room

full of attorneys who he must have perceived were not "on his side" but at the same time amazing that audience with the fact that Mr. Milkovich was declared not to be a public figure in the case.

Coach Milkovich made some interesting off-the-cuff remarks (including that he loves Mr. Diadiun and that his attorney is probably the only attorney in the room who ever won a Supreme Court case), and seemed to think of himself as the little guy who took on the press establishment and the Supreme Court. But Mr. Diadiun made us feel his fear as he explained how he was the junior reporter taking on the renowned coach, a respected and admired institu-

tion, in his column and suffering repercussions as a result because of the coach's popularity. Mr. Diadiun also shared a sobering "dose of reality" of how cases sometimes are resolved:

After the Supreme Court's decision, the case was remanded to the Ohio courts. The Ohio Supreme Court had recently issued a decision in a companion case that the defendants believed would lead to a ruling in favor of the newspaper in this case. The unwavering position of the family that owned the newspaper had been to defend the case through seventeen years of litigation, and they intended to go all the way. However, the newspaper was then sold to new

owners, and that position was abandoned—instead, the case was settled for economic reasons. (Full disclosure: Ted Diadiun and his current employer, the Cleveland *Plain Dealer* newspaper, are clients of my firm.)

Scholarships

This year the Forum awarded three full scholarships to law students to attend the Conference and the Media Advocacy Workshop—Kevin Kemper of the University of Missouri-Columbia School of Law, Casey Murray of the University of Kansas School of Law, and Shannon Torgerson of Northwestern University School of Law. I had the opportunity to observe the three students at the Media Advocacy Workshop, and all three addressed the entire group before the first plenary session to thank us for the opportunity we provided them. I believe everyone was quite impressed with their credentials and drive and abilities, and a number of us surely felt inadequate, comparing them to what we were like in law school.

Inside View of Putting on the Conference

I saw this conference “from the inside.” As the new Chair of the Forum, I became a member of the Planning Committee for the Conference. In that capacity, I saw what goes into creating and running such a Conference, and it is quite impressive. The three long-time members of the Planning Committee, George Freeman, Kelli Sager, and Barbara Wall, are an amazing team. They take on a wide array of tasks, including preparing the substantive program, reaching out to sponsors, and soliciting and making arrangements with speakers. I’m impressed by how well they work together, even when they disagree, their creativity and knowledge of the law in coming up with ideas, the number of people they know, and their willingness to do whatever it takes to do a good job—on top of their real day jobs, of course. And, I must add, their general good cheer through all of the above. We are so lucky to have them planning this conference.

In addition, I saw how crucial Teresa Ucock, the Forum’s Staff Administrator,

is to the smooth running of our Conference. Until you have been involved in planning such an event, you really can’t fathom how much “behind the scenes” work is involved, an endless amount of tasks that most of us don’t “see” . . . Teresa handles them all efficiently. This Conference could not happen without her.

And now that I am fully privy to the financial aspects of the Conference, I know what an incredible value it is for the attendees. Interesting plenary sessions with first-hand participants and top-notch experts, practical workshops, high quality meals . . . at the low price charged! I have looked at the price of other CLE programs. Nothing comes close in a value-for-cost comparison. And the reason we can offer this is the dedication of the professional participants in the program, most of whom pay their own way, and all of whom devote their time and talent at no cost, and the incredible contribution made by the Conference’s sponsors. Our sponsors bear a substantial portion of the cost of the Conference, and we owe them our thanks and appreciation. They are listed in a sidebar on page 3.

I must add that working on the Conference was a lot of fun. Sometimes I felt as though I had a new profession, but I felt creative, I spoke with many, many people about a wide range of issues, I made policy decisions, I organized, I made last-minute decisions (like whether to move the reception indoors because of the possibility of rain, and adding lobsters to the Friday night menu), I solicited sponsors, and I did numerous other tasks that are not normal parts of my job as a lawyer. I am already looking forward to working on next year’s program, and the ideas are flowing.

Election of Forum Leadership and Other Changes

At the annual meeting the Forum elected Richard Goehler as the Chair-Elect of the Forum effective August 2005, and Peter Canfield, Josh Koltun, Mary Ellen Roy, and Cory Ulrich to the Forum’s Governing Committee, also effective August 2005, replacing Harold Fuson, Jr., Robert Nelson, David Schulz,

and Jack Weiss, who hopefully will stay involved in one way or another.

In other changes, Patricia Clark has succeeded Natalie Spears as co-chair of the Women In Communications Law group; Elizabeth Ritvo continues as co-chair. We thank Natalie for all of her hard work and energy during the past two years of her service as co-chair of WICL.

I have appointed Jonathan Anshell as a new co-editor of *Communications Lawyer*, effective with the next issue, to replace Kurt Wimmer. Kurt has ably served as a co-editor of *Communications Lawyer* for the past four years, and we thank him for his many contributions. Kurt, along with Kevin Goering and Nathan Siegel, will be the three Forum co-editors of the new *Journal of International Media and Entertainment Law*, being headed by David Kohler.

Future Programs

Looking to the future, on April 17 the Forum will put on its annual “Representing Your Local Broadcaster” practicum before the NAB Convention in Las Vegas. Year after year, this seminar presents an incredible amount of practical information in a very short time on a variety of substantive areas of crucial importance to broadcasters. This year’s seminar is entitled “Eight Misbehavin’ ” and will address the top eight legal issues facing local broadcasters in each of the areas of news, sales, programming, webcasting, and regulatory compliance. I highly recommend it.

We are also working on presentations for the National Conference for the Minority Lawyer in Seattle in June, the ABA Annual Meeting in Chicago in August, and a special seminar with the ABA’s Judicial Division on how the media, elected officials, and the public perceive the judiciary, in Washington, D.C. in October. Then, next year, our Annual Conference will be in La Quinta, California, on January 12–14, 2006, and the year after we will return to Florida, but most likely to a new location in Key Largo. 

COURTSIDE

PAUL M. SMITH, DONALD B. VERRILLI, JULIE M. CARPENTER, DANIEL MACH, AND KATHERINE A. FALLOW

Free speech-related activity in the U.S. Supreme Court this quarter included one decision, oral argument in two additional cases, and the granting of certiorari in another case.

San Diego v. Roe

In a December 6, 2004, per curiam opinion, the Court unanimously rejected a police officer's claim that his termination for selling sexually explicit videos on an Internet auction site violated his First Amendment rights. The Court held that the officer failed to establish that his expressive activity qualified as speech on a matter of public concern and thus was not subject to the balancing test for public employee speech under *Pickering v. Board of Education*¹ and its progeny.

Respondent John Roe, a San Diego police officer, videotaped himself taking off a generic police uniform and masturbating. He then sold the videotape in the adults-only section of eBay, the popular online auction site. Roe's supervisors discovered this activity and ordered Roe to cease displaying, distributing, or selling any sexually explicit materials on the Internet. Roe complied with the order by removing the items he was selling, but he did not change his seller's profile on the auction site, which continued to list the videos he made and their prices. Concluding that the continued listing of the videos violated the original order, the police department fired Roe. Roe sued the department and the city, alleging that the termination violated his First Amendment right to free expression.

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The Ninth Circuit upheld Roe's First Amendment claim, reversing a district court's dismissal of the suit. With one judge dissenting, the court held that Roe's actions in making and distributing the tapes fell within the protected category of citizen commentary on matters of public concern. In reaching this conclusion, the majority relied on the Supreme Court's decision in *United States v. Treasury Employees (NTEU)*,² which invalidated a federal statute prohibiting federal employees from receiving honoraria for giving speeches or writing articles outside of work.

Unlike the Court's previous public employee speech cases, the expression at issue in *NTEU* (encompassing articles and lectures on history, religion, and dance) did not necessarily involve government policies on which the employees were uniquely qualified to speak. The Court there held that the employees' expression was protected because it was "addressed to a public audience, made outside the workplace, and involved content largely unrelated to their government employment."³ Drawing on this language, the Ninth Circuit concluded that Roe's activity similarly satisfied the public concern test because his expression was not about his employer, was directed to the general public, and occurred outside the workplace. The court left it to the district court to determine the outcome of the balancing test for public employee speech claims under *Pickering*.

The Supreme Court summarily reversed. Calling the Ninth Circuit's reliance on *NTEU* "seriously misplaced," the Court held that public speech unrelated to the government employer is protected only to the extent that it is not outweighed by the employer's legitimate interests in regulating it. Unlike the statute at issue in *NTEU*, the Court held, the San Diego police department had legitimate and substantial interests that were compromised by Roe's speech. Although Roe wore a generic uniform in the video and did not identify himself as a San Diego

police officer, the Court found that Roe's seller's profile linked the video to his police work in a way that brought "disrepute" on the police department.

Having rejected *NTEU* as the controlling case, the Court proceeded to determine whether Roe's expressive activity satisfied the public concern test as set forth in its decisions in *Pickering* and *Connick v. Myers*.⁴ Acknowledging that the contours of the test are "not well-defined," the Court turned to its decisions involving common law actions for invasion of privacy. According to the Court, those decisions "make clear that public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication."⁵ Because Roe's expression did not inform the public about anything related to the police department, the Court concluded, it did not fall within this category of matters of public concern.

Livestock Marketing

For the third time in a decade, the Supreme Court is considering the First Amendment limitations on federal commodity-marketing programs. On December 8, 2004, the Court heard argument in two consolidated cases, *Veneman v. Livestock Marketing Association*, No. 03-1164, and *Nebraska Cattlemen v. Livestock Marketing Association*, No. 03-1274, that address the constitutionality of the "beef checkoff" program, a program that produced, among other things, the "Beef—It's What's For Dinner" advertising campaign. As the oral argument made clear, the Court continues to grapple with this subset of compelled speech cases and the numerous doctrinal issues they raise.

The challenged program imposed on beef producers a mandatory assessment of one dollar for each head of cattle. Funds from the program went to a variety of activities, including a generic promotion campaign designed to encourage greater beef consumption. Relying on the Supreme Court's compelled subsidy

cases, a group of cattle producers challenged the beef checkoff program as an unconstitutional requirement to pay for speech to which they object. Specifically, the plaintiffs argued that the program advanced the message that all beef is the same and failed to distinguish between domestic and imported beef.

The Nebraska district court invalidated the beef program, and the Eighth Circuit affirmed. In striking down the federal program, the lower courts navigated through several related, seemingly inconsistent decisions by the Supreme Court addressing similar First Amendment challenges to mandatory checkoff programs. In *Glickman v. Wileman Bros. & Elliott, Inc.*,⁶ the Supreme Court upheld the use of mandatory assessments for generic advertising of California tree fruits. But four years after *Wileman*, the Court in *United States v. United Foods*⁷ invalidated compelled assessments imposed on mushroom growers, finding a violation of the First Amendment prohibition on compelled expression. The Eighth Circuit concluded that the beef checkoff program was virtually identical to the mushroom scheme at issue in *United Foods* and therefore suffered from the same constitutional infirmity.

In seeking to justify the law, the defendants raised two new theories not specifically addressed in *United Foods* or *Wileman*. First, the defendants argued that the beef checkoff program was a form of “government speech” that was effectively insulated from constitutional challenge. Alternatively, the defendants asserted that the program satisfied the intermediate First Amendment scrutiny applicable to commercial speech regulation. The Eighth Circuit rejected both theories, and the Bush administration and the defendant Nebraska cattle producers brought the case to the Supreme Court.

At oral argument in December, the Court focused primarily on the first of the defendants’ two arguments, i.e., the government speech rationale. Several Justices appeared troubled by the government’s theory, particularly in the context of advertisements that, on their face, provide no indication of any government involvement, let alone the federal mandate imposed by the checkoff program.

In any event, the respondents argued, a determination that the advertisements constituted government speech should not save the program. According to the respondents, the ills of compelled speech stem from the compulsion itself and therefore are not cured simply because the targeted compulsion supports a governmental, rather than private, message.

For its part, the federal government argued that there would be no constitutional concerns if the beef advertisements were financed from the general Treasury rather than from funds raised through the checkoff program. Given that fact, the government asserted, the beef program should survive constitutional scrutiny because the First Amendment does not regulate the details of government fundraising and bookkeeping.

The Court has yet to issue a decision in the *Livestock Marketing* case, which not only will directly affect numerous other federal checkoff schemes but also will likely implicate core First Amendment doctrines of government speech, commercial expression, and compelled speech.

Clingman v. Beaver

On Wednesday, January 19, 2005, the U.S. Supreme Court heard argument in *Clingman v. Beaver*, No. 04-37, a case presenting the question of whether it is permissible for Oklahoma to forbid parties to allow registered voters from other parties to participate in their primaries. The plaintiffs (the Libertarian Party of Oklahoma (LPO) and several registered voters from the Republican, Democratic, and Libertarian parties) are challenging certain Oklahoma election statutes preventing a recognized political party from opening up its primary and runoff elections to all Oklahoma registered voters, regardless of those voters’ party affiliation. Oklahoma’s election statutes currently provide for a semiclosed primary system, in which a party may invite only its own party members and registered voters designated as Independents to vote in its primary.

The plaintiffs assert that Oklahoma’s primary system violates their constitutional rights to political association and free speech. They argue that the LPO and Libertarian voters have the right to deter-

mine the scope of the citizenry who will elect their political representatives and, in so doing, to associate with registered members of the Democratic and Republican parties who choose to vote in the Libertarian primary. The plaintiffs propose as an alternative a party-option open primary system like that employed in Utah and Alaska, whereby a political party may choose to open up its primary elections to any registered voters regardless of party affiliation.

The district court found the Oklahoma primary election statutes to be constitutional, but the Tenth Circuit reversed, concluding that the election laws impermissibly violate the LPO’s associational rights. Relying on past Supreme Court cases holding that a political party has a First Amendment interest in the process by which it selects its nominee for office, the Tenth Circuit applied the test laid out by the Supreme Court in *Timmons v. Twin Cities Area New Party*.⁸ Under that test, if the burden on a party’s freedom of association posed by a regulation is severe, the regulation must be narrowly tailored to advance a compelling state interest; on the other hand, if the burden is less severe, then important regulatory interests are generally sufficient to justify the regulation.

The Tenth Circuit held that the burden on a party’s freedom of association posed by the semiclosed primary system in Oklahoma is severe because it restricts the ability of a political party to define the group of citizens that will choose its standard bearer. The court accordingly subjected Oklahoma’s election statutes to strict scrutiny, ultimately concluding that the statutes are not narrowly tailored to serve any compelling state interest because the state’s interest in preserving the integrity of political parties was not sufficiently compelling to justify the burden imposed by the statutes.

On appeal to the U.S. Supreme Court, Oklahoma argued not only that the Tenth Circuit erred in applying strict scrutiny because the semiopen primary system is not overly burdensome or severe, but also that the system meets the less restrictive test because it is supported by “important regulatory

interests.” Oklahoma also argued that its primary election statutes meet strict scrutiny by functioning to prevent party “raiding” and voter “poaching,” and that a shift to a party-option open primary system would create political instability as voters cross political lines to vote. The outcome will turn on whether the Court agrees with the application of strict scrutiny and on the Court’s assessment of the importance and legitimacy of these state interests.

Tory v. Cochran

On March 22, 2005, the U.S. Supreme Court is scheduled to hear oral argument in *Tory v. Cochran*, No. 03-1488. The case arose out of a long-running dispute between Ulysses Tory and noted Los Angeles lawyer Johnnie Cochran, Jr., who withdrew as Tory’s lawyer in a civil rights suit nearly twenty years ago. In the late 1990s, Tory began picketing Cochran’s office, carrying signs that called him a liar and a thief, among other things. Cochran successfully sued Tory for libel and invasion of privacy; but instead of awarding him damages, the Superior Court for the State of California issued an injunction ordering Tory never again to display a sign or

speak about Cochran, favorably or otherwise, in a public forum. Tory appealed the injunction to the California Court of Appeal, which affirmed the injunction in an unpublished decision. The U.S. Supreme Court granted certiorari to determine “whether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment.”

Several key First Amendment questions may be addressed by the Supreme Court in this case. The issues raised include whether a court order permanently enjoining speech, even if it is issued following a full trial, constitutes a prior restraint on speech, and whether prior restraints are ever a constitutionally permissible remedy in defamation suits. Tory argues that the injunction does constitute a prior restraint and that this is an impermissible remedy in a defamation suit, both because damages are a sufficient remedy for defamation and because injunctions issued in defamation cases are inherently overbroad. *Cochran* attempts to characterize the injunction not as a prior restraint but rather as “subsequent punishment,” though *Cochran* does not cite to any

Supreme Court precedent for this notion. Finally, this case raises the particular First Amendment problem of an injunction barring speech about a public figure on topics of arguably public concern, which may cause the Court to view the injunction with heightened scrutiny.

The petitioner does not seem intent on urging the Court to issue a more generalized ruling on the constitutionality of injunctions issued following a defamation trial. Because the injunction issued by the Superior Court so clearly reached nondefamatory speech, the petitioner’s strategy is to emphasize first and foremost the overbroad nature of the injunction issued in this case. As a result, the Supreme Court ultimately may not reach the broader question of whether a court may enjoin defamatory statements following a trial. ■

Endnotes

1. 391 U.S. 563 (1968).
2. 513 U.S. 454 (1995).
3. *Id.* at 466.
4. 461 U.S. 138 (1983).
5. 125 S. Ct. 521, 525–26 (2004).
6. 521 U.S. 457 (1997).
7. 533 U.S. 405 (2001).
8. 520 U.S. 351 (1997).

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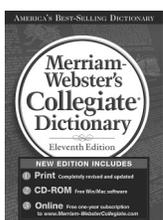
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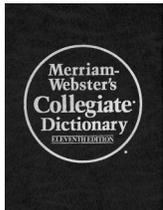
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